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 an 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 VERIZON AND VERIZON WIRELESS

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COMMENTS OF VERIZON[1] AND VERIZON WIRELESS

I. INTRODUCTION AND SUMMARY.

The intercarrier compensation and universal service systems are collapsing memorials to a bygone era. To clear the path for the broadband future it is critical for the Commission to rapidly move forward with comprehensive intercarrier compensation and Universal Service Fund (USF) reform. Verizon strongly supports this initiative,[2] and we agree with the Commission that comprehensive reform must start now.

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[1] In addition to Verizon Wireless, the Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] *See Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, et al., FCC 11-13 (Feb. 9, 2011) ("*NPRM*"). Verizon's comments largely address only Section XV of the *NPRM*. Verizon will address additional sections of the *NPRM* consistent with the bifurcated comment cycle in this matter.

As things stand, the current intercarrier compensation and universal service regimes act as impediments to further broadband build-out and deployment of advanced services. These systems actually pay carriers not to update their business models for the broadband era because doing so would mean forgoing the subsidies they receive for continuing to operate inefficient Twentieth Century networks. Acting promptly to adopt comprehensive reform is vital to eliminate the skewed incentives created by today's uneconomic system of both direct and implicit support payments to carriers. At the same time, reforming the intercarrier compensation and universal service regimes will provide all segments of the industry with the certainty and stability that will allow them to quickly transition to more sustainable business models where needed, and by doing so, put the entire industry on a more stable footing for the long term.

While it is important for the Commission to adopt a comprehensive reform plan quickly, fully implementing all aspects of that reform will take some time and is likely to involve a transition period. Until that reform can be fully implemented, therefore, it is critical to keep the problems with the current system from expanding into new areas and becoming an even greater deterrent to broader deployment of broadband and advanced services. That would merely enlarge the problems with the current system and make the Commission's comprehensive reform task even more difficult. A few essential stop-gap measures are necessary and should be implemented immediately, within the span of weeks not months or years.

First, the Commission should act now to prevent the cost of the uneconomic subsidies inherent in the current intercarrier compensation system from being extended to VoIP services and set a uniform low default rate for VoIP calls that will apply during any transition period adopted for legacy services. It is essential to resolve on a nationwide basis what intercarrier compensation may be due on VoIP traffic. The lingering absence of a Commission decision on

VoIP compensation has produced a chaotic environment in which carriers are forced to engage in perpetual disputes over the proper compensation for this traffic. The situation is marked by endless lawsuits, administrative complaints, and financial uncertainty that significantly detracts from important priorities such as the broader deployment of broadband and the advanced services that ride over it.

The Commission should immediately adopt a single low default rate of $0.0007 per minute prospectively for all VoIP traffic that connects with the PSTN at either end-point of a call. Swift action setting a low default rate for VoIP traffic will provide carriers and investors with needed certainty and allow for more efficient deployment of broadband and advanced services. It does not make sense to increase the cost of VoIP in the short-term by forcing these jurisdiction-agnostic services into the broken intercarrier compensation system. That approach would substantially deter deployment of broadband and advanced services such as VoIP. The default rate for VoIP should apply without regard to the geographic location of the calling and called parties, and it should only apply in the absence of commercial agreements, which the Commission should encourage providers to enter into on negotiated terms dictated by market conditions. The Commission should also confirm that VoIP is an interstate information service subject to the Commission's exclusive jurisdiction.

Second, the Commission should prevent carriers from gaming absurd variations in intercarrier compensation rates by clamping down now on the various forms of traffic pumping schemes. Traffic pumping ultimately costs consumers billions of dollars over time. Allowing carriers to abuse the existing intercarrier compensation system to inflate their uneconomic subsidies increases the disincentive to reform their business models for the modern broadband era. The Commission should also resolve the longstanding—and thanks to traffic pumping, widening—gap in its rules regarding intraMTA wireless traffic terminated by CLECs. The Commission should set a rate of $0.0007 for this traffic. Unless the Commission acts promptly to address intraMTA arbitrage this situation will emerge as the next evolution of the dial-up ISP arbitrage schemes that were finally resolved only late last year. The dial-up ISP schemes likewise siphoned billions of dollars that could have been put to productive uses and did not stop until the Commission took decisive action. In the *NPRM* the Commission proposes a workable framework to address traffic pumping schemes that it should adopt with a few minor adjustments, including additional solutions for intraMTA wireless traffic.

Third, the Commission should address concerns some carriers have with "phantom traffic" that they find difficult to properly bill. New signaling rules in response to these concerns, however, must reflect limitations of current technology and be consistent with industry standards for signaling systems and protocols. The Commission's proposed signaling rules are generally workable with some modification and a proper understanding of the limited scope of the rules. Carriers, for example, cannot signal call information that they do not have. And all parties must realize that signaling data—even if available and passed—does not dictate the proper intercarrier compensation billing rate, if any, for associated traffic, particularly with calls initiated from certain VoIP and wireless services.

Finally, the Commission should immediately phase-out remaining USF support to competitive eligible telecommunications carriers (CETCs). Phasing down what is left of this support now will put all wireless carriers on the same footing and provide a source of funding for the broadband-based intercarrier compensation and USF reforms adopted in this proceeding. The only way to ensure adequate funding for new broadband priorities without burdening consumers with a dramatic increase in USF charges is to eliminate and repurpose remaining

CETC support. It is also necessary to start reclaiming this support now to ensure that the Commission will have sufficient resources without increasing the size of the USF for new transition funding that may off-set a portion of reductions in intercarrier compensation revenues. It is anticipated that time-limited transition funding may be necessary as part of comprehensive intercarrier compensation reform. Consistent with its commitment not to grow the fund, the Commission can account for this new support within the current size of the USF by moving quickly to eliminate remaining CETC subsidies.

II. THE COMMISSION SHOULD IMMEDIATELY EXERCISE ITS EXCLUSIVE AUTHORITY OVER VOIP TO SET A NATIONAL DEFAULT RATE OF $0.0007 FOR ALL VOIP TRAFFIC, REGARDLESS OF TECHNOLOGY OR PROVIDER.

As the Commission is well aware, the current intercarrier compensation regime—which is characterized by widely varying, often extremely high rates that lead to many inefficiencies and arbitrage opportunities—is badly broken. The absence of any ruling by the Commission setting forth rules to govern the intercarrier compensation obligations for VoIP traffic has contributed to the proliferation of disputes over the past several years, which in turn, has led to inconsistent rulings by state commissions and federal courts. Accordingly, the Commission should take *immediate* action to provide the much-needed regulatory certainty that is essential to promoting investment in advanced services. Delay will only exacerbate existing problems and disputes, as VoIP traffic continues to grow, making it more difficult for the Commission to act in the future.

Most important, the Commission should hold that intercarrier compensation rates for VoIP traffic should be established in the first instance not through top-down, one-size-fits-all regulation, but through negotiated, commercial agreements between interconnecting carriers. A market-based approach, relying on negotiated, commercial agreements, is the best long-term solution to ensuring the efficiency of the communications markets in the face of rapid technological change. Indeed, negotiated agreements have proven successful in a variety of circumstances—most notably in the Internet itself. If providers are unable to reach a commercial agreement, however, the Commission should also establish a default rate of $0.0007 per minute for the origination and termination of VoIP traffic on the PSTN, under its exclusive jurisdiction over VoIP services.[3] Establishing a default rate of $0.0007 per minute is reasonable, because that is already the default rate for a substantial portion of the traffic that carriers exchange today.

Lastly, the Commission should confirm that it will not apply the existing, dysfunctional intercarrier compensation regime to innovative new services, like VoIP, because those services do not fit neatly within, and should not be shoehorned into, legacy regulatory silos. *See Pulver Order* ¶ 19[4] (finding it inappropriate to apply "a regulatory paradigm that was previously developed for different types of services, which were provided over a vastly different type of network" to an innovative new communications service).[5] In particular, the Commission should reaffirm its prior holding that all VoIP services—regardless of provider or technology—are inseverable and, therefore, interstate for jurisdictional purposes. These services are "any distance" by design, and therefore it is not practical—even if technically feasible in some (but

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[3] The default $0.0007 per minute rate should only apply to retail mass market services and not to carrier-to-carrier transmission and/or conversion services typically sold as wholesale solutions. The market for these services is already grounded in negotiated, commercial arrangements, and regulatory intervention is not required and would be harmful.

[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 (2004) ("*Pulver Order*").

[5] *See also Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982, ¶ 343 (1997) (emphasizing that "the existing access charge system includes non-cost based rates and inefficient rate structures," and that "there is no reason to extend such a system to an additional class of customers, especially considering the potentially detrimental effects on the growth of the still-evolving information services industry").

not all) instances—to separate intrastate and interstate VoIP traffic. The Commission should also make clear that VoIP is an information service, both because VoIP involves a "net protocol conversion," and because that service involves an integrated suite of services that include information-processing capabilities. The more critical action, however, is the need for the Commission promptly to adopt rules to bring certainty to the exchange of VoIP traffic and promote the continued development of innovative IP-based services and the broadband networks over which they travel.

A. The Commission Should Act Immediately To Eliminate the Regulatory Uncertainty Regarding Intercarrier Compensation for VoIP Traffic.

Consumers are rapidly abandoning traditional telephone service in favor of VoIP services. As of September 2010, there were at least 23.5 million cable voice subscribers—who generally receive "fixed" VoIP service—an increase of 18 percent since 2008, and nearly four times the number of subscribers in 2005.[6] Over-the-top VoIP services are also an increasingly attractive option for consumers. Vonage, the largest of those companies, has approximately 2.5 million subscribers, a 625-percent increase from December 2004.[7] "SkypeOut"—which allows Skype customers to make VoIP-originated calls to wireline and wireless phones—carried 6.4 billion minutes of calls in the first half of 2010, which (on an annualized basis) is more than

[6] *See* NCTA, *Industry Data: Operating Metrics (as of September 2010)*, http://www.ncta.com/Statistics.aspx (citing SNL Kagan); NCTA, *Cable Phone Customers, 1998-2009*, http://www.ncta.com/Stats/CablePhoneSubscribers.aspx (citing SNL Kagan) .

[7] *See* Vonage Press Release, *Vonage Holdings Corp. Reports Third Quarter 2010 Results*, http://files.shareholder.com/downloads/VAGE/1209433439x0x415014/4b401e96-24ab-4a59-9140-01abc56239bf/VG_News_2010_11_3_Financial.pdf (Nov. 3, 2010); Vonage Press Release, *Vonage® Crosses 400,000 Line Mark*, http://files.shareholder.com/downloads/VAGE/1209433439x0x37039/8caa2274-d088-4cb4-8696-3855de46a354/pr_01_05_05.pdf (Jan. 5, 2005).

three times the number of SkypeOut minutes in 2006.[8] Google began offering free calling to its Gmail users over wired and wireless broadband networks to any telephone number in the United States and Canada in August 2010, an offer it has extended through December 31, 2011.[9] Incumbent LECs, too, are rapidly deploying innovative new VoIP services.

The Commission, however, has never determined "the appropriate intercarrier compensation framework" for VoIP traffic that originates or terminates on the PSTN. *NPRM* ¶ 608. In particular, the Commission has not yet decided whether legacy intercarrier compensation rules—such as tariffed switched access charges—apply to VoIP traffic. As the Commission acknowledges, *see id.* ¶ 608 & n.913, this lack of clarity has led to disputes and litigation before federal courts and state commissions. Many of these disputes were initially stayed pending the Commission's resolution of the intercarrier compensation rules for VoIP.[10] But, in more recent cases, several courts and state commissions have made clear that they are no longer willing to postpone their decisions until the Commission acts. For example, the federal district court in Washington, DC noted that "[a]lthough some risk of inconsistent rulings is present, that risk is outweighed by the need for a decision: continued uncertainty about whether and when the FCC will ultimately address and decide the issue is unacceptable."[11] In light of the

[8] *See* About Skype, http://about.skype.com; eBay Inc., Form 10-K, at 51 (SEC filed Feb. 20, 2009) (4.1 billion minutes in 2006).

