

BEFORE THE  
Federal Communications Commission  
WASHINGTON, D.C.

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	)	CC Docket No. 96-98
Provisions in the Telecommunications Act of 1996	)	
	)	
Developing a Unified Intercarrier Compensation	)	CC Docket No. 01-92
Regime	)	
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
	)	

**REPLY COMMENTS OF TW TELECOM INC., ONE COMMUNICATIONS CORP.  
AND CBeyond INC.**

Willkie Farr & Gallagher LLP  
1875 K Street, N.W.  
Washington, D.C. 20006  
(202) 303-1000

ATTORNEYS FOR TW TELECOM INC., ONE  
COMMUNICATIONS CORP. AND CBeyond  
INC.

December 22, 2008

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tw telecom inc. (“TWTC”), One Communications Corp. (“One”), and Cbeyond Inc.

(“Cbeyond”) (collectively, the “Joint Commenters”), by their attorneys, hereby file these reply

comments in response to the FNPRM released in the above-referenced dockets on November 5.<sup>1</sup>

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<sup>1</sup> *High-Cost Universal Service Support et al.*, Order on Remand and Report & Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008) (“*FNPRM*”). References to the “draft order” refer to the “Chairman’s Draft Proposal,” attached as Appendix A to the FNPRM.

## **I. INTRODUCTION AND SUMMARY**

The comments in this proceeding show that there is broad agreement within the industry that the FCC can and should take certain discrete steps toward rationalizing the intercarrier compensation system. Most importantly, many parties agree that the FCC should reduce interstate and intrastate terminating access rates over a period of five years to the interstate level pursuant to Section 251(b)(5). This step is legally justified, will go a long way toward wringing arbitrage opportunities out of the system and ensures that consumers and carriers are not harmed by unnecessary rate shock. Further steps toward rate unification should be accomplished pursuant to a subsequent order adopted during the five year transition. In addition, many commenters agree that the FCC should permit ILECs to increase their SLCs to recover forgone intercarrier revenues, but only if the FCC prohibits incumbent LECs from using higher SLCs in less competitive markets to subsidize lower rates in more competitive markets. Many commenters also support the appropriate limits set forth in the draft order on ILECs' access to make-whole universal service payments.

Unfortunately, the comprehensive draft orders contain many elements (both in terms of what is included in and what is omitted from those orders) that would not advance the goal of efficient intercarrier compensation reform and would affirmatively harm competition. For example, the filings in this proceeding (both comments and economic analyses) demonstrate that the existing TELRIC methodology is more efficient than the LRIC methodology proposed in the comprehensive draft orders. In addition, the proposals in the comprehensive draft orders to classify VoIP as an information service and to preempt state regulation of VoIP jeopardize

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References to the "comprehensive draft orders" mean the draft orders attached as Appendix A and Appendix C collectively.

competitors' rights to essential inputs, are unnecessary to advance intercarrier compensation reform and are unlawful. Moreover, the absence of a clear ruling as to whether access charges apply to VoIP is also harmful. The FCC should act in this rulemaking to ensure that access charges apply to VoIP. Any other approach increases the risk of retroactive application of access charges, an outcome that would impose substantial and needless costs on the industry. In addition, as many parties have argued, the interconnection architecture rules proposed in the comprehensive draft orders are ill conceived and do not advance intercarrier compensation reform. Finally, the FCC should not adopt the universal service contribution methodology proposals in its comprehensive draft orders, but should instead seek further comment on those proposals and address them in a separate proceeding.

## **II. DISCUSSION**

### **A. The FCC Should Unify Intrastate and Interstate Terminating Access Rates At Interstate Levels Over a Period of Five Years; Any Additional Steps Toward Rate Unification Should Be Addressed In A Future Order**

Both CLECs and ILECs agree with the Joint Commenters that the FCC should unify interstate and intrastate terminating access rates at the interstate level over a period of at least five years while not making any determination regarding further rate unification until a later order. *See, e.g.,* Citynet *et al.* Comments at 9; Broadview *et al.* Comments at 3; Joint Commenters Comments at 4; USTA Comments at 4.<sup>2</sup> Moreover, as many parties explain, the FCC has clear jurisdiction to adopt this approach pursuant to Section 251(b)(5). *See, e.g.,* CTIA Comments at 21-22; Sage Telecom, Inc. Comments at 3-4; Windstream Comments at 17; USTA Comments at 4.

