

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

COMMENTS OF RURAL LEC SECTION XV GROUP

**BIG BEND TELEPHONE COMPANY
BRANTLEY TELEPHONE COMPANY
HILL COUNTRY TELEPHONE COOPERATIVE, INC.
HORRY TELEPHONE COOPERATIVE, INC.
INDUSTRY TELEPHONE COMPANY
MID-PLAINS RURAL TELEPHONE COOPERATIVE, INC.
PEMBROKE TELEPHONE COMPANY, INC
PINELAND TELEPHONE COOPERATIVE, INC.
RIVIERA TELEPHONE COMPANY, INC
SANDHILL TELEPHONE COOPERATIVE, INC.
WAVERLY HALL TELEPHONE COMPANY, LLC
WILKES TELECOMMUNICATIONS**

April 1, 2011

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EXECUTIVE SUMMARY

The undersigned rural local exchange carriers (“Commenters”) appreciate the Commission’s decision to address whether VoIP traffic is subject to the intercarrier compensation rules, and, if so, the applicable rate for such traffic. Each time the FCC crafts a different category of traffic subject to a different intercarrier compensation rate, it creates new opportunities for arbitrage and a race to find the lowest rate, regardless of whether the traffic truly meets the definition of the newly-established category. Commenters support the Commission’s efforts in implementing processes that will help reduce rate arbitrage and allow carriers to bill for traffic.

Commenters urge the Commission to reach the following conclusions in the short-term phase of ICC reform:

- Conclude that services utilizing VoIP technology are telecommunications services or, at a minimum, are to be treated as a telecommunications services for rating, routing, and interconnection purposes when traffic originating or terminating from such service is exchanged over the Public Switched Telephone Network.
- Adopt rules that require originating and transiting parties to provide accurate billing information in the call signaling such that terminating carriers can identify the originating party and assign proper jurisdiction for traffic based on the location of the originating and terminating parties for all traffic exchanged over the PSTN.
- Adopt rules and procedures to enforce Rural ILECs’ (“RLEC”) approved intrastate and interstate switched access tariffs for all interexchange traffic originated from or terminated to a RLEC regardless of whether or not the responsible party has negotiated a traffic exchange agreement.

The FCC should take the above actions before trying to make long-term reforms to intercarrier compensation and universal service. If the Commission wishes to make any sort of organized transition to a new intercarrier compensation mechanism in the long-run, whether it be bill-and-keep or at some unified rate (including Commercial Mobile Radio Service (“CMRS”)), the Commission must first eliminate the access avoidance schemes already prevalent and growing in the market. Further, without devising a cost-effective way for RLECs to recover intercarrier compensation from responsible parties, broadband networks in these rural service areas will wither.

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Come now, Big Bend Telephone Company, Brantley Telephone Company, Hill Country Telephone Cooperative, Inc., Horry Telephone Cooperative, Inc., Industry Telephone Company, Mid-Plains Rural Telephone Cooperative, Inc., Pembroke Telephone Company, Inc., Pineland

Telephone Cooperative, Inc., Riviera Telephone Company, Sandhill Telephone Cooperative, Inc., Waverly Hall Telephone Company, LLC, and Wilkes Telecommunications (“Commenters”) and file these comments in response to the Federal Communications Commission (“FCC” or “Commission”) Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking released February 9, 2011 seeking comment on proposed classification of Voice over Internet Protocol (“VoIP”) traffic and intercarrier compensation reforms intended to reduce artificial arbitrage opportunities.¹

I. INTRODUCTION

Commenters applaud the Commission’s willingness to recognize that arbitrage under the current intercarrier compensation mechanism has led to significant disruption in the telecommunications market and encourage the Commission to settle, once and for all, the proper regulatory treatment of VoIP traffic in addition to taking steps to reduce all forms of rate arbitrage. As discussed herein, the amount of uncompensated traffic terminating on the Public Switched Telephone Network (“PSTN”) today have reached a level such that the system of intercarrier compensation nears collapse. Rather than further encourage additional rate arbitrage by devising another new category of traffic subject to different rates (or subject to bill-and-keep), Commenters encourage the Commission to conclude that, under existing law, VoIP traffic that terminates on the PSTN is subject to the same intercarrier compensation obligations as all other voice traffic. Additionally, Commenters encourage the Commission to take action to end all forms of rate arbitrage by implementing mechanisms that will allow parties to accurately bill

¹ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Linkup*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011), (“USF-ICC Reform NRPM”).

responsible parties and, when responsible parties refuse to compensate rural local exchange carriers (“RLECs”) for the use of their network, to enable RLECs to take reasonably swift action to eliminate uncompensated traffic whether that be by issuing bills to the intermediary providers or by requiring the intermediary provider to discontinue transiting uncompensated traffic to RLEC networks.

II. VOIP TECHNOLOGY IS NOT A SEPARATELY IDENTIFIABLE SERVICE AND SHOULD NOT BE SUBJECT TO DIFFERENT RULES

IP technology is just another technology used within the PSTN. IP technology and the PSTN are not mutually exclusive. The PSTN is constantly changing and being upgraded just as switching has migrated from an operator-staffed switchboard, to a mechanical switch, to an electronic or digital switch, and now to IP or soft switches. The use of IP technology is just another step in the technological evolution of the PSTN. Eventually, all network elements within the United States communications system will be IP based. Clarifying that VoIP is a technology and not a specialized service will ensure that common carriage, non-discriminatory interconnection, and network security rules will continue to apply to the nation’s communications network.

A. VoIP is Functionally Equivalent to Other Voice Service

All voice transmissions start and end as analog calls. All VoIP is technically “IP in the middle.” Human beings do not converse in 0s and 1s – the language of digital transmission. Even if the telephone equipment on both ends of a call are completely digital, the voice signal must be converted from an analog voice input into digital components for transmission through the PSTN and then back into an analog signal to be heard by the party on the other end. Ever since the deployment of digital switching technology beginning in the 1980s, all voice traffic

undergoes a protocol conversion. The fact that analog voice is converted into an IP signal does not make it unique any more than the previous iteration of the PSTN converted the analog voice signal into a digital signal.

B. State Commissions Have Found that Fixed VoIP is a Telecommunications Service Under State Law

The Commission previously determined that some forms of VoIP are interstate because they are nomadic and therefore can not be easily jurisdictionalized. The Commission preempted state regulation of Vonage's VoIP because it "cannot be separated into interstate and intrastate communications."² The Commission then went on to exempt other VoIP providers from state regulations by stating that "to the extent other entities, such as cable companies, provide VoIP services, we would preempt state regulation to *an extent comparable* to what we have done in this Order."³ However, fixed VoIP is not comparable to the nomadic service and the jurisdiction of these calls can be determined as precisely as circuit switched calls are determined. The Commission has been silent on the regulatory status of fixed VoIP service. Absent a decision from the Commission, two states, Maine⁴, and Vermont⁵, have found that fixed VoIP service meets the state definition of a local exchange service.

