to create decisional or interpretative rules governing USF programs independently. Instead, the Commission and the Federal-State Joint Board retain full authority and control over the USF programs, and USAC remains subject to FCC oversight at all times.[93]

In addressing early concerns over the role of USAC, the Commission has emphasized that USAC's functions are to be "exclusively administrative,"[94] noting that Section 54.702(c) expressly limits USAC's power. As a result, USAC:

> "may not make policy, interpret unclear provisions of the statute or rules, or interpret the intent of Congress. Where the Act or the Commission's rules are unclear, or do not address a particular situation, the Administrator shall seek guidance from the Commission."[95]

It follows that USAC cannot adopt new rules without express authorization from the Commission. The Commission has not authorized USAC to create a rule whereby wholesale providers are vicariously liable for contributions based on its carrier's carrier retail revenue simply because the wholesale provider did not affirmatively confirm its carrier customer was contributing directly to the Fund.

Since both USAC and the Commission exceeded their authority when adopting and imposing the vicarious liability provision of the carrier's carrier rule, Compass cannot be found vicariously liable for the actions -- or inactions -- of its reseller customers.

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profit entity with the sole function of administering the Universal Service Fund ("USF") and other universal service support programs.

[93] See *In the Matter of Federal State Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 9192 at ¶¶ 813-815 (1997) ("1997 Joint Board Order"); 1998 Joint Board Order at 25065 at ¶ 14; see also 47 U.S.C. § 254, et seq.

[94] 47 U.S.C. §§ 54.702(a)-(b).

[95] *1998 Joint Board Order* at 25067 at ¶ 16 (responding to comments of BellSouth, Sprint, and US WEST).

5. Compass, as a Wholesale Provider, is Not Obligated to Contribute to the Fund.

Compass provides two distinct service offerings: its EWS and EPS. In both instances, Compass does not provide telecommunications services to end-users for a fee or a *retail* telecommunications service. *See* Section IV.A, *supra*. Rather, Compass is a wholesale provider and as such, the Company is not subject to USF contribution obligations. Compass took reasonable efforts to comply with the Carrier's Carrier Rule, both with respect to its EWS and EPS. Whenever feasible, Compass documented the status of its customers as either "revenues from resellers" or revenue from statutorily exempt entities and booked all such revenue as being wholesale, "carrier's carrier" revenue exempt from Funds and regulatory fees.

6. Compass Can Demonstrate Absolute Compliance with the Post-2004 Carrier's Carrier Rule With Respect to Its EWS Offerings.

As shown above, the infirmities surrounding the creation of the vicarious liability provision in the Carrier's Carrier Rule are fatal. As such, the vicarious liability provision is unlawful. Wholesale carriers cannot be liable for not following an unlawful rule. However, this issue is moot as it relates to Compass' EWS because, with regard to these revenues, Compass has complied with the Carrier's Carrier Rule in complete and absolute terms.

EWS is two things: (1) enhanced/information service; and (2) wholesale. What it is not is "telecommunications service" or a retail telecommunications service subject to federal support program contribution bases. Compass offers and sells its EWS to common carrier customers that in turn sell their services to the public. It has always been Compass' business practice to obtain Exemption Certificates[96] from customers that were subject to FCC jurisdiction.[97] In support of its

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[96] True and accurate copies of Exemption Certificates obtained from the Company's retail customers are attached at Exhibit 1.

[97] There is widespread acceptance that organizations typically operate in a repetitive manner. As a result, there is some assurance of the reliability of an organization's 'routine' as proof that a

compliance with the Carrier's Carrier Rule, Compass is producing herewith USF Exemption Certificates for all of its existing EWS customers and over 95% of all of the Company's customers, including EPS customers, since 2005. Further, Compass has in the past performed the necessary Carrier's Carrier Rule validation and in 2007 retained the services of a communications law firm to validate Compass' customers' status on the Company's behalf.

7. No Forfeitures Are Justified For Contribution Obligations Tied To Revenues Derived From EPS.

Compass' provisioning of its EPS makes it neither a "telecommunications service" provider nor a "calling card services" provider, as those terms are defined by statute and Commission regulations.[98] However, even if the Commission determines that Compass' EPS offerings are "telecommunications services" subject to USF contribution obligations, Compass has complied fully with the USF contribution regime, just as if it was providing retail long distance toll services.

a. Compass' EPS Customers Are Contractually Responsible For USF

Throughout its existence, Compass has, in good faith, attempted to comply fully with the Carrier's Carrier Rule with respect to revenues derived from its provisioning of EPS. At the time of service establishment, Compass takes strides to obtain signed certifications from each EPS customer. Over the course of time, there have been instances where Compass has not obtained signed certifications. However, under the "lawful" Carrier's Carrier Rule, such an omission would not likely result in liability, either forfeiture or vicarious, because the "lawful" Carrier's Carrier Rule was intended as an "auditing" tool only. Moreover, the "lawful" Carrier's Carrier Rule merely

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particular act was performed in a given instance. This is because responsible people perform their tasks in a consistent manner and therefore a company's routine is often accepted as proof of conduct. *See*, Federal Rule of Evidence 406. Accordingly, the Commission can accept the Exemption Certificates produced as evidence that the Company, routinely and as a practice, obtained Exemption Certificates from its EWS customers.

[98] Compass' EPS provides carrier customers with a package of offerings including (i) internet access to traffic and billing records, (ii) toll-free and local inbound access to a PIN Access Prepaid Platform, (iii) enhanced call routing, and (iv) IP call transport to terminating carriers via a variety of peering arrangements.

required a carrier's carrier to have a "reasonable" belief that its customer was a "reseller" and direct contributor. Based on Compass' business model and relationship with its EPS customers, as described herein and in Compass' responses to IHD data requests during the investigation, Compass management's belief that its EPS customers were responsible for USF contributions was certainly "reasonable."

