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. 99-200
	)	
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

REPLY COMMENTS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AND THE PEOPLE OF THE STATE OF CALIFORNIA

The California Public Utilities Commission and the People of the State of California (California or CPUC) submits these Reply Comments in response to

comments from other parties filed in the *Further Notice of Proposed Rulemaking* (*FNPRM*) released November 5, 2008, by the Federal Communications Commission (FCC or Commission)[1] in the above captioned proceedings. We also address here certain proposals in the *FNPRM* on which, in our Comments in this proceeding, we reserved the right to comment in reply.

I. INTRODUCTION

California commends the FCC for its effort to adopt needed reforms to the intercarrier compensation regime and the universal service programs. In our Comments in this proceeding, California urged the Commission to adopt final reforms.[2] However, as discussed below, California agrees with other parties that certain proposals in the *FNPRM* must be modified or rejected.

We note again the three parts of the *FNPRM*: Appendices A, B, and C. Appendix A is the "Chairman's Proposal"; Appendix B is the "Narrow Universal Service Reform proposal"; and Appendix C is the "Alternate Proposal". California's comments are focused *primarily* on the Chairman's Proposal, referred to throughout these Comments as Appendix A. To the extent that provisions of Appendix A are mirrored in either of the other two appendices, the CPUC's comments apply equally to those parallel provisions. Where Appendix A contains proposals absent from the other Appendices, the CPUC's comments pertain solely to the Chairman's Proposal.

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[1] *Order on Remand and Report and Order and Further Notice of Proposed Rulemaking (Order; FNPRM),* FCC 08-262, Released: November 5, 2008.
[2] Comments of the California Public Utilities Commission and the People of the State of California (CPUC Comments) (filed November 26, 2008), p. 2.

II. CLASSIFICATION OF IP-ENABLED SERVICES

In our Comments, California expressed serious concerns about the FCC Chairman's conclusion that IP/PSTN services are "information services".[3] Specifically, we objected to this classification for two reasons: 1) the classification implicates myriad federal and/or state regulations currently applied to IP/PSTN services, and 2) the rationale for the classification is far too broad.[4] In these Reply Comments, the CPUC concurs with the position taken by the National Association of Regulatory Utility Commissioners (NARUC) on this proposed classification of IP/PSTN services.[5] The CPUC specifically agrees with NARUC's reasoning that, (1) "[t]he ubiquitous protocol conversions that characterize PSTN voice traffic do not change the form or content of the input to the service (e.g., real time voice communications) and have never been the basis for reclassifying a telecommunications service,"[6] (2) prior case law does not support federal preemption,[7] and (3) classification of a particular service as an "information service" standing alone does not provide a basis for preemption of all State oversight.[8]

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[3] IP/PSTN services are defined as "those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks." *FNPRM*, Appendix A, Chairman's Proposal, ¶ 209.
[4] CPUC Comments, pp. 3-4.
[5] NARUC Comments, pp. 11-24.
[6] *Id.*, pp. 13-16.
[7] *Id.*, pp. 16-17.
[8] *Id.*, pp. 17-20. *See also* Comments of Ohio Public Utilities Commission, pp. 5-6 ("the FCC previously acknowledged that Congress' 70-year old jurisdictional reservation of State commission authority over intrastate communication services, found in 47 U.S.C. § 152(b), is applicable to matters not covered by Section 251"). Section 251, in turn, relates by its express terms to "telecommunications carriers." The Ohio PUC also cited to *AT&T v. Iowa Utilities Board*, 525 U.S. 366, 381 n.8 (1999) ("The Commission could not, for example, regulate *any aspect of intrastate communication not governed by the 1996 Act* on the theory that it had ancillary effect on matters within the Commission's primary jurisdiction")(emphasis added). The same prohibition applies here, as Ohio aptly argues.

The proposal to classify IP/PSTN as an "information service" is fatally flawed and should be rejected.

