

**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 iBASIS, INC.

Pursuant to the Public Notice and Order issued by the Federal Communications Commission (“Commission”),^{1/} iBasis, Inc. (“iBasis”) hereby submits the following reply comments in the above-captioned proceeding. iBasis continues to support the Commission’s

^{1/} *Comment Dates Established for Comprehensive Intercarrier Compensation and Universal Service Fund Reform Further Notice of Proposed Rulemaking*, Public Notice, DA 08-2486 (rel. Nov. 12, 2008) (setting the initial comment deadline for Nov. 26, 2008 and reply comment deadline for Dec. 3, 2008); *see also High-Cost Universal Service Support, et. al.*, Order, DA 08-2631 (rel. Dec. 2, 2008) (extending the reply comment deadline to Dec. 22, 2008).

efforts to reform intercarrier compensation. These reply comments respond to questions raised regarding the Commission's authority to eliminate originating access charges.

INTRODUCTION

The Commission's proposal to cap originating access charges and eliminate such charges at the end of the transition period received substantial support.^{2/} In response to the Commission's request for comment on the appropriate transition framework for originating access, a number of commenters joined iBasis in proposing that the same transition framework adopted for terminating access should also apply to originating access.^{3/} iBasis files these reply comments to address the arguments of a few carriers that claim that the Commission is without authority to eliminate originating access charges and that to do so would be contrary to sound policy.^{4/}

^{2/} See, e.g., iBasis, Inc. Comments at 3-4; OPASTCO and WTA Comments at 20 (supporting the elimination of originating charges at the end of the proposed ten-year transition period); Comcast Corp. Comments at 5 (supporting capping and eliminating originating access charges, while favoring a shorter transition period); MetroPCS Comments at 27-28 (favoring the same transition period for originating and terminating access rates).

^{3/} See *id.*; see also Warinner, Gesinger & Assocs. Comments at 4 (noting that the "reduction of intrastate rates to interstate levels should apply to both originating and terminating access, and the changes to both originating and terminating access rates should be commensurate and implemented at the same time"); Iowa Telecommc'ns Assoc. Comments at 16 (stating that it "strongly recommends that such changes include changes in both originating and terminating charges on identical time frames"); and Global Crossing Comments at 11 (stating that "originating access charge reform should be completed contemporaneously with terminating access charge reform").

^{4/} See Hypercube Comments at 5 (claiming that the "limited grant of authority to establish a methodology for pricing of *transport and termination* under Sections 251 and 252 does not give the Commission any authority or basis upon which to regulate, reform, or eliminate charges for the provision of *originating* access services.") (emphasis in original); Integra Telecom Comments at 14-15 (arguing that since "Section 152(b) of the Act limits the Commission's jurisdiction, exempting from it authority over charges for 'intrastate communications services,' moving intrastate access rates to interstate access rate levels, for any period of time, would be overreaching its jurisdictional authority. Nor is it within the Commission's statutory authority to preempt state jurisdiction over intrastate access charges."); TW Telecom Comments at 19 (asserting that there "is no basis for reforming the rules governing originating access charges . . . there is little point in this inquiry [about capping and eliminating originating access rates] because the FCC likely does not have the authority to set originating intrastate access rates.").

I. ELIMINATION OF INTERSTATE ORIGINATING ACCESS IS A LAWFUL AND SOUND POLICY

The Commission has ample authority to eliminate interstate originating access charges. The Commission's authority over interstate access charges pursuant to sections 201 and 205 of the Communications Act of 1934, as amended ("Act") was established long ago,^{5/} and Congress expressly authorized the Commission to revise or supersede its access charge regime following the passage of the 1996 Telecommunications Act.^{6/} Nothing in sections 251 and 252 undermine that authority, as some claim.^{7/} Hypercube, for example, argues that the "limited authority" conferred by sections 251 and 252 to set a pricing methodology for transport and termination provide no basis to reform or eliminate originating access charges.^{8/} But, this point is largely irrelevant to the question of the Commission's authority. As Hypercube readily admits, the Commission does have authority over originating access charges pursuant to sections 201 and 205.^{9/} Hypercube's argument regarding interstate charges is therefore not about authority, but whether it is sound policy to eliminate originating access fees.