Furthermore, any failure to secure a signed certification is a non-issue because Compass has contributed to the Fund for EPS revenues and thus, there has been no violation of FCC rules and no forfeitures are justified.[99] Indeed, the entire issue is wholly irrelevant to the NAL, because even if Compass did not have exemption certifications from 100% of its EPS customers, no forfeitures are justified because Compass paid contributions and fees on EPS revenue that was reported as "retail" toll telecommunications revenue in its revised 2005 and 2006 499-As and 2007 499-A. To the extent Compass has obtained and produces proof of exemption for the relevant period from an EPS customer, Compass is owed refunds from the various administrators.

b. Despite the Fact That Compass Does Not Believe the Carrier Carrier's Rule is a Valid Rule, it Nonetheless Voluntarily Reported and Contributed to the Fund Based on EPS Revenues.

Even if the Carrier's Carrier Rule's vicarious liability provision is considered valid, Compass cannot be found liable for any forfeitures tied to its EPS revenues because it has, since 2005, reported all of its wholesale EPS revenue as "Toll Reseller" revenue. When Compass was unable to obtain – with 100% certainty – customer proof of compliance with the Carrier's Carrier Rule, Compass made the ultra-conservative decision to report its wholesale EPS revenue as retail Toll Reseller revenue. To its surprise and ultimately to its dismay, it was Compass' election of this conservative approach that triggered the present NAL.

[99] The conclusion is justified further given the unlawfulness of the Carrier's Carrier Rule's vicarious liability provision.

In retrospect, Compass could have and should have asserted that the Carrier's Carrier Rule and its imposition of vicarious liability on wholesale providers is unlawful due to its improper promulgation by USAC and its promulgation without the required notice and opportunity for comment. *See* Section IV.D.4, *supra*.

In retrospect, Compass should have treated its EPS revenue as "wholesale" and exempt because all reasonable indicia indicated that its EPS customers were "resellers" and that Compass was a bona fide "carrier's carrier." However, Compass, out of an abundance of caution, reported its EPS revenue as "toll revenue." It did not report it as "prepaid calling card revenue" (which must be reported at Face Value of the cards) because the Company does not know what its EPS customers charge their end users.[100] Therefore, since 2006, Compass has reported as "toll revenue" 100% of the revenue derived from "services provided to" its EPS carrier customers. Compass' practice of reporting the EPS revenue as toll revenue is wholly consistent with the Act and in compliance with the Commission's Rules governing contributions.

8. The Significance of Compass' Wholesale Services

The importance of properly characterizing Compass' offerings as wholesale cannot be understated. When the Company's services are treated correctly, with both EWS and EPS being wholesale, Compass is a *de minimis* provider that need not contribute to the USF. And, because Compass is a *de minimis* provider offering services on a non-common carrier basis, it need not file Worksheets or contribute to any of the federal support mechanisms. Indeed, if upon application of the law to the facts, the Commission treats Compass as it should, which is as a *de minimis*, non-common carrier, Compass would be wholly excused from even registering with the FCC as an ITSP in the first instance – which is precisely the position taken by Compass prior to and upon its receipt

[100] This approach is appropriate given the fact that Compass is privy only to the amount it charges its direct customers for the Enhanced Platform Services, which includes the originating transmission, the session processing and the termination.

of the Commission's audit letters; yet despite its protestations, Compass felt coerced and compelled by the IHD to register and submit Forms 499-A.[101]

E. THE *DE MINIMIS* EXEMPTION RELIEVES COMPASS OF FILING AND CONTRIBUTION (AND EVEN ITS REGISTRATION) REQUIREMENTS

Despite its voluntary, ultra-conservative reporting decision regarding EPS revenue (which it may retract at will), when all facts are considered, since 1998, Compass has operated on a non-common carrier basis and any contributions owed to the Universal Service Fund based on revenue derived from its non-common carrier operations would have been and still are *de minimis*. Fund contributors that provide telecommunications on a non-common carrier basis and whose contributions would be *de minimis* are neither required to file FCC Form 499 nor contribute to any of the federal support mechanisms, including USF, TRS, NANP, LNP and FCC regulatory fees. Specifically, Form 499-A provides, in pertinent part:

> Providers that offer telecommunications for a fee exclusively on a non-common carrier basis need not file this Worksheet if their contribution to the universal service support mechanisms would be *de minimis* under the universal service rules. ... In contrast, telecommunications carriers (*i.e*, entities providing telecommunications services on a common-carriage basis) that meet the *de minimis* standard must file this Worksheet (because they must contribute to other support and cost recovery mechanisms) but need not contribute to the universal service mechanisms.

1. The *De Minimis* Exemption Excuses Contribution Obligations When the Expected Contribution is Less Than $10,000.

In establishing the Fund, Congress and the Commission agreed that an exemption was needed to prevent waste resulting from the administrative costs of collecting contributions that would exceed the amounts collected. As a result, a *de minimis* exemption was created whereby a carrier or class of carriers are exempt from contributing to the universal service mechanisms "if the carrier's telecommunications activities are limited to such an extent that the level of such carrier's

[101] *See infra*, at fn. 11 and Section II, generally.

contribution to the preservation and advancement of universal service would be *de minimis*." *In the Matter of Federal-State Joint Board on Universal Service*, 12 F.C.C.R. 8776, 12 FCC Rcd. 8776, 7 Communications Reg. (P&F) 109, 1997 WL 236383, CC Docket No. 96-45, FCC 97-157 (1997 Report and Order), Para 802.

Since 1998, when Compass began offering its services, the *de minimis* amount has been $10,000. That is, if the contributor's contribution for the year is expected to be less than $10,000 it is exempt from contributing to the universal service mechanisms.

In 1998 and 1999, FCC Form 457, the predecessor to Form 499-A provided that a *de minimis* contributor was exempt from both USF contribution and filing requirements.[102]

In 2000, the *de minimis* exemption in Form 499-A was expanded to include a distinction between *de minimis* providers that offer telecommunications for a fee on a non-common carrier basis and those telecommunications service providers that offered telecommunications on a common carrier basis.[103] The revised instructions provided that the provider offering services on a non-common carrier basis need not file the Form 499 or contribute if their contribution would be *de minimis* under the universal service rules. The instructions further provide that telecommunications service providers (common carriers) whose estimated contributions are *de minimis* are not be required to contribute directly to universal service support mechanisms or file the worksheet, if the carrier

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[102] "A contributor that provides interstate telecommunications will be exempt from universal service contribution and filing requirements if that contributor's contribution for the year is expected to be less than $10,000." Form 457 (1998); "Contributors that provide interstate telecommunications but whose contributions would be *de minimis* are not required to file or contribute to universal service." Form 457 (1999).