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<sup>2</sup> Unless otherwise noted, all comments cited herein refer to the submissions filed in response to the FNPRM.

Taking this initial step will provide substantial public policy benefits. Because intrastate access rates are in many cases relatively high, the unification of interstate and intrastate rates would eliminate most of the arbitrage potential within the intercarrier compensation system.<sup>3</sup> Unifying terminating access rates at interstate levels would result in dramatic reductions in LECs' access revenues in many states.<sup>4</sup> Such a large reduction in access revenues would require that LECs undertake major adjustments in their businesses. For example, CLECs enter into long-term contracts with many of their business customers, and the terms of such contracts generally prevent CLECs from adjusting end-user rates to account for reduced intercarrier rates. *See Citynet et al.*, Comments at 10. It would therefore take time for CLECs to adjust end user rates take into account reduced access charge rates. In addition, reducing intrastate terminating access rates to the level of interstate terminating rates would require states to undertake rate rebalancing (shifting regulated rate recovery from access charges to end user rates), a process that is likely to take many years to cushion the impact of higher end-user rates. Accordingly, a five year transition for unifying terminating access rates at interstate levels is appropriate.

Finally, limiting initial rate reductions to unifying access charge rates need not delay the ultimate adoption of a unified rate for all terminating traffic. If the FCC adopts a rate-setting methodology for such comprehensive reform before the expiration of the five-year transition to unified terminating access rates, it can commence the transition to a unified rate for all terminating traffic (not just terminating access) immediately upon the expiration of the five year

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<sup>3</sup> *See* USTA Comments at 3 (arguing that the reduction of intrastate access rates to interstate levels will “accomplish the single largest step towards a rationalized regime that meets the Commission’s and industry’s goals of efficient, compensatory and sustainable rates.”).

<sup>4</sup> *See* Citynet *et al.* Comments at 9; *see also* Declaration of William A. Haas ¶ 7, Attach. A to Citynet *et al.* Comments (explaining the substantial revenue loss that Paetec will experience when intrastate and interstate rates are unified).

transition recommended here. In this way, the FCC will have sufficient time to identify the optimal approach to unifying all terminating rates while it makes progress toward unifying all terminating access rates.

**B. The FCC Should Retain The TELRIC Methodology for Traffic Subject to Section 251(b)(5) and Reject the Proposed LRIC-Based Methodology**

As the Joint Commenters and many other parties have explained in this proceeding, the LRIC methodology proposed in the comprehensive draft orders would yield inefficient rates.<sup>5</sup> TELRIC is far more likely to yield efficient outcomes. Thus, rather than continue to entertain LRIC as a possible methodology, the FCC should focus its energies on refining TELRIC, to the extent necessary, in preparation for using that methodology as the basis for setting unified rates for all terminating traffic.

The record in this proceeding abundantly demonstrates that the LRIC methodology proposed in the comprehensive draft orders does not accurately model the “additional costs” of termination and that TELRIC is far more likely to yield efficient prices. For example, two detailed economic papers filed in this proceeding both reach this conclusion.<sup>6</sup> Among other things, both papers convincingly argue that the costs of termination are not “extremely close to zero” as the comprehensive draft orders assert in support of the LRIC proposal. The economists

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<sup>5</sup> Rather than support the new methodology, Verizon continues to support a rate of \$.0007 for traffic subject to Section 251(b)(5). See Verizon Comments at 42. As the Joint Commenters have explained at length, the FCC may not adopt a rate of \$.0007 for Section 251(b)(5) traffic. See *Ex Parte* Letter of Thomas Jones, Counsel, tw telecom *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, WC Dkt. Nos. 05-337 *et al.*, at 7-12 (filed Oct. 14, 2008) (“*Willkie Oct. 14 Letter*”).

<sup>6</sup> See Declaration of Dr. Lee L. Selwyn, attached to Letter of Brad E. Mutschelknaus, Counsel, Broadview Networks *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 *et al.*, (filed Nov. 26, 2008) (“*Selwyn Decl.*”); Declaration of August H. Ankum, Ph.D., *et al.*, attached to Letter of Tamar E. Finn, Counsel, Paetec, to Marlene H. Dortch, Secretary, FCC CC Dkt. Nos. 01-92 *et al.* (filed Nov. 26, 2008) (“*Ankum Decl.*”).

reject the “extremely close to zero” assertion because, in order to provide call termination on modern networks, carriers incur substantial traffic-sensitive and common costs that are not taken into account in the proposed LRIC standard. *See Ankum Decl.* ¶¶ 38-40. Nor are these common costs consistent across carriers. In fact, CLECs likely have higher per-service common costs than ILECs because ILECs are able to spread their common costs over a greater number of services. *See Selwyn Decl.* ¶¶ 33-36. TELRIC, but not the FCC’s proposed methodology, takes this difference in common costs into account, and it is therefore far more likely to yield cost-based rates for CLECs as well as for ILECs. *See id.* ¶ 39.