III. UNIVERSAL SERVICE REFORM

A. California Supports, With Modifications, the Requirement that ETCs Commit to Deploy Broadband to 100 Percent of Customers in Service Territory Within Five Years

The Chairman's Proposal in Appendix A would require all eligible telecommunications carriers (ETCs), including rural ILECS, to provide broadband Internet access service within five years to all customers in the study areas where the carrier receives federal high-cost support as a condition of receiving such support.[9] California supports this proposal, if modified as we recommend below.

The majority of the rural rate-of-return ILECs in California have deployed broadband services throughout much of their service areas, passing a majority of their customers. However, the unserved areas in California include areas where build-out would be very costly and the benefits of deployment may be outweighed by the cost of deployment, whether because of topography, distance, customer density, or other factors. Therefore, California supports adoption of some type of mechanism to facilitate review as to whether the deployment mandate should apply to these areas. For instance, the FCC could adopt the suggestion of the Missouri Public Service Commission (MoPSC) that the FCC do the following:

> [A]llow the opportunity for carriers to seek waivers, provide the opportunity for competitors to respond to such requests and then review the merits of such waivers before terminating universal service support and

[9] *FNPRM*, Appendix A, ¶¶ 19-31.

> proceeding with reverse auctions for an area. Such a process will allow carriers and competitors to demonstrate the validity of broadband deployment to all areas of the country.[10]

The CPUC recommends that the Commission devise a means to ensure that broadband deployment is achieved, but should not put smaller companies at financial risk to accomplish the goal.

B. California Supports the Three-Year $900 Million Pilot Program to Provide Link-up/Lifeline Subsidies for Internet Access

The draft order in Appendix A would create a Pilot Program to provide universal service subsidies to low-income consumers to facilitate access to the Internet.[11] The program would provide subsidies for installation, a broadband Internet access device, and monthly Internet access service.

All eligible telecommunications carriers (ETCs) participating in the existing low-income programs would be eligible to participate, provided they certify that they will comply with all program requirements. Such certification must identify the service area in which the ETC plans to offer Lifeline/Link Up broadband services, the costs of the service(s) and broadband device, as well as all costs, both recurring and nonrecurring, to the customer participating in the program. The ETC must offer the services supported in the Pilot Program throughout the entire service area(s) identified.[12]

If an ETC provides Lifeline service to an eligible customer, the Pilot Program would support 50 percent of the cost of broadband Internet access installation, including a

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[10] Missouri Public Service Commission Comments, p. 10.
[11] *FNPRM*, Appendix A, ¶¶ 64-91.
[12] *Id*, ¶ 83.

broadband Internet access device, up to a total amount of $100. The device could be a laptop computer, a desktop computer, or a handheld device, so long as the equipment has the capability to access the Internet at the speeds established per the FCC's order,[13] and the equipment carries a warranty.[14] The device subsidy would be one-time, and would be limited to one unit per qualified household. Using the same process currently employed for the Link-Up program, USAC would pay the subsidy amount to the participating ETC providing the device and the service to the customer.[15]

In addition, the Pilot Program would double, up to an additional $10, the household's current monthly Lifeline subsidy to offset the cost of broadband Internet access service.[16] Universal service support for Internet access service would be limited to one subsidy per household. The Pilot Program would be exempt from fees and taxes to the same degree as the current Lifeline program. There would be no state or carrier matching requirements.[17]

Although California is concerned about the cost of adding broadband Internet access service to the services subsidized by the federal universal service fund, we support this limited pilot proposal. This Pilot Program will provide valuable information on the need and demand for such subsidies, and on the potential impact to the universal service fund should such a program be extended permanently to all Lifeline customers. If the

[13] ETCs participating in the Pilot Program must offer broadband Internet access service with download speeds equal to or greater than 678 kbps and upload speeds greater than 200 kbps. *See FNPRM*, Appendix A, ¶ 84.
[14] Where the device costs $100 or less, the Pilot Program will support 90% of the cost of the broadband Internet access device. Appendix A, ¶ 81, fn. 196.
[15] *FNPRM*, Appendix A, ¶ 81.
[16] *Id.*, ¶ 82.
[17] *Id.*, ¶ 80.