[103] Form 499-A - 2000: "Telecommunications service providers that offer telecommunications for a fee on a non-common carrier basis need not file this worksheet if their contribution to the universal service support mechanisms would be *de minimis* under the universal service rules. Such telecommunications service providers should complete the table contained in Figure 1 to determine whether they meet the *de minimis standard*. ... Telecommunications service providers whose estimated contributions to universal service support mechanisms would be less than $10,000 are considered *de minimis* for universal service contribution purposes and will not be required to contribute directly to universal service support mechanisms. ...."

need not file the Form 499 for any other purpose.

Additional alterations to FCC Form 499 instructions occurred in 2001 when *de minimis* providers offering telecommunications services on a common carriage basis were required to file a Form 499 despite the fact that these *de minimis* carriers were not required to contribute to the USF.[104] For the most part, the filing and contribution requirements for providers whose estimated contribution would be *de minimis* under the 2001 universal service rules remains unchanged to date.[105]

Thus, the constant from 1998 to the present is that providers that offer telecommunications on a non-common carrier basis need not file a Form 499 or contribute to the USF and other support mechanisms if their contribution to the USF would be less than $10,000. From 1998 until 2001, all *de minimis* providers, including those providing common carrier services were exempt from filing and contributing. Then, beginning in 2001, common carrier providers of telecommunications services whose contributions were *de minimis* were exempt from contributing, but were required to file Form 499.

2. Compass' Contribution Obligations Tied to its Enhanced Wholesale Services Has Always Been *De Minimis*

Since opening its doors in 1998, Compass has diligently researched and calculated its USF contribution obligations based on the methodologies and worksheets provided in the Form 499 Instructions (and its predecessor, Form 457). In each instance, the "*de minimis* worksheet" calculations resulted in estimated contribution amounts below the $10,000 threshold, indeed, the amounts were zero. This is because, given the alternatives between "end user" (retail) and "carrier's

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[104] "Thus, providers that offer telecommunications for a fee exclusively on a non-common carrier basis need not file this Worksheet if their contribution to the universal service support mechanisms would be *de minimis* under the universal service rules. In contrast, telecommunications carriers that meet the *de minimis* standard must file this Worksheet (because they must contribute to other support and cost recovery mechanisms) but need not contribute to the universal service mechanisms." Form 499-A (2001).

[105] Note, there have been insignificant changes in the language of the instructions, but the reporting and contribution requirements remain unchanged.

carrier" (wholesale), revenue derived by Compass was more appropriately booked as "wholesale." Wholesale or "carrier's carrier" revenue is exempt from all support mechanism Contribution Bases and regulatory fees. Indeed, Compass' revenue remained 100% wholesale throughout the years and, thus, its *de minimis* worksheet calculations continued to yield zero end user revenues.

This remained the result with respect to its Wholesale Enhanced Service revenue even *after* the introduction and application of the so-called "Carrier's Carrier Rule" (which may itself be an unlawful "rule").[106] As shown in Section II, Compass documented its compliance with the Carrier's Carrier Rule with respect to all revenue from Enhanced Wholesale Services and, therefore, appropriately reported such revenue in Block 300 of its revised 2005 and 2006 Forms 499-A and subsequently filed Forms 499. The Commission has no factual grounds upon which to conclude that Compass "underpaid" federal support mechanism contributions or regulatory fees based on its reporting of EWS revenue.

F. UNDER THE ACT AND WEIGHT OF COMMISSION PRECEDENT, EWS AND EPS ARE NOT "TELECOMMUNICATIONS SERVICES"; EWS AND EPS ARE MORE AKIN TO "NETWORK ELEMENTS" OR "INFORMATION SERVICES"

The Commission tentatively concludes that the services Compass calls "Enhanced Wholesale Service" ("EWS") are telecommunications services. NAL, ¶17. The Commission

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[106] Changes to the Carrier's Carrier Rule – a substantive rule -- was announced in the instructions to the 2004 Telecommunications Reporting Worksheet without opportunity for notice and comment. The rule requires that "[e]ach filer should have documented procedures to ensure that it reports as "revenues from resellers" only revenues from entities that reasonably would be expected to contribute to support universal service." *See*, Instructions to the Telecommunications Reporting Worksheet, Form 499-A, March 2004 at page 16. Application of the rule may impose vicarious USF liability on "wholesale" companies that fail to comply ("**Filers will be responsible for any additional universal service assessments that result if its customers must be reclassified as end users.**"). *Id.* at 17. Thus, even when Carrier A's revenue is technically "wholesale," because it was derived from another carrier, Carrier B, if Carrier B or Carrier B's customer did not make required USF contributions and Carrier A failed to comply with the Carrier's Carrier Rule, Carrier A's wholesale revenue from Carrier B may be reclassified by USAC as "end user" revenue, subject to USF contributions. *See* discussion of the invalidity of the post-2004 Carrier's Carrier Rule at Section IV.D.4, *supra*.

explains that "Compass resells network capacity to communications companies who transmit international voice calls and data over Compass' IP network" and that "Compass' services, including the offering of network access for basic voice services, are used by end users for basic transmission purposes, and thus [the Commission] find[s] the services are telecommunications services subject to Title II requirements." *Id.*, ¶18. The Commission similarly concludes that EPS is a mere telecommunications service. *Id.*, ¶14. The Commission's tentative conclusions are flawed.

