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
	)	

REPLY COMMENTS OF XO COMMUNICATIONS, LLC

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REPLY COMMENTS OF XO COMMUNICATIONS, LLC

XO Communications, LLC ("XO") hereby files its reply to the initial comments submitted in the above-referenced dockets on April 1, 2011 regarding the intercarrier compensation framework that should be applied to Voice-over-Internet Protocol ("VoIP") traffic.[1] XO also is filing companion comments in these proceedings today under separate cover

[1] XO filed initial comments regarding this topic as well as phantom traffic rules and access stimulation regulation on April 1, 2011. Comments of XO Communalizations, LLC, WC Docket No. 10-90 (April 1, 2011) ("XO Comments"). These reply comments focus solely on VoIP traffic interim compensation issues; however, XO urges the Commission to move forward with its interim proposals to resolve phantom traffic and access stimulation issues.

As discussed more fully below, these reply comments, like XO's initial comments, when referring to "VoIP," include IP-enabled originating and terminating services that are connected to the Public Switched Telephone Network ("PSTN") generally, but do not include so-called "IP in the middle," which was addressed in the Commission's *AT&T IP-in-the-Middle Order*. *See, Petition for Declaratory Ruling that AT&T's Phone-to-*

that address issues raised in the *Notice* concerning long-term Universal Service Fund ("USF") and intercarrier compensation reform.

Introduction and Summary

The initial comments filed herein make one thing abundantly clear – the Commission has never specified the intercarrier compensation rate that should be applied to the origination and termination of VoIP traffic within the broader regulatory framework of the Commission. Accordingly, carriers have been left to self-determine the character of VoIP traffic. Relying on the current rule that traffic entailing a net protocol conversion is "enhanced," most providers have elected to route VoIP traffic over local trunks for termination at reciprocal compensation rates. Other providers have chosen to deliver VoIP traffic over interexchange trunks for completion at switched access rates. While either choice could be valid in the absence of an FCC-mandated compensation framework that focuses on VoIP traffic, commenters universally agreed that it is time for the Commission to resolve the issue by specifying the intercarrier compensation rate to be applied on a going-forward basis.

Not surprisingly, however, commenters disagreed sharply regarding which intercarrier compensation rate should apply to VoIP traffic. Some VoIP providers urged the Commission to permit them to terminate their traffic for free, subject to so-called "bill-and-keep" arrangements. While XO agrees that a bill-and-keep framework can be desirable when the traffic exchanged between carriers is reasonably balanced, the Commission cannot presume a traffic balance. Thus, a default rate must be specified for use when the traffic exchanged is not in balance, particularly when VoIP traffic is exchanged via TDM-based interconnection arrangements.

Phone IP Telephony Services Are Exempt from Access Charges, 19 FCC Rcd 7457 (2004) ("*AT&T IP-in-the-Middle Order*").

Mandatory use of a bill-and-keep system when traffic is imbalanced would deny terminating Local Exchange Carriers ("LECs") the ability to recover their reasonable cost of service in contravention of the requirements of Section 252 of the Communications Act (the "Act").

On the other hand, a group of LEC commenters urged the Commission to grant them a new revenue opportunity by permitting them to bill switched access charges for the termination of VoIP traffic. Since access charges continue to be priced far above the actual cost of service, these LECs effectively are asking the Commission to create new subsidies for LEC operations. It is important to realize that expansion of the access charge system to cover VoIP services would represent a *new* source of LEC revenues since a substantial portion of VoIP traffic currently is delivered over local trunks for termination at cost-based reciprocal compensation rates. Thus, applying access charges to VoIP traffic would represent an undeserved profit-enhancement windfall for LECs – and the resulting intercarrier compensation rate increase imposed on providers and their customers would be antithetical to a main objective of this proceeding, namely, the reduction of intercarrier compensation costs.

