

Before The
Federal Communications Commission
Washington, D.C. 20554

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

COMMENTS OF COMPTTEL

COMPTTEL respectfully submits these comments in response to Section XV of the Commission’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“*NPRM*”) released on February 9, 2011 (FCC 11-13) in the above-referenced dockets.¹ In this section of its *NPRM* the Commission invites parties to comment on the appropriate intercarrier compensation framework for interconnected voice over internet protocol (VoIP) traffic, a question that has bedeviled the industry for far too long. As discussed below, the Commission

¹ These Comments reflect the position of a majority of COMPTTEL members. Individual members may be filing separate comments where they advocate positions on some issues that are different from those stated herein. Some members, including Sprint Nextel, do not join in these comments.

should not only address the intercarrier compensation regime applicable to interconnected VoIP traffic, it must finally make a determination as to the classification of this traffic. Specifically, the Commission should find interconnected VoIP to be a telecommunications service and establish, through this rulemaking proceeding, that the intercarrier compensation for this traffic be the same as other voice telephone service traffic both today, and during any intercarrier compensation reform transition.

The Commission also seeks comment on its proposed rules to reduce access stimulation. The Commission should amend its proposal, as discussed below, to prevent the unnecessary re-filing of interstate access tariffs by competitive local exchange carriers (“CLECs”) and to preserve the deemed lawful status of CLEC tariffs that, as currently filed, comply with the Commission’s proposed pricing requirements for those engaged in access revenue sharing arrangements.

I. The Commission Should Classify Interconnected VoIP as a Telecommunications Service

As the Commission has recognized, it has thus far declined to explicitly address the classification and intercarrier compensation obligations associated with VoIP traffic, and this has led to ever increasing billing disputes and possibly has deterred the roll out of new products and services. The Commission needs to act expeditiously to address both of these issues. In particular, the Commission should find interconnected VoIP to be a telecommunications service and establish, through this rulemaking proceeding, that the intercarrier compensation for this traffic be the same as any other traffic terminating on the public switch network both today, and during any intercarrier compensation reform transition.

The Act defines “telecommunications services” as the offering of telecommunications – which is the transmission of *information of the user’s choosing* without change in the form or

content of the information as sent and received² - for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, *regardless of facilities used*.³ Accordingly, the Commission must look at the nature of the service purchased by the end user – not the network technology used by the provider of service – when classifying this service. In other words, it doesn't matter how providers transmit the information between points, what is relevant to determining if a service is a telecommunications service is the capability the end user is being provided by the service.

An end user that purchases voice service from a carrier deploying a circuit-switched network is purchasing a telecommunication service. And if that customer calls an individual that also purchases telephone service from a carrier deploying a circuit-switched network, the end-to-end communication is a telecommunications service. The same is true when the call is made using an interconnected VoIP service. As the Commission has determined, IP telephony services (including that which is provided through computer gateways that translate the circuit-switched voice signal into IP packets) “enable real-time voice *transmission*.”⁴ The Commission acknowledges that consumers have a reasonable expectation that interconnected VoIP services are replacements for traditional phone service.⁵ This is because the nature of the service being purchased does not change simply because the call terminates or originates on an IP network – the customers “pay fees for the sole purpose of obtaining transmission of information without

² 47 U.S.C. 153(43) *emphasis added*.

³ 47 U.S.C. 153(46) *emphasis added*.

⁴ Report and Order and Further Notice of Inquiry, *In the Matter of Implementation of Sections 255 and 251(a)(2) of the Communications Act of 1934, as Enacted by the Telecommunications Act of 1996*, WT Docket No. 96-198, FCC 99-181, ¶ 177 (1999).

⁵ Report and Order, *In the Matters of IP-Enabled Services, et al*, WC Docket No. 04-36, WT Docket No. 96-198, CG Docket No. 03-123, CC Docket No. 92-105, FCC 07-110, ¶17 (2007); *See also NPRM* at ¶ 612.

change in form or content.”⁶ The packet switching deployed in IP networks and the circuit-switching deployed in the PSTN are transmission technologies used to route traffic.⁷ Declining to classify a service as a telecommunications service based solely on the different transmission technologies used to initiate or terminate a telephone call is counter to the statutory definition of telecommunications service, which mandates that the Commission not look at the facilities used.