First, the tentative conclusions are based on an oversimplified comprehension of the functionality and purpose of the services. To an extent, this lack of comprehension is understandable given the limited investigation conducted by the Enforcement Bureau, which failed to seek any clarifications of the information supplied by Compass. Second, the tentative conclusion oversimplifies and overlooks considerable precedent and long-standing Commission policies regarding the proper regulatory treatment of enhanced and other "IP-Enabled" services which, as Compass demonstrates, includes EWS and EPS. Instead, the Commission "cherry-picked" a fact-specific and narrow "internetworking conversions" decision to support a rush to judgment that EWS is a mere telecommunications service subject to the full panoply of Title II regulations.[107] To reach this conclusion, the Commission misapplies internetworking conversions precedent and improperly expands the scope of the *AT&T VoIP Order*.[108] Moreover, the Commission has ignored the existence, purpose, and scope of the pending *IP-Enabled Services* rulemaking proceeding; a proceeding that recognizes the meaning of "IP-enabled services" goes beyond the "internetworking conversions" precedent, which is only applicable to the limited factual context in which it was rendered.

The IP-Enabled Services proceeding was initiated for the very purpose of avoiding the type of result the Commission would impose if the NAL is not cancelled. That is, the introduction of

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107 NAL, ¶14.

108 NAL, ¶¶19–21.

regulatory uncertainty as to whether any one of the thousands of "flavors" of enhanced or advanced IP-enabled communications services is or is not subject to burdensome regulations. This Commission recognizes all too well that such regulatory uncertainty will stifle innovation and investment in a time where innovation and investment are needed most in this country to reduce consumer costs.[109]

As demonstrated below, Compass' EWS is not a mere telecommunications service. The Commission's tentative conclusion is wrong and the record should be clarified to avoid uncertainty in the marketplace, not just for Compass, but for other entrepreneurial and innovative communications enterprises. The failure to issue the necessary clarification may have the unintended consequence of driving innovative U.S.-based companies to foreign shores where the Commission and the Congress have no jurisdiction and where the economic benefits of innovation flow outside our borders.

1. Compass Only Engages in "Session Processing" and Therefore Does Not Provide a Telecommunications Service

With respect to both its EWS and EPS services, Compass provides (and provides on a comprehensive basis) only a single service element which might arguably act as one component of a full-blown telecommunications service offered by those entities actually operating as telecommunications carriers – that offering is "session processing." To be sure, Compass also provides network management features to its customers in connection with its EWS and EPS products; however, even taking into account the Company's value-added benefits to its customers, EWS and EPS still fall far short of the comprehensive bundling of all network elements which would be necessary to the provision of an end-user friendly "telecommunications service." It is

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109 http://www.usatoday.com/tech/news/techpolicy/2004-01-22-voip-no-regs_x.htm (Quoting Commissioner Abernathy as saying that a decision in the IP-Enabled Services Docket is necessary because "[t]he present uncertainty [regarding VoIP] may be distorting competition and the flow of capital.")

abundantly clear from the Act and the Commission's rules that the provisioning of switching alone cannot be equated with the provisioning of a telecommunications service; mere switching does not, and cannot, constitute "transmission of information, between or among points specified by the user, of information of a user's choosing." [110] And Compass does not provide "switching," per se, but instead engages in the act of "session processing," which is even further differentiated from "telecommunications" and "telecommunications services." Since a service must constitute telecommunications before it can qualify as a telecommunications service, products such as EWS and EPS, which do not offer "telecommunications" cannot be classified as a telecommunications service.[111]

In short, the primary purpose of Compass' service is processing traffic between global enhanced service providers; in so doing, Compass utilizes what might in another circumstance be termed an "unbundled network element" – *i.e.*, switching (indeed, "session processing"), to provide

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[110] *See*, 47 U.S.C. § 153(43) (defining "telecommunications") and 47 U.S.C. § 153(46) (defining "telecommunications service" as "offering of telecommunications for a fee directly to the public"). Consistent with this analysis, the Commission's rules define switching as a network element which is part of a larger telecommunications service; as such, network elements like switching can be combined to form a telecommunications services, but are not telecommunications services by themselves. *See*, 47 C.F.R. § 51.319(d) (defining switching as a network element); 47 U.S.C. § 251(c)(3) (network elements combine to create telecommunications services); Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499, 15646-7 (discussing process of combining elements to create a telecommunications service), 15705 (requiring provision of switching as a separated network element) (1996).

[111] Furthermore, as the FCC has made clear, "the legislative history of the 1996 Act indicates that the definition of telecommunications services is intended to clarify that telecommunications services are common carrier services . . . the Courts have held that the indiscriminate offering of a service to the public is an essential element in common carriage." *In the Matter of Cable & Wireless, PLC*, 12 F.C.C. Rcd. 8516 (rel. June 20, 1997). By their very nature, the products provided by Compass to the rigidly defined universe of entities which comprise the Company's customer base are not carrier services -- neither EWS nor EPS is provided on an *indiscriminate* basis to the public. Thus, at the most rudimentary level, neither EWS nor EPS constitutes a "telecommunications service." Furthermore, since the totality of products offered by Compass fail the test of a "common carrier service" (and as discussed more fully at Section IV.D hereto), Compass may not be treated as a "telecommunications carrier" subject to the FCC's common carrier reporting and contribution obligations at issue in the NAL. (*See, e.g.*, 47 U.S.C. § 153(44): "[A] telecommunications carrier shall be treated as a common carrier under this chapter only to the extent it is engaging in providing telecommunications services.")

its discrete EWS and EPS products. This does not, however, convert Compass' products into "telecommunications services"; nor, does it convert Compass into a "telecommunications carrier" with respect to its EWS and EPS products. And finally, as explained above, only telecommunications service providers are subject to the obligation to fund the various federal support contribution mechanisms; Compass is not providing a telecommunications service. Accordingly, Compass does not fall within the universe of entities which would be subject to federal support mechanism contribution obligations.[112]

2. Compass' Service Does More Than Simply Transport Voice Traffic and is Therefore Best Classified as an Information Service.

Furthermore, even in the event EWS or EPS could be deemed to constitute a "service" rather than a product offering (which they cannot), it is clear from the above that such products may not be considered "telecommunications" services. Thus, if EWS or EPS constitute "services" at all, the only plausible argument which the FCC could make, under the facts present here, would be that EWS and EPS constitute "information services."