[9] *See*, *e.g.*, "Free Calling in Gmail Extended Through 2011,"Google Voice Blog, http://googlevoiceblog.blogspot.com/2010/12/free-calling-in-gmail-extended-through.html (Dec. 20, 2010).

[10] *See, e.g.*, *Frontier Tel. of Rochester, Inc. v. USA Datanet Corp.*, 386 F. Supp. 2d 144, 150-51 (W.D.N.Y. 2005).

[11] Memorandum Order at 8, *PAETEC Commc'ns, Inc. v. CommPartners, LLC*, No. 08-cv-397 (D.D.C. Feb. 10, 2009))(denying CommPartners motion to dismiss for lack of personal jurisdiction, for transfer to Nevada, and for primary jurisdiction stay); *see also* Order Denying Request to Stay Proceedings, *In re Complaint filed by Midcontinent Communications et al. for Unpaid Access Charges*, TC10-096 (S.D. P.U.C. Mar. 14, 2011).

recent *NPRM*, other courts have referred VoIP intercarrier compensation disputes to the Commission, subject to the Commission acting on this issue within certain time limits.[12]

This litigation is costly, and it diverts resources from new and innovative services and broadband networks. It also has resulted in contradictory legal rulings: most federal courts have held that the legacy access charge regime does not apply to VoIP, while state commissions generally have sought to assert jurisdiction over VoIP traffic to apply legacy intercarrier compensation rules to that service. The regulatory uncertainty in this area is likely deterring investment in VoIP and the associated growth in broadband usage and deployment.[13]

It is critical that the Commission act on this issue *now*—within weeks, not months or years, of when the expedited comment cycle completes. The Commission simply cannot afford to let this issue linger any longer. With each day that passes without a Commission decision that sets the intercarrier compensation framework for VoIP, the problems grow larger. Intercarrier disputes grow larger and more numerous; companies continue to divert resources away from new services and focus instead on litigation; and courts and state regulators attempt to fill the void by issuing more contradictory rulings. Immediate Commission action would provide necessary certainty to the industry and unleash the full potential of investment in VoIP services and

[12] *See CenturyTel of Chatham v. Sprint Commc'ns*, No. 3:09-cv-1951, 2011 U.S. Dist. LEXIS 7132 (W.D. La. Jan. 25, 2011) (staying case for one year pending FCC action).

[13] *See Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act*, Memorandum Opinion and Order, 22 FCC Rcd 3513, ¶ 13 (2007) (noting that "VoIP is often accessed over broadband facilities," and that "there is a nexus between the availability of VoIP services and the goals of section 706 of the Act"); *see also* National Broadband Plan at 142 (noting that "regulatory uncertainty about whether or what intercarrier compensation payments are required for VoIP traffic, as well as the lack of uniform rates, may be hindering investment and the introduction of new IP-based services and products").

broadband networks. This will further accelerate the move towards an all-IP world.[14] The Commission should act now to address these problems, to keep matters from getting worse, while it considers and eventually adopts and implements broader intercarrier compensation reform.

Acting now to apply a default rate of $0.0007 to VoIP traffic will also facilitate another of the Commission's key policy goals—a transition away from the implicit subsidies involved in the current intercarrier compensation regime for TDM traffic. *See National Broadband Plan* at 142 (noting that implicit subsidies are "not sustainable in an all-broadband Internet Protocol world"). Although VoIP is rapidly increasing in popularity, it currently accounts for a relatively small percentage of the total voice traffic local exchange carriers exchange with other carriers. By establishing a new regulatory regime for VoIP that does not contain implicit subsidies, the Commission can create a gradual and self-effectuating transition away from the current system of implicit subsidies. In particular, as explained below, the Commission should establish a framework in which intercarrier compensation rates are determined in the first instance through negotiated agreements, with a default rate of $0.0007 per minute applying in the absence of such agreements. With that framework in place, as the volume of VoIP traffic continues to increase, and to displace legacy TDM traffic, more and more traffic will shift from the legacy intercarrier compensation system to the new regime for VoIP, gradually weaning carriers off the implicit subsidies. That transition can work in combination with any other transition mechanism the Commission adopts as part of its broader intercarrier compensation reform.

[14] *See* Comments of AT&T, NBP Public Notice #25, *A National Broadband Plan for Our Future*, GN Docket No. 09-51 (Dec. 22, 2009).

B. Intercarrier Compensation Rates Should Be Established Through Negotiated Commercial Agreements.

In the absence of any clear guidance from the Commission about intercarrier compensation obligations for VoIP, Verizon and other carriers have increasingly turned to commercial negotiations regarding VoIP traffic. For example, Verizon recently signed a commercial agreement with Bandwidth.com under which the parties agreed to exchange VoIP traffic at a rate of $0.0007 per minute.[15] Consistent with Commission precedent and the purposes of the 1996 Act, the Commission should hold that intercarrier compensation for VoIP traffic should be determined in the first instance through commercial, negotiated agreements between carriers, rather than through a new set of detailed rules and regulations.

1. In the 1996 Act, Congress sought to create a pro-competitive, deregulatory framework for the provision of local telephone service that reflects the "virtues of negotiated competition." *Verizon North Inc. v. Strand*, 367 F.3d 577, 585 (6th Cir. 2004). One of the key purposes of the Act was to "replace the comprehensive state and federal regulatory scheme with a more market-driven system that is self-regulated through negotiated interconnection agreements." *Pacific Bell v. Pac West Telecomms., Inc.*, 325 F.3d 1114, 1127 (9th Cir. 2003); *see also MCI Telecomms. Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 500 (3d Cir. 2001) (noting the Act's "clear preference" for "negotiated agreements").

This Commission has similarly recognized that "[p]ermitting voluntary negotiations for binding interconnection agreements is the very essence of" the 1996 Act.[16] Consistent with this

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[15] *See Bandwidth.com Enters Into a Groundbreaking Commercial Agreement with Verizon for the Exchange of VoIP Traffic*, http://bandwidth.com/about/read/verizonAgreement.html (Jan. 18, 2011).

[16] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*,

statutory purpose, the Commission has eliminated regulatory obligations—such as the "pick-and-choose" rule—that proved to be impediments to voluntary negotiations between carriers.[17] In the context of intercarrier compensation specifically, the Commission has recognized that commercial solutions are superior to regulatory prescriptions, finding that "negotiated agreements between carriers are more consistent with the pro-competitive process and policies reflected in the 1996 Act."[18] The Commission has routinely recognized that "the best way to achieve reliable, ubiquitous service . . . is to encourage further reliance on negotiation and market-based solutions to the fullest extent possible."[19]

Today's marketplace provides many examples of different networks interconnecting on commercially negotiated terms in the absence not only of rate regulation, but even in the absence of any regulatory mandate to interconnect in the first place. For example, what is commonly referred to as "the Internet" is actually a series of individual networks, owned and operated by many different entities that have entered into purely voluntary interconnection agreements.[20] Those agreements may contain vastly different terms, but all are made based on a perceived

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(Continued . . .)
Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶ 701 (2003) ("*Triennial Review Order*").

[17] *See Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Second Report and Order, 19 FCC Rcd 13494, ¶¶ 12-13 (2004) (noting that the pick-and-choose rule had resulted in "largely standardized agreements with little creative bargaining to meet the needs of both the incumbent LEC and the requesting carrier").

[18] Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, ¶ 14 (2005) ("*T-Mobile Order*").

[19] *Cellular Service and Other Commercial Mobile Radio Services in the Gulf of Mexico*, Report and Order, 17 FCC Rcd 1209, ¶ 27 (2002).

[20] *See* Comments of Verizon, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at Exhibit A, Declaration of Lyman Chapin ¶¶ 5-8 (May 23, 2005) ("Chapin Decl.").

equitable exchange of value between the interconnecting parties. For example, if each network receives equal value from the mere fact of interconnection, the parties may agree not to compensate each other for the exchange of traffic; in contrast, if one network receives greater value from interconnection, then that network will provide some form of compensation to the other network. Despite a complete absence of regulation of those exchanges, the market has become increasingly transparent, with many networks openly publishing their interconnection policies.[21]

These negotiated, commercial agreements have been tremendously successful, and have been credited for the rapid growth in the capacity of the Internet. These agreements, moreover, have ensured that the Internet is always fully interconnected—any end-user connected to the Internet can communicate with any other end-user, regardless of whether the two users' networks are directly interconnected. There is virtually no possibility that a network could find itself disconnected from the Internet, even if one, or many, other networks refused to interconnect with it.[22]

The experience of the Internet demonstrates that—because carriers have strong incentives to interconnect their networks in an economically efficient manner—negotiated agreements are the most effective way of ensuring efficient interconnection arrangements and efficient network development.

2. Consistent with Commission precedent—and the great success of private agreements in facilitating the development of the Internet—the Commission should hold that

[21] *Id.* ¶¶ 39-41; *see* Verizon Business Policy for Settlement-Free Interconnection with Internet Networks, http://www.verizonbusiness.com/terms/peering/; *see also* http://www.comcast.com/peering/; http://www.corp.att.com/peering/; http://www.twtelecom.com/cust_center/public_peering_policy.html.

[22] Chapin Decl. ¶¶ 42-44.

intercarrier compensation for VoIP traffic should be determined in the first instance through commercial, negotiated agreements between carriers, rather than a new set of detailed rules and regulations. Any attempt to prescribe a mandatory, one-size-fits-all regulatory solution will inevitably fail to account for the myriad complexities of today's communications markets, and will be gamed by carriers keen on exploiting arbitrage opportunities rather than engaging in actual competition.[23] By contrast, a market-based approach based on commercial agreements is the best long-term solution to ensure the efficiency of telecommunications markets in the face of substantial technological change. For example, a market-based approach—which, by definition, is technologically neutral—would allow parties to adapt more easily to changing technologies, encouraging the introduction of new services without the need for belated modification of outdated regulatory regimes.[24]

At least one state commission has directed providers involved in a dispute over whether tariffed access charges apply to VoIP to "enter into private contract negotiations on the rates, charges, terms and conditions for the exchange" of that traffic.[25] The Commission should take the same approach here.

[23] *See* Comments of Verizon, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, at 11-15 (May 23, 2005) (listing numerous examples of regulatory arbitrage resulting from one-size-fits-all intercarrier compensation rules); *see also* Ex Parte Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, *Developing a Unified Intercarrier Compensation Regime*; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, CC Docket No. 01- 92, WC Docket No. 07-135 (Nov. 12, 2010) ("Verizon November Ex Parte Letter").

[24] *See, e.g.*, *Petition of SBC Communications Inc. for Forbearance from Title II Common Carrier Regulation to IP Platform Services*, Memorandum Opinion and Order, 20 FCC Rcd 9361, ¶ 14 (2005) (noting that SBC sought regulatory relief for "newly constructed . . . IP networks that SBC plans to roll out later this year").

[25] Order Directing Negotiation at 16, *Complaint of TVC Albany, Inc. d/b/a Tech Valley Communications Against Global NAPs, Inc. for Failure to Pay Intrastate Access Charges*, Case 07-C-0059 (N.Y. P.S.C. Mar. 20, 2008).

C. The FCC Should Establish a Prospective Default Rate of $0.0007 for VoIP Traffic That Would Apply If Carriers Are Unable to Reach a Commercial Agreement.