Commission adopts this Pilot Program, the CPUC recommends that the Program be evaluated at the beginning of the third year for possible expansion at the end of the three-year pilot.

C. Numbers-Based Universal Support Proposal

The CPUC concurs with those commenters who question whether the Chairman's proposal to fund universal service programs via a flat $1.00 per number contribution for residential service customers would, in fact, conserve numbers. The proposal in Appendix A would assess a fee only against numbers that generate revenue; hence the proposed new category of numbers, "assessable numbers". But, Missouri correctly notes that many incumbent providers still have vast inventories of numbers, many of which are stranded under the FCC's existing reporting and number portability rules.[18] In addition, the Chairman's proposed "assessable number" category is an even narrower category than "assigned" numbers. Given that the quantity of "unassigned" numbers in the possession of many ILECs is generally greater than the quantity of assigned number, it is hard to see how targeting surcharges to a subset of "assigned numbers" will produce any significant donation of numbers back to number pools.

California also agrees with the Massachusetts Department of Telecommunications and Cable (MDTC) that it might be a good approach for the FCC to require reporting of "assessable numbers" via NRUF reports for two reporting cycles (one year) in order to determine how many assessable numbers carriers possess, and thus, to better forecast

[18] MoPSC Comments, pp. 13-14.

how much revenue the $1.00 per assessable number actually would likely produce.[19] Absent any concrete estimates of the quantity of numbers in the new category, the FCC would be shooting in the dark by guesstimating how much universal service support this approach would generate.

Finally, the CPUC also agrees with the Nebraska Public Service Commission (NPSC) that, even if the FCC adopts a per-number funding mechanism for universal service support, it should not mandate that the states adopt a comparable mechanism for funding their own state universal service programs.[20] While California, for example, may re-examine the manner in which it funds its five universal service programs, the CPUC very much wants to retain the flexibility to either mimic the FCC's approach, stick to its own historical approach, or select a different approach.

IV. INTERCARRIER COMPENSATION REFORM

A. Early Adopter States Should Be Compensated

In Comments filed with the FCC in this proceeding, the Nebraska PSC indicated that if Commission adoption of the proposals in either Appendix A or Appendix C would harm Nebraska's consumers because Nebraska is an early adopter state.[21] Consumers, the NPSC argues, will be required to pay higher local rates or SLC charges, and will be required to contribute to the Universal Service Fund for other carriers to recover lost

[19] MDTC Comments, p. 25.
[20] NPSC Comments, p. 17.
[21] NPSC Comments, p. 10. Early adopter states, including California, are those states that have already reduced intrastate access charges. California reduced intrastate access charges in CPUC Decisions 06-04-071 and 07-12-020.

revenues resulting from reduced access charges.[22] Thus, the NPSC recommends that reductions by early adopter states should be taken into account. Early adopter revenues should be allocated for states that have used state universal service funds or increased local rates to explicitly replace access reduction by order or regulation.

In Comments filed with the Commission on October 25, 2006, regarding the "Missoula Plan", the CPUC supported the Early Adopter Fund (EAF) mechanism. California proposed that the funding of first adopter revenue losses be distributed to eligible carriers regardless of the manner in which the lost revenues were recovered.[23] For example, in California, AT&T and Verizon recover their lost intrastate access charge revenues through a surcharge on local rates.

California also recommended that funding of first adopter states be based on the percentage of each state's contribution to total nationwide dollars reduced. The recovery plan should first determine the total amount of access charge reduction by all states, and then compare each state's access charge reduction with the total amount. California further recommended that those states which had previously reduced access charges for many years should be given priority and maximum draw from the EAF ahead of states that just recently reduced access charges. Finally, each state that is eligible to draw from the EAF should be given flexibility to flow-through EAF compensation to carriers' customers.[24]

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[22] *Id*.
[23] CPUC's Comments, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, filed October 25, 2006, p. 12.
[24] *Id*., pp. 12-13.

California supports NPSC's position that early adopter states should be taken into account. However, the Commission should provide the early adopter funding to such states regardless of how reduced access charge revenues are recovered by carriers within the state.