² *In the Matter of Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, WC Docket No. 03-211, FCC 04-267, ¶ 1, (rel. Nov. 12, 2004).

³ *Id.* At ¶ 46.

⁴ State of Maine Public Utilities Commission Investigating into whether providers of Time Warner "Digital Phone" services and Comcast "Digital Voice" service must obtain certificate of Public Convenience and Necessity to offer telephone service Docket No. 2008-421 October 27, 2010 pg. 1, "We find that the voice over internet protocol (VoIP) services offered by Time Warner Cable Digital Phone L.L.C., (TWC) and Comcast IP Phone, L.L.C., (Comcast) are 'telephone services' under Maine law and are therefore subject to regulation by the Commission. We also find that these particular VoIP services are 'telecommunications services,' and not 'information services,' pursuant to 47 U.S.C. § 153, and that the Commission's authority to regulate these services has not been preempted by federal law."

⁵ State of Vermont Public Service Board Investigation into regulation of Voice over Internet Protocol ("VoIP") services Docket No. 7316 pg. 1, "the VoIP services presently offered in Vermont indeed fall within the statutory definition of a 'telecommunications service' under Vermont Law."

Fixed VoIP services, which are the overwhelming majority of VoIP services provided today, should not be artificially exempt from state regulation nor should the intercarrier compensation mechanism be any different than any other “like” service (i.e., local exchange service) because the end points of the voice transmission are known. The Commission should stop treating fixed VoIP as if it were nomadic VoIP, particularly when the overwhelming majority (an estimated 90 percent) of all VoIP is fixed. At a minimum, for purposes of intercarrier compensation, the Commission should allow the current intercarrier billing process to jurisdictionalize VoIP traffic in accordance with the Commission’s long-standing “end-to-end” analysis used for other telecommunications traffic.

C. State Commissions Have Found VoIP is Subject to the Same Intercarrier Compensation Obligations as Other Voice Services

Given the current vacuum caused by the absence of an FCC decision on the proper intercarrier compensation treatment for VoIP traffic, when state commissions have had to implement an intercarrier compensation mechanism for VoIP traffic in individual company arbitration proceedings, most, if not all, have ruled that VoIP traffic should be treated like any other telecommunications traffic under existing law.⁶ However, because the Commission has not

⁶ *E.g., Global NAPS, Inc. v. PUC of the State of California*, 624 F.3d 1225 (9th Cir. 2010) (affirming GNAPS obligation to pay over one million dollars in traffic termination charges), *In the Matter of Petition of CLEC Coalition for Arbitration Against Southwestern Bell Telephone, L.P. d/b/a SBC Kansas under Section 252(b)(1) of the Telecommunications Act of 1996*, Order No. 16: Commission Order on Phase II Intercarrier Compensation, Subloop and 911 Issues, Docket No. 05-BTKT-365-ARB et al. ¶ 33 and ¶¶ 30, 31, (July 18, 2005) (finding that the current state of federal law is that access charges apply to interexchange traffic, barring a specific exemption and the ESP exemption applies to information service providers, not to carriers that provide service to ESPs and other customers.), *TelCove Operations, Inc. Petition for Arbitration*, Arbitration Award, Case No. 04-1822-TP-ARB, p. 16, (Jan. 25, 2006) (finding that carriers are required to follow the existing rules and apply different rates based on traffic jurisdiction. As to the technologically neutral intercarrier compensation and trunking guiding principles, it has been clearly articulated by the FCC, in paragraph 61 of its IP-Enabled Services NPRM, that any service provider that sends traffic to the PSTN should be subject to similar compensation obligations, irrespective of whether the traffic originates on the PSTN, on an IP network, or on a cable network, and that the cost of the PSTN should be borne equitably among those that use it in similar ways...Accordingly, we find that ... for all types of traffic (PSTN-PSTN, PSTN-IP-PSTN, or IP-PSTN), the physical location of the calling and called party, to the extent it is known, is the deciding factor in the jurisdiction of the call for traffic routing and intercarrier compensation purposes.),

yet reached the same conclusion industry-wide, some carriers argue that the various state commission decisions apply only to the individual carriers involved in the company-specific arbitration proceedings and continue to use the “Enhanced Service Provider (‘ESP’) exemption” as a way to avoid their lawful intercarrier compensation obligations.

The only alternative afforded a RLEC is to pursue their own state arbitration cases or seek relief in court.⁷ Both avenues are extremely cost prohibitive given the volumes of traffic exchanged with individual carriers. Taken as a whole, the uncompensated minutes of use are significant, but when one considers that the minutes are coming from thirty or forty different providers, one realizes that each RLEC would have to participate in thirty or forty different arbitration cases in order to be compensated for all of the interexchange traffic passing through their networks. Further, every time a new provider enters the market, the RLEC would have to repeat the process because, of course, the new provider’s traffic would be “different” or because the previously-decided arbitration cases didn’t apply to it.

Illinois Bell Tel. Co. v. Global NAPs Illinois, Inc., Docket No. 08-0105, (ICC Feb. 11, 2009), at pp. 24, 44), (finding that the “exemption” on which Global would rely, is the FCC’s “enhanced service provider” exemption, which exempts ESPs, and only ESPs, from certain access charges. Once again, Global causes a mismatch of fact to law by asserting that, since 1983, the FCC has held that interstate access charges may not be applied to traffic that is delivered from ESPs...Even more to the point, the FCC’s exemption does not apply “to traffic that is delivered from ESPs.” Rather, it applies to ESPs themselves, exempting ESPs from certain interstate access charges. Global is a carrier, not an ESP, and hence the ESP exemption does not apply to Global, even if the customers of Global’s affiliates (and Global itself has no customers) were in fact ESPs. Thus, the ESP exemption offers Global no relief.), *Petition of UTEX Communications Corporation for Arbitration Pursuant to Section 252(b) of the Federal Telecommunications Act and PURA for Rates, Terms, and Conditions of Interconnection Agreement with Southwestern Bell Telephone Company*, Docket No. 26381, Arbitration Award, pp. 36-39 (very narrowly limiting the type of VoIP traffic that is exempt from access charges by finding that AT&T may assess access charges upon UTEX when all of the following conditions do not exist: (1) UTEX provides service to a customer that meets the FCC’s definition of an ESP, (2) the ESP customer elects to be treated as an ESP, (3) the ESP has a POP in the AT&T Texas local calling area in which the calling or called end user served by AT&T Texas is located, (4) the traffic is routed through that POP, and (5) the ESP provides an enhanced service during the specific communication (i.e., a service, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol, or similar aspects of the transmitted information; provide the subscriber additional, different, or restructured information; or involve subscriber interaction with stored information.)