The best choice is for the Commission to specify that the reciprocal compensation rate applies to VoIP traffic when service providers properly identify the traffic. Since a substantial portion of VoIP traffic already is delivered over local trunks, applying the reciprocal compensation rate is the option that most closely preserves the *status quo.* More importantly, applying the reciprocal compensation rate represents the reasonable middle-ground in this debate. The reciprocal compensation rate permits terminating LECs to recover their reasonable costs of service (plus a reasonable profit) without over-charging for delivery of VoIP traffic by collecting subsidy-laden access charges. Since the reciprocal compensation rate is the only alternative that is based on the actual cost of service, it is also the option that is least prone to arbitrage. Notably, the Commission can apply the reciprocal compensation rate simply by classifying VoIP generally as "telecommunications," as it has already done in the case of interconnected VoIP, and without deciding the more thorny issue of whether VoIP constitutes a "telecommunications service" or an "information service."

Finally, it is critical that the Commission make clear that its decision will be effective only *prospectively*. Since the Commission has steadfastly refused to specify an intercarrier compensation arrangement for VoIP traffic in the past, its decision herein effectively amounts to a modification of its existing rules. Indeed, since service providers have sought Commission guidance on this topic without success for more than a decade, it would be a manifest injustice to apply any decision retroactively at this point. Accordingly, XO respectfully requests that the Commission make clear that LECs are entitled to bill the reciprocal compensation rate prospectively when originating or terminating VoIP traffic that is identified as such by other service providers.

I. REFORM INTENDED TO REDUCE INTERCARRIER COMPENSATION CHARGES SHOULD NOT BEGIN BY INCREASING RATES PAID BY VOIP PROVIDERS.

The initial comments reflect the desire of many LECs to go "back to the future." In a proceeding where access charge reduction and promotion of broadband development are the main objectives, they propose to increase the intercarrier compensation rates paid by innovative VoIP providers. They suggest that VoIP traffic, which is now often terminated at reciprocal compensation rates, in the future be subject to switched access charges that are several times higher. These LECs apparently are in a state of denial about the direction that the industry is heading – the Commission should disregard their plea to remain stuck in the past, and get on with the job of serious intercarrier compensation reform.

A. **<u>Access Charges Are Not Paid for Termination of Most VoIP Traffic Today</u>.**

The record is clear that there has been substantial confusion over what intercarrier compensation rate should be applied to the termination of VoIP traffic.[2] Some providers route VoIP traffic over switched access trunks for termination at switched access rates.[3] However, as the comments indicate, most providers believe that their VoIP traffic is exempt from access charge assessment and have routed that traffic over local trunks for termination at much lower reciprocal compensation rates or have disputed the billing of access charges even when their VoIP traffic is delivered over switched access trunks.[4] While some LECs have contested the claims that VoIP traffic is exempt from access charge assessment, many courts have sustained this position, and providers have continued to routinely dispute LEC attempts to collect access charges on VoIP traffic.[5] Indeed, LEC commenters in this proceeding have complained that they have "lost" substantial access charge revenue because VoIP providers have engaged in "self help" by refusing to pay access charges,[6] making it clear that the predominant *status quo* for VoIP traffic is that providers terminate VoIP traffic at or near reciprocal compensation rates.

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2 *See,* Comments of Verizon and Verizon Wireless, WC Docket No. 10-90, at 8 (April 1, 2011) ("Verizon Comments") ("The Commission…has never determined 'the appropriate compensation framework' for VoIP traffic…In particular, the Commission has not yet decided whether legacy intercarrier compensation rules – such as tariffed switched access charges – apply to VoIP traffic.")

3 *See generally,* Comments of AT&T Inc., WC Docket No. 10-90, at 26 (April 1, 2011) ("AT&T Comments").

4 *See* Comments of the Voice on the Net Coalition, WC Docket No. 10-90, at 4 (April 1, 2011) ("VON Comments") (stating that imposing access charges would require VoIP providers to pay access charges "for the first time.")