B. California Supports the Total Element Long Run Incremental (TELRIC) Cost Methodology Instead of the Incremental Costs Standard (ICS) Methodology

The FCC seeks comment on whether the additional cost standard utilized under § 252(d)(2)[25] of the 1934 Communications Act should be: (i) the existing TELRIC standard; or (ii) the incremental cost standard described and adopted in the draft order.[26] California recommends that the FCC not adopt the proposed ICS methodology.

1. Discussion of TELRIC Methodology and Incentives for Arbitrage

The TELRIC methodology is used to develop the cost of providing unbundled network elements (UNE) and forms the cost basis for reciprocal compensation between carriers. It is based on a forward-looking least cost technology. In addition, the TELRIC methodology includes a reasonable allocation of forward-looking common costs to be recovered through usage-based charges.

The Chairman's Proposal in Appendix A concludes that the existing TELRIC methodology produces reciprocal compensation rates, which are greater than the additional cost(s) incurred by providing call termination service.[27] Appendix A further concludes that this disparity between rates and costs is a major factor contributing to the

[25] Sec. 252(d) (2) mandates certain pricing standards for reciprocal compensation charges for transport and termination of traffic.
[26] *FNPRM*, ¶ 41.
[27] *FNPRM*, Appendix A, ¶ 239.

arbitrage problem plaguing the current ICC regime.[28] The Chairman's proposal suggests that these high rates are due to the inclusion of common costs and the use of total demand. Hence, the Chairman proposes an alternative to the TELRIC methodology and an end to these inflated rates.[29]

The FCC needs to closely examine the root cause of the arbitrage. Are TELRIC rates high because they include common cost or are other factors contributing to this result? California agrees with AT&T's Comments that part of the arbitrage problem lies in the rate structure itself.[30] TELRIC rates include traffic sensitive costs and non-traffic sensitive costs (common/fixed costs), and both of these costs are recovered on a volumetric basis (i.e., a rate based on per minute of use (MOU)).[31] With this type of rate structure, costs are not recovered in the same manner as they are incurred. More importantly, this rate structure gives the wrong incentives to carriers by encouraging them to be the net recipients of reciprocal compensation payments. By increasing the minutes through high volume traffic customers, such as ISPs or conference call centers, a carrier can easily over-collect its common costs as illustrated in the following example. If common costs are $100 and a switch is expected to terminate 10 calls, with an average call lasting 10 minutes, then the rate component for common costs on a MOU basis is: $100/ (100 minutes = (10 calls * 10 minutes)) = $1 per MOU. However, if calls are

[28] *Ibid*.
[29] *Id*, ¶ 262.
[30] AT&T Comments, pp. 12-13
[31] Some TELRIC rate structures have both flat and usage charges. The usage component typically still contains some common costs.

actually on average 15 minutes long, the carrier will receive $150 in revenues, 50% more revenues in excess of its common costs.

One reason underlying the arbitrage the FCC is trying to eliminate through ICC reform is that cost causation principles are not being followed. Certainly some of the current arbitrage schemes could be avoided if costs were recovered in the same way that they were incurred.

2. The Proposed ICS Methodology Is Flawed and Should Not Be Adopted

California recommends that the FCC not adopt the proposed ICS methodology, set forth in the Chairman's Proposal, for the reasons outlined below.

As described in Appendix A, the proposed ICS methodology uses an avoided cost approach.[32] Most notably, it excludes common costs and all non-traffic sensitive costs. Furthermore, ICS would be based on the least-cost, most efficient network design that uses soft switches and fiber for transport.

The economic basis for the ICS may be inappropriately applied. For instance, NASUCA states in its Comments that the intent of the Faulhaber article, upon which the Chairman's proposal relies, was to identify whether a service was being subsidized. The article does *not* address recovery of common costs.[33]

California is most concerned with ICS's exclusion of common costs. ICS is likely to result in one of two outcomes: (1) a company could become financially unstable because it would be unable to recover all of its costs; or (2) consumers would be faced

[32] *FNPRM*, Appendix A, ¶¶ 262-273. The additional cost is the savings from not producing the additional service.
[33] NASCUA Comments, p. 14

with unaffordable basic telephone service because end-user customers would end up paying most, if not all, common costs.