⁷ Several carriers have gone to court to resolve billing disputes with mixed results. Some courts have ruled that VoIP traffic is subject to access charges while others have ruled that VoIP falls within the ESP exemption.

The Commission's failure to act on the current rate arbitrage and VoIP intercarrier compensation has started a death spiral of increasing access rates, further decreasing demand. This death spiral is caused as providers continue to route interexchange minutes of use through least cost (or no cost) routers in unlawful access avoidance schemes. As compensated minutes continue to decline, the cost of providing switched access services to paying providers has to be spread across a dwindling bucket of compensated minutes, increasing rates and further incentivizing providers to take steps to avoid RLEC access charges. If the Commission wishes to implement changes to intercarrier compensation and universal service reform in a thoughtful and meaningful way, it must first unify the treatment of all interexchange traffic in a technology-neutral manner. If the Commission introduces a new bill-and-keep compensation mechanism for VoIP traffic, providers will immediately move all of their traffic to the new VoIP compensation rate without waiting for the planned migration to a new intercarrier compensation structure. Rural LECs will have little or no transition period.

D. Service Utilizing VoIP is Mature and Should be Classified as a Telecommunications Service

VoIP technology is no longer a nascent technology deserving of special (*i.e.*, artificial) regulatory advantages. As the Commission recently reported, at the end of June 2010, approximately 23 percent of all wireline retail local telephone service customers receive service *via* VoIP technology.⁸ Between June 2009 and June 2010, interconnected VoIP subscriptions rose 21 percent, while subscriptions to traditional switched services dropped eight percent.⁹ As

⁸ See *Local Competition Report as of June 30, 2010*, p. 3. Table 1.

⁹ *Id.*, p. 2.

also shown in the FCC's recent Local Competition Report, nearly 90 percent of all VoIP service is fixed, non-nomadic service meaning that the originating and terminating points are known.¹⁰

To the extent that there truly are cost advantages and service improvements associated with retail telephone services provided using VoIP technologies, if the Commission classifies such service as telecommunications service subject to existing Title II regulatory obligations, the use of the technology will continue to expand. In fact, many Commenters either already use (or are deploying) VoIP technology and soft switches to provide retail telephone exchange service to customers throughout their service area under existing Title II rules and neither customers, other carriers, nor regulators are cognizant of these internal network changes. These Commenters' VoIP transmissions are treated just like their fiber-routed and copper-routed services, subject to the same set of federal and state rules and regulations. The VoIP technology is just another technology that allows voice service to be delivered to end users.

It is time for the Commission to put an end to the gamesmanship caused by the artificial distinction by clearly defining voice service delivered using IP technology as a telecommunications service, particularly when such traffic is exchanged over the PSTN. The Commission should level the playing field and let the market drive the technology used to provide telecommunications services instead of artificial regulatory classifications for services that are virtually, if not completely, indistinguishable to the public.

E. VoIP Traffic Cannot be Identified for Billing Purposes

Many carriers bill based on the information that is passed with the call signaling information. Currently there is no information in the call signaling that allows a carrier to determine if a call is originated in VoIP format or a circuit switched format. By the time the call

¹⁰ *Id.*, p. 7.

is handed over a circuit switched interface it looks exactly like any other circuit switched call. There is no standard for identifying a VoIP call based on information in the call signaling. Therefore there is no information in the call detail billing records indicating that the call was converted to an IP signal at some point between the originating customer's lips and the terminating customer's ear. Without this information, carriers have to rely on the originating party to disclose if the calls are VoIP. There is a significant financial incentive for carriers to identify traffic as VoIP if VoIP has a lower compensation rate than other voice traffic. If the Commission does set a different compensation rate for VoIP, all other intercarrier compensation will immediately be migrated to that new (assumedly lower rate) system because terminating carriers cannot measure VoIP as a unique call type.

F. Developing a Separate Rate for VoIP Traffic Would Establish Yet Another Opportunity for Rate Arbitrage

If the FCC establishes a bill-and-keep compensation program for VoIP traffic or orders a technology-specific rate that is lower than the standard rate applied to all other interexchange traffic, parties will undermine any coordinated intercarrier compensation reform efforts by immediately declaring that all (or a significant portion) of their traffic is VoIP. Intercarrier compensation is the third revenue leg supporting rural rate-of-return networks.¹¹ Given the relative number of access lines served by the RLECs, even significant local rate increases will not be able to make up the elimination of intercarrier compensation revenues.

Bill-and-keep only works in a situation where both parties are originating approximately the same number of minutes and both parties have roughly the same termination costs. In access avoidance situations where arbitragers' entire business plan is designed around disguising traffic

¹¹ The other two "legs" are local service revenues and universal service support.

in order to get a free ride, bill-and-keep does not work and rural network operators will be left with stranded investment while others use their networks for free.

If the Commission establishes a technology-specific rate and compensation mechanism for VoIP traffic as it did for Commercial Mobile Radio Service (“CMRS”) traffic, the Commission will simply further complicate intercarrier compensation and place the arbitragers in control of intercarrier compensation reform as they rush to the lowest rate. Any coordinated effort by the FCC to phase down or unify intercarrier compensation rates over some period of time will be thwarted as arbitragers immediately and unilaterally declare that all of their traffic is the “new” traffic subject to the lowest rates. By the time those providers who are playing by the rules are able to work through the complaint and/or arbitration process to prove that the arbitrager’s traffic is not really the “new” traffic at all and is therefore subject to the regular compensation mechanisms, years will have passed and any decision requiring the arbitrager to true-up compensation will likely be met with the ever-present bankruptcy filing and never paid. Meanwhile, those individuals who owned the old arbitrager and reaped years of profits disguising traffic before being shut down will set up a new traffic laundering scheme under a new name and the process begins anew.

III. PROVIDERS MUST PROVIDE ACCURATE INFORMATION TO BILL CALLS TO CURB ARBITRAGE

Rate arbitrage will occur as long as there is a disparity in rates between similar services. The Commission has recognized that “traffic lacking sufficient information to enable proper billing of intercarrier compensation charges is not consistent with the public interest and rules are needed to address this problem.”¹² Carriers must be required to provide all of the information

¹² See *USF-ICC Reform NRPM* at para. 624

required to bill a call in the calling records such that the other parties in the call path can properly bill the appropriate party. All providers (including VoIP providers or so-called “Enhanced Service Providers”) should be required to accept responsibility for any and all interexchange traffic that they exchange with a rural ILEC. The Commission has focused on the requirement for carriers to pass Calling Party Number (“CPN”) unaltered for the entire call path to insure proper billing. However, carriers not only need to know the originating party, there is also a requirement to know which carrier to bill, to clearly identify the jurisdiction of the call, and to have a carrier billing address. The Commission should require that the call record include the calling and called number, the calling and called Local Routing Number, and the billing OCN or CIC. In addition, all carriers involved in terminating the call would need a copy of the Access Service Request to obtain the address of the carrier to be billed. Finally, all of these call identifiers should comply with the ATIS industry standard for billing records (“MECOD”). As traffic migrates to IP the same information will be required to bill usage-based traffic. Most of the billing information is already included in the IP signaling but may not consistently map to a billing record. ATIS should be charged with developing the billing standard for usage-based IP billing.