Information service, on the other hand, is defined as

the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.⁸

VoIP service does not fit the definition of an information service since, when making a telephone call, the customer served does not acquire, store, transform, process, retrieve or utilize information – regardless of whether the call is made over the PSTN or IP network. As the Public Service Commission of Wisconsin recently found with regard to AT&T’s fixed, interconnected VoIP service, the various elements of such service are similar to, if not simply a re-packaging, of existing telecommunications services. It found the service to be a

⁶ Report to Congress, *In the Matter of Implementation of Federal- State Joint Board on Universal Service*, CC Docket No. 96-45, FCC 98-67, ¶ 101 (1998).

⁷ See Final Decision, Before the Public Service Commission of Wisconsin, Docket 6720_DR-101, p. 11, n. 9 (2010)(“Wisconsin Final Order”) [“Within “transmission,” “Internet protocol” or “IP-enabled” refer to services whose functional transmission mode is digital packetized transmission, as opposed to traditional circuit-based time division multiplexed (TDM) transmission. The digital IP-enabled mode typically will involve diverse routing of packets over networks, whether proprietary or the Public Internet, before re-assembly for delivery to the ultimate destination. “IP-enabled” is contrasted to current PSTN electronic switched circuit transmission in which a specific electronic circuit pathway, through Signaling System 7 (SS7), is established and disassembled for each communication.”]

⁸ 47 U.S.C. 153(20).

“communication capability like Plain Old Telephone Service (POTS)” and, likewise, found the related features, such as voicemail, “live-reply,” and “click-to-call” to be “virtually identical to their counterparts in traditional telecommunications voice service and customer calling offerings.”⁹

Moreover, the fact that a call is routed through a gateway where it is converted to IP format (or vice versa), does not render the service an information service, as the Commission found when classifying AT&T’s phone-to-phone IP Telephony Services (“IP in the middle” services). Rather the Commission found that a service in which the call is routed through a gateway where it is converted to IP format and changed back from IP format is a telecommunications service.¹⁰ Indeed, to the extent that protocol conversions take place within the network, they are internetworking conversions, which the Commission has found to be telecommunications services.¹¹ The statute makes clear that information service capabilities used for the “management, control or operation of a telecommunications system or the management of a telecommunications service” are exempt from the definition of information services.¹² Protocol processing “involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net conversion to the end user)” are included within that exception.¹³

⁹ *Wisconsin Final Order* at p. 10.

¹⁰ Order, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97 (2004).

¹¹ *Id.* at ¶ 12.

¹² 47 U.S.C. 153(20).

The Commission seeks comment on the retroactive effect of its decision on this matter. It is well established that the Commission’s rulemaking authority does not encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms.¹⁴ Yet even if the Commission’s decision were to be considered a finding or clarification that VoIP traffic currently falls under the existing access or reciprocal compensation regime - rather than a rulemaking – retroactivity may be denied if the equities so require. “[R]etroactivity must be balanced against the mischief of producing a result which is contrary to a statutory design or to legal and equitable principles.”¹⁵ As the Commission has found, the equitable inquiry is inherently fact-specific. “For example, the nature of a particular phone-to-phone service offering, when the service was introduced, the purported basis for detrimental reliance on Commission pronouncements, and the course of dealings between the parties in a dispute all may prove relevant to the analysis.”¹⁶ In the absence of direction from the Commission, carriers have

¹³ Order on Reconsideration, *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, 12 FCC Rcd 2297, ¶2 (1997)

¹⁴ *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988)[“A statutory grant of legislative rulemaking authority will not, as a general matter, be understood to encompass the power to promulgate retroactive rules unless the power is conveyed by Congress in express terms”]. The Administrative Procedures Act defines “rule” to “mean[] the whole or a part of an agency statement of general or particular applicability and *future effect* designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency *and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefore or of valuations, costs, or accounting, or practices bearing on any of the foregoing.*” 5 U.S.C. § 551(4) *emphasis added*.

¹⁵ *SEC v. Chenery*, 332 U.S. 194, 203 (1947).