If every product in a multi-product firm is priced at ICS, so that all customer groups are treated equitably, the firm would not recover all of its costs, including common costs. The Chairman's Proposal even acknowledges that incremental pricing may not permit a firm to recover its total costs, particularly if common costs are significant.[34] It appears, however, that the Chairman intends for carriers to be compensated for common costs. Appendix A allows price cap carriers, after meeting certain requirements, to draw from the universal service fund to recover revenues for access charges reductions in order to earn a normal profit.[35] The FCC defines normal profit as total revenues covering all of the firm's costs.[36]

Since the Chairman's Proposal intends to make the carrier whole, the recovery of common costs falls squarely and solely on retail end-user customers,[37] and not on originating carriers. The burden on end-user customers could be substantial. This would be especially true given that, as NPSC points out, the majority of costs in a telecommunications network are joint and common costs, and many network components are used in the provision of more than one service.[38]

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[34] *FNPRM*, Appendix A, ¶ 252.
[35] *Id.*, Appendix A, ¶ 323.
[36] *Ibid.*
[37] Pennsylvania Public Utilities Commission (PaPUC) indicates that the new cost standard leads to an unfair shifting of joint and common costs of carrier access to consumers and violate Section 254(k) of the federal Telecommunications Act of 1996, Comments of PaPUC, p. 28.
[38] NPSC Comments, p. 19

This outcome would be discriminatory, and it could be interpreted as a form of Ramsey pricing. As NASUCA explains, under Ramsey pricing, customers who have the most inelastic demand pay higher prices. Demand by customers of basic residential service historically has tended to be inelastic. As a result, basic residential customers, under the Chairman's proposal, would be charged a much higher basic telephone service rate, which would seem to be inconsistent with the FCC's universal service goals.

Implementing ICS has other potential consequences that the FCC should consider. For instance, NASUCA notes that the ILECs have also consistently argued that TELRIC costing yielded rates that were too low, allowing the use of their network elements at "subsidized" rates.[39] If the ILECs are correct, then the ICS compounds that problem by forcing rates even lower and creating an even greater subsidy.

The differential between ICS and TELRIC also impacts the size of the universal service fund. If the FCC adopts ICS, more residential customers would be unable to afford the higher basic rates because common costs would be allocated to end-user customers. Thus, a greater number of residential customers would have to apply for subsidized telephone service, placing added pressure on the universal service fund.

The Chairman's Proposal anticipates that this ICS methodology would generate rates in the zero to $.0007 range, which are lower than rates determined using the TELRIC methodology. The Chairman's Proposal justifies the $.0007 target using existing contract prices.

[39] NASUCA Comments, p. 14.

Appendix A includes a discussion of a Sprint calculation to determine a national weighted average for unbundled local switching of $0.00058.[40] The CPUC staff reviewed the same source documents that Sprint used, and found Sprint's calculations to be misleading and incorrect.

When CPUC staff reviewed Sprint's survey analysis, staff calculated the weighted average to be $0.00103, and not $0.00058. However, the $0.00103 number may also be misleading as it only includes the Regional Bell Operating Company (RBOC) rates. In California, Sprint only used SBC's data and did not include Verizon or any of the smaller LECs' data in the calculations. The same is true for all other states; no data from small LECs were utilized. Sprint also stated that, based on its survey, 34 states have switching rates below $0.0007 per minute. However, Sprint's statement is inaccurate. In reviewing the survey, California determined that the only state with a rate of less than $0.0007 is Georgia, which has a rate of $0.00061.

Sprint's calculation also disclosed a zero switching rate for seven states, namely, California, Illinois, Indiana, Michigan, Minnesota, Utah, and Wisconsin. This is because the costs associated with switching were bundled into the line port costs. As a result, the zero rate for switching does not reflect the true costs for switching. Based on the CPUC's calculations, California concluded that Sprint's analysis is flawed. The weighted average unbundled switching rates could be twice as much as the amount Sprint calculates.