A. Intermediate Providers Must Pass Accurate Information to Other Parties in the Call Path

AT&T sends transiting call records as a tandem or transiting provider for Competitive Local Exchange Carrier (“CLEC”) and CMRS traffic to the Commenters with a Charge Number (“CN”) in the CPN signaling field such that jurisdictionalizing the call based on CPN is impossible if one were to utilize calling/called NPA-NXXs as a proxy to identify the end points of a call. When Commenters look at the call detail records for these calls, all of the calls appear to have originated from the same telephone number. While this allows the terminating party to

identify the carrier who handed the call to AT&T, it does not allow the terminating party to properly jurisdictionalize the traffic nor does it identify the carrier who originated the call.

Intermediate providers, both tandem providers and numbering partners, must be required to pass along accurate billing information such that downstream parties are not only able to identify the originating party, but are able to accurately assign jurisdiction to the traffic. Where the intermediate provider is unable to provide this information, they should be responsible for compensating downstream parties just as the FCC determined that telecommunications providers who partner with third-party interconnected VoIP providers are responsible for all traffic that their wholesale VoIP provider customers pass through the network.¹³

In a tandem/transit situation, the relationship is very similar to that between an interconnected VoIP provider and their wholesale numbering partner in that the relationship allows the wholesale customer (VoIP provider) to pass traffic to other parties connected to the PSTN. The numbering partner (typically a CLEC) is compensated for this wholesale service through a contractual relationship with its customer. In a tandem/transit situation, the tandem/transit service provider also has a contractual relationship providing wholesale services with the interconnected party that typically allows for the transit/tandem provider to recover its tandem/transit costs. To the extent the tandem/transit service provider does not receive the accurate information from the interconnected party, the tandem/transit service provider is best suited to resolve the problem due to the direct interconnection arrangement. In many cases, the tandem/transit service provider even has included indemnity language in the interconnection

¹³ See *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Service to VoIP Providers*, WC Docket No. 06-55, DA 07-709, Memorandum Opinion and Order (“*Time Warner Order*”) at ¶ 17, (rel. Mar. 1, 2011) finding that “the wholesale telecommunications carriers have assumed responsibility for compensating the incumbent LEC for the termination of traffic under a section 251 arrangement between those two parties. We make such an arrangement an explicit condition to the section 251 rights provided herein.”

agreement with the interconnected party that allows the tandem/transit service provider to recoup third-party charges associated with the interconnected party's traffic.¹⁴ As such, even if the tandem/transit service provider were held financially responsible for the interconnected party's traffic, it could recover those costs from the responsible party.

If the Commission elects not to hold the intermediate provider financially responsible for all of its wholesale customers' traffic, at a minimum, the FCC should provide a mechanism that will allow RLECs to "disconnect" the originating party similar to what is allowed for interexchange carriers ("IXCs") under existing access tariffs. IXCs are not allowed to refuse to pay their bills for lawful charges in perpetuity. After a few months of falling behind in their payments, ILECs are allowed to initiate termination of service procedures spelled out in federal and state access tariffs. If the IXC refuses to pay, service is disconnected until payment is rendered. The Commission should require intermediate service providers to implement a mechanism that will allow RLECs to require the intermediate service provider to block traffic from parties that refuse to accept financial responsibility for the traffic they pass to the RLECs after some reasonable period of notice.

B. Interconnection

The Commenters currently do not have the right to request interconnection from CLECs. Even when traffic can be identified to a particular CLEC, if there is not an interconnection agreement, the CLEC often refuses to pay rightfully billed calls. Without the explicit right to request negotiation, the Commenters have no recourse with the CLEC. The FCC extended the

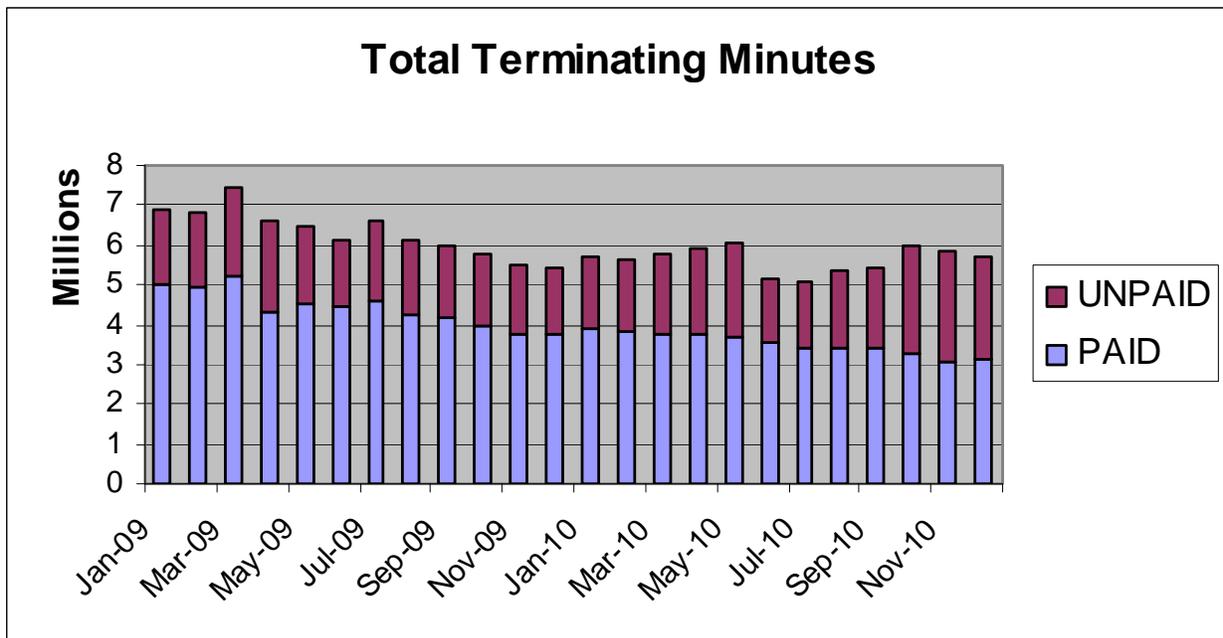
¹⁴ See Attachment 2, Section 6.1.6 of AT&T-21 State Agreement at <https://clec.att.com/clec/shell.cfm?section=115> providing that "In the event that traffic exchanged with a Third Party with whom CLEC does not have a traffic compensation agreement, CLEC will indemnify, defend, and hold harmless AT&T-21 STATE against any and all losses including, without limitation, charges levied by such Third Party."

rights for ILECs to request interconnection to CMRS carriers in the *T-Mobile Order*.¹⁵ The FCC should extend the same rights to ILECs to request interconnection from CLECs.