5 *PAETEC Communications v. CommPartners, LLC,* 2010 WL 1767193, *3 (D.D.C., Feb. 18, 2010).

6 Comments of the Independent Telephone & Telecommunications Alliance on Intercarrier Compensation Arbitrage Issues, WC Docket No. 10-90, at 3-4 & 17-18 (April 1, 2011) ("ITTA Comments"); Comments of the National Exchange Carrier Association, et. al, WC Docket No. 10-90, at 6-7 (April 1, 2011) ("NECA Comments"); Comments of Windstream Communications, Inc., WC Docket No. 10-90, at 3-5 (April 1, 2011) ("Windstream Comments").

Thus, the reality is that a Commission decision to impose access charges on VoIP traffic now would actually increase the intercarrier compensation charges applied to most VoIP traffic several times over. That would be a strange result, especially, in an expedited proceeding intended to reduce intercarrier compensation burdens and facilitate the growth of innovative new broadband services. Indeed, in a perverse twist, applying access charges to VoIP traffic would permit LECs to raise intercarrier compensation rates substantially on VoIP providers and their customers. This would result in an undeserved new revenue windfall for terminating LECs – "undeserved" because the rate increase is totally unrelated to the cost of providing the service and constitutes almost entirely additional profit margin. Ironically, some LECs try to justify such avarice by claiming that the additional monies – taken from broadband services – can be used for the development of broadband facilities, but they ignore both that the Connect America Fund ("CAF") is being established to subsidize that expense and that many of the same LECs already are using excess cash to pay outsized dividends to shareholders.[7]

B. Establishing a "VoIP Only" Rate Ends Uncertainty and Uneconomic Arbitrage, Not Creates Them.

XO and others have suggested that, as an interim measure, VoIP traffic be made subject to its own cost-based intercarrier compensation rate.[8] LECs that want to collect access charges on VoIP traffic contend that charging disparate rates for the termination of VoIP traffic and TDM-based voice calling would create undesirable confusion. *First*, they claim that applying a VoIP-specific rate would create confusion, since the termination of VoIP and

7 *See* Comments of CenturyLink, WC Docket No. 10-90, at 6-11 (April 1, 2011) ("CenturyLink Comments"). CenturyLink, Windstream and Frontier, for example, pay annual dividends ranging from 7.2 to 9.4 percent.

8 XO Comments at 31-34; Verizon Comments at 15-19.

traditional interexchange traffic would need to be billed at different rates.[9] That concern is simply unwarranted, provided that a VoIP-specific rate is properly implemented. Interexchange, local and wireless traffic all are terminated at different rates today. The key is to make sure that traffic is delivered by the originating (or intermediate) carrier to the terminating LEC in a manner that permits accurate billing. XO offered a framework in its initial comments filed herein that would accomplish that,[10] including the Commission requiring accurate identification of VoIP traffic in conjunction with adoption of its phantom traffic proposal. Indeed, since most confusion today results from disagreements over what rate applies to VoIP traffic, establishing a VoIP-specific rate actually puts an immediate end to most VoIP termination-related disputes and considerable marketplace uncertainty.

Second, some LECs argue that creation of a VoIP-specific rate would introduce a new opportunity for arbitrage by enabling long distance carriers to originate traffic in IP rather than TDM to avoid high access charges.[11] However, arbitrage is only undesirable if it is "uneconomic" arbitrage. In this case, the choice would be for carriers to reap the benefit of substituting new, forward-looking broadband technology for antiquated circuit-switched transmission by paying reasonably cost-based termination charges. The so-called "arbitrage" actually is an incentive to invest in more efficient and capable technology. Indeed, the true economic harm would result from now making VoIP traffic subject to access charge assessment, as the deployment of VoIP services would be impeded significantly by the requirement that VoIP providers subsidize the inefficient operation of their competitors. Applying the legacy access

9 *See* Comments of Frontier Communications Corporation, WC Docket No. 10-90, at 5-6 (April 1, 2010) ("Frontier Comments").