¹⁶ Order, *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Service are Exempt from Access Charges*, WC Docket No. 02-361, FCC 04-97, ¶ 23 (2004).

in good faith treated such traffic in different ways for intercarrier compensation purposes. In particular, existing commercial agreements (otherwise compliant with the Act and Commission regulations) should not be disrupted by the Commission's determination on the treatment of this traffic unless the contractual terms of the agreement provide for such changes.

II. The Commission Should Clarify that only CLECs Charging above the Permissible Rate When Engaging in Access Stimulation Must File Revised Access Tariffs

The Commission should clarify that, pursuant to any new rules on the matter, the re-filing of access tariffs for CLECs is only triggered if the CLEC *both* engages in access revenue sharing *and*, at the time, is charging a rate higher than is allowed when engaged in such activity.

The proposed rule defines "access revenue sharing" as occurring when the CLEC or rate-of-return ILEC enters into an access revenue sharing agreement that will result in a net payment to the other party (including affiliates) to the access revenue sharing agreement, over the course of the agreement.¹⁷ For a CLEC, the act of engaging in access revenue sharing would trigger the requirement to file a revised interstate access tariff.¹⁸ In accordance with the Commission's proposed rules, the CLEC's revised tariff for its interstate exchange access services may not price those services above the rate prescribed in the access tariff of the RBOC in the state, or, if there is no RBOC in the state, the incumbent LEC with the largest number of access lines in the state.¹⁹

The proposed rules do not seem to contemplate the fact that some CLECs may already be charging only the rate prescribed in the access tariff of the RBOC in the state (or the incumbent

¹⁷ *NPRM*, Appendix C, § 61.3(aaa).

¹⁸ *NPMR* at ¶ 659 and Appendix C, § 61.26(g)(1).

¹⁹ *NPRM*, Appendix C, § 61.26(g).

LEC with the largest number of access lines in the state). Rather, the rules appear to create an absolute requirement to file revised tariffs regardless of what the CLEC's rates are under the current tariff. In particular the proposed rule states:

A CLEC engaging in access revenue sharing, as that term is defined in section 61.3(aaa) of this Part, shall file revised interstate switched access tariffs within forty-five (45) days of commencing access revenue sharing as that term is defined in section 61.3(aaa) of this Part, or within forty-five (45) days of [the effective date of the Order] if the CLEC on that date is engaged in access revenue sharing, as that term is defined in section 61.3(aaa) of this Part.²⁰

A CLEC should not be required to file a revised tariff (and the one on file should continue to be deemed lawful) if its tariff is already compliant with the pricing rules, as the revised tariff would likely be identical to the one already on file. The Commission, in the text of the *NPRM*, seems to recognize this, but the rules should nonetheless be modified to reflect this understanding.²¹ This is an important clarification as the Commission further states that, when a LEC fails to comply with the proposed tariff requirements, the tariff would lose its deemed lawful status and the LEC would be subject to sanctions for violating the Commission's tariffing rules.

COMPTTEL proposes the Commission modify proposed rule (g)(1) to include the following language in bold:

(g)(1) A CLEC engaging in access revenue sharing, as that term is defined in section 61.3(aaa) of this Part, **with an interstate switched access tariff on file that prices those services above the rate prescribed in the access tariff of the RBOC in the state, or, if there is no RBOC in the state, above the incumbent LEC with the largest number of access lines in the state**, shall file revised interstate switched access tariffs within forty-five (45) days of commencing access revenue sharing as that term is defined in section

²⁰ *NPRM*, Appendix C, § 61.26(g)(1).

²¹ The *NPRM* seems to contemplate this scenario and indicates that the carrier may not have to file a revised tariff. *NPRM* at ¶ 665[“In particular, we propose that when competitive LECs meet the trigger, they would be required to benchmark to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, *if they are not already doing so.*” *emphasis added.*]

61.3(aaa) of this Part, or within forty-five (45) days of [the effective date of the Order] if the CLEC on that date is engaged in access revenue sharing, as that term is defined in section 61.3(aaa) of this Part.

In conclusion, the Commission should find interconnected VoIP to be a telecommunications service and establish, through this rulemaking proceeding, that the intercarrier compensation for this traffic be the same as any other traffic terminating on the public switched network. The Commission should also modify its proposed rules to reduce access stimulation as discussed above.

Respectfully submitted,

/s/

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