Hypercube claims that eliminating originating access would be bad policy because it would deny the originating carrier compensation for services it performs in delivering a call to a third party interexchange carrier, and would be contrary to the Calling Party Network Pays

^{5/} See *MTS and WATS Market Structure*, 93 FCC 2d 241, ¶¶ 36-89 (1983) (sub. history omitted).

^{6/} 47 U.S.C. § 251(g).

^{7/} See, e.g., Broadband Service Providers Comments at 6 ("From this language [of section 251(g)], the Commission essentially assumes that its authority to supersede the then existing restrictions and obligations on LEC exchange access charges and practices comes from Section 251(b)(5) Section 251(g), however, says nothing about the source of the Commission's authority to supersede its then existing regulations over access charges.").

^{8/} Hypercube Comments at 5.

^{9/} *Id.* at 8.

(“CPNP”) principle.^{10/} Any reasonable weighing of policy considerations, however, points to the elimination of originating access charges.

The Commission recognizes that the current access charge regime creates unreasonable opportunities for arbitrage and prolongs inefficient, implicit subsidies.^{11/} These concerns apply equally to originating and terminating access charges. Indeed, maintaining originating access fees at their currently inflated levels while reducing terminating access to cost will actually encourage further arbitrage. Carriers will seek out customers that originate large volumes of traffic simply to reap access fees.

Such arbitrage occurs today. One example involves local exchange carriers (“LECs”) that insert themselves between wireless carriers and interexchange carriers (“IXCs”) in order to collect originating access charges, typically on 8YY calls, that otherwise would not be imposed if the wireless carrier and the IXC interconnected directly. The wireless carrier generally would not be able to assess an originating access fee on the IXC. By inserting itself into the call flow, the LEC effectively charges the originating access that the wireless carrier itself could not.

^{10/} *Id.* at 6-8; *see also* Comments of CityNet, LLC at 29 (asserting that it “would be contrary to the CPNP framework underpinning 251/252 for the FCC to mandate elimination of originating access charges (whether interstate *or* intrastate) on interexchange traffic. If originating access charges were eliminated, the third party IXC would get a ‘free ride’ on the originating end of every call, while properly paying compensation on the terminating side to the LEC for causing costs on the terminating LEC network.”).

^{11/} *See Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶ 11 (2001) (stating that the “existing intercarrier compensation rules raise several pressing issues. First, and probably most important, are the opportunities for regulatory arbitrage created by the existing patchwork of intercarrier compensation rules.”); *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, ¶ 3 (2005) (noting that the intercarrier compensation rate distinctions “create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions [And that the] record in this proceeding makes clear that a regulatory scheme based on these distinctions is increasingly unworkable in the current environment and creates distortions in the marketplace at the expense of healthy competition.”).

These schemes often involve sharing originating access revenue with the wireless carrier in order to encourage the wireless carrier to route traffic through the LEC.^{12/}

Maintaining originating access also runs counter to one of the main thrusts of the Commission's reform efforts -- to require providers to recover costs from their end users rather than from other carriers.^{13/} As the Commission has recognized, when access charges are imposed on carriers, end users do not receive appropriate price signals. This leads to inefficiencies and market distortions. Masking the true costs of originating service is particularly problematic because end users have the ability to choose the provider that originates their traffic, and thus are in a position to act on appropriate price signals by choosing a lower cost, more efficient alternative. Finally, as explained further below in the context of preemption, maintaining subsidy-laden intrastate access charges would wholly frustrate the Commission's efforts to unify intercarrier charges.

II. THE COMMISSION HAS AUTHORITY TO ELIMINATE INTRASTATE ORIGINATING ACCESS

The Commission may, indeed it must, exercise authority over intrastate access rates in order to have meaningful intercarrier compensation reform. Excluding a major type of intercarrier payment from this process would continue the very problem that reform seeks to address -- the wide divergence of rates for performing the same network functions.

^{12/} See, e.g., *MCI Worldcom Network Servs. Inc. v. Paetec Commc'ns, Inc.*, No. Civ.A.04-1479, 2005 WL 2145499, at *1-2 (E.D. Va. Aug. 31, 2005), *aff'd*, 204 Fed. Appx. 271 (4th Cir. 2006); *ITC DeltaCom Commc'ns, Inc. v. U.S. LEC Corp.*, No. Civ.A. 3:02-CV-116-J, 2004 WL 3709999, at *3 (N.D. Ga. Mar. 15, 2004).