The NAL erroneously concludes that Compass' "Enhanced Wholesale Services" are fundamentally telecommunications services because Compass' IP-enabled services did not meet the statutory definition of "information service" under the Act. The Commission rests this belief on the unsupported conclusion that the use of Internet Protocol to transmit traffic is not, by itself, sufficient to justify a finding that Compass' service is an "information service."[113] The FCC's conclusion on this point is not supported by the record in this matter. In reaching this conclusion, the FCC failed to consider Compass' service offering in its entirety; the NAL also inappropriately declines to address the enhanced features Compass offers to other enhanced service providers.

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[112] Compass' position is not a solitary one; Arbinet, for example, espouses a similar position with respect to the inapplicability of FCC reporting and contribution requirements as those requirements would relate to products akin to Compass' EWS and EPS. *See*, Exhibit 26.

[113] NAL, ¶ 19-21.

Consideration of these aspects of Compass' service offering should have led the FCC to the opposite conclusion.

Compass correctly classified its service as an information service during the relevant period: Compass utilizes its network exclusively to process data driven, IP-based communications between connecting enhanced service providers; thus, the Company provides services beyond basic telecommunications services. As the FCC is aware, the use of Internet Protocol allows Compass to receive, process, and transmit almost all types of data over its network, most notably by providing enhanced routing and protocol transformation services which enables incoming data to be modified and transformed. Some of the enhanced functions that Compass' network adds to transmissions include database look-ups for special traffic routing, specialized transmission of traffic to specific geographic locations, and manipulation of data and voice traffic to enhance transmission quality and output.[114]

Compass also provides CODEC matching and protocol processing between carriers so that multiple customers can interconnect and route communications between separate and disparate networks. For instance, the vast majority of Compass' customers employ a wide range of different VoIP CODEC, ranging from G711 and G23, along with different Protocols, such as H323 to SIP, with many different versions of each protocol.[115] Without Compass' CODEC matching and protocol processing and conversion service, it would be functionally impossible for a customer using one type of protocol to terminate traffic to another customer using a different protocol. In other words, with respect to a very significant portion of the Company's activities, Compass' network acts as the value-added service allowing multiple enhanced service providers to interconnect.[116]

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114 *See* Exhibit 27.
115 *See*, Exhibit 27.
116 *See*, Exhibit 28.

Similarly, any call that is sent to Compass' prepaid calling card platform, which is a TDM switch, *see* Exhibit 28 at ¶¶86-93, must be converted to IP before it can be routed over Compass' network. Since all prepaid calls must interface and leave Compass' network through an IP gateway, all TDM prepaid calls received by Compass necessarily must be converted to VoIP and routed over the network.[117] In essence, all prepaid calls undergo a protocol conversion, from TDM to IP, through Compass' network.

By offering these services in conjunction with data transmission services, Compass' service offering is directly analogous to a Value-Added Network, or VAN. VANs have traditionally offered enhanced data transport in the form of session processing and protocol conversion to end users over their networks.[118] The Commission has long held that VANs are information services under the Act because the enhanced features they offer cannot be separated from any basic telecommunications provided in conjunction with the overall enhanced service.[119] These networks are largely unregulated by the Commission; indeed, directly relevant to the issues raised in the NAL, the FCC has never subjected VANs to Universal Service Fund obligations.[120]

To the extent Compass' network is utilized to provide processing of voice communications, the voice traffic of Compass' customers is routed entirely in IP and is thus indistinguishable from packet-switched information sent over a conventional data network. As the facts provided in

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117 *See*, Exhibit 28.

118 *See, In The Matter Of Public Packet Switching Service New York Telephone Company Revisions To Tariff, F.C.C. No. 41, Pacific Bell Amendment Of Tariff, F.C.C. No. 128, Southwestern Bell Telephone Company Revisions To Tariff F.C.C. No. 68 Ameritech Operating Companies Amendment Of Tariff F.C.C. No. 89 Bellsouth Telephone Companies (On Behalf Of South Central Bell Telephone Company) Amendment Of Tariff F.C.C. No. 1*, 4 FCC Rcd. 3382, (April 10, 1989) at fn. 5.

119 *In The Matter Of Federal-State Joint Board On Universal Service*, Fourth Order on Recon, 13 FCC Rcd. 2372 at ¶ 282 (1997) ("Traditionally, the Commission has not regulated value-added networks (VANs) because VANs provide enhanced services. VAN offerings are treated as enhanced services because the enhanced component of the offering, i.e., the protocol conversions, 'contaminates' the basic component of the offering, thus rendering the entire offering enhanced.")

120 *In The Matter Of Federal-State Joint Board On Universal Service*, Fourth Order on Recon, 13 FCC Rcd. 2372 at ¶ 282 (1997).

Exhibit 27 and Exhibit 29 demonstrate, all traffic originating and terminating from Compass' network must be transmitted in Internet Protocol; it is impossible for Compass to receive or transmit traditional voice-grade telephony without the conversion by a connecting user of all of that customer's traffic to Internet Protocol.[121] Further, because Compass' network is designed purely to transmit IP-based data, the Company cannot independently determine the nature of traffic is being transported between networks.[122] Thus, Compass' primary role, as both a relay service and protocol conversion mechanism between two interconnecting carriers, is fully supportive of the conclusion that Compass' services may be classified, if they may be classified at all, only as information services. And, as the FCC has recognized with other VANs, any basic transmission services using telecommunications are incidental to the primary features of Compass' enhanced network.[123]

3. The Information Services Aspect of Compass' Product Offering Also Support Classification of its Products as Information Services

Although EWS and EPS may not rationally be characterized as "telecommunications services," the regulatory definition of the "Internet," the interconnected nature of Compass' network, and the use of Internet Protocol as a transport mechanism, all support classification of Compass' products as "information services" since they comprise simply another facet of the global

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[121] For example, contracts between Compass and connecting enhanced service providers state: "In order to receive Service from COMPASS GLOBAL hereunder, Customer must establish a dedicated VOIP connection between Customer's network and COMPASS GLOBAL's designated VOIP network location meet point ("POP") via IP Address as specified in the Service Schedule(s). Each Party shall be responsible for procurement, at its own expense, of the necessary equipment and switching required to bring and accept traffic to/from the interconnection points. At each Party's own expense and responsibility, the Parties shall interface on a 24 hours a day, 7 days a week basis to assist each other with the isolation and repair of any facility faults in their respective networks, and with the identification, investigation and mitigation of real time traffic flow problems to any Destinations/Originations."