[40] *FNPRM*, Appendix A, ¶ 254.

Even if the contract rates were approximately $0.0007 and covered marginal costs, the equitable contribution to common costs remains a significant issue. All customers, end-user and carriers alike, should contribute to common costs.

In short, California recommends the Commission not adopt ICS.

3. Refining TELRIC May Be the More Cost-Effective Option

While recognizing potential problems associated with including common costs in the TELRIC volumetric rates, California agrees with Public Service Commission of Wisconsin (PSCW) that the TELRIC methodology should not be disregarded in its entirety.[41] Rather than expending time and limited resources on new cost studies utilizing the new proposed ICS, which has significant flaws, the FCC should consider refining the existing TELRIC methodology by removing the common costs from the volumetric rates and recovering those costs from a flat rate charge. This would minimize arbitrage schemes stemming from windfalls engineered by increasing traffic volume. If the FCC chooses to adopt the ICS, it should modify that methodology so that common costs are recovered from all customer groups.

The two options outlined in the preceding paragraph strike the appropriate balance between economic efficiency and equitable treatment of customers. These option would send correct price signals to carriers by matching cost recovery with cost incurrence, and all customer groups would be treated equitably.

[41] PSCW Comments, p. 5.

C. California Recommends A Hybrid Approach to Rate Uniformity

The FCC requests comment on whether the terminating rate for all Section 251(b)(5) traffic should be set as: (1) a single, statewide rate; or (2) a single rate per operating company.

Appendix A proposes a single statewide uniform ICC rate. The Chairman's Proposal concludes that, because ICS assumes a network with soft-switches and fiber for transport, all costs will be the same across carriers.[42] While arguably, soft-switch costs may be the same across carriers as these costs are scalable according to the Chairman's Proposal,[43] it is unlikely that transport costs would be the same for all carriers, especially between rural and urban carriers. Since transport distances for rural carriers are likely to be longer, they probably incur higher costs. For example rural carriers are likely to need more network facilities. The New York Public Service Commission (NYPSC) makes similar observations regarding the cost differential between high and low density service area in its comments.[44]

Instead of either of the two alternatives raised by the *FNPRM* – one rate per state v. one rate per operating company -- we recommend that the FCC consider other paradigms. For example, California is moving intrastate access rates to uniformity within the service areas of our non-rural carriers. To date, California has achieved near rate uniformity in intrastate access charges in the service areas of AT&T and Verizon. In

[42] *FNPRM*, Appendix A, ¶ 272.
[43] *Id.*, ¶ 274.
[44] NYPSC Comments, p. 5.

California, the intrastate access termination rates of competitive local exchange carriers (CLECs) are capped at the higher of AT&T or Verizon's rate, plus 10%[45] on the assumption that because CLECs are competing in the same market as the ILEC, the price of a CLEC's call termination services in a particular service area should be similar to the ILEC's price in that service area. The additional 10% allows room for some diversity among carriers.

However, California has not mandated this uniformity in the service areas of California's rural rate-of-return[46] carriers.

We suggest that the FCC may want to consider such a hybrid approach. We suggest that a carve-out for rural carriers still under rate-of-return regulation in the state is appropriate because these carriers are likely to have significantly different cost characteristics due to the geography of their service areas. Company specific rates for rural carriers recognize the different cost attributes of each company. And most importantly, such rates send the correct price signals for the services rendered. Additionally, by having the carrier customers paying for the proper access costs, there will be less pressure on universal service funding which is financed by all end-user customers

However, before any unified rate scheme is adopted, the FCC should refresh its record with more current and better information on call termination costs.

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[45] CPUC D.07-12-020 at p. 22.
[46] "Rate-of-return" here refers to carriers designated as rate-of-return carriers under state regulation.

V. CONCLUSION

For the reasons stated, the CPUC urges the FCC to modify the Chairman's Proposal as suggested above, and consider California's Comments and Reply Comments in any further rulemaking in these proceedings.

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