1. As explained below, the Commission's prior orders make clear that VoIP is inseverable and, therefore, interstate for jurisdictional purposes. The Commission therefore has authority to establish a uniform default rate for VoIP traffic in accordance with section 201 of the Act, which grants the Commission authority to ensure that charges for "interstate" communications are "just and reasonable." 47 U.S.C. § 201(a)-(b). The D.C. Circuit recently upheld the Commission's authority under section 201 to enact compensation rules regarding interstate traffic, irrespective of whether that traffic is also encompassed within section 251(b)(5). *See Core Communications, Inc. v. FCC*, 592 F.3d 139, 143-46 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 597, 626; 2010 U.S. LEXIS 8885 (2010).

In the exercise of that authority, the Commission should select $0.0007 per minute as the default rate for the origination or termination of VoIP traffic that is exchanged with the PSTN and that is not subject to a commercially negotiated agreement. Selecting $0.0007 per minute as the default rate is clearly a reasonable policy choice, as this is *already* the default rate for a substantial portion of the traffic that carriers exchange today (such as intraMTA wireless and ISP-bound traffic), as a result of the Commission's "mirroring" rule.[26]

When the Commission adopted the $0.0007 per minute rate, it drew upon then-recently negotiated interconnection agreements, which showed a "downward trend in intercarrier compensation rates." *Id.* ¶ 85. The $0.0007 per minute rate is also consistent with Verizon's experience in negotiating agreements with competitive LECs (CLECs). As explained above,

[26] *See 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, ¶ 89 (2001) ("*ISP Remand Order*").

Verizon recently entered into a commercial agreement with Bandwidth.com for the exchange of VoIP traffic at $0.0007 per minute. Verizon has also entered into negotiated, publicly filed interconnection agreements with several carriers—including pre-merger AT&T and Level 3—that established rates at or below $0.0007 per minute for terminating local traffic and ISP-bound traffic.[27] Verizon Wireless, too, has entered into commercially negotiated agreements with several CLECs, including a nationwide agreement with Comcast, to exchange traffic at or below the $0.0007 per minute rate.[28]

As the Commission has recognized, evidence that "carriers have agreed to rates" for intercarrier compensation through voluntary, arms-length negotiations, is substantial evidence that those rates are just and reasonable. *ISP Remand Order* ¶ 85. The Commission has also emphasized more generally that rates set through market-based negotiations are just and reasonable rates. *See*, *e.g.*, *ACS Anchorage Forbearance Order* ¶¶ 39-40 & n.136 (finding that "commercially negotiated rates" provide "just and reasonable prices")[29]; *Triennial Review Order* ¶ 664 (finding that "arms-length agreements" demonstrate that the rate is "just and reasonable"); *Orloff v. FCC*, 352 F.3d 415, 421 (D.C. Cir. 2003) (noting that the "free market" allows consumers "to get the full benefit of competition by playing competitors against each other," and that any attempt to limit such negotiations "would harm consumers and would be contrary to Congress' clearly articulated policy in favor of competition in telecommunications services"). Similarly, the Commission has resolved "historically vexing issues" involving "interstate access

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[27] *See* Comments of Verizon and Verizon Wireless, *Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos. 05-337 et al., at 49-50 (Nov. 26, 2008).

[28] *Id.*

[29] *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended, for Forbearance from Sections 251(c)(3) and 252(d)(1) in the Anchorage Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 1958 (2007) ("*ACS Anchorage Forbearance Order*").

reform" by adopting a negotiated agreement reached by a coalition of different providers that "negotiated with each other in good faith and fashioned a reasonable compromise that . . . addresses their competing interests."[30]

Courts have similarly held that, in competitive markets, the Commission may "conclude that market forces generally will keep prices at a reasonable level." *Illinois Pub. Telecomms. Ass'n v. FCC*, 117 F.3d 555, 562 (D.C. Cir. 1997).[31] The Supreme Court recently reaffirmed that the *Mobile-Sierra* doctrine—which applies to the Act[32]— requires an agency to "presume that the rate set out in a freely negotiated . . . contract meets the 'just and reasonable' requirement imposed by law." *Morgan Stanley Capital Group, Inc. v. Public Util. Dist. No. 1 of Snohomish County*, 554 U.S. 527, 530 (2008).

2. In adopting rules for VoIP traffic, the Commission should make clear that, when wireless carriers begin offering VoIP services to their customers, wireless intraMTA traffic will continue to be exchanged at or below the rate of $0.0007 per minute that currently applies to nearly all intraMTA wireless traffic as a result of the Commission's "mirroring rule" (or at reciprocal compensation rates if a LEC has not opted into the ISP-bound traffic rate). *See ISP Remand Order* ¶ 89. If the Commission adopts $0.0007 per minute as the national default rule—as Verizon proposes—there will be no need to single out wireless intraMTA traffic for different treatment. But if the Commission were to impose a higher default or transition rate for VoIP traffic, it should exclude wireless intraMTA traffic from those rules.

[30] *Access Charge Reform*, Sixth Report and Order, 15 FCC Rcd 12962, ¶¶ 1-2, 48 (2000).

[31] *See also Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) (holding that an agency "may rely upon market-based prices . . . to ensure a 'just and reasonable' result").

[32] *See, e.g., Western Union Tel. Co. v. FCC,* 815 F.2d 1495, 1501 (D.C. Cir. 1987).

Wireless carriers are currently planning to offer VoIP service directly to their customers, which will involve carrying voice traffic over their networks in IP format. Those services make more efficient use of the available spectrum than non-IP-based calls, and they free up additional spectrum for the IP-based data services that consumers demand. Those plans could be curtailed (if not abandoned) if shifting to VoIP service increased the intercarrier compensation rate currently applicable to circuit-switched wireless intraMTA traffic. Wireless carriers are still, on the whole, net payors of intercarrier compensation. Therefore, to avoid creating an adverse incentive on CMRS providers to shift to new technologies, such as VoIP, the Commission should rule that the intercarrier compensation rate for wireless intraMTA traffic remains at or below $0.0007, even if a CMRS provider is offering a VoIP service. To require CMRS providers or the carriers they are interconnected with to pay a rate above $0.0007 for the exchange of intraMTA VoIP traffic would create a significant disincentive for wireless carriers to deploy new, spectrum-efficient VoIP services, which, in turn, would hinder the Commission's goal of promoting advanced wireless broadband services.

3. The $0.0007 per minute default rate, moreover, should apply only to VoIP traffic that either originates or terminates *on the PSTN*. The Commission should not establish any default rate for calls that both originate and terminate in IP format. That traffic has *never* been regulated by the Commission, and it should continue to be governed solely by commercial agreements between the interconnecting providers. For example, in the *Pulver Order*, the Commission noted that wholly IP-based information services should "remain[] unregulated by the Commission or the states" because regulation "would risk eliminating an innovative service offering that . . . promotes consumer choice, technological development and the growth of the Internet, and universal service objectives." *Pulver Order* ¶ 19.

Although the *Pulver Order* involved IP-based communications routed entirely over the Internet, the same result should apply if a call originates with a VoIP customer, transits the PSTN, and terminates with another VoIP customer. Currently, the relationships between VoIP providers and the LECs that provide them with access to the PSTN are governed by commercial negotiations—and those LECs are often affiliated with the VoIP providers that serve end-users. The Commission has *never* established rules governing the rates paid by the VoIP providers to the LECs (or vice versa), and there is no reason to regulate those rates now. Imposing a default payment rule when IP-to-IP traffic happens to be routed over the PSTN (*i.e.*, "TDM-in-the-middle") would only complicate arrangements that have previously been addressed effectively and solely through commercial negotiations.

4. A default rate of $0.0007 per minute for VoIP traffic is just and reasonable and the only default rate that could apply under the current system. VoIP is both jurisdictionally interstate and an information service (*see* below). The only default rate that the Commission has ever established for comparable attendant traffic is the $0.0007 rate cap for ISP-bound dial-up traffic. *See ISP Remand Order* ¶ 78. Therefore, under the existing regime $0.0007 is the only default rate that could apply to VoIP. Moreover, as explained above, arms-length negotiations in the marketplace often result in carriers agreeing to exchange traffic at a rate of $0.0007 per minute, and there is no reasonable basis for adopting a rate different from $0.0007 for VoIP traffic.

D. The Commission Should Ensure That Legacy Intercarrier Compensation Rules Are Not Applied to VoIP Services.

1. *The Commission should reaffirm that it has exclusive jurisdiction over VoIP, which is inseverable and, therefore, interstate for jurisdictional purposes.*

In ruling that rates for the exchange of VoIP traffic should be set through commercial agreements, with a default rate of $0.0007 per minute for VoIP traffic that originates or terminates on the PSTN, the Commission should reaffirm explicitly that all VoIP and IP-enabled services, regardless of provider or technology, are interstate services subject to the Commission's exclusive jurisdiction—*not* to more than 50 different sets of economic regulation. This critical step will bring certainty to the marketplace and allow providers to deploy these services efficiently, using nationwide services and processes.

a. The Commission has already found that VoIP services are subject to its exclusive federal jurisdiction,[33] and it should explicitly reaffirm that this finding applies to *all* VoIP and IP-enabled services, regardless of provider or technology. In the *Vonage Order*, the Commission made five key findings that are relevant here:

First, the Commission recognized that Vonage had "no means of directly or indirectly identifying the geographic location" of its customers when they place or receive calls. *Vonage Order* ¶ 23; *see also id.* ¶¶ 26-27. That is a function of two different features of Vonage's service that each independently results in geographic indeterminacy. One is that the service "is fully portable," so that "customers may use the service anywhere in the world where they can find a broadband connection." *Id.* ¶ 5. The other is that, "in marked contrast to traditional circuit-switched telephony," Vonage assigns telephone numbers to customers that are "not necessarily tied to" the user's usual or "home" location. *Id.* ¶ 9. Because a customer may have a telephone number associated with one state, but actually be located in a different state, permitting states to regulate calls that appear intrastate based on telephone numbers means that

[33] *See Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd 22404, ¶¶ 15-37 (2004)("*Vonage Order*").

states would, in fact, impermissibly regulate interstate communications. The Commission found that this fact, by itself, was sufficient to justify preemption of state regulation. *See id.* ¶ 26.

Second, the Commission relied on the integrated nature of Vonage's service, which is integrated in two respects. First, it offers consumers any-distance calling without distinguishing between "local" and "long-distance" minutes of use. *Id.* ¶ 27. Second, Vonage's service offers a "suite of integrated capabilities and features" with that any-distance calling, including "multidirectional voice functionality" and "online account and voicemail management" that allows customers to access their accounts from an Internet webpage to configure service features, play voicemails through a computer, or receive or forward them in e-mails with the message attached as a sound file. *Id.* ¶ 7. "These functionalities in all their combinations," the Commission explained, "form an integrated communications service designed to overcome geography, not track it." *Id.* ¶ 25. As a result, the Commission found that its end-to-end analysis did not readily apply to IP-enabled communications services. Because those services have the "inherent capacity . . . to enable subscribers to utilize multiple service features that access different websites or IP addresses during the same communications session and to perform different types of communications simultaneously," they cannot meaningfully be sliced up into individual components and the end points cannot be separately tracked or recorded. *Id.* Therefore, even if information "identifying the geographic location of a [Vonage] subscriber" were "readily obtainable," that is far from the only information that would matter under the end-to-end analysis; one would also need to know the location of the myriad databases, servers, and websites utilized during the communication session. *Id.* ¶ 23. These integrated services and functionalities render Vonage's service "too multifaceted for simple identification of the user's location to indicate jurisdiction."