IV. RATE ARBITRAGE AND UNIDENTIFIED TRAFFIC IS A SIGNIFICANT PORTION OF THE TERMINATING TRAFFIC

Figure 1 below shows the level of compensated and uncompensated traffic terminating on the networks of the Texas Commenters (a subset of the undersigned carriers). These data are based on call records provided by either the transiting provider or the Commenters' own terminating records.

FIGURE 1



¹⁵ See *Developing a Unified Inter-carrier Compensation Regime* and *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, FCC 05-42, Declaratory Ruling and Report and Order at (rel. Feb. 24, 2005), (“T-Mobile Order”).

As shown by these data, almost a third of the traffic terminating to the Texas Commenters is unpaid. The percentage of terminating traffic that is unpaid has increased from 26 percent to 45 percent over the two year period.

It is important to point out that the overwhelming majority of paid traffic identified above is IXC Terminating Traffic, as shown in Figure 5 below. In fact, virtually all IXC Terminating Traffic is compensated. Given that the Commenters have the ability to disconnect service to IXCs who fail to pay for traffic, one should not be surprised that IXC usage is fairly uniformly compensated. Unfortunately, as demonstrated above, while overall terminating usage has declined somewhat due in large part to access line loss, the rate of decline in paid traffic has declined sharply while the rise in unpaid traffic is almost equally sharp. The likely explanation is that IXCs or VoIP carriers are finding ways to move their traffic from the compensated category into the uncompensated category by handing their traffic to nefarious least cost routers who pass traffic to interconnected CLECs or CMRS providers who then transit the traffic through a transit/tandem provider and either disguise the traffic, call the traffic local or just avoid compensating terminating parties through various methods, discussed below.

A. Examples of Self-Help Already Occurring

1. GNAPs

Examples of self-help have been ongoing for several years. One of the most notable carriers that has refused to pay intercarrier compensation for traffic it terminates to the PSTN is Global NAPs (“GNAPs”). GNAPs has been involved in multiple disputes which have been debated before multiple state utility commissions and courts in several states. An example of one of these protracted disputes was between GNAPs and a group of RLECs in Georgia (“GA RLECs”). This dispute began in 2004 and was not concluded until 2009 when GNAPs’ traffic

was ultimately shut off.¹⁶ The five GA RLECs that were a part of the dispute had outstanding switched access charges to GNAPs that was in excess of \$1.1 Million for just 36 months of the disputed invoices (the 1.1 Million represents 6.4 percent of the total access revenue of the carriers over the same period). This does not take into account the added time and expense the RLECs had to incur in order to argue their case before the Georgia Public Service Commission (“GA PSC”). This underscores the importance of the FCC making a definitive decision regarding VoIP traffic that terminates to the PSTN being subject to the same intercarrier compensation rules as traditional voice traffic.

The only reason GNAPs’ traffic was stopped was not because the GA RLECs won the case at the GA PSC, but rather because GNAPs was also in a dispute with BellSouth and the interconnection agreement between the parties allowed BellSouth to shut down GNAPs interconnection trunks and thus the traffic to BellSouth and any provider that subtended BellSouth tandems such as the GA RLECs. This dispute was also long and drawn out and had to ultimately go to a district court in North Carolina before it was finalized.

GNAPs, like many VoIP carriers, argued that the GA PSC lacked jurisdiction, under state and federal law, to impose access charges for the traffic subject to dispute. In addition, GNAPs claimed that the traffic terminated by the RLECs was from ESPs and that the FCC also has consistently held that access charges may not be applied to traffic that is delivered from ESPs. The RLECs were able to provide data that showed that most of the calls were not from ESPs but instead originated from the PSTN network by ILECs, CLECs and wireless providers. The GA

¹⁶ Docket No. 21905, (Georgia Public Service Commission), *In Re: Request for Expedited Declaratory Ruling as to the Applicability of the Intrastate Access Tariffs of Blue Ridge Telephone Company, Citizens Telephone Company, Plant Telephone Company, and Waverly Hall Telephone LLC to the Traffic Delivered to Them by Global NAPs, Inc.*, Order Adopting in Part and Modifying in Part the Hearing Officer’s Initial Decision, (rel. July 21, 2009).

PSC found that GNAPs did not make a showing that the subject traffic was ESP. Instead, GNAPs merely presented unsubstantiated claims regarding the nature of the traffic.

GNAPs had other well-documented disputes nationwide where it claimed its traffic was all subject to the ESP exemption and when it was ordered to pay the terminating carrier, the traffic just disappeared and GNAPs continued to fight in the courts to not pay the terminating carrier.

2. Halo Wireless

A more recent example of this self-help remedy is where Commenters are involved in disputes with Halo Wireless (“Halo”), a provider that claims to provide CMRS over a mobile broadband network that “is now available in Tyler, Brenham, and Pleasanton, Texas.”¹⁷ However, despite this provider’s rural service area in East Texas, it is terminating large amounts of traffic throughout the United States. When a rural ILEC tries to invoke its right to request interconnection under 47 C.F.R. § 20.11(e) and to bill Halo at the FCC-authorized interim reciprocal compensation rate for CMRS providers,¹⁸ Halo refuses to pay the charges.