[122] *See*, Exhibit 28.

[123] *See, Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd. 3072, 3075 (May 22, 1987) (noting that VANs are treated as enhanced because they combined protocol processing with basic transmission services).

Internet. Nothing affirms this principle better than the Commission's definition of the Internet in the 2005 *Internet Policy Statement*.[124] In this policy statement, the Commission referenced two statutory definitions to synopsize the Internet. The Commission first cited the statutory definition of the Internet in 47 U.S.C. § 230(f)(1) as an "international computer network of both Federal and non-Federal interoperable packet switched data networks."[125] The Commission also cited the definition of the Internet in 47 U.S.C. § 231(e)(3) as "the combination of computer facilities and electromagnetic transmission media, and related equipment and software, comprising the interconnected worldwide network of computer networks that employ the Transmission Control Protocol/Internet Protocol or any successor protocol to transmit information."[126] These statutory definitions referenced by the Commission highlight the two key components of the Internet: the use of packet-switched data networks to connect to an international computer network, and the use of Internet Protocol to transmit data between these networks.

Compass' service offering is built upon both of these components. Compass' network is entirely IP-based; as such, that network employs Internet Protocol to help transmit information between global enhanced service providers.[127] Indeed, Compass employs an entirely packet-based network which does not relay information using traditional telephony. Rather, Compass' service connects to hundreds of other networks, both international and domestic, using only IP-based interconnection. In essence, Compass' service is functionally and technologically equivalent to any other data-driven, packet-switched network that uses its facilities to route information throughout a global communications network. Thus, Compass' service meets the definition of an Internet service. In accordance with the Commission's maxim in the NAL, that services should be regulated

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124 *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Policy Statement, 23 FCC Rcd. 340 (2005) ("*Internet Policy Statement*").

125 47 U.S.C. § 230(f)(1).

126 47 U.S.C. § 231(e)(3).

127 *See*, Exhibit 27

based upon their underlying functionality, Compass' network should be regulated similar to an Internet Service Provider under the Commission's rules.[128]

Under those rules, ISPs are categorized as "information services" providers which are not subject to the legacy Title II (*i.e.*, common carrier) regulations applicable to traditional telephony services, including the obligation to fund federal support mechanisms. This was made explicitly clear in the *1998 Universal Service Report*; therein, the Commission stated that ISPs are not required to contribute to USF "[i]n those cases where an Internet service provider owns transmission facilities, and engages in data transport over those facilities in order to provide an information service."[129] A plain reading of this language indicates that Internet service providers like Compass are exempt from the duty to contribute to USF.

4. Protocol Processing Functionality Qualifies Compass' Service as Information Service

In addition to explicitly exempting ISPs from Universal Service Fund contribution obligations, the Commission considers IP-based telephony to be distinguishable from traditional telephony as a result of the "protocol processing" involved in the transmission of the voice component. Thus, the Commission itself recognizes that services which provide protocol processing fall under the definition of information services.[130]

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128 *See, Compass NAL* ¶ 18 ("The definitions of 'telecommunications service' and 'information service' do not hinge on the particular type of facilities used, but on the functions available.").

129 *In The Matter of Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11,501, 13 FCC Rcd. 11,830, 11507 at ¶ 15 (Apr 10, 1998) ("*Universal Service Report*"). *See also, In The Matters Of Appropriate Framework For Broadband Access To The Internet Over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 (August 5, 2005) (The new regulatory framework in this Order "establishes a minimal regulatory environment for wireline broadband Internet access services to benefit American consumers and promote innovative and efficient communications.").

130 *Universal Service Report* at ¶ 51 ("[S]ervices offering net protocol conversion appear to fall within the statutory language, because they offer a capability for 'transforming [and] processing' information.").

As noted above, one of the primary functions of Compass' data-based switching service is to provide a seamless interface between different enhanced service providers; Compass' entire service constitutes one large protocol processing mechanism. A detailed description of the networks' protocol processing functions supports this conclusion.[131] This description clearly demonstrates that, contrary to the Commission's declaration in the NAL, protocol processing is not incidental to the services Compass is providing to connecting enhanced service providers.

To be sure, protocol process is an integral part of the definition of information services. The only established exception to this doctrine, as the Commission readily admits in footnote 83 of the NAL, is "internetworking conversations" – in other words, protocol conversions taking place entirely within a network. Network conversions which result in a change of transmission protocol are considered information service. Nowhere is this better summarized than in the *Universal Service Report*, in which the Commission states that internetworking "occurs when a carrier converts from X.25 to X.75 formatted data at the originating end within the network, transports the data in X.75 format, and then converts the data back to X.25 format at the terminating end."[132] Compass' network necessarily changes the protocol between input and output, placing it firmly outside the concept and definition of "internetworking."

An examination of the regulatory history of the protocol processing exception for internetworking conversation strengthens this conclusion. In the *Computer III* proceeding, the FCC discussed Waiver Orders which had been granted to legacy carriers who offered protocol processing in conjunction with voice transmission services. The Commission has summarized these waivers as follows:

> ". . . in the X.25/X.75 Waiver Order, we ruled that the X.75/X.25 internetworking protocol conversion could be treated as a basic service. Still later, in the Asynchronous/X.25 Waiver Order, we stated that we would authorize BOCs to

131 *See*, Exhibit 28.