Third, the Commission recognized that the standard for determining jurisdiction is not whether it is technologically possible to carve out a purely intrastate service. Instead, the question is whether a "practical means to separate the service" exists and whether compelling providers to do so would conflict with federal policy. *Id.*; *see also id.* ¶ 37. The Commission found that this separation is not practical, because it would require a substantial redesign of Vonage's service—at significant cost—to try to disaggregate and track all of the individual components of that service. For example, Vonage would have to change multiple aspects of its service operations to track, record, and process geographic location information, including "modifications to systems that track and identify subscribers' communications activity and facilitate billing; the development of new rate and service structures; and sales and marketing efforts." *Id.* ¶ 29. As the Commission has recognized, it has "declined to require" providers to bear the costs of that separation in the past where the provider has "no service-driven reason" to do so, because such a requirement "would impose substantial costs . . . for the sole purpose of enabling state regulation." *Id.*

Fourth, mandating that Vonage undertake these changes and bear these costs would conflict with the Commission's policies in favor of promoting innovative services in general, and the development and deployment of broadband in particular. As the Commission put it, VoIP "facilitates additional consumer choice, spurs technological development and growth of broadband infrastructure, and promotes continued development and use of the Internet"—all of which advances federal policy and is strongly in the public interest. *Id.* ¶ 37. Forcing VoIP providers to incur the substantial costs and operational complexity of separating their integrated, any-distance services would substantially reduce the benefits of IP-based technologies[34] and would discourage the development and deployment of innovative services by increasing the cost and risk of rolling out those new services, contrary to the Commission's policies.

Fifth, the Commission recognized that its conclusions were not limited to Vonage's service, but applied to other VoIP services as well. As the Commission explained, the "integrated capabilities and features" characteristic of VoIP "are not unique to [Vonage's service], but are inherent features of most, if not all, IP-based services." *Id.* ¶ 25 n.93. Therefore, the Commission's conclusions about Vonage's service apply as well to "other types of IP-enabled services having basic characteristics similar to" that service—a class the Commission expressly recognized included "cable companies" and other "facilities-based providers"—and would "preclude state regulation to the same extent." *Id.*; *see also id*. ¶ 32. And the Commission emphasized that a key characteristic warranting the same conclusion is a service offering with "a suite of integrated capabilities" that enables consumers to "originate and receive voice communications and access other features and capabilities." *Id.* ¶ 32. Tellingly absent from that list of "basic characteristics" is any suggestion that a service must be portable in order for state regulation to be preempted. Because the Commission did not have any services other than Vonage's before it, the Commission did not rule directly on those facilities-based services, but made clear that, for any of those services, it "would preempt state regulation" to the same extent. *Id.*[35]

b. In affirming the *Vonage Order*, the Eighth Circuit rejected a variety of challenges and addressed each of the key factual findings discussed above:

[34] Forcing VoIP providers to, for example, to abandon least cost routing solutions merely to jurisdictionalize traffic for regulatory purposes would make no sense.

[35] *See also id.* ¶ 1 (stating that it is "highly unlikely that the Commission would fail to preempt state regulation of [facilities-based] services to the same extent").

First, with regard to the geographic indeterminacy of VoIP services, the Eighth Circuit upheld both of the bases underlying the Commission's finding.[36] The court recognized "the practical difficulties of determining the geographic location of nomadic VoIP phone calls." *Id.* at 579. And it also recognized "the practical difficulties" of using the assigned telephone number for "accurately determining the geographic location of VoIP customers when they place a phone call," as the number may not match "the physical location at which they would first utilize [the] VoIP service." *Id.*

Second, the court rejected challenges to the Commission's determinations about the integrated nature of VoIP service. The court specifically upheld the Commission's finding that "communications over the Internet [are] very different from traditional landline-to-landline telephone calls because of the multiple service features which might come into play during a VoIP call, *i.e.*, 'access[ing] different websites or IP addresses during the same communication and [ ] perform[ing] different types of communications simultaneously, none of which the provider has a means to separately track or record [by geographic location].'" *Id.* at 578 (quoting *Vonage Order* ¶ 25) (alterations in original). Moreover, the overall geographic significance of numbers with the proliferation of "pick-your-own area code" and nationwide mobile services is diminishing.

Third, the court upheld the Commission's finding that state regulation of VoIP should be preempted even assuming it were technically possible to carve out a separate, intrastate service, and that providers of any-distance VoIP services should not be required to disaggregate their services into separate interstate and intrastate pieces. The court found that it was "proper" for the Commission to consider "the economic burden" that would be imposed on VoIP providers if

[36] *See Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).

they were required "to separate the[ir] service into . . . interstate and intrastate components." *Id.* And the court recognized the long-standing rule—set out in precedents dating back at least to the 1970s—that service providers are not required to bear those costs and "develop a mechanism for distinguishing between interstate and intrastate communications merely to provide state commissions with an intrastate communication they can then regulate." *Id.*

Fourth, the court upheld the Commission's determination that state regulation of VoIP would conflict with federal policies favoring the introduction of innovative services and the deployment and development of broadband. The court had no difficulty affirming the Commission's finding that "state regulation of VoIP service would interfere with valid federal rules or policies," expressly finding that "[c]ompetition and deregulation are valid federal interests the FCC may protect through preemption of state regulation." *Id.* at 580. The court specifically upheld the Commission's determinations that state regulation may "*harm consumers by impeding the development of vigorous competition*" and that it "conflicts with the federal policy of nonregulation" of broadband and information services, which permits those services to "flourish in an environment of free give-and-take of the market place." *Id.* (internal quotation marks omitted; emphasis in original).

Fifth, the court recognized that the Commission, in the *Vonage Order*, found that, "if faced with the precise issue" of state attempts to regulate facilities-based VoIP services, the Commission "would preempt" state regulation of "fixed VoIP services." *Id.* at 582. But, because the Commission was not faced with that precise issue in the *Vonage Order*, the court found no need to reach claims that states can regulate the so-called "intrastate portion" of facilities-based VoIP services. *See id.* at 583.

c. The *Vonage Order* is also consistent with many other decisions in which the Commission preempted state regulation where it was not possible to enforce the regulation without negating federal policy, even where it might have been *technically* possible to distinguish between intrastate and interstate communications.

One closely analogous example is the Commission's preemption of state regulation of information services under its *Computer Inquiry* orders. The Ninth Circuit upheld the Commission's preemption of state regulation of information services (or enhanced services, as they were called at the time) that included integrated interstate and intrastate capabilities, based on the Commission's determination "that it would not be economically feasible for the BOCs to offer the interstate portion of such services on an integrated basis while maintaining separate facilities and personnel for the intrastate portion." *California v. FCC*, 39 F.3d 919, 932 (9th Cir. 1994). As a result, the "BOCs would be forced to comply with the state's more stringent requirements, or choose not to offer certain enhanced services," thereby "essentially negating the FCC's goal of allowing integrated provision" of those services. *Id.* at 932-933. The Ninth Circuit, moreover, had recognized that the Commission's preemption authority does not require the actual impossibility of separating an intrastate service from the integrated information service. The court explained that, even if it were technically "possible to comply with both the states' and the FCC's regulations," preemption was appropriate based on the Commission's finding that it is "highly unlikely, due to practical and economic considerations," that consumer reaction would enable that jurisdictional division to succeed. *Id.* at 933. Thus, in that case, state regulation presented the same conflict with the same federal policies—increasing costs and burdens on providers, thereby deterring the development and deployment of innovative services the FCC wanted to encourage—that state regulation of VoIP services presents.

Another closely analogous example is the Commission's preemption of state regulation of customer premises equipment (CPE), where the Commission similarly found that federal policies of promoting competition and innovation—the same policies at issue here—supported the preemption of state regulation that would frustrate those objectives. The D.C. Circuit upheld the Commission's finding that consumers' preference for "using CPE jointly for interstate and intrastate communication" would "unavoidably affect . . . federal policy adversely." *Computer and Commc'ns. Indus. Ass'n v. FCC*, 693 F.2d 198, 216 (D.C. Cir. 1982). As the court explained, because "consumers use the same CPE in both interstate and intrastate communications and generally wish to purchase both interstate and intrastate transmission services," if "charges for intrastate transmission service" included CPE charges, that would "certainly influence the consumer's choice of CPE" in conflict with federal policy. *Id.* at 215.

The D.C. Circuit also affirmed the Commission's assertion of jurisdiction over the marketing of CPE, concluding that even though certain marketing requirements would "surely 'affect' charges for" and regulate "intrastate communications services," preemption was appropriate. *Illinois Bell Tel. Co. v. FCC*, 883 F.2d 104, 112-113 (D.C. Cir. 1989). The court specifically recognized that the Commission would have authority to preempt the marketing of a purely intrastate service "if – as would appear here – it was typically sold in a package with interstate services. Marketing realities might themselves create inseparability." *Id.* at 113 n.7. Of course, the VoIP services at issue here are marketed as a single package of any-distance communications, and any attempt to separate intrastate communications for purposes of regulating them would fly in the face of these "marketing realities."[37]

[37] In defending its preemption of state regulation of BellSouth's voice mail service, the Commission explained that "absolute impossibility" is not the standard for justifying federal preemption, but instead that it was sufficient to preempt state regulation where "marketing

Similarly, the Fourth Circuit upheld the Commission's preemption of state regulation of CPE because it was "not feasible, *as a matter of economics and practicality of operation*," to have separate state and federal regulation of the CPE, despite the fact that the CPE in question was used 97-98 percent of the time for intrastate calls.[38]

All of these holdings apply here. Forcing facilities-based VoIP providers artificially to break apart their any-distance, integrated offerings solely to provide states with an intrastate communications component they can regulate would require VoIP providers to change multiple aspects of their service operations to comply with that requirement. This includes creation of systems that track and identify the many types of communications activity that the integrated features make possible; modifications to billing systems; the development of new services structures and associated rates; and new sales and marketing efforts for these new, artificial offerings, all of which would be done "just for regulatory purposes." *Vonage Order* ¶ 29.

d. Certain parties have argued that the *Federal VoIP USF Order*[39]—which established a safe harbor for allocating a VoIP provider's revenues between state and federal operations for purposes of calculating the provider's contribution to the federal Universal Service Fund—cut back on the Commission's conclusion in the *Vonage Order* that state commissions

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(Continued . . .)
realities effectively preclude[] the separate offering of interstate" and intrastate voice mail services." *See also* FCC Brief, *Georgia Pub. Serv. Comm'n v. FCC*, No. 92-8257, at 29-34 (11th Cir. filed Feb. 8, 1993). The Eleventh Circuit agreed, finding the Commission's defense of its preemption decision so obviously correct that it affirmed the Commission's order in a one-word, unpublished ruling. *See Georgia Pub. Serv. Comm'n v. FCC*, 5 F.3d 1499 (11th Cir. Sept. 22, 1993).

[38] *North Carolina Utils. Comm'n v. FCC*, 537 F.2d 787, 791 (4th Cir. 1976) (emphasis added); *see also North Carolina Utils. Comm'n v. FCC*, 552 F.2d 1036, 1044, 1046 (4th Cir. 1977).

[39] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518 (2006) ("*Federal VoIP USF Order*").

are preempted from regulating *all* VoIP services, whether fixed or nomadic. Those parties rely on the Commission's statement in that order that "an interconnected VoIP provider with the capability to track the jurisdictional confines of customer calls would no longer qualify for the preemptive effects of our *Vonage Order* and would be subject to state regulation." *Federal VoIP USF Order* ¶ 56. But this language does not suggest, as these parties argue, that fixed VoIP providers are *categorically* subject to state regulation. To the contrary, the *Vonage Order* recognized that the "geographic location" of the parties to the call was only "*one clue* to a jurisdictional finding under the end-to-end analysis." *Vonage Order* ¶ 25 (emphasis added). It remains the case today that many, and in the future probably most, VoIP providers have no independent business reason to assemble that information, nor do VoIP providers jurisdictionalize their service packages more generally.