10 XO Comments at 32-34.

11 Frontier Comments at 506; ITTA Comments at 17-18; NECA Comments at 13-16; Windstream Comments at pp. 6-7.

charge rate established for TDM-based interexchange services to innovative VoIP services would truly amount to a case of being "stuck in the past."

Furthermore, the Commission should not wait to apply reciprocal compensation rates to VoIP traffic until it adopts long-term intercarrier compensation reform. Immediately applying the lower rate to VoIP traffic would effectively begin the transition for reducing the overall intercarrier compensation burden, and any plea to apply access charge rates to this traffic is simply a self-serving request to pad a LEC's revenues for as long as possible. Since the Commission has already determined that access rates should be reduced, there is no need to wait for adoption of its long-term reform plan before applying a lower reciprocal compensation rate to this subset of traffic. The current volume of VoIP traffic is relatively small by comparison to overall TDM-terminated traffic, but as providers continue to transition additional customers and traditional services to IP-enabled services, the intercarrier compensation rates for those services would naturally transition to lower rates as well, providing a market-based reduction in rates. Again, this should not be considered an undesirable arbitrage opportunity since this transition to IP-enabled services is behavior that the Commission seeks to encourage.

C. Increasing VoIP Termination Rates by Making Them Subject to Above-Cost Access Charges Would Be Inconsistent with the Objectives of This Proceeding and the Act.

The Commission must take care not to lose sight of what this proceeding is all about. A main objective is to restructure and reduce intercarrier compensation rates and to allow LECs to recover costs and revenues required to accomplish social objectives from a reformed Universal Service Fund ("USF"). When enacting the 1996 Act, Congress intended to create a system where competing carriers would terminate traffic for each other at cost-based rates (established pursuant to Section 252(d))[12] while the funding required to provide universal service would be recovered separately and explicitly through targeted USF programs (established pursuant to Section 254).[13] While an exception was created for legacy access charges, that exception was intended to apply only to grandfathered legacy interexchange services, and even then only on a limited, transitional basis (pursuant to Section 251(g)).[14]

Applying access charges to VoIP traffic would be backpedaling in a way that is totally at odds with these objectives. Instead of restructuring and reducing access charges to drive them toward cost-based rates, the Commission would be increasing the charges paid by many VoIP providers and saddling them with the subsidy amounts that are embedded in legacy access charge rates. Burdening VoIP traffic with access charge liability would move in exactly the opposite direction than the stated purposes of this proceeding, and the Commission should resist the self-interested pleas of certain LECs to do so.

II. CONSENSUS EXISTS THAT THE COMMISSION NEED NOT DECIDE WHETHER VOIP IS A "TELECOMMUNICATIONS SERVICE" IN ORDER TO PRESCRIBE A VOIP INTERCARRIER COMPENSATION FRAMEWORK.

A. Commenters Agree That a Rate Can Be Established Regardless of Whether VoIP is A "Telecommunications Service" or An "Information Service."

XO argued in its comments that it is not necessary for the Commission to assign a regulatory classification – telecommunications service or information service – to VoIP traffic before establishing a compensation rate for the traffic, and other commenters echo XO's position.[15] CenturyLink noted in its comments that "it is unnecessary to determine the classification of VoIP to determine whether existing intercarrier compensation rules apply to IP-

12 47 U.S.C. § 252(d).

13 47 U.S.C. § 254.

14 47 U.S.C. § 251(g).

