

**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 Hawaiian Telcom, Inc.

Hawaiian Telcom, Inc. (“HTI”) hereby submits its comments in response to the Notice of Proposed Rulemaking (“NPRM”) in the above-captioned dockets.¹ HTI commends the Federal Communications Commission (“FCC” or “Commission”) for proposing to take swift action on the major arbitrage opportunities that the NPRM identified. Failure by some providers to pay access charges on interconnected voice over Internet protocol (“VoIP”) traffic, use of phantom traffic to avoid required intercarrier compensation (“ICC”) payments, and access stimulation to game the Commission’s access charge rules, all create unfair competitive disadvantages and increase litigation costs while depriving service providers of funds that could be used to expand broadband services. As noted in the NPRM, these practices provide no public benefits, and

¹ *Connect America Fund, et al.*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, et al. (rel. Feb. 9, 2011) (“NPRM”).

there is no reason for the Commission to allow these inefficiencies to continue while comprehensive reform is implemented. Therefore, HTI urges the Commission to act promptly to eliminate these arbitrage opportunities.

I. THE FCC SHOULD MAKE CLEAR THAT INTERCONNECTED VOIP TRAFFIC IS SUBJECT TO THE SAME ICC OBLIGATIONS AS ALL OTHER VOICE TRAFFIC.

Confusion regarding the proper type and amount of ICC due when carriers exchange interconnected VoIP traffic has resulted in significant and growing problems. The NPRM recognizes that the failure to clarify the appropriate treatment for interconnected VoIP traffic has led to unnecessary billing disputes and litigation, may be stifling investment and innovation, and could compromise long-term reformation of ICC.² HTI has experienced these problems first hand. Beginning in at least 2006, certain carriers began rejecting HTI imposition of intrastate and interstate access charges for traffic terminated on HTI's network. Indeed, one carrier refused to pay terminating access for approximately 80 percent of the traffic that it sent to HTI and currently owes HTI in excess of \$700,000. The disputed amount with all carriers was as high as \$30,000 per month, and HTI anticipates that these amounts will increase. These disputes are further complicated by the fact that HTI has no way of determining which traffic terminated on HTI's network is VoIP. Thus, not only do HTI and these carriers disagree whether compensation is due on this traffic, but also HTI is unable even to verify if the carriers' alleged percentage of VoIP traffic is accurate. Because the Commission recently estimated that 19 percent of all wireline retail local service connections in June 2010 were interconnected VoIP subscriptions,³ the need to resolve how this traffic is treated is critical.

² NPRM, ¶¶ 610-611.

³ Local Telephone Competition: Status as of June 30, 2010, FCC Industry Analysis and Technology Division, Wireline Competition Bureau, Figure 2 (Mar. 2011).

A. VoIP services are functionally equivalent to TDM voice services.

What primarily distinguishes interconnected VoIP traffic from traditional or time-division multiplexing (“TDM”) traffic is that interconnected VoIP either originates or terminates on a packet-switched network, while TDM traffic uses a circuit-switched network.

Interconnected VoIP is fundamentally different from the pulver.com Free World Dialup (“FWD”) service that the Commission found to be an information service,⁴ and thus not subject to traditional ICC. FWD required the use of computers and a numbering system separate from regular telephone numbers.⁵ In addition, FWD did not use the public switched telephone network (“PSTN”) either to originate or terminate calls.⁶

In contrast, interconnected VoIP and TDM voice services compete with one another and are viewed as substitutes. Advertisements for interconnected VoIP services claim that “[y]ou simply pick up your regular phone, dial a number and talk just like you would with a traditional phone service.”⁷ The FCC has similarly recognized that consumers view these services as interchangeable, stating that interconnected VoIP “replaces the legacy POTS service functionality of traditional local telephone exchange service”⁸ and “enables a customer to do

⁴ *Petition for Declaratory Ruling that pulver.com’s Free World Dialup Is Neither Telecommunications nor a Telecommunications Service*, Memorandum Opinion and Order, 19 FCC Rcd 3307, 3312-16 (2004).

⁵ *Id.* at 3308 n.3, 3309-10.

⁶ *Id.* at 3308 n.3.