In addition, the *Federal VoIP USF Order* did *not* authorize states to impose universal service assessments on VoIP services. The Eighth Circuit expressly rejected an attempt by Nebraska to impose state USF assessments on VoIP providers, holding that "[the FCC], and not state commissions, has the responsibility to decide if such regulations will be applied." *Vonage Holdings Corp. v. Nebraska Pub. Serv. Comm'n*, 564 F.3d 900, 905 (8th Cir. 2009). In the subsequent *State VoIP USF Order*,[40] the FCC expressly *authorized* states to collect universal service fees from VoIP providers, which simply reaffirms the Commission's exclusive authority to determine the regulations, if any, that will apply to all VoIP services. Indeed, in that same order, the Commission made clear that the *Federal VoIP USF Order* did not affect its "conclusion in the *Vonage* [*Preemption*] *Order* concerning preemption of rate regulation, tariffing, or other requirements that operate as 'conditions to entry'" with regard to VoIP

[40] *Universal Service Contribution Methodology*, Declaratory Ruling, 25 FCC Rcd 15651 (2010) ("*State VoIP USF Order*").

services.[41] And, in any event, USF contributions did not affect the *Vonage Order's* findings regarding the integrated nature of the services.

e. Lastly, Congress has made clear that it is "the policy of the United States" to promote "the continued development of the Internet and other interactive computer services," and to "preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(1)-(2); *see also id.* 47 U.S.C. §1302 (codifying § 706 of the Act). Imposing even one state's regulation—much less 50 or more different sets of regulations—on facilities-based, any-distance, multi-function VoIP services would conflict with federal policies favoring the introduction of innovative services and the deployment of broadband, as set forth in Section 706 of the Act and in Commission decisions informed by that section that federal courts have upheld.[42]

The Commission has recognized the "nexus between VoIP services and accomplishing [those policy] goals," finding that VoIP "driv[es] consumer demand for broadband connections, and consequently encourag[es] more broadband investment and deployment." *Vonage Order* ¶ 36. Because facilities-based VoIP providers are also the ones investing in the deployment of next-generation broadband infrastructure, over which VoIP service can be provided by either the facilities-based provider itself or a third-party, "over the top" provider, like Vonage, applying

[41] *Id.* ¶ 23.

[42] *See, e.g.*, *EarthLink, Inc. v. FCC*, 462 F.3d 1, 8 (D.C. Cir. 2006); *United States Telecomm. Ass'n v. FCC*, 359 F.3d 554, 584 (D.C. Cir. 2004).

state regulations to those providers would harm consumers by “discourag[ing] the . . . building [of] next generation networks in the first place.”[43]

* * *

In sum, the Commission should reaffirm its holding that all VoIP services, regardless of provider or technology, are inseverable and, therefore, interstate for jurisdictional purposes. That holding is both compelled by Commission precedent and consistent with Congress’s and the Commission’s longstanding goal of promoting the deployment of broadband and other advanced services.

2. *The Commission should confirm that VoIP and IP-enabled services are information services, to which switched access tariffs do not apply.*

a. Because VoIP is jurisdictionally interstate, the Commission has authority to establish a default rate of $0.0007 per minute for the exchange of that traffic. Although not necessary to establish compensation rules for VoIP traffic, the Commission should further confirm that *all* VoIP and IP-enabled services—whether nomadic or facilities-based and regardless of provider or platform—are properly classified as information services. That is so for at least two independent reasons.

First, by enabling communications between VoIP providers and the PSTN, traffic using these services is originated in one format (IP) and exits the network in another format (TDM), or vice versa. This process is known as a “net protocol conversion.” In the Supreme Court’s words, that conversion is what enables communication “between networks that employ different

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[43] *Petition for Forbearance of the Verizon Telephone Companies Pursuant to 47 U.S.C. § 160(c) et al.*, Memorandum Opinion and Order, 19 FCC Rcd 21496, ¶ 27 (2004), *aff’d*, *EarthLink, Inc. v. FCC*, 462 F.3d 1 (D.C. Cir. 2006).

data-transmission formats."[44] The Commission has long classified services that require or have an integrated capability of a net protocol conversions as "enhanced services,"[45] which are defined as services that "employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the subscriber's transmitted information." 47 C.F.R. § 64.702(a). The statutory definition of "information service" similarly includes, *inter alia*, the "offering of a capability for . . . transforming or processing . . . information via telecommunications." 47 U.S.C. § 153(24).

As one federal district court recently recognized, all VoIP and IP-based services are properly classified as information services because they allow subscribers to originate or terminate real-time, two-way voice communications over an IP-generated dial-tone and a broadband connection that, when delivered to or received from the PSTN, undergo a net protocol conversion to enable them to exit or enter the network in a different protocol (the TDM-based protocol used on the PSTN).[46] The Commission has similarly held that "an end-to-end protocol conversion service that enables an end-user to send information into a network in one protocol and have it exit the network in a different protocol clearly 'transforms' user information," and therefore qualifies as both an "enhanced service" and an "information service" under federal

[44] *National Cable & Telecomms. Ass'n v. Brand X Internet Svcs.*, 545 U.S. 967, 977 (2005).

[45] *See Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, First Report and Order and Further Notice of Proposed Rulemaking,11 FCC Rcd 21905, ¶¶ 102-107 (1996) ("*Non-Accounting Safeguards Order*") (subsequent history omitted).

[46] *See PAETEC Commc'ns, Inc*. v. *CommPartners, LLC,* No. 08-cv-0397, 2010 U.S. Dist. LEXIS 51926, at *5-7. (D.D.C. Feb. 18, 2010).

law.[47] That is precisely what happens in the case of a VoIP service that originates or terminates on the PSTN.

Second, independent of the net protocol conversions, all VoIP and IP-enabled services meet the statutory definition of information services because they offer consumers an integrated suite of capabilities that allow them to "generat[e], acquir[e], stor[e], transform[], process[], retriev[e], utilize[e], or mak[e] available information via telecommunications." 47 U.S.C. § 153(24).

As explained above, VoIP services include many of those capabilities, including, but hardly limited to, voicemail, online account configuration and management, and find-me/follow-me and other single-number/multiple-phone services. As the Commission recognized in the *Vonage Order*, "integrated features and capabilities" like these—which are "inherent features of most, if not all, IP-based services," including "those offered or planned by facilities-based providers"—allow customers to "control their communications needs by determining for themselves how, when, and where communications will be sent, received, saved, stored, forwarded, and organized." *Vonage Order* ¶¶ 8, 25 n.93. Because those capabilities are offered as part of a single, integrated, any-distance service—and cannot practicably be broken apart into component pieces—these services, at a minimum, "combine both telecommunications and information components" and are accordingly "treated as information services." *PAETEC*, 2010 U.S. Dist. LEXIS 51926, at *6.

It also makes sense to establish parity with traffic that either originates or terminates in IP. Call flows and the embedded regulatory status of carriers involved can be different depending whether an IP call (on one end or the other) originates on or terminates to the PSTN.

[47] *Non-Accounting Safeguards Order* ¶ 104.

But the larger objective of this proceeding is to transition all rates down to a default, uniform low rate. Rate parity is critical to avoid arbitrage and to encourage all providers to move to more efficient IP solutions as soon as possible. Starting with a level playing field for all IP traffic that connects with the PSTN—on either end of a call—therefore, is the best way to avoid a drag on tomorrow's technologies and promote an all-IP environment.

III. THE *NPRM* PROPOSES A WORKABLE FRAMEWORK TO ADDRESS MANY HARMFUL TRAFFIC PUMPING SCHEMES, BUT THE COMMISSION SHOULD ALSO ADDRESS RELATED INTRAMTA WIRELESS TRAFFIC.

Traffic pumping schemes have festered for more than five years, and the Commission must take action now to stop this recognized arbitrage. The Commission's proposal to address the current traffic pumping scams through changes to its tariff rules is a reasonable approach and should be adopted with minor adjustments discussed below. *NPRM* ¶¶ 658-66. And critically, the Commission must at the same time also address related schemes and other issues concerning the proper rate for CLEC-terminated, intraMTA CMRS traffic. Unless the Commission acts promptly to address intraMTA arbitrage this situation will emerge as the next evolution of the dial-up ISP arbitrage schemes that were finally resolved only late last year.[48] The dial-up ISP schemes likewise siphoned billions of dollars out of the intercarrier compensation system and did not stop until the Commission took decisive action.

Taking on today's traffic pumping schemes and filling the intraMTA arbitrage gap left by the Commission's *North County Order*[49] are necessary interim steps pending comprehensive intercarrier compensation reform. Ultimately, however, the only permanent solution to these and

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[48] Petition for a Writ of Certiorari, *Core Commc'ns., Inc. v. FCC*, No. 10-189 (Aug. 6, 2010); *cert. denied* (Nov. 15, 2010).

[49] *North County Commc'ns Corp. v. MetroPCS California, LLC*, Order on Review, 24 FCC Rcd 14036 (2009) ("*North County Order*") (declining to set a rate for or provide a federal compensation methodology for intraMTA CMRS traffic terminated by CLECs).

other new arbitrage schemes that will surely arise in the future is fundamental and comprehensive reform of intercarrier compensation to reflect the new communications marketplace dominated by any-distance, technology-neutral services such as the fixed and nomadic VoIP services discussed above. In that environment, the only way to avoid harmful and inefficient arbitrage is to adopt a single, low intercarrier compensation rate that applies nationwide to all traffic that originates or terminates on the PSTN.

A. Traditional Traffic Pumping Arrangements and IntraMTA Wireless Arbitrage Cost Ordinary Consumers Hundreds of Millions of Dollars Every Year and Will Only Get Worse Absent Commission Action.

The traffic pumping problem continues to grow and has cost consumers and the industry more than $2 billion over the last five years, approximately $400 million per year.[50] There are many permutations of these schemes, but in a typical traffic pumping arrangement a LEC forces the ordinary customers of other carriers—traditional long distance or interconnected wireless carriers—to subsidize supposedly "free" conferencing, chat line, and other calling services that feed off of traffic pumping. Traffic pumping LECs partner with these free conferencing and other providers to drive up call volumes (many times in rural areas with high intercarrier compensation rates)[51] by marketing their services at no cost to end users. The LECs then share

[50] *See* TEOCO Corp., *Traffic Pumping Bleeds CSPs of Billions*, http://www.teoco.com/documents-for-downloading to 2010; TEOCO Corp. News Release, "Access Stimulation Responsible for $2.3 Billion in Cost: Traffic Pumping Quantified by TEOCO Study," http://www.teoco.com/local/upload/fckjail//homenews/file/access-stimulation-responsible-for-2-3-billlion-in-cost.pdf (Oct. 23, 2010); *see also* Verizon November Ex Parte Letter.

[51] Even some states with rural areas where these schemes are based have renounced traffic pumping. *See, e.g., NPRM* ¶ 669 (discussing Iowa Utilities Board actions to rein in traffic pumping); and Bartlett D. Cleland, "Rural Phone Companies Pumping Porn,"ArgusLeader.com (March 3, 2011) (discussing recent proposed, though not adopted, South Dakota traffic pumping legislation) ("The rural carrier. . .pays a kickback to the call marketing company for having it direct all of its 'free' calls to the carrier's network. The carrier then skims off the remaining money and takes it as profit from this seamy bootstrapping operation. These arrangements are

the intercarrier compensation windfalls—which result from unreasonably high rates based on the volume of traffic associated with traffic pumping—with the conferencing and other providers. *NPRM* ¶¶ 636-37.

On the wireless side in particular, traffic pumping schemes have flourished in the wake of the *North County Order*, which opened the door to pumping of intraMTA CMRS traffic by CLECs. *NPRM* ¶¶ 672-75. Traffic pumping costs the domestic wireless industry alone more than $190 million annually—not accounting for any of the latest intraMTA traffic pumping schemes.[52] At the end of last year wireless companies were engaged in more than 60 traffic pumping disputes nationwide.[53] IntraMTA wireless traffic is subject to reciprocal compensation requirements under the Act and the Commission's rules.[54] Accordingly, most this traffic is terminated by LECs at a rate of $0.0007 per minute under the Commission's mirroring rule adopted as part of the dial-up ISP rate regime. *ISPRemand Order* ¶ 3. But CLECs generally do not "mirror" the $0.0007 rate, which enables them to engage in traffic pumping schemes.