The manner in which the proposed LRIC methodology models the cost of soft switches is particularly flawed. The comprehensive draft orders assert that the “additional cost” of terminating traffic on a soft switch is close to zero because soft switches allegedly cause carriers to incur few or no usage-sensitive costs. *See Draft Order* ¶ 257. But this is simply incorrect. As Embarq and Messrs. Ankum *et al.*, demonstrate, a large portion of the costs associated with soft switches is in fact usage sensitive.<sup>7</sup> Moreover, other pieces of equipment, in addition to soft switches, must be installed to properly route traffic. The costs associated with this additional equipment must be taken into account if the FCC were to properly model the costs of a soft switch in any pricing methodology adopted. *See Embarq Comments* at 49-50. This further increases the additional costs associated with reliance on soft switches.

There is no empirical evidence in the record in this proceeding that supports the adoption of LRIC. As the Joint Commenters and others asserted in their initial comments, prior to the release of the comprehensive draft orders, no party had argued for or provided any evidence to

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<sup>7</sup> *See Ankum Decl.* ¶¶ 32-33 (noting that soft switches have components that are shared among services and that soft switch capacity must be increased, at a cost, to accommodate growth in traffic); *Embarq Comments* at 49-50.

support the adoption of the FCC's LRIC methodology. *See* Joint Commenter Comments at 6.<sup>8</sup> Indeed, the FCC admitted as much in its comprehensive draft orders. *See Draft Order* ¶ 253. While several parties supported the LRIC-based methodology in their comments, no such party filed any detailed *evidence* to support this view. Because no additional evidence has been placed in the record supporting the FCC's proposed LRIC-based methodology, any FCC order adopting the methodology could not withstand appeal.<sup>9</sup> It is clear therefore that the economics and the law support adoption of TELRIC as the methodology for setting unified terminating rates.

Finally, the FCC should not adopt the suggestion in footnote 717 of the draft order that rates for trunk ports should be flat, monthly rates rather than usage-sensitive rates. *See Draft Order* n.717. As Messrs. Ankum and Selwyn show, the costs of trunk ports are usage sensitive and those costs therefore should continue to be recovered pursuant to the TELRIC methodology in the form of usage-sensitive prices. *See Ankum Decl.* ¶ 40; *Selwyn Decl.* ¶ 16.

**C. Rates For Traffic Subject To Section 251(b)(5) Should Continue To Be Set On A Carrier-by-Carrier Basis**

The Joint Commenters argued in their initial comments, and many other parties agree, that the FCC should retain the rule in the *Local Competition Order* that rates for traffic subject to Section 251(b)(5) should be set on a carrier-by-carrier basis instead of on a state-by-state basis. *See, e.g.,* Telecom Investors Comments at 5, Citynet *et al.*, Comments at 11; Public Service

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<sup>8</sup> *See Ankum Decl.* ¶ 14 (“We are perplexed by any assertion that the ‘available evidence’ suggests that the incremental costs of terminating telephone calls are likely ‘*extremely close to zero.*’ Having reviewed the FNPRM, we found that there is in fact little, if any, reliable ‘evidence’ in the record (or elsewhere) that would lead to such a conclusion.”) (emphasis in original).

<sup>9</sup> *See NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939) (“Substantial evidence is more than a scintilla.... It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”) (internal quotation marks omitted).

Commission of Wisconsin Comments at 7. No party has shown why a carrier-by-carrier determination is inappropriate or creates inefficient outcomes. To the contrary, a carrier-by-carrier determination allows each carrier to recover its “additional costs” of termination. *See Ankum Decl.* ¶¶ 50-62. As Embarq explains, the population density of the area served and traffic volumes carried by a carrier within a state have a significant effect on the carrier’s costs. *See Embarq Comments* at 48-49. It follows that carriers that serve areas with different population densities and that carry significantly different traffic volumes within the same state likely have substantially different termination costs. These cost differences exist regardless of whether each carrier purchases the same equipment.<sup>10</sup> If rates were set on a state-by-state basis, these cost differences would not be taken into account and carriers in low-cost areas would likely be over-compensated while carriers in high-cost areas would likely be under-compensated.