132 *Universal Service Report* at fn. 106.

offer asynchronous/X.25 protocol conversion services as enhanced services without observing the structural safeguards of Computer II . . . ."[133]

The key distinction made by the Commission is that X.75/X.25 protocol conversion, or protocol conversion occurring entirely within a network, is considered a basic telecommunications service; but, protocol conversions which result in a net change of the data path are considered enhanced/information services. And, as noted above, services like Compass' change the protocol of transmission between input and output; hence Compass' products must be considered information services if they are to be considered "services" at all. Any other finding would represent a clear and unsupportable break from long-standing Commission precedent.

The Commission also recognized this principle in the *Universal Service Report* when debating the application of USF contribution obligations to IP-enabled telephony. Here the Commission recognized that IP-based telephony was difficult to classify because of the protocol conversion inherent in an IP-based communications system[134] and declined to affirmatively classify such "hybrid" services.[135] Indeed, given the regulatory uncertainty which continues to persist in this area, the FCC would go no farther than to issue a *tentative* classification of IP "phone-to-phone" services as telecommunications services, and even then, only under a strictly confined universe of circumstances.[136] The FCC's tentative conclusion is thus limited in application to a service which:

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[133] *In the Matters of Amendment to Sections 64.702 of the Commission's Rules and Regulations (Third Computer Inquiry); and Policy and Rules Concerning Rates for Competitive Common Phase II Carrier Service and Facilities Authorizations Thereof Communications Protocols under Sections 64.702 of the Commission's Rules and Regulations*, 2 FCC Rcd. 3072, F.C.C. (May 22, 1987).

[134] *Universal Service Report* at ¶ 60 ("We recognize that the question may not always be straightforward whether, on the one hand, an entity is providing a single information service with communications and computing components, or, on the other hand, is providing two distinct services, one of which is a telecommunications service.").

[135] *Id*, ¶ 90 ("We do not believe, however, that it is appropriate to make any definitive pronouncements [concerning IP-telephony] in the absence of a more complete record focused on individual service offerings.").

[136] *Id*, ¶ 55 "We do not believe, however, that it is appropriate to make any definitive pronouncements [regarding the regulatory classification of "phone-to-phone" IP-telephony] in the absence of a more complete record focused on individual service offerings.").

1. holds itself out as providing voice telephony or facsimile transmission service;
2. does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network;
3. allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and
4. transmits customer information without net change in form or content.[137]

Clearly, the products provided by Compass bear no resemblance to the type of service which the FCC contemplated in its tentative conclusion. As an initial matter, Compass does not hold itself out as providing voice telephony or facsimile transmission service. Next, Compass' customers do not use traditional CPE to connect to Compass' network; rather, Compass requires its customers to connect all traffic through a VoIP connection. Furthermore, Compass' customers are not end-users which will be "calling telephone numbers assigned in accordance with the North American Numbering Plan"; Compass' customers are telecommunications carriers, Enhanced Service Providers or private service providers. Finally, all of the traffic transmitted by Compass undergoes a net change in protocol. Thus, not only does Compass' product offering fail to satisfy all four prongs of the FCC's intentionally cautious and narrowly defined "tentative conclusion," it fails to satisfy *any* of the requisite four prongs of the bright-line test set forth by the FCC.

5. AT&T IP-in-the-Middle Order was Specifically Limited to End-to-End Services and, Therefore, Cannot be Reasonably Applied to Carriers like Compass

The Commission used a similar definition of an IP "phone-to-phone" service in the *AT&T IP-in-the-Middle Order*.[138] Therein, the FCC held that AT&T's phone-to-phone, IP-in-the-Middle service was not an information service. In so doing, however, the Commission specifically limited its regulatory classifications to service that meeting the specific "end-to-end" service characteristics

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137 *Id.*, ¶ 88.

138 *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges, Order*, 19 FCC Rcd 7457, (2004) ("*AT&T IP-in-the-Middle Order*").

present in the AT&T service. Indeed, the FCC specifically cautioned that its "decision *is limited to* the type of service described by AT&T in this proceeding, *i.e.*, an interexchange service" that:

1) uses ordinary customer premises equipment (CPE) with no enhanced functionality;
2) originates and terminates on the public switched telephone network (PSTN); and
3) undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology.[139]

Here again, the Commission's decision was narrowly limited, having application only to a fully self-contained interexchange services offering such as that provided by AT&T. And here again, Compass' service configuration satisfies none of the requisite three prongs.

The Commission confirmed the very narrow scope of its holding in paragraph 10 of the Order:

> This order represents our analysis of one specific type of service under existing law based on the record compiled in this proceeding. It in no way precludes the Commission from adopting a fundamentally different approach when it resolves the IP services rulemaking, or when it resolves the *Intercarrier Compensation* proceeding.[140]

This position is fully consistent with the Commission's continued cautionary approach to regulating IP-enabled telephony services. The Commission has consistently declined, for example, to affirmatively classify any IP-enabled telephony service as a telecommunications service. Instead, the Agency prefers to defer classification of these types of services to ongoing rulemaking proceedings concerning *Universal Service, Intercarrier Compensation*, and *IP-Enabled Services*.[141] Compass

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139 *Id.*, ¶ 1.

140 *AT&T IP-in-the-Middle Order* at ¶ 10 (emphasis added).

141 *Id.* at ¶ 15 ("We are undertaking a comprehensive examination of issues raised by the growth of services that use IP, including carrier compensation and universal service issues, in the *IP-Enabled Services* rulemaking proceeding. In the interim, however, to provide regulatory certainty, we clarify that *AT&T's specific service* is subject to interstate access charges." (emphasis added)).

Indeed, the Commission took no action after this proceeding to subject any IP-in-the-Middle carrier to USF contribution requirements, nor released clarification of scope of this Order. And, subsequent to this Order, the Commission only undertook very limited steps to impose Title II obligations on "interconnected" VoIP services, at no time ever imposing Title II obligations on IP-in-the-Middle carriers generally, through a formal rulemaking proceeding. (*See, IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, WC Docket Nos. 04-36, 05-196, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257-58, ¶ 24 (2005)("*E911*

strongly urges the Commission to refrain from reaching any conclusion contrary to that already so clearly enunciated by it; certainly, the vehicle of an NAL – which by its very nature will have applicability to only one entity – is not an appropriate opportunity to institute such a sweeping policy change. As the FCC has already appropriately recognized, a departure from established policy should only follow a notice-and-rulemaking proceeding of general applicability in order to provide an opportunity for full public comment consistent with Section 553 of the APA.