^{13/} See *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 68 (1997) (stating that the original *Access Charge Order*, the Commission's "long range goal was to have incumbent LECs recover a large share of the NTS common line costs from end users instead of carriers"); *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, ¶ 18 (2000) (noting that in the *Access Charge Reform Order*, the Commission reformed access charges by "aligning the rate structure more closely with the manner in which costs are incurred").

Nevertheless, some commenters argue that nothing in the Act authorizes the Commission to regulate, or to preempt states from regulating, intrastate originating access charges.^{14/} iBasis limits its reply here to discussion concerning the Commission’s ability lawfully to preempt states from setting charges for intrastate originating access service.

Commenters’ preemption arguments center on the physical severability of intrastate and interstate fixed wireline originating access service.^{15/} This analysis is overly simplistic. There is no dispute that certain types of geography independent services, such as wireless and “nomadic” VoIP services cannot be readily or reliably separated into intrastate and interstate services using the calling and called numbers as a proxy for the physical end points of a call. States are already preempted from imposing traditional economic regulation on such services.^{16/} The Commission’s efforts to eliminate arbitrage due to disparate rates would immediately be undermined if states allowed so-called fixed service providers to charge originating access while being barred from doing so with respect to “nomadic” services. This would result in some communications service providers having an unfair advantage by avoiding access charges imposed on other types of services providers.

More fundamentally, preemption is not predicated on the technical ability to separate intrastate from interstate calls. Rather, the question is whether it is economically feasible, in light of practical and economic considerations, to separate intrastate from interstate traffic.^{17/} Today, even “fixed” VoIP and wireline services are providing all distance single-price offerings,

^{14/} See *supra* n.4.

^{15/} See Hypercube Comments at 11-12.

^{16/} See, e.g., *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404, ¶ 1 (2004) (“*Vonage Order*”) (preempting states from applying state entry, rate, and certain 911 requirements to VoIP services); see also 47 U.S.C. § 332(c)(3) (preempting states from regulating the entry or rates of wireless carriers).

^{17/} See *California v. FCC*, 39 F.3d 919, 932-33 (9th Cir. 1994).

“follow-me” services that may ring multiple phones, and the integrated features that are “far too multifaceted for simple identification of the user’s location to indicate jurisdiction.”^{18/} Service providers have no reason to incur the costs of tracking these calls other than to satisfy artificial jurisdictional separations processes.^{19/} States may not require service providers to incur such costs “merely to provide state commissions with an intrastate communication they can then regulate.”^{20/}

Focusing on the technical ability to separate out intrastate from interstate components of a service misses the mark for another reason. Preemption is not based on the impracticability of separating a service into discrete state and interstate components, but on the impossibility of state regulation coexisting with federal regulation.^{21/} In this case, the ability of carriers to continue to charge disparate and subsidy ridden intrastate access charges wholly negates the Commission’s regulatory goal of rationalizing intercarrier charges, eliminating arbitrage opportunities, and minimizing market distortions. These are sufficient grounds for the Commission to preempt states from allowing originating access charges.

^{18/} *Vonage Order* ¶ 23.

^{19/} *See, e.g.*, Letter to Marlene H. Dortch, Secretary, Federal Communications Commission from Donna Epps, Vice President, Federal Regulatory, Verizon, WC Docket No. 01-92, *et al.*, at 18-19 (filed Sept. 19, 2008).

^{20/} *Minn. Pub. Utils. Comm’n v. FCC*, 483 F.3d 570, 578 (8th Cir. 2007).

^{21/} *See La. Pub. Serv. Comm’n v. FCC*, 476 U.S. 355, 375 n.4 (noting cases preempting state regulation where “it was *not* possible to separate the interstate and the intrastate components of the asserted FCC regulation.”) (emphasis in original). The cases discussed in the footnote involved preemption of state regulation over “foreign attachments” notwithstanding the ability to identify whether calls were intrastate or interstate. *See, e.g., N.C. Utils. Comm’n v. FCC*, 552 F.2d 1036 (4th Cir. 1977).

CONCLUSION

For the foregoing reasons, the Commission should adopt the proposal to cap and ultimately eliminate originating access charges. Sound public policy mandates such a change, and the Commission has ample authority to undertake this change.

Respectfully submitted,

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