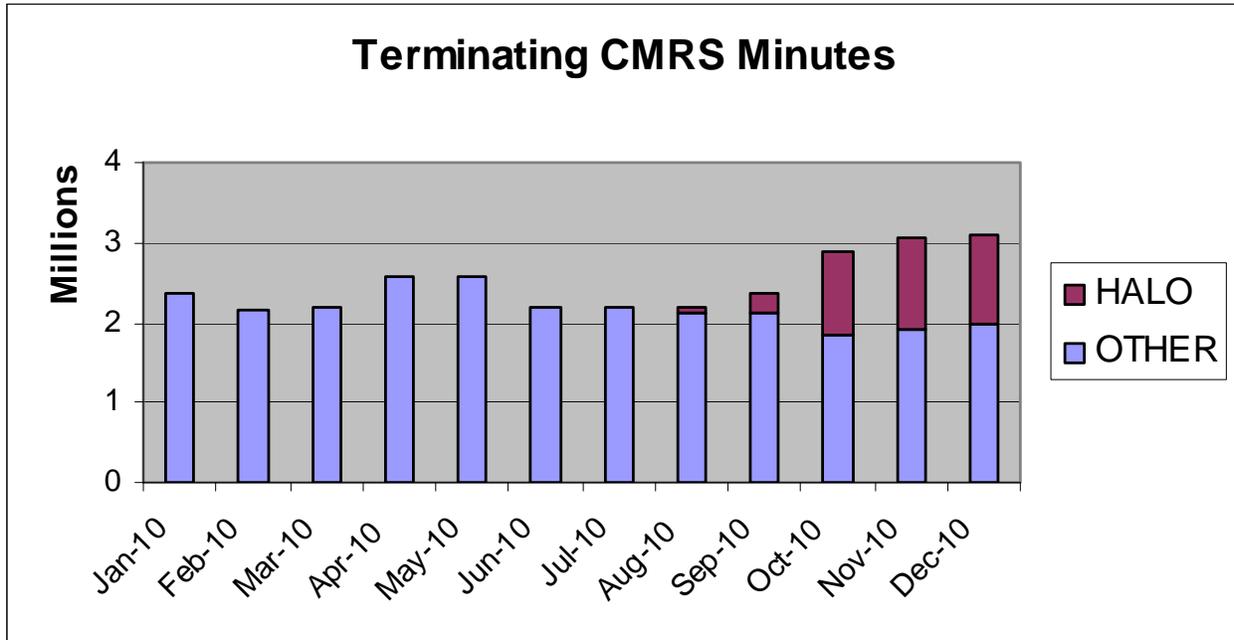
The minutes of use that Halo terminates through the PSTN first appeared in the summer of 2010, but have increased dramatically. The following table and graph shows the level of uncompensated traffic coming from Halo and terminating to the Commenters located in Texas. However, all of the Commenters, many of which are located in Georgia, North Carolina, and South Carolina are receiving significant levels of traffic from Halo. Roughly one-third of all wireless minutes of use terminating to Texas Commenters’ networks originate from Halo. However, it is important to note that for some individual Texas Commenters, Halo is originating

¹⁷ See <http://www.halowireless.com/coverage/index.jsp>.

¹⁸ See *T-Mobile Order* at para. 16.

more minutes of use than all other wireless providers combined including the large national wireless providers.

FIGURE 2



The traffic is all one-way, originating from Halo and terminating to the Commenters, very uncharacteristic of typical CMRS traffic, leading one to believe that not all (if any) of the traffic really comes from Halo’s end user customers subscribing to Commercial Mobile Radio Service within its service area in rural East Texas. All of the Commenters face the difficult decision of either pursuing very expensive, time-consuming, company-specific arbitrations or complaint cases against Halo in multiple states or accepting the default bill-and-keep compensation mechanism that Halo has forced upon the Commenters by simply refusing to pay the FCC’s interim rates. Even if RLECs pursue an arbitration/complaint case against Halo and a few years into the future Halo is ultimately ordered to compensate Commenters at reasonable rates reflective of the cost of providing service to customers in sparsely-populated rural service

areas, Commenters suspect that Halo will simply evaporate like GNAPs did after it was ordered to pay millions in settlements for traffic it claimed was “special.”

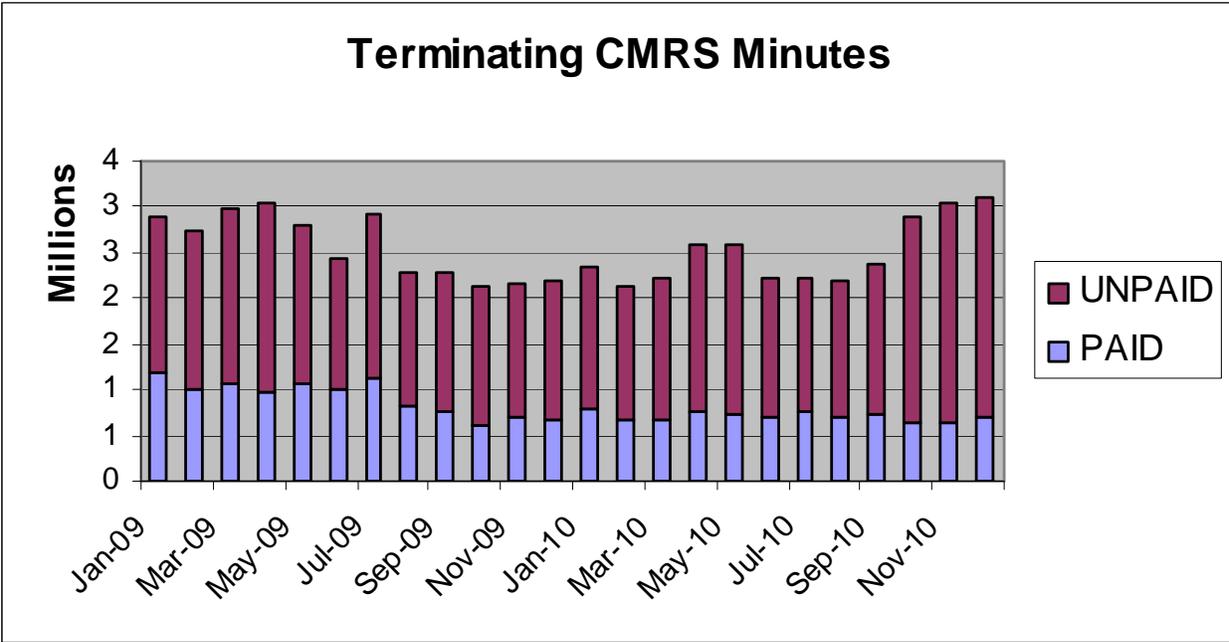
B. Dumping Traffic on Feature Group C Trunks

Providers are already looking for ways to avoid compensating RLECs for terminating traffic. As shown in Figure 1, above, the minutes of use for which Texas Commenters receive compensation has declined significantly over the last two years, while uncompensated traffic has increased. Overall, approximately half of all minutes terminating on Texas Commenters’ networks are currently uncompensated.

Broken out by type of service provider, it is clear that most of the uncompensated terminating minutes originate from wireless providers. While the FCC has authorized RLECs to initiate interconnection requests to wireless providers, voluntary negotiations have not been fruitful in large part because large wireless providers are unwilling to pay rates that reflect the cost of providing service in sparsely-populated rural service areas or, if they are willing to accept that rural costs differ significantly from urban areas, they insist on originating/terminating traffic factors that effectively eliminate their financial liability for using rural networks.

Figure 3 identifies all compensated and uncompensated wireless minutes of use terminating on the Commenters’ networks in Texas.