By all indications intraMTA wireless arbitrage by CLECs is indeed emerging as the next iteration of the CLEC dial-up ISP arbitrage schemes. The lessons of the dial-up ISP schemes (which festered for years) are sobering. In eventually addressing the arbitrage associated with

(Continued . . .)
legal but hardly moral. They are not what a rural phone service company should be doing, but what it can do.")

[52] *See* Connectiv Solutions, *Understanding Traffic Pumping, Industry Study*, http://www.connectiv-solutions.com/traffic-pumping.html (2010).

[53] *See* Ex Parte Letter from Scott Bergmann, CTIA– The Wireless Association, to Marlene Dortch, FCC, *Developing a Unified Intercarrier Compensation Regime*; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, CC Docket No. 01-92, WC Docket No. 07-135 (Nov. 24, 2010).

[54] 47 U.S.C. §§ 251(b)(5), 332; 47 C.F.R. § 51.701(b)(2); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, ¶¶ 65, 85, 92 (2001) ("*2001 Intercarrier Compensation NPRM*").

ISP-bound traffic, the Commission "found convincing evidence in the record that carriers had targeted ISPs as customers merely to take advantage of . . .intercarrier payments (including offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud)."[55] These schemes flourished until the Commission stepped in and squarely addressed the issue, having initially deferred to the states. By the time the Commission acted, the problem with CLEC ISP-bound traffic had ballooned—involving, literally, billions of dollars in uneconomic arbitrage payments that the Commission correctly found harmed competition and infrastructure investment. *See 2008 ISP Remand Order* ¶¶ 3, 24. Faced with that crisis, the Commission "adopted an ISP payment regime in order to limit, if not end, the opportunity for regulatory arbitrage." *Id.* ¶ 3, citing *ISP Remand Order* ¶ 77.

The Commission cannot allow a repeat of that situation with intraMTA wireless-CLEC traffic. The phenomenal growth in the American wireless industry has been fueled in part by predictable, low terminating rates for most intraMTA traffic, a situation that could unravel unless the Commission steps in to address CMRS-CLEC rates and the new associated traffic pumping schemes. Regrettably, however, at the moment the dial-up ISP arbitrage history does seem to be repeating itself.

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[55] *See Intercarrier Compensation for ISP-Bound Traffic, et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, ¶ 3 (2008) (subsequent appellant history and internal citations and quotations omitted) ("*2008 ISP Remand Order*"); *see also ISP Remand Order* ¶ 70 ("The record is replete with evidence that reciprocal compensation provides enormous incentive for CLECs to target ISP customers. The four largest ILECs indicate that CLECs, on average, terminate eighteen times more traffic than they originate, resulting in annual CLEC reciprocal compensation billings of approximately two billion dollars, ninety percent of which is for ISP-bound traffic. Although there may be sound business reasons for a CLEC's decision to serve a particular niche market, the record strongly suggests that CLECs target ISPs in large part because of the availability of reciprocal compensation payments. Indeed, some ISPs even seek to become CLECs in order to share in the reciprocal compensation windfall, and, for a small number of entities, this revenue stream provided an inducement to fraudulent schemes to generate dial-up minutes.").

In *North County* the Commission considered a complaint filed by North County Communications ("North County"), a CLEC, concerning nonpayment of terminating compensation for intraMTA traffic by MetroPCS, a CMRS provider. The parties had no interconnection agreement; North County sought to collect an intrastate rate that it had tariffed in California. Both the Enforcement Bureau and the full Commission acknowledged that all traffic between the parties was one-way, terminating *with* North County, because North County primarily served chat lines and telemarketers.[56] Ultimately, the Commission refused to set the rate for any compensation that might be due in *North County*. Instead, the Commission deferred to the California state commission to assess whether North County's compensation demand is "reasonable" under section 20.11 of the Commission's rules. 47 C.F.R. § 20.11. In doing so, the Commission provided the state with no guidance concerning application of the Commission's rules with respect to CMRS traffic.

The *North County Order* has encouraged some unscrupulous CLECs to view terminating charges imposed on CMRS-originated intraMTA traffic as an attractive new source of intercarrier compensation revenues. Verizon Wireless's review of several arrangements the company has with CLECs suggests that some CLECs are indeed stepping up intraMTA traffic pumping. In some cases, for example, Verizon Wireless now sends more than nine times as much traffic to particular CLECs than the CLECs send to Verizon Wireless (*e.g.*, a 9:1 inbound/outbound ratio). Even apart from the Commission's new deference to the states over intraMTA traffic rates, because there is no mechanism in the Commission's rules to apply the

[56] The situation in *North County* is typical of the kind of questionable revenue sharing arrangements that led the Commission to tentatively conclude four years ago should preclude assessment of access charges by LECs. *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, ¶ 12 (2007) ("*Traffic Pumping NPRM*").

Part 51 pricing regulations to CLEC termination charges for CMRS-originated traffic, CLECs have every incentive to engage in intraMTA traffic pumping and share intercarrier compensation revenues with their pumping "partners."

Before the *North County Order*, Verizon Wireless had reached commercially negotiated compensation agreements with approximately 75 percent of the CLECs with which it exchanges intraMTA traffic. Some of these agreements are bill-and-keep arrangements, and others reflect a rate of $0.0007. But now CLECs like North County view the decision as an invitation to demand exorbitant intercarrier compensation rates from state regulators and courts for the termination of intraMTA traffic. For example, in California, North County filed a petition seeking the state commission's approval of $.011 per minute rate for traffic from CMRS providers—in other words, *more than a penny a minute*.[57] Another CLEC has asked the Kentucky commission to mediate a dispute in which it seeks a compensation rate for intraMTA CMRS traffic of $.015 per minute.

There is no obvious procedural vehicle to resolve these and other CMRS-CLEC intercarrier compensation disputes unless the Commission rules. Although all CMRS-*ILEC* reciprocal compensation disputes are subject to the state arbitration process in the wake of the Commission's *T-Mobile Order*, CMRS-CLEC disputes are not subject to that process because neither CMRS providers nor CLECs can initiate the section 252 arbitration process vis-à-vis a carrier other than an ILEC. *T-Mobile Order* ¶¶ 11-12 ("Nor could the section 252 arbitration process be invoked against CLECs, since section 252, by its terms, contemplates processing against incumbents."). And in two separate cases, the federal courts have also refused to

[57] *See Application of North County Communications Corporation of California (U5631C) for Approval of Default Rate for Termination of Intrastate IntraMTA Traffic Originated by CMRS Carrier*, Docket No. 10-01-003 at 2, (Ca. PUB. Utils. Comm'n Jan. 6, 2010).

recognize a private right of action for North County's collection of intraMTA termination charges from a CMRS provider under the Act.[58]

The CMRS-CLEC intraMTA rate uncertainty is fueling more and more traffic pumping arbitrage. Any traffic pumping solutions adopted in this proceeding must address both traditional access traffic pumping schemes and the intraMTA wireless version of traffic pumping, which have been viewed as a package since the Commission initiated its 2007 *Traffic Pumping NPRM* docket. *Id*. ¶ 38 ("We. . .invite parties to address whether carriers are adopting traffic stimulation strategies with respect to forms of intercarrier compensation other than interstate access charges. We ask parties to identify situations in which this is occurring and to explain the physical provisioning and compensation arrangements that make these strategies work. Parties should also address what remedies may be available to the Commission to address such activities.") (citation omitted).[59]

B. The Proposed Traffic Pumping Solution In the *NPRM* Is A Sensible Approach.

The Commission generally proposes to address current traffic pumping schemes with a new three-step process involving the federal tariff rules. *NPRM* ¶¶ 658-66; *see also NPRM* at

[58] *See North County Commc'n. Corp. v. Cal. Catalog & Tech.*, 594 F.3d 1149 (9th Cir. 2010); *North County Commc'ns Corp. v. Cricket Commc'ns, Inc.*, 09-cv-2623 (D. Ariz. June 16, 2010).

[59] The omitted citation in this paragraph is to a September 2007 letter from MetroPCS to then Chairman Martin, which highlighted the traffic pumping problems, and potential problems, with intraMTA wireless traffic terminated by CLECs. *Traffic Pumping NPRM* ¶ 38 n.69 (citing Letter from Carl Northrop, MetroPCS, to The Honorable Kevin Martin, FCC, WC Docket No. 07-135, at 2 (Sept. 7, 2007) (discussing ILEC and CLEC traffic pumping "kick-back" schemes and why these schemes are also a problem for wireless carriers terminating local or intraMTA traffic to LECs). The 2007 MetroPCS letter cited in *the Traffic Pumping NPRM* also cited to MetroPCS' then-pending complaint regarding these issues with a particular LEC.

Appendix C. As applied to CLECs,[60] the presence of an "access revenue sharing" arrangement (a defined term in the new rules) would trigger an obligation on the part of the CLEC to re-file its access service tariff with the Commission, and in many instances reduce its access rates. A CLEC that re-files its access tariff because of a revenue sharing arrangement would be prohibited from charging a termination rate that is higher than the corresponding RBOC's interstate rate in the CLEC's home state. The CLEC would further be prohibited from filing its revised tariff on seven or 15 days' notice, thereby eliminating "deemed lawful" protections for its interstate access service tariff and rates under the Act. 47 U.S.C. § 204(a). Overall, this is a sensible framework and largely consistent with various proposals in the existing *Traffic Pumping* docket.

In particular, the Commission's proposal to focus on revenue sharing arrangements as the "trigger" to require CLECs to lower their access rates is a reasonable approach. Carriers are not entitled to windfall profits that flow from excessive intercarrier compensation charges. And there is no better evidence that access rates are excessive than a CLEC's agreement to share revenues generated by those rates with a business partner engaged to artificially inflate traffic by marketing chat line, conferencing, and other services as free to end-users.

Requiring CLECs to benchmark to the state-specific RBOC access rate when they engage in revenue sharing is also reasonable. The existing rural CLEC access charge benchmarking rules are designed to allow CLECs legitimately serving only rural parts of more populated study areas to recover their costs, not to fund traffic pumping schemes that enrich a select few individuals with forced subsidies from customers of other carriers. Even at the RBOC rate,

[60] The Commission proposes slightly different rules for traffic pumping ILECs. *NPRM* ¶¶ 662-64. Because the vast majority of traffic pumping activity is now conducted by CLECs, Verizon's comments focus on CLECs. Suggested changes to the Commission's proposed new rules below, however, should apply both to CLECs and, where appropriate, also to any new ILEC rules.

however, existing precedent makes clear that CLECs are still prohibited from charging rate elements for services not functionally equivalent to ILEC services or services that CLECs do not actually provide. 47 C.F.R. § 61.26. For example, ILECs charge for transporting traffic in appropriate circumstances. But transport charges would be impermissible in certain situations where a CLEC and a traffic pumping conference bridge are co-located in the same facility (*i.e.*, the CLEC does not actually transport traffic to the bridge over any appreciable distance before terminating the traffic). The reverse is also true. LECs should not be allowed to game their transport rate element charges by establishing artificially long transport routes only to increase these charges to other carriers. The FCC should clarify that LECs should not be able to engage in transport arbitrage.

C. The Commission Should Make Minor Adjustments to Its Traffic Pumping Proposal to Improve the New Process And Must Also Squarely Address the CMRS-CLEC IntraMTA Rate Gap.

The Commission—and all parties—must recognize that intercarrier compensation arbitrage schemes will continue until the Commission adopts a uniform, default rate for all PSTN traffic as part of comprehensive reform. The Commission's proposal goes a long way toward fixing many of the most egregious arbitrage opportunities in the existing system, but the proposal can and should be improved even in the interim.