It is clear therefore that rates should be set based on a LEC-by-LEC basis. Rates in each ILEC region should be set based on that ILEC’s costs. Moreover, CLECs should continue to have the opportunity to prove that their costs are higher than the ILEC in their area. *See Joint Commenters Comments* at 6-7. This is particularly important because, as explained above, CLECs may have higher common costs than ILECs.

**D. If the FCC Increases SLC Caps, It Must Ensure That ILECs Do Not Improperly Cross-Subsidize Less Competitive Markets**

The Joint Commenters support the proposal in the draft orders to increase SLC caps to assist ILECs in recovering forgone intercarrier revenues from any decrease in intercarrier rates. However, the Joint Commenters noted in their initial comments that the FCC’s comprehensive

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<sup>10</sup> Moreover, as the Telecom Investors and Dr. Selwyn observe, inherent differences in the manner in which CLECs’ networks are structured appear to produce higher-traffic sensitive costs and common costs than ILECs’ networks. *See Telecom Investors Comments* at 5-6; *Selwyn Decl.* ¶ 38.

draft orders do not propose any rules that would prevent ILECs from subsidizing lower rates in more competitive business and urban markets with higher SLCs in less competitive residential and rural markets. *See* Joint Commenter Comments at 9. As the Joint Commenters have argued on many occasions, any SLC cap increase must be subject to rules limiting ILECs' opportunity to engage in cross-subsidy.<sup>11</sup> At least one other party supports the adoption of such rules (*see* Broadview *et al.* Comments at 39), and it appears that no party opposes the adoption of such rules. Therefore, in any final order, the FCC should adopt rules to prevent ILECs from cross subsidizing prices in less competitive markets through SLC manipulation.

#### **E. The Appropriate Regulatory Regime for VoIP**

##### **1. Access Charges Should Apply Only Prospectively To VoIP**

Nearly every party agrees that access charges should apply to VoIP traffic (*see, e.g.*, Frontier Comments at 9; ITTA Comments at 15-16; Comcast Comments at 20; Embarq Comments at 38), and others agree with the Joint Commenters that the FCC must ensure that access charges only apply prospectively. *See e.g.*, Broadview *et al.*, Comments at 12.<sup>12</sup> As the Joint Commenters explained, the FCC will be on firmer legal ground to avoid retroactive application of access charges if the FCC determines whether to apply access charges to VoIP in a rulemaking, rather than in an adjudicatory or quasi-adjudicatory proceeding. *See* Joint Commenter Comments 15-18. The Joint Commenters also agree with AT&T and Qwest that carriers could use traffic studies or number proxies to determine the appropriate intercarrier

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<sup>11</sup> *See Willkie Oct. 14 Letter* at 13-14; Comments of TWTC *et al.*, CC Dkt. No. 01-92, at 14 (filed Oct. 25, 2006); Comments of TWTC *et al.*, CC Dkt. No. 01-92, at 41 (filed May 23, 2005).

<sup>12</sup> A review of the record indicates that Surewest was the only party to advocate retroactive application of access charges to VoIP. *See* Surewest Comments at 4, 7-9. Surewest's argument was only made in passing and was not backed up by any policy or legal justification. *See id.*

charge for VoIP traffic until all rates are unified. *See* AT&T Comments at n.36; Qwest Comments at 18.

2. The FCC May Not Classify VoIP As An Information Service and the FCC May Not Preempt State Regulation of VoIP On That Basis

The discussion in the comprehensive draft orders of the regulatory classification of VoIP traffic and the implication of such classification for state jurisdiction is replete with mistakes of law and fact. For example, in the comprehensive draft orders, the FCC asserts that it may classify VoIP as an information service on the basis of the net protocol conversion that takes place during a VoIP call. *See Draft Order* ¶ 209. But as the Joint Commenters and others explained, the FCC has found previously that the mere presence of protocol conversion does not convert what would otherwise be a basic telecommunications service into an information service. *See* RICA Comments at 10; NARUC Comments at 13-14; Public Service Commission of Wisconsin Comments at 8; Embarq Comments at 35-36; Ohio PUC Comments at 10-12; Broadview *et al.* Comments at 13.