⁷ Compare VoIP Provider Solutions at WhichVoIP.com, *available at* www.whichvoip.com (last visited Mar. 25, 2011).

⁸ *Communications Assistance for Law enforcement Act and Broadband Access and Services*, First Report and Order and Further Notice of Proposed Rulemaking, 20 FCC Rcd 14989, 15010-51 (¶ 42) (2005) (“CALEA Order”).

everything (or nearly everything) the customer could do using an analog telephone.”⁹ Because of this, the FCC has imposed on interconnected VoIP traffic Title II-type obligations similar to those imposed on TDM traffic, such as Communications Assistance for Law Enforcement Act and Broadband Access and Services (“CALEA”) obligations, E-911 requirements, disability access, and USF contributions.¹⁰ In addition, the Commission has extended Title II-like protections to interconnected VoIP.¹¹

B. VoIP services should be subject to the same regulatory obligations as TDM traffic.

Where interconnected VoIP traffic uses the PSTN, it is indistinguishable from, and imposes the same costs on HTI, as TDM traffic. Both VoIP and TDM traffic travels over Feature Group D trunks or CLEC trunks. As noted above, when HTI receives traffic from another carrier, it is unable to determine whether the traffic was originated on an IP network or a circuit-switched network. HTI terminates the traffic to its customer and incurs the same expense regardless of the originating network. Because interconnected VoIP makes use of the PSTN in the same way as TDM traffic, interconnected VoIP should be subject to the same charges for using the PSTN as other providers.

Allowing interconnected VoIP traffic to escape access fees gives it a competitive advantage unrelated to any efficiency inherent in an IP service. Rather, if interconnected VoIP

⁹ *E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd 10245, 10257 (¶ 23) (2005) (“E911 Order”) (footnote omitted).

¹⁰ E911 Order; CALEA Order; *IP-Enabled Services Access to Telecommunications Service, Telecommunications Equipment and Customer Premises Equipment by Persons with Disabilities*, 22 FCC Rcd 11275 (2007); *Universal Service Contribution Methodology, et al.*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006).

¹¹ *See, e.g., Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers may Obtain Interconnection under Section 251, et al.*, Memorandum Opinion and Order, 22 FCC Rcd 3513 (2007); *Telephone Number Requirements for IP-Enabled Service Providers, et al.*, Report and Order, et al., 22 FCC Rcd 19531 (2007) .

traffic can avoid costs imposed on its TDM-based competitors, VoIP will be less expensive to consumers solely because it is avoiding paying access charges. Indeed, the NPRM notes that one VoIP company specifically “touts that it can provide service at low prices because it collects access charges but does not pay them.”¹²

In addition to giving VoIP providers an unfair competitive benefit, permitting VoIP providers to avoid access charges endangers the FCC’s goal of promoting broadband services. Building and maintaining voice and broadband networks is an expensive, capital-intensive undertaking. If the users of these networks do not contribute to their support, carriers building the networks will have difficulty maintaining and expanding them. For HTI, capital investment is tied to revenues. Investment and broadband expansion occur first where competition and density are greatest (such as in more urban areas) while investment in rural and less dense areas may be deferred if revenues decrease. Thus, allowing VoIP providers to shortchange ILECs has a direct effect on their ability to expand and upgrade their networks, both to provide broadband and to invest in network facilities that other broadband providers, such as wireless carriers, use for backhaul.

C. Interconnected VoIP traffic is subject to access charges under the FCC’s existing rules.

In the NPRM, the Commission asks whether during the development of a new ICC system, interconnected VoIP should be subject to a bill-and-keep arrangement, VoIP-specific ICC rates, future payment of ICC at some to-be-determined rate, immediate payment of current ICC rates, or some alternative approach.¹³ Because interconnected VoIP traffic competes with

¹² NPRM, ¶ 507 (footnote omitted).

¹³ NPRM, ¶¶ 615-619.

and imposes the same network costs as TDM traffic, VoIP traffic should be subject to the same charges as TDM voice traffic to ensure regulatory parity.