First, because the proposal does not establish a bright line rule prohibiting traffic pumping,[61] it may be difficult in some instances to determine whether a LEC is actually engaged in revenue sharing. LECs do not typically broadcast the terms or structure of their kickback arrangements with traffic pumping partners. There are notable exceptions. For example, in

[61] Verizon still favors a declaratory ruling prohibiting carriers from assessing intercarrier compensation charges on traffic subject to a revenue sharing arrangement. *See* Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135 (Mar. 26, 2010).

August of last year Free Conferencing Corporation—a renowned LEC traffic pumping partner—filed a claim in federal district court in South Dakota directly against Verizon.[62] The claim alleges tortious interference with a revenue sharing agreement between Free Conferencing and a rural CLEC. In its lawsuit, Free Conferencing also alleges that the CLEC has failed to make good on its agreement to share intercarrier compensation revenues with Free Conferencing. Free Conferencing attached to its district court complaint accounting records showing millions of dollars in payments from just one rural CLEC to Free Conferencing over a four-year period, and an outstanding balance of more than $10 million. Free Conferencing also attached the revenue sharing agreement itself, in which Free Conferencing committed to send the CLEC at least two million minutes per month in exchange for the CLEC's agreement to pay Free Conferencing a "marketing fee" of $0.02 per minute. Nonetheless, it is the rare case that traffic pumpers are so brazen. Typically, carriers like Verizon are forced to identify and track traffic pumping schemes through traffic spikes, which could—but will not always—be the result of traffic pumping. And even in litigation LECs resist discovery of revenue sharing arrangements with their traffic pumping partners.

Second, the Commission's proposal arguably does not capture a situation where a LEC does not have a documented revenue sharing agreement with its traffic pumping partner, but there is still effective revenue sharing because both entities have common ownership. For example, Verizon is engaged in traffic pumping litigation with North County in California.[63]

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[62] *See Free Conferencing Corp. v. Sancom, Inc., Verizon Business, et al.*, 10-cv-4113 (D. SD) (Aug. 19, 2010).

[63] Letter from Joseph G. Dicks, Counsel to North County, to Marlene Dortch, FCC, *Developing a Unified Intercarrier Compensation Regime*; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, CC Docket No. 01- 92, WC Docket No. 07-135 (Nov. 12, 2010); *see also* Letter from Jonathan E. Canis, Counsel to North County, to Marlene Dortch,

From what Verizon can determine, North County's business consists of serving sex chat lines (its "customers") that are marketed for free, at least initially.[64] North County's primary chat-line customer is a company for which North County's president, Todd Lesser, is also an officer. That company, HFT, Inc., is served by North County (a CLEC) and provides pornographic chat services, as well as pay-per-call 900 services. The cross-ownership situation (between CLECs and conferencing and other providers) in which there is effective revenue sharing but not document agreement is common with traffic pumping schemes.

To address these issues the Commission should make clear in the text of its forthcoming traffic pumping order that its new traffic pumping rules do not establish a presumption that traffic pumping and other intercarrier compensation arbitrage schemes that may fall outside of the four corners of those rules are considered legitimate and consistent with section 201(b) of the Act. 47 U.S.C. § 201(b). In addition, the Commission should also establish a presumption that a revenue sharing arrangement exists, and the new triggering mechanism is engaged, if a predominant share of a LEC's billed intercarrier compensation minutes are routed to or from conferences bridges, information services such as chat lines, or other known traffic stimulation mechanisms regardless of whether the LEC and the other providers are affiliated.

With respect to reciprocal compensation in particular (where the intraMTA wireless problems lie today), the Commission should also establish a presumption that a revenue sharing arrangement exists if there is a traffic imbalance between carriers that exceeds a three-to-one terminating to originating ratio similar to the Commission's dial-up ISP rate regime. *ISP*

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FCC, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135 (Nov. 18, 2010).

[64] Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135 (Dec. 6, 2010).

Remand Order ¶ 79 (adopting a rebuttable presumption that traffic delivered to a carrier that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic). The mandatory benchmark for this traffic should then be $0.0007, consistent with the CMRS-CLEC terminating rate the Commission should set for intraMTA traffic (*see* below), not the RBOC rate.[65]

Finally, the Commission must close, once and for all, the longstanding gap in its intercarrier compensation regime and adopt rules to actually govern CMRS-CLEC intraMTA compensation arrangements. The Commission should exercise its plenary authority over CMRS-CLEC compensation under sections 251(b)(5) and 332 of the Act to establish a default termination rate of $0.0007 per minute for that intraMTA traffic, in the absence of a negotiated interconnection agreement, to stabilize the CMRS-CLEC compensation regime. As discussed above, this rate has been broadly applied to intraMTA traffic exchanged with ILECs since 2001 because of the mirroring rule, and is also identical to the rate in many commercial agreements Verizon Wireless and other wireless carriers were able to negotiate with CLECs before the Commission's *North County Order*. The continuing CMRS-CLEC rate issue presents a significant problem that injects uncertainty into the competitive CMRS marketplace, which impedes further deployment of 4G wireless and other broadband networks to handle increased demand for data services. For the reasons discussed above, the failure to address this longstanding gap in the CMRS–CLEC intercarrier compensation rules also impedes the success of the near-term solutions proposed in the *NPRM*.

[65] CLEC intraMTA rates are typically set in state tariffs. The Commission, however, recognized 10 years ago its authority over CMRS-LEC reciprocal compensation rates pursuant to sections 251(b)(5) and 332 of the Communications Act. *2001 Intercarrier Compensation NPRM*, ¶¶ 65, 85, 92. Addressing both interstate access and intraMTA wireless traffic would clamp down on most existing traffic pumping schemes. To completely close the loop, the Commission should also require CLECs to benchmark their intrastate access and non-intraMTA wireless reciprocal compensation rates to the ROBC rates when the traffic pumping triggers are satisfied.

IV. THE PROPOSED NEW SIGNALING RULES RESPONDING TO PHANTOM TRAFFIC COMPLAINTS ARE GENERALLY WORKABLE BUT SHOULD BE MODIFIED IN A FEW IMPORTANT RESPECTS.

The Commission proposes in the *NPRM* to adopt two new signaling rules to reduce the occurrence of "phantom traffic" for which certain LECs find it difficult to bill appropriate intercarrier compensation. *NPRM* ¶¶ 620-634; *see also NPRM* at Appendix B. The framework of the proposed rules, which is loosely based on a consensus industry proposal submitted by USTelecom, which Verizon supported,[66] is acceptable with some modifications to the rules to avoid unintended consequences and potentially significant new costs associated with systems changes. In addition, any Commission order adopting new call signaling rules must make clear that telephone number information is not always available: for some services, providers do not assign a telephone number to the calling party or receive a telephone number from the calling party. Moreover, the Commission should acknowledge that telephone number information — even if available and passed—does not necessarily dictate the jurisdiction of a call and is not dispositive of the relevant intercarrier compensation billing rate, if any. This is particularly true for calls initiated from a nomadic VoIP service, wireless calls roaming outside of the caller's home area code, and services that allow customers to choose their own area codes.

The proposed rule is headed in the right direction because there remains no need for, and the proposal appropriately avoids, a heavy-handed regulatory solution to phantom traffic concerns.[67] For instance, in call flows involving termination on the PSTN, as long as the

[66] Letter from Glenn Reynolds, USTelecom, to Marlene Dortch, FCC, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92 (Feb. 12, 2008) ("USTelecom Proposal").

[67] State regulators have reached similar conclusions. In Oregon, the Public Utility Commission recently closed its phantom traffic proceeding with no action after analyzing multiple studies and collecting data and comments from all interested parties. The PUC's analysis showed that in reality, phantom traffic was minimal, both in terms of traffic minutes and

terminating LEC knows which carrier is financially responsible for payment, other billing questions—such as proper jurisdiction—can and should be addressed by the terminating carrier directly with the entity responsible for payment. And no regulatory action is needed to provide LECs the tools to identify the carrier responsible for payment. In those cases where the tandem owner is also the terminating carrier, the terminating carrier can determine the carrier responsible for payment by looking to the identity of the in-bound trunk group at the tandem. LECs that terminate traffic that has transited a different carrier's tandem also have the tools needed to identify the carrier responsible for payment. In accordance with industry standards, the carrier responsible for payment is identified on billing records known as "EMI records" or "terminating access records," which are created by the tandem provider and provided in electronic format to the terminating LEC, outside of the signaling process.

Even though the carrier responsible for payment should be known to terminating LECs, some LECs still report difficulty determining the jurisdiction of certain calls. This can occur when traffic has missing, invalid, or inaccurate jurisdictional information. Even then, however, it is important to remember that just because some traffic lacks valid jurisdictional information does not mean that the traffic is not billable. To the contrary, carriers have been dealing with the business issues surrounding this type of so-called phantom traffic for decades and have developed methods to arrive at negotiated factors that can be applied so long as the terminating LEC knows which carrier to bill—and as discussed above, the identity of those carriers is readily available. Factoring approximates the percentage of traffic that should be designated as local,

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associated billables. *Oregon Exchange Carrier Association, Request for investigation into the issue of Phantom Traffic*, UM 1423, Order at 5 (Dec. 21, 2010) ("After reviewing the parties' comments, we conclude that phantom traffic is a minimal problem in Oregon, and that action on the issue of phantom traffic is not required at this time.").

intrastate access, and interstate access under the current intercarrier compensation regime. Factoring is a widely accepted, reliable practice to address traffic identification and billing concerns, and factoring is a process that carriers have used for years to deal with unlabeled traffic.

Carriers can and should continue to rely on factoring, in addition to any new call signaling rules, to avoid the need for heavy-handed regulatory requirements that will inevitably grow stale[68] and could impede roll-out of more efficient transport technologies and services. This approach is equitable because it allows both parties, who may have different billing systems and network configurations, to negotiate appropriate factors, without forcing either carrier to incur inefficient costs simply to ensure that the other carrier can bill the appropriate intercarrier compensation rate to certain volumes of traffic. The fairness of negotiating factors is especially appropriate as the Commission seeks to address in a competitively neutral manner the compensation obligations for VoIP traffic, discussed *supra*.

With respect to the proposed rules, the Commission should make certain important modifications to avoid unintended consequences and to acknowledge certain technical realities. It is important that the exceptions to the Commission's proposed new signaling rules are sufficient to avoid disrupting the migration to new IP-based services and do not necessitate expensive systems modifications merely to comply with the rules themselves for some interim period. In particular, new section 64.1601(a)(1) of the Commission's proposed rules seeks to require all providers, including interconnected VoIP providers, that originate traffic from or direct traffic to the PSTN to transmit the telephone number "received from, or assigned to or

[68] Once the Commission sets a single, low intercarrier compensation rate that applies to all traffic, the phantom traffic "problem" will be eliminated entirely. In that environment LECs only need to know which carrier to bill for the traffic—not how much to bill. And, as discussed above, LECs already have this information.

otherwise associated with the calling party" to the next provider in the traffic stream.[69] *NPRM* at Appendix B. The Commission's proposal appropriately requires transmission of the telephone number associated with the calling party, "where such transmission is feasible with network technology deployed at the time a call is originated." *Id*. Any order should make clear that this means the proposed rule imposes no obligation on providers to deploy new equipment or upgrade equipment in order to transmit or pass telephone number information.[70] Moreover, consistent with the USTelecom Proposal, the exception to the requirement to transmit the calling party's telephone number must be broad enough to include reliance on industry standards, which signaling and transmission equipment, software, and other programming were designed to support. *See* USTelecom Proposal at Attachment. As drafted, the new rule only allows for a "technically feasible" exception to the requirement to transmit the calling party's telephone number. *NPRM* at Appendix B. The new rule should additionally provide for an industry standards exception.