The comprehensive draft orders also assert that the enhancements delivered by VoIP service render the service as a whole an information service. *See Draft Order* ¶ 210. However, as the Joint Commenters and others have also explained at length, there are no fundamental differences between the features and functions of circuit switched and VoIP service that would justify differential treatment.<sup>13</sup>

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<sup>13</sup> *See* NTCA Comments at 17 (“Much of the ‘enhanced functionality’ provided by VoIP services can also be accomplished through Class-5 and circuit-switched technologies.”); *see also* NECA Comments 30-39; RICA Comments at 10, NARUC Comments at 13, 15-16; Embarq Comments at 36, 38; Joint Commenters Comments at 12; *Ex Parte* Letter of Thomas Jones, Counsel, tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 & 96-45, CC Dkt. Nos. 05-337 *et al.*, at 3-8 (filed Oct. 23, 2008) (“*Willkie Oct. 23 Letter*”).

In addition, the draft orders assert that the FCC may preempt state regulation of VoIP if the service is classified as an information service. But classification of VoIP as an information service is irrelevant to whether the FCC may preempt state regulation as courts have held that states can regulate intrastate information services. *See* NARUC Comments at 18-19.<sup>14</sup>

### 3. The FCC May Not Preempt State Regulation of VoIP Under the Impossibility Doctrine

Regardless of the classification of the VoIP, the FCC may only preempt state regulation of VoIP under the impossibility doctrine.<sup>15</sup> As the Joint Commenters explained at length in a recent *ex parte* and in their comments, the impossibility doctrine cannot apply to fixed VoIP services, particularly fixed VoIP services provided by dominant carriers. *See generally Willkie Oct. 23 Letter.*

No party presents a serious response to this argument. Verizon's limited arguments in its comments are makeweight. For example, Verizon argues that state regulation of VoIP should be preempted under the impossibility doctrine because it is not "economically feasible" to separate the inter- and intrastate portions of the service. *See Verizon Comments* at 12. But as the Joint Commenters argued (and as AT&T and Qwest have now also explained), whether or not a VoIP call is local or interexchange can be determined using the same traffic studies and numbers-based proxies that have been applied to circuit-switched traffic (including mobile CMRS calls) for

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<sup>14</sup> *See California v FCC*, 905 F.2d 1217, 1243 (9<sup>th</sup> Cir. 1990) ("*California I*") (holding that states may regulate intrastate information services).

<sup>15</sup> Verizon, the most vocal proponent of FCC preemption of state regulation of VoIP, recognizes this fact in its comments. *See Verizon Comments* at 5 ("As a threshold matter,... the Commission should both confirm that all VoIP and IP-enabled services are interstate in nature, and set out its rationale supporting that decision. And it should do so *regardless of the decision it reaches on the classification of VoIP[.]*") (emphasis added).

years. *See Willkie Oct. 14 Letter* at 9; AT&T Comments at n.36; Qwest Comments at 18.<sup>16</sup> No additional costs need be incurred to appropriately jurisdictionalize VoIP traffic.

Moreover, preemption of state regulation of VoIP service is unnecessary to unify intercarrier rates. The FCC believes, and Joint Commenters and others agree, that the FCC may set the rate methodology for intrastate traffic (including VoIP) pursuant to Section 251(b)(5).<sup>17</sup> Preemption of state regulation under the impossibility doctrine is simply unnecessary for the FCC to achieve its goals.

4. Only Classification of VoIP as a Telecommunications Service Will Safeguard CLECs' Rights To Inputs Under Section 251.

Many parties agree with the Joint Commenters that CLECs must be guaranteed interconnection and other rights pursuant to Sections 251 and 252. *See e.g.*, AT&T Comments at 25; CompTel Comments at 18-19; Telecom Investors Comments at 10-11; NCTA Comments at 8; Citynet *et al.* Comments at 15-16; Broadview *et al.* Comments at 13-14. Most parties that address this issue focus on how to preserve interconnection rights even if VoIP is classified as an information service. But this is the wrong approach. Competitors will only be able to retain

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<sup>16</sup> Qwest argues that, while the correct rate for billing purposes (*e.g.*, reciprocal compensation or access) can be determined through the “imperfect” proxy of numbers, this method would not be sufficient to determine the jurisdiction of traffic. *See Qwest Comments* at 18. But Qwest provides no analysis as to why this is so. In fact, in the leading case on the impossibility doctrine, *Louisiana PSC*, the Supreme Court found that the imperfect proxy of traffic studies were sufficiently rigorous to permit a state to regulate the intrastate aspects of a service. *See La. Public Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986) (“*Louisiana PSC*”); *Willkie Oct. 14 Letter* at 8, n.23.