The FCC recognizes that “[o]ne of [its] primary objectives with respect to the formulation of [its] access charge rules has been to assess access charges on all users of exchange access, irrespective of their designation as carriers, non-carrier service providers, or private customers.”¹⁴ Further, the FCC has already stated that it believes that “any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network” and that “the cost of the PSTN should be borne equitably among those that use it in similar ways.”¹⁵ Given that access charges for price cap carriers like HTI are designed to “reflect the manner in which carriers incur costs” and that terminating IP traffic imposes the same costs as terminating TDM traffic, access charges apply to both types of traffic. This is consistent with HTI’s actual cost structure; HTI expends the same resources terminating an IP-originated call as it does terminating a TDM-based call. Moreover, HTI cannot distinguish an IP-originated call from a TDM-based call that travels over Feature Group D or CLEC trunks and thus cannot treat them differently.

The Commission asks (1) whether it is necessary to classify formally interconnected VoIP as a telecommunications service or information service in order to clarify that interconnected VoIP is subject to the same ICC as TDM traffic and (2) if ICC would apply if the Commission were to determine that the enhanced service provider (“ESP”) exemption does not

¹⁴ *Amendments of Part 69 of the Commission’s Rules Relating to the Creation of Access Charge Subelements for Open Network Architecture Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order & Order on Further Reconsideration and Supplemental NPRM, 6 FCC Rcd 4524, 4534 (¶ 54) (1991).

¹⁵ *IP-Enabled Services*, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4904 (¶ 61) (2004).

apply to interconnected VoIP.¹⁶ In response to the first question, the FCC does not need to determine if interconnected VoIP is an information or telecommunications service to find that access charges and other ICC are due. The filed rate doctrine holds that a tariff is the “exclusive source of the terms and conditions by which the common carrier provides to its customers the services covered by the tariff.”¹⁷ Once filed with the FCC, access tariffs are the “equivalent of a federal regulation,”¹⁸ and the tariff’s terms “are considered to be ‘the law’ and to therefore ‘conclusively and exclusively enumerate the rights and liabilities’” of both the carrier and the customer.¹⁹ ILEC tariffs, including HTI’s, apply access charges to all access traffic terminated on their networks; there is no limitation that such charges apply only to telecommunications traffic.

Interconnected VoIP providers cannot unilaterally decide that they want to take advantage of ILEC access services without complying with the terms of the tariff. Thus, access charges are due for all traffic terminated under the terms of current ILEC access tariffs, regardless of whether it is TDM, interconnected VoIP, or some other type of traffic. For local interconnected VoIP traffic, such exchanges are governed by Section 251(b)(5) of the Act, which requires local exchange carriers to establish reciprocal compensation arrangements for the transport and termination of telecommunications.²⁰ Because local interconnected VoIP traffic

¹⁶ NPRM, ¶ 1618.

¹⁷ *AT&T Corp. v. Central Office Tel., Inc.*, 524 U.S. 214, 230 (1998).

¹⁸ *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998).

¹⁹ *Evanns v. AT&T Corp.*, 229 F.3d 837, 840 (9th Cir. 2000) (quoting *Marcus v. AT&T Corp.*, 138 F.3d 46, 56 (2d Cir. 1998)).

²⁰ 47 U.S.C. § 251(b)(5).

imposes the same costs as local TDM traffic, both types of traffic should be subject to the same reciprocal compensation rate.

As to the second issue, the ESP exemption does not apply to interconnected VoIP traffic for either interstate or intrastate access charges, and the Commission should make this clear. When the access charge regime was initially adopted, the FCC determined that ESPs should not immediately be subject to interstate access charges so as to avoid rate shock to these emerging competitors.²¹ This decision allowed ESPs to purchase access services as if they were end-user business customers.

However, interconnected VoIP providers are not ESPs because they do not use the PSTN in a manner similar to ESPs. In upholding the FCC's disparate treatment of different entities purchasing access services, the Eighth Circuit relied upon the fact that Internet service providers ("ISPs")²² do not use access services in the same way as interexchange carriers ("IXCs"):

ISPs subscribe to LEC facilities in order to receive local calls from customers who want to access the ISP's data, which may or may not be stored in computers outside the state in which the call was placed. An IXC, in contrast, uses the LEC facilities as an element in an end-to-end long-distance call that the IXC sells as its product to its own customers.²³

In explaining why disparate treatment of ESPs was not arbitrary or capricious, the court distinguished another case in which "the FCC was imposing inconsistent, allegedly transitional rates on entities – incumbent long-distance carriers and smaller long-distance carriers – that essentially provided identical services. Here the FCC is exempting from interstate access

²¹ *MTS and WATS Market Structure*, Memorandum Opinion and Order, 97 FCC 2d 682, 715 (¶ 83) (1983).