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[69] Entities subject to this requirement using Signaling System 7 (SS7) are also required to transmit the "calling party's charge number (CN)" for "any call where the CN differs from the CPN." *NPRM* at Appendix B. There are circumstances where a CN may be different from the CPN but cannot be easily transmitted. For example, consistent with industry standards many switch vendors designed their switching systems without the capability to transmit a CN on local calls.

[70] Entities are appropriately required to transmit the calling party's telephone number only "when feasible with network technology deployed at the time a call is originated." *NPRM* at Appendix B. Even the Missoula Plan's flawed phantom traffic proposal acknowledged that carriers should not be required to deploy new technology or modify networks to comply with call signaling rules. The Missoula Plan provided several examples of existing call flows in which transmission of telephone number information is not technically feasible with currently-deployed equipment, such as operator-assisted dialed traffic for which the provider uses an operator service platform based on MF signaling. *See* Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, CC Docket No. 01-92, Attachment at 57-58 (July 24, 2006) (attaching the Missoula Plan).

In addition, the rule should acknowledge that some services—like new VoIP services that provide for outbound calling to customers on the PSTN, while allowing inbound calling only from other users of the VoIP service—may simply have no telephone number information at all to transmit. In these and other cases where the originating provider has not assigned a telephone number to the calling party, and the originating provider does not receive a telephone number from the calling party, the originating provider should be unambiguously excepted from any requirement to signal such information. Such an exception would expand on the existing section 64.1601(d)(3)'s exception for PBX and Centrex systems that do not pass end user CPN.

The other new signaling rule in the *NPRM*, section 64.1601(a)(2), proposes new requirements on passing call information[71]—and a prohibition on altering that information—that would apply to "intermediate providers" (an undefined term) in the signaling stream. *NPRM* at Appendix B. This rule contains an exception that does include reliance on industry standards, but should also contain the "technically feasible" exception that is properly included in new section 64.1601(a)(1). In addition, the first sentence of section 64.1601(a)(2) should make clear (as the proposed section 64.1601(a)(1) does) that the requirements apply only to PSTN traffic or traffic that is destined for the PSTN. As discussed above, traffic that is both IP-originated and IP-terminated never has been, and should not be, subject to regulation at any level—even if that traffic transits the PSTN at one or more points in the call flow (*i.e.*, "TDM-in-the-middle").

[71] There is an inconsistency in the proposed rules regarding the scope of the signaling information that must be passed. The rules should not apply to "all signaling information." *NPRM* at Appendix B. For phantom traffic purposes, all signaling information is not necessary, and it is neither technically feasible, consistent with industry standards, nor cost effective to map all signaling fields for all traffic. Other references in the rules are specific to CPN. References to "all signaling information," "all SS7 information," and similar notations should be removed from the final rules.

In addition, the rule notes that providers of "interconnected voice over Internet protocol . . .who are intermediate providers" are subject to the new section 64.1601(a)(2) requirements. *NPRM* at Appendix B. It is not clear how an interconnected VoIP provider could ever be an "intermediate" carrier in this context. The Commission's definition of interconnected VoIP requires, among other things, "Internet protocol-compatible customer premises equipment." 47 C.F.R. § 9.3. Intermediate transport services do not involve customer premises equipment—IP or otherwise.

Finally, the first sentence of the new rule in section 64.1601(a)(2) also includes a reference to information identifying "the financially responsible party." *NPRM* at Appendix B. It is not clear what this means. Indeed, "financially responsible party" is an undefined term. The current signaling standards do not support the passing of signaling information identifying the financially responsible party even when known by the intermediate carrier. In other words, there is no field in signaling to designate a financially responsible provider.

Moreover, to the extent the proposed rule's reference to a financially responsible party implies some duty on the part of an intermediate provider to investigate and make a legal determination about whether intercarrier compensation is due—and from whom—to a terminating LEC, that would clearly be inappropriate. Depending on its position in the call path, an intermediate provider may or may not be in a position to know who the "financially responsible party" for a call is, let alone have the capability to make such determinations instantaneously as call signaling information is transmitted and calls are set up and taken down. In any event, as discussed above, the identity of the financially responsible party is already available to terminating carriers through terminating access records available at the tandem level and passed on to the terminating provider. In short, requiring that financially responsible party information be inserted into the signaling stream is neither necessary nor technically feasible. Thus, the Commission should remove any reference to the "financially responsible party" in its final call signaling rules.

V. THE COMMISSION MUST MOVE FORWARD NOW AND ELIMINATE REMAINING CETC SUPPORT TO CLEAR THE WAY FOR ADDITIONAL BROADBAND FUNDING AND INTERCARRIER COMPENSATION REFORM.

In the short term, the only way to free up sufficient USF support for the Commission's USF and intercarrier compensation reform objectives in this proceeding is to make good on the National Broadband Plan recommendation and Commission proposal to eliminate remaining CETC support in addition to the Verizon Wireless and Sprint funding. *NPRM* ¶¶ 248-58.[72] There is no cause for delay. Indeed, the intercarrier compensation proposal in the *NPRM* to establish a new universal service mechanism for carrier recovery—on a time-limited, transition basis—of some portion of access revenues lost as part of comprehensive reform heightens the urgency to eliminate remaining CETC support now. *NPRM* ¶¶ 559-602. The Commission should include final rules for this necessary step in its next universal service and/or intercarrier compensation reform item.

All the pieces are in place, and there are no impediments to begin eliminating this legacy voice support immediately. The National Broadband Plan recommendations to free up broadband funding by first repurposing CETC support were issued in March of last year. NBP at

[72] *See also Connecting America: The National Broadband Plan*, http://download.broadband.gov/plan/national-broadband-plan.pdf, at 147-48 (2010) ("National Broadband Plan" or "NBP"); *Connect America Fund*; *A National Broadband Plan for Our Future*; *High-Cost Universal Service Support*, Notice of Inquiry and Proposed Rulemaking, 25 FCC Rcd 6657, ¶¶ 59-62 (2010) ("*Connect America Fund NPRM*"); *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Request for Review of Decision of Universal Service Administrator by Corr Wireless Communications, LLC*, Order and Notice of Proposed Rulemaking, 25 FCC Rcd 12854 (2010), *reconsideration pending* ("*Corr Order*").

147-48. In the *Connect America Fund NPRM* (issued in April of last year), the Commission then provided notice of and sought comment on how to implement these reductions. *Connect America Fund NPRM* ¶¶ 59-62. Interested parties commented extensively on the proposed reductions in current high cost universal service support teed up in the National Broadband Plan and in the initial Connect America Fund proceeding.[73] Even outside of the formal *Connect America Fund NPRM* comment cycle, universal service funding reduction issues have been subject to extensive discussion in the industry and in ex parte comments filed with the Commission.[74]

Further, in the *Corr Order* (issued in September 2010) following extensive comment from all interested parties, the Commission adopted detailed, workable procedures to phase out Verizon Wireless and Sprint support pursuant to merger conditions, which can now be applied industry-wide. *Corr Order* ¶¶ 14-17. At the same time the Commission provided explicit, detailed instructions to the Universal Service Administrative Company to administer these support reductions. *Id*. ¶¶ 18-22. Finally, just before the new year the Commission cleared the last operational hurdle, changing the interim CETC cap procedures so that when a carrier relinquishes its ETC status in particular states—which may happen as support is eliminated—

[73] *See, e.g.*, Comments of the USA Coalition, *Connect America Fund*; *A National Broadband Plan for Our Future*; *High-Cost Universal Service Support*, WC Docket Nos. 10-90 & 05-337; GN Docket No. 09-51, at 41-54 (July 12, 2010) ("Connect America Fund NPRM Comments"); CTIA Connect America Fund NPRM Comments at 5-12; Qwest Connect America Fund NPRM Comments at 20-24; NECA, NTCA, OPASTCO, WTA and Rural Alliance Connect America Fund NPRM Joint Comments at 34-45.

[74] *See, e.g.*, Letter from Grant Spellmeyer, US Cellular, to Marlene Dortch, FCC, *A National Broadband Plan for Our Future*; *Implementing a Nationwide, Broadband, Interoperable Public Safety Network in the 700 MHz Band*, GN Docket No. 09-51, PS Docket No. 06-229; WC Docket No. 05-25; RM-11592; WT Docket No. 05-265 (Dec. 9, 2010); Letter from Rebecca Murphy Thompson, Rural Cellular Association, to Marlene Dortch, FCC, *Connect America Fund*; *A National Broadband Plan for Our Future*; *High-Cost Universal Service Support*, WC Docket Nos. 10-90 & 05-337; GN Docket No. 09-51 (Dec. 8, 2010).

funding will now be freed up for new USF priorities instead of being redistributed under existing voice support programs to other CETCs in the state.[75] With the right mechanisms now in place and procedural issues out of the way the Commission should adopt final rules and begin eliminating the remaining CETC support as soon as possible.

Specifically, the Commission can, and should, act now to first eliminate CETC support this year for multiple wireless handsets in the same household. *NPRM* ¶ 257. The National Broadband Plan recognized that "[i]n order to accelerate the phase-down of legacy support, the FCC could *immediately adopt a rule* that any wireless family plan should be treated as a single line for purposes of universal service funding." NBP at 148 (emphasis added). In 2010 dollars, over the next decade this approach could free up nearly $6 billion for new USF priorities. *Id*. The significance of potential new funding from eliminating duplicative support for multiple wireless handsets in the same household is also confirmed by the Commission's latest Wireless Competition Report, which found that "67 percent of all mobile wireless subscribers were part of a family plan in 2009, up from just 35 percent in 2004."[76] The Commission provided for notice and comment on eliminating duplicative family plan subsidies as an initial step (*i.e.,* in 2011) toward eliminating legacy CETC support last July. *Connect America Fund NPRM* ¶ 60 (citing National Broadband Plan recommendations to eliminate legacy CETC support, including an initial reduction to duplicative family plan support).

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[75] *High-Cost Universal Service Support; Federal-State Board on Universal Service,* Order, 25 FCC Rcd 18146, ¶ 5 (2010).

[76] *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993*; *Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services,* Fourteenth Report, 25 FCC Rcd 11407, ¶ 164 (2010). To simplify implementation of the initial reduction for family plan handsets the Commission could define these lines in the same way that they are identified in the Wireless Competition Report. *NPRM* ¶ 257.

The “initial reduction” to CETC support need not be tied to duplicative subsidies for family plan handsets if the Commission prefers a different approach. The Commission could, for example, eliminate 40 percent of the remaining legacy CETC funding before the end of 2011 (and phase out reductions to the remaining 60 percent of this support) over the next few years. This alternative approach would be consistent with the Commission’s implementing procedures for the Verizon Wireless and Sprint reductions. *Corr Order* ¶ 18 (retroactively implementing, in 2010, the 20 percent per-year Verizon Wireless and Sprint 2008 merger condition reductions—effectively reducing these carriers’ high cost USF support by 40 percent initially, followed by a phased reduction of remaining support).

After an initial reduction in legacy CETC funding before the end of 2011, the Commission should eliminate remaining support in equal percentage amounts over the next few years consistent with the procedures laid out in the *Corr Order*. *Id*. ¶¶ 14-17. The National Broadband Plan recommends that the Commission complete the phase-out within five years, by 2016. NBP at 144. As a practical matter, however, if the Commission moves promptly the CETC phase-out may be substantially complete well before then—thus freeing up more funding more quickly for broadband and/or intercarrier compensation reform.

VI. CONCLUSION.

For these reasons, the Commission should act immediately to set a national default rate of $0.0007 per minute for all VoIP traffic connecting with the PSTN that applies, regardless of jurisdiction, in the absence of a commercial agreement. The Commission should also adopt sensible new rules or rule changes discussed in these comments to address harmful traffic pumping schemes and phantom traffic concerns, and implement final rules to phase-out remaining CETC support.

Respectfully submitted,

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