<sup>17</sup> *See Draft Order* n.564; *see also* NCTA Comments at 7 (“[T]he 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.”); Windstream Comments at 26-27 (“Under the Commission’s own reading of the Act, Section 251(b)(5) applies to the ‘transport and termination of telecommunications,’ which would seem to cover both telecommunications offered to the public for a fee . . . and ‘telecommunications’ itself.”).

their rights to all of the inputs available under Section 251(c), including UNEs as well as interconnection, if VoIP is classified as a telecommunications service.

*First*, there is no avoiding the fact that classifying VoIP as an information service would seriously jeopardize CLECs' access to UNEs. Under Section 251(c)(3), a competitor has a right to a UNE only to the extent it uses the facility to provide a telecommunications service. *See* 47 U.S.C. 251(c)(3). If VoIP is classified as an information service, a competitor simply cannot obtain UNEs for the purpose of providing VoIP service. Given that competitors are increasingly transitioning their networks to IP format, this poses a major threat to the future of local competition. Accordingly, as the Joint Commenters and others argued, the most prudent approach to ensuring CLEC rights to UNEs is for the FCC to classify VoIP as a telecommunications service. *See* Joint Commenters Comments at 11-14; Nebraska Rural Independent Companies Comments at 20.

*Second*, even interconnection rights would be seriously threatened if VoIP were classified as an information service. For example, several parties argue that the FCC could ensure interconnection rights for VoIP by expanding upon the Time Warner Cable Declaratory Ruling Order.<sup>18</sup> They argue that the FCC should clarify that VoIP providers' third-party carrier partners, VoIP providers' carrier affiliates, as well as VoIP providers that are also carriers have the legal right under Section 251(a) to interconnect for the purpose of exchanging VoIP traffic. *See, e.g.*, Qwest Comments at 19-20; Verizon Comments at 27; Sprint Nextel Comments at 9-10. But these arrangements unnecessarily increase transaction costs because, to take advantage of this

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<sup>18</sup> *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007) (holding that that carriers that provide wholesale telecommunications service to VoIP partners are entitled to interconnection rights).

theory, a VoIP provider that is not also a carrier must either create a CLEC “shell” affiliate or incur the expense of contracting with a third party carrier middle-man to deliver traffic.

Moreover, as carriers’ traffic moves to an all-IP environment, ILECs may be able to opt-out of treating their VoIP service as telephone exchange service or exchange access, thereby eliminating ILECs’ duty to interconnect.<sup>19</sup> ILECs’ ability to evade their interconnection duties obviously poses a real threat to competition. They would have no such ability if VoIP were classified as a telecommunications service.

**F. Tandem Transit Rates Should be Regulated Pursuant To Section 251(b)(5).**

Qwest reiterates the RBOCs’ self-serving argument that tandem transit service should remain unregulated by the FCC. *See* Qwest Comments at 23-26. As several commenters explain, however, this position has no policy justification or legal basis. *See* Comcast Comments at 29-30; Sprint Comments at 9; Coalition for Rational Universal Service and Intercarrier Reform Comments at 6. In most areas, the ILEC has a monopoly over transit service and is therefore able to charge above-cost rates. It therefore makes no sense to exclude transit service from federal regulation of intercarrier compensation. Nor is there any question that the FCC has the authority under Section 201 or 251 to regulate tandem transit service. Thus, tandem transit rates, just like rates for all other intercarrier traffic, should be set pursuant to the additional costs standard applicable to traffic subject to Section 251(b)(5).

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<sup>19</sup> Specifically, an ILEC might argue that it is only subject to the obligation of an ILEC to the extent that it can be classified as a LEC. If an ILEC is not providing telephone exchange or exchange access service, it is arguably not a LEC (and therefore not an ILEC). *See* 47 U.S.C. § 153(26) (defining a local exchange carrier as a person “engaged in the provision of telephone exchange service or exchange access.”).