²² Internet service providers are ESPs. See, e.g., *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9158 (2001).

²³ *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 n.9 (8th Cir. 1998).

charges ISPs that, according to the FCC, utilize the local networks differently than do IXC's."²⁴ In contrast, interconnected VoIP providers use the PSTN in exactly the same way as traditional IXCs. Thus, interconnected VoIP providers do not qualify as ESPs, and there is no justification for subjecting interconnected VoIP to different charges for accessing the PSTN.²⁵

D. While comprehensive reform is pending, the FCC should not allow VoIP providers to take advantage of this arbitrage opportunity.

The Commission recognizes in the NPRM that this proceeding could give parties additional incentives to take advantage of interconnected VoIP arbitrage opportunities.²⁶ As explained above, some service providers are creating artificial advantages for their offerings by collecting access charges on interconnected VoIP traffic but refusing to pay such charges. The FCC should make clear that in the interim period while comprehensive reform proposals are developed and implemented, interconnected VoIP traffic should be treated the same as all other voice traffic for all ICC, including access charges and reciprocal compensation. The Commission asks whether its interim mechanism should be retroactive.²⁷ The disputes regarding appropriate ICC for interconnected VoIP have existed since these services first began competing with traditional voice offerings and are well-known to all market participants. The Commission

²⁴ *Id.* at 544.

²⁵ The ESP exemption has never applied to intrastate access charges. *See, e.g., Filing and Review of Open Network Architecture Plans*, Memorandum Opinion and Order, 4 FCC Rcd 1, 167-68 (¶ 318) (1988) ("Under the ESP exemption, ESPs are treated as end users for access charge purposes and therefore are permitted, although not required, to take state access arrangements instead of interstate access. We have not, however, attempted to preempt states from applying intrastate access charges, or any other intrastate charges to ESPs, when such service providers are using jurisdictionally intrastate basic services.") (footnotes omitted). Several states have explicitly found that intrastate access charges apply to interconnected VoIP traffic. *See, e.g., Palmerton Tel. Co. v. Global NAPS South, Inc.*, Docket No. C-2009-2093336, at 30-32 (Pa. Pub. Util. Comm., rel. Mar. 16, 2010).

²⁶ NPRM, ¶ 614.

²⁷ *Id.*

should not reward those who have failed to comply with the valid terms of access charge tariffs by allowing them to keep unlawfully withheld payments.

II. THE COMMISSION SHOULD BRING A SWIFT END TO ACCESS STIMULATION AND PHANTOM TRAFFIC.

Access stimulation and phantom traffic are arbitrage opportunities that impose substantial costs on all users of the PSTN with no corresponding public benefits.²⁸ Access stimulation, also known as traffic pumping, occurs when carriers take advantage of loopholes in the Commission's rules to raise access rates and generate a high volume of access calls through revenue sharing with third parties. Phantom traffic is a scheme in which a carrier disguises the nature or source of traffic in order to avoid or reduce intercarrier payments. As explained in detail in the USTelecom's comments, these practices cause significant harm by distorting the access market and improperly shift costs.²⁹ Therefore, HTI supports USTelecom's call for the immediate elimination of these arbitrage schemes.

III. CONCLUSION

Changes in technology and the telecommunications market have made the current ICC mechanisms untenable. In particular, disputes regarding interconnected VoIP, access stimulation, and phantom traffic have created arbitrage opportunities that have artificially favored some providers over others, enriched a few at the expense of the many, and allowed certain parties to avoid paying charges which are unquestionably due. While the Commission considers how to best revise both the ICC and universal service systems, it should immediately remove these methods of unfairly taking advantage of outdated or inadequate regulation.

²⁸ NPRM, ¶¶ 620-657.

²⁹ Comments of the United States Telecom Association, WC Docket No. 10-90, et al. (filed Apr. 1, 2011).

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