FIGURE 3

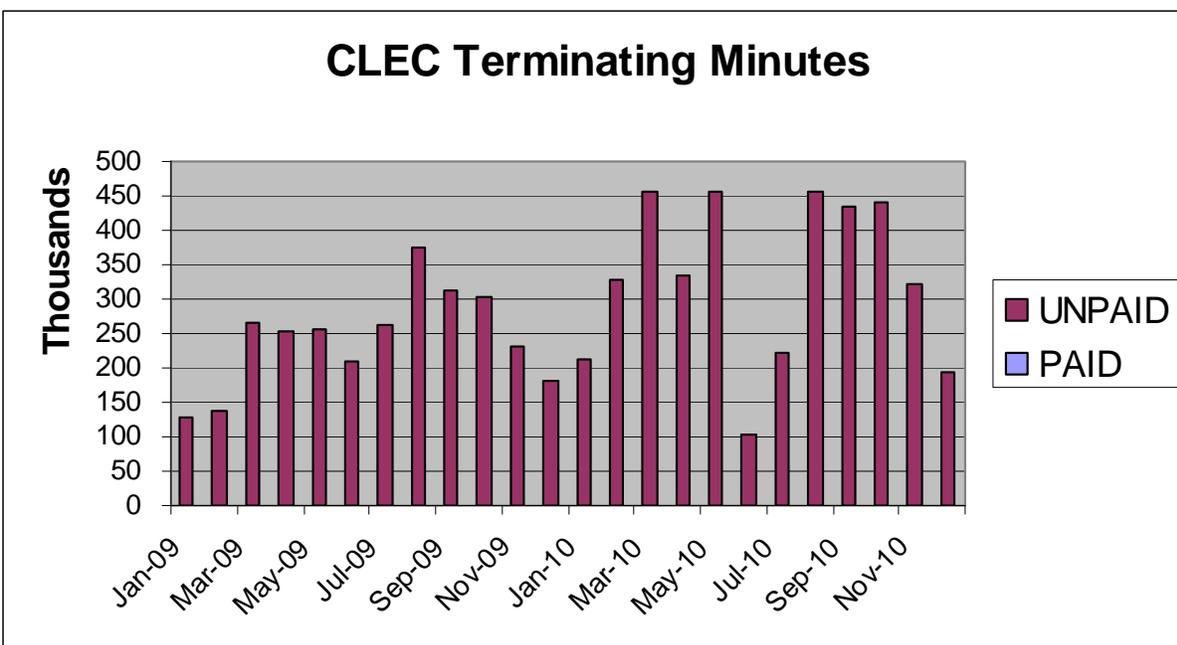


However, wireless providers are not the only providers getting a free ride on the PSTN. While traffic coming from CLECs has not been as significant as that originating from wireless providers, CLECs also send significant traffic to Commenters’ networks in Texas. It is interesting to note that a significant portion of the traffic (*i.e.*, more than half) comes from one provider, UTEX Communications, Inc., a known arbitrager, but that usage is starting to decline, as the Texas Commission’s decision requiring UTEX to pay \$3,777,388.56 to AT&T Texas for the traffic through September 2007 that UTEX claimed was VoIP traffic is being implemented after a very lengthy four-year contract dispute proceeding.¹⁹ It is important to note that this four-year proceeding was not a complicated arbitration case where the Texas Commission had to develop new interconnection agreement language. The arbitration was a simple contract dispute but, because the FCC had failed to make any determinations about the proper intercarrier

¹⁹ See *Petition of UTEX Communications Corporation for Post-Interconnection Dispute Resolution with AT&T Texas and Petition of AT&T Texas for Post-Interconnection Dispute Resolution with UTEX Communications Corporation*, Docket No. 33323, Order on Reconsideration of Arbitration Award, (rel. Feb. 12, 2010).

compensation treatment of VoIP traffic, UTEX was able to twist the ESP exemption in its favor in an effort to avoid intercarrier compensation obligations while the case was pending. Not surprisingly, a few months after the Texas Commission’s decision was released, UTEX filed for Chapter 11 bankruptcy protection, but not before sending significant levels of arbitrage traffic through Texas Commenters’ areas and, as UTEX minutes declined over the final months of 2010, Halo’s minutes increased and the never-ending process starts over.

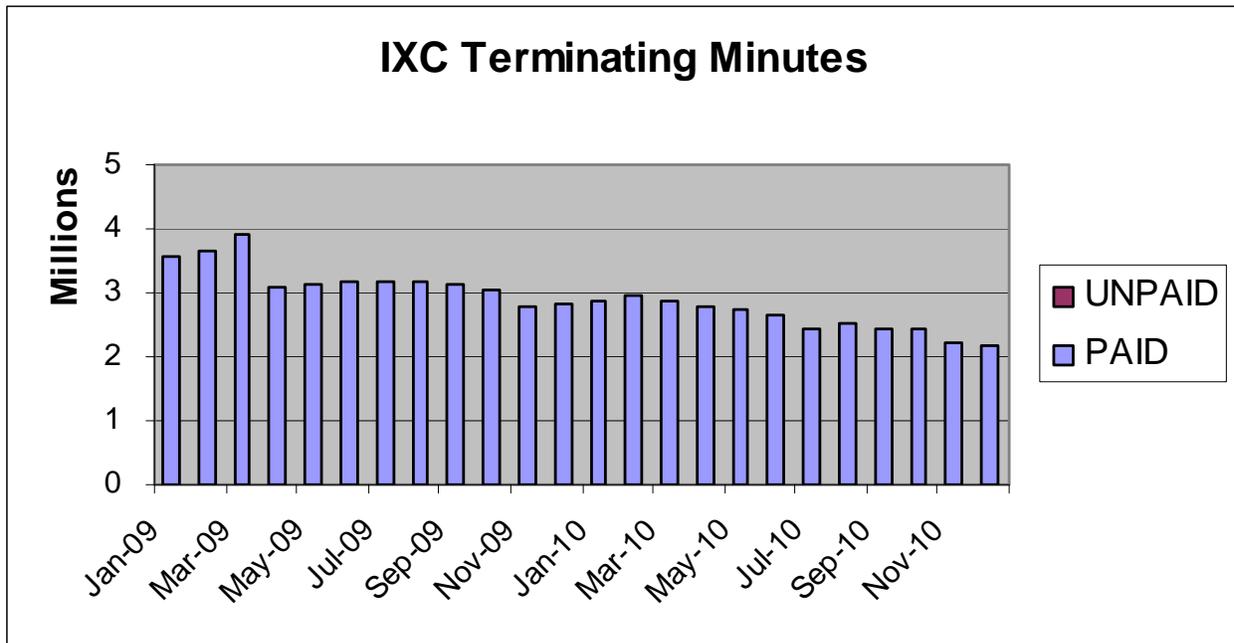
FIGURE 4



The uncompensated minutes of use terminating on Texas Commenters’ networks are not really new minutes of use. Instead, they are minutes of use that were once compensated minutes. As unregulated least-cost-routing middle-men buy and sell minutes like commodities on a black market, minutes that were once compensated decline significantly. As shown in Figure 5 below, compensated IXC minutes of use terminating to RLEC networks in Texas has nearly been reduced to half of what they once were merely two years ago. As those compensated minutes decline and the cost of providing switched access services has to be spread across fewer and