6. Any VoIP Transport Provided by Compass is a Computer-to-Computer IP-Enabled Transport System and is, Therefore, an Information Service and is Not Interconnected VoIP.

There is no question that computer-to-computer, IP-enabled transport services have been classified as information services under the Commission's Rules. Nowhere is this more apparent than the Commission's decision in *pulver.com FWD Order*[142] which affirmatively classified pulver.com's FWD service as an information service because it relayed VoIP calls between computer users. Notwithstanding that pulver.com's FWD service was primarily used to enable VoIP communications, the FCC found dispositive the fact that the service provided merely facilitated communication between two users over the Internet. Those aspects of pulver.com's service which qualified it as an information service included:

Order"), *Universal Service Contribution Methodology*, WC Docket No. 06-122; CC Docket Nos. 96-45, 98-171, 90-571, 92-237; NSD File No. L-00-72; CC Docket Nos. 99-200, 95-116, 98-170; WC Docket No. 04-36, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7538-43, paras. 38-49 (2006) ("*2006 Interim Contribution Methodology Order*"), *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, CC Docket No. 96-115, WC Docket No. 04-36, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd 6927, 6954-57, paras. 54-59 (2007) ("*CPNI Order*"); *See, IP-Enabled Services*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, Report and Order, 22 FCC Rcd 11275, 11283-291, paras. 17-31 (2007) ("*TRS Order*"); and *see, Communications Assistance for Law Enforcement Act and Broadband Access and Services*, ET Docket No. 04-295, RM-10865, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 14991-92, ¶ 8 (2005) ("*CALEA First Report and Order*"), *aff'd, Am Council on Educ. v FCC*, 451 F.3d 226 (D.C. Cir. 2006); *See also, In The Matter Of Developing A Unified Intercarrier Compensation Regime*, 20 FCC Rcd. 4685, (March 03, 2005).

[142] *Petition for Declaratory Ruling that pulver.com's Free World Dialup is Neither Telecommunications Nor a Telecommunications Service*, 19 FCC Rcd. 3307 (Feb 19, 2004) (*pulver.com FWD Order*").

1. the ability to "acquire" information about other connected users;
2. the ability to "store" member information;
3. the ability to "utilize" password and connection information; and
4. the use of "processes" to connect to other users defined the service as an information service.[143]

Compass' service offers the exact same "peering exchange" service to its customers. Indeed, the following detailed explanation of Compass' systems and processes demonstrates that EWS and EPS (which is dependent and inseparable from the EWS system) meets and exceeds each of the four individual components or "tests" as identified by the Commission in the *pulver.com FWD Order*:

1. the ability to "'acquire' information about other connected users"

In Step 2 of the EWS flow process, *see* Process-Conversion Flow Chart at **Exhibit 27**, Compass' systems and software "Authenticate and Validate" two critical pieces of information that are presented as part of every session sent to Compass from its customers: (1) that customer's unique IP address which must be checked against the Resource List Database (Step 3), *id.*, and (2) that customer's unique four digit password prefix (that is presented in the string of data which is presented as part of every session sent to Compass) which also must be checked against the Resource List Database (Step 3), *id.*. Both the unique IP address and the unique password must match the information stored in the Compass Global Resource List Database or else the session is rejected back to the customer. This database dip and validation/rejection of the session constitutes "information processing".

In Step 6 & 8 of the process, *id.*, unique customer information is again processed when the session processor looks up the customer's CODECs and the terminating carrier's CODECs by accessing the Route Termination List Database, and the Resource List Database.

And finally, again in Step 11, *id.*, when the session processor looks up the customer and terminating carrier's protocol resulting in the protocol being changed or processed.

2. the ability to "'store' member information"

Steps 2, 4, 6 and 10, *id.*, in processing the customer's session requires Compass to "store" member (service provider customer) information and to either validate the information and accept and process the session request, or to reject the request back to the originating customer.

3. the ability to "'utilize' password and connection information"

In Step 2 of the session processing, *id.*, Compass' system and software requires and mandates that each customer provide a unique four to six digit password or "prefix" as part of the information sent to Compass' session processor. This data related to the specific

[143] *Id.*, ¶11.

customer is stored in the Resource List Database, and that data or information is verified and either validated or rejected. The unique password information received from the customer on each session is processed by the system by querying and validating this information against the database. If there is no validation, the session is rejected. There is absolutely no comparison in the TDM and telecommunications world for anything similar to this type of information processing and information storage, thereby reinforcing the fact that Compass is both storing and processing information on each customer and carrier as part of its session processing system.

4. the use of '"processes' to connect to other users defined the service as an information service"

The entire end-to-end peering session performed by the Compass hardware, software and systems requires a series of very defined and specific individual "processes" that must be followed. Taken as a collective whole, the unique individual processes come together to form an "set" or end-to-end defined process in order for the sessions that are received from Compass' customers to be able to be processed and for the session to eventually be connected to the terminating carrier. This set of individual processes, and the total end-to-end process, are both mandatory and cannot be deviated from, therefore making the "process," and the processing of information, the foundation for Compass' two lines of business – its EWS and EPS.

As noted above, Compass' network both changes and manipulates information as that information traverses the network. Indeed, this "conversion" is an integral element in the architecture of Compass' network and has figured prominently in the development of the Company's operating systems. Compass is not a telecommunications or even a mere telephony switching company, but is instead a "peering exchange" whose hardware, software and processes facilitate the ability for Compass' originating customers to obtain "universal compatibility" between their networks and dissimilar terminating carriers' networks. Compass' processing of information goes beyond the processing of the customers sessions, by performing additional unique valued added and enhanced services that constitute information processing and database storage and lookup.

By means of example, Compass takes calls from partners in Afghanistan and partners in Ghana and monitors traffic to ensure that these providers can connect and stay connected. This