**G. The FCC Should Not Adopt Its Proposed Interconnection Architecture Rules.**

Many parties agree that the FCC's proposed interconnection architecture rules are not necessary, would violate CLECs' statutory right to interconnect at any technically feasible point, and are likely incompatible with IP interconnection which will become increasingly predominant in the coming years.<sup>20</sup> The Joint Commenters agree with NCTA that any interconnection architecture rules, if adopted, should take into account soft switches and other IP-based network features. *See* NCTA Comments at 21. Moreover, the ILECs' use of these technologies on their own networks should not relieve ILECs of the obligation to interconnect "at any technically feasible point." *See id.*

**H. The FCC Should Seek Further Comment On The Universal Service Contribution Methodology While Ensuring That Carriers Can Recover Their Transition Costs**

The record in this proceeding does not support the adoption of a new method for requiring contributions to the federal universal service fund. For example, among the parties commenting in this proceeding, there is substantial disagreement regarding the appropriate means of allocating USF contribution responsibility among business and residential customers. Adding further to the confusion, AT&T and others recently filed further proposals regarding universal service contribution methodology.<sup>21</sup> Parties and the FCC both need time to thoroughly

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<sup>20</sup> *See* Telecom Investors Comments at 7-8 ("[T]he network edge rule is inconsistent with the plain language of . . . [s]ection 251(c)(2)[, which] requires RBOCs to provide interconnection at any technically feasible point requested by CLECs."); Broadview *et al.*, Comments at 47; Comcast Comments at 24; NCTA Comments at 19-21 ("[T]he proposal seems not to contemplate the interconnection of IP networks or the exchange of traffic in IP format . . . [which is] a significant omission in an item that is premised on the entire industry eventually transitioning to IP-based networks.").

<sup>21</sup> *See, e.g., Ex Parte* Letter of Mary L. Henze, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-122, CC Dkt. Nos. 96-45 & 01-

assess these proposals. The FCC should therefore seek further comment on any changes to the universal service contribution methodology regime.

Regardless of the methodology ultimately adopted, however, conversion from a revenues-based contribution methodology to a numbers and/or connections based methodology will involve significant cost and expense. *See Broadview et al.* Comments at 48; *Integra Telecom, Inc.* Comments at 24; *PAETEC et al.* Comments at 23-24. In light of these substantial burdens, Joint Commenters agree with Qwest that carriers should be permitted to recover the costs of converting to a new contribution methodology through end-user charges in the same manner that the FCC permitted carriers to recover Local Number Portability costs. *See Qwest Comments* at 43.<sup>22</sup>

#### **I. The Comprehensive Draft Orders Appropriately Limit Access to Supplemental USF Payments**

Many parties agree with the Joint Commenters that the FCC's draft orders propose generally appropriate rules to limit access to supplemental USF funds that would compensate carriers for losses due to reductions in intercarrier payments. *See e.g.*, Comcast Comments at 9. While the Joint Commenters continue to believe that CLECs should be able to draw on the fund on the same basis as ILECs, the proposed rules appropriately ensure that no carrier will receive a fixed level of revenue in perpetuity. Moreover, as Free Press points out, carriers, through

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92 (filed Nov. 21, 2008) (proposing modifications to the proposals in the draft orders); *Ex Parte* Letter of Mary L. Henze, Assistant Vice President, Federal Regulatory, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 06-122 (filed Oct. 29, 2008) (proposing specific capacity tiers).

<sup>22</sup> *Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, ¶ 9 (1998) (“[W]e will allow -- but not require -- rate-of-return and price-cap LECs to recover their carrier-specific costs directly related to providing long-term number portability through a federally tariffed, monthly number-portability charge that will apply to end users for no longer than five years[.]”).

negligence and fraud, have been receiving much more universal service funding than they have been entitled to (*see* Free Press Comments at 15), demonstrating that any additional payments would be an additional, unnecessary windfall.

### **III. CONCLUSION**

The FCC should adopt the foregoing proposals for the reasons discussed above.

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/s/

Thomas Jones  
Jonathan Lechter  
Mary Underwood\*  
Willkie Farr & Gallagher LLP  
1875 K Street, N.W.  
Washington, D.C. 20006  
(202) 303-1000

ATTORNEYS FOR TW TELECOM INC., ONE  
COMMUNICATIONS CORP. AND CBeyond  
INC.

December 22, 2008

\* Admitted only to the Virginia Bar; working under  
the supervision of members of the D.C. Bar.