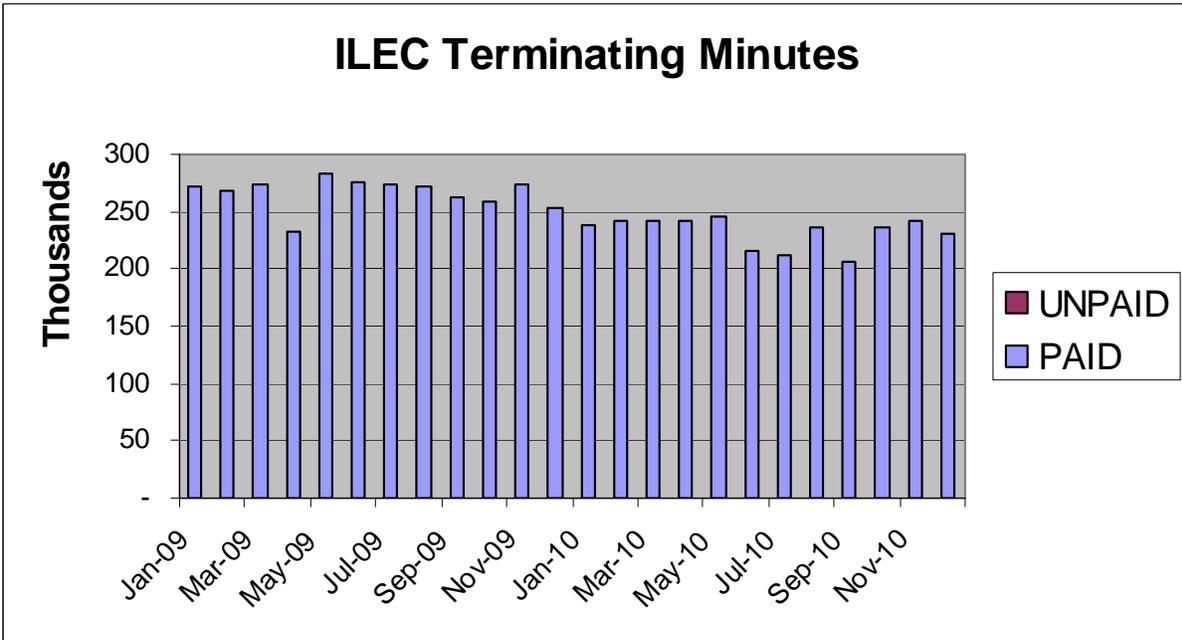
fewer minutes of use in the National Exchange Carrier Association’s (“NECA’s”) interstate traffic-sensitive pool, the cost per minute of use is artificially driven up, increasing the incentive to avoid intercarrier compensation obligations in the future.

FIGURE 5



In order to provide a complete picture, Texas Commenters have compiled data shown in figure 6 displaying terminating minutes of use that come from other ILECs in Texas. All ILECs in Texas continue to provide intraLATA toll service to their customers, though most have already moved their intraLATA toll service to an IXC. However, the graph below shows intraLATA toll that the Texas Commenters have received from other ILECs. Virtually all of the minutes are paid and, over the 2009–2010 period, while there has been some reduction in terminating usage consistent with access line loss, other ILEC terminating usage has been relatively flat.

FIGURE 6



C. Small Rural ILECs Have Little Recourse

The FCC has affirmed that all carriers are prohibited from blocking traffic.²⁰ Additionally, as discussed above, small RLECs have few resources to pursue company-specific carrier-to-carrier arbitration cases with dozens of providers who refuse to pay for the traffic that they terminate on the PSTN and, even if they did, state commissions would be swamped and unable to handle the caseload. While the overall level of uncompensated traffic is significant, that traffic is coming from dozens of providers and, even if arbitrations are awarded such that one carrier is ordered to compensate RLECs for the use of their networks, the worst offenders would simply create another arbitrage company and move the traffic to the new entity while the RLECs would have to start the whole process over again at considerable expense.

²⁰ See *Establishing Just and Reasonable rates for local exchange carriers call blocking by Carriers*, WC Docket No. 07-135 at 6, (rel. June 28, 2007) finding that “Commission precedent provides that no carriers, including interexchange carriers, may block, choke, reduce or restrict traffic in any way.”

When the tandem/transit provider fails to provide accurate call records by substituting a Billing Number in the place of the Calling Party Number, terminating providers have no recourse for the lost revenue. If the FCC would order the tandem/transit provider to pay the highest possible rate for improperly identified traffic, the intermediate provider would have a financial incentive to make sure that their agreements with all connecting parties include receiving all the appropriate signaling information for billing, and appropriate records are passed to the terminating parties in the call path.

V. RECOMMENDATION

Commenters support the Commission confirming that, under existing law, originating and terminating VoIP traffic is subject to the same intercarrier compensation obligations as any other traffic on the PSTN. Commenters believe that the Commission should achieve the above result by recognizing that VoIP is no longer a nascent technology deserving of “special” treatment and declaring VoIP as a telecommunications service, subject to Title II regulation. Alternatively, Commenters support the Commission concluding that, for rating, routing, and interconnection purposes, VoIP services are to be treated as telecommunications services.

Additionally, Commenters support the adoption of rules requiring originating and transiting carriers to provide accurate call signaling information such that terminating carriers can identify both the originating party and proper jurisdiction and have the information to send a bill to the responsible carrier. The Commission should also require carriers to pay tariffed intrastate and interstate access rates for all non-local interexchange traffic exchanged with an RLEC regardless of whether or not the carrier has negotiated an interconnection agreement. This

last point is important if the Commission is interested in eliminating arbitrage opportunities and providing long-term intercarrier compensation and universal service reform.

The Commission should also confirm that all carriers have a right to request interconnection with other providers similar to what the Commission extended to CMRS providers under the *T-Mobile Order*.

The FCC should create incentives for all providers to comply with the rules by clarifying that the misrouting of traffic to avoid intercarrier compensation obligations is an unreasonable practice under the Act and that injured parties are entitled to seek damages under Sections 206 – 208 of the Act, including, but not limited to, the cost of prosecution.

Respectfully submitted,

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