15 *See, e.g.*, Comments of Time Warner Cable Inc., WC Docket No. 10-90, at 8 (filed April 1, 2011) ("Time Warner Cable Comments").

on-the-PSTN."[16] Similarly, in its comments, EarthLink argued that "[t]he Commission could bring VoIP traffic within the section 251(b)(5) framework without determining whether VoIP services are telecommunications services."[17] In its comments, Windstream noted that "[i]n confirming that VoIP providers are required to pay approved rates for IP/PSTN traffic, the Commission does not have to find that interconnected VoIP is a 'telecommunications service.'"[18] Although XO obviously does not agree with the compensation regimes advanced by these commenters, it is clear that the majority of industry participants do agree that the Commission can establish a compensation regime for VoIP traffic without first applying a regulatory classification to VoIP services. XO urges the Commission to heed these comments and require that VoIP traffic be compensated pursuant to the current reciprocal compensation regime.

B. <u>Declaring VoIP to be "Telecommunications" Is Sufficient to Establish a Compensation Regime for VoIP Traffic.</u>

As XO and other commenters explained in their comments, the Commission's 2006 classification of VoIP as "telecommunications" is sufficient for the Commission to require payment of compensation pursuant to sections 251(b)(5) and 201 of the Act.[19] In particular, XO explained in its comments that section 251(b)(5) requires LECs to enter into reciprocal compensation arrangements for the transport and termination of telecommunications, and the Commission's rules implementing section 251(b)(5) apply to all traffic, including local and long distance.[20] The Commission has already declared interconnected VoIP to be "telecommunications;" consequently, the Commission has authority to require reciprocal

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16 CenturyLink Comments at 5.

17 Comments of EarthLink, Inc., WC Docket No. 10-90, at 6 (filed April 1, 2011) ("EarthLink Comments").

18 Windstream Comments at 12 (filed April 1, 2011).

19 XO Comments at 12-14, 19-24.

20 *Id.* at 20.

compensation as payment for the transport and termination of VoIP traffic.[21] XO further asserted in its initial comments that to the extent VoIP traffic is not limited to the exchange of traffic between ILECs and other carriers (the pricing of which is governed by Section 252(d)), Section 201(b) gives the Commission authority to adopt compensation regulations governing all section 251(b)(5) traffic.[22] This authority includes arrangements where an intermediate carrier delivers VoIP traffic originated on a third party's network to a LEC for termination.[23]

Commenters agree that VoIP is "telecommunications," and XO submits that this classification is sufficient for the Commission to establish a compensation regime for VoIP traffic.[24] Time Warner explicitly supported this finding when it stated "as the NPRM recognizes, the Commission already has determined that interconnected VoIP traffic is 'telecommunications' traffic, regardless of whether interconnected VoIP service were to be classified as 'telecommunications service' or 'information service.'"[25] PAETEC et al. similarly asserted that "there is no need for the Commission to find that interconnected VoIP is a telecommunications service in this proceeding because it is clearly 'telecommunications' that falls within section 251(b)(5)."[26] PAETEC et al. then went on to state that, as a result, "the Commission has broad authority to apply the duty to provide reciprocal compensation under section 251(b)(5) to all

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21 *Id.* at 19.

22 *Id.* at 24.

23 *Id.*

24 As XO argues herein, the Commission should not apply access charges to VoIP traffic. XO does not address in these comments the question of whether access charges – which should not be imposed on VoIP traffic in any event – could be required prospectively without first finding that VoIP services are classified as telecommunications services. *See* Section III.C, *infra* (discussing prior Commission decisions where it inquired whether a service was telecommunications service as a threshold question in determining whether access charges applied in an adjudicatory context).

25 Time Warner Cable Comments at 6.

26 Comments of PAETEC Holding Corp., MPower Communications Corp. and U.S. Telepacific Corp., and RCN Telecom Services, LLC, WC Docket No. 10-90, at 36 (filed April 1, 2011) ("PAETEC et al. Comments").

telecommunications traffic exchanged with LECs, including interconnected VoIP traffic."[27] XO urges the Commission to follow the recommendations made by commenters regarding VoIP traffic being regulated as telecommunications traffic subject to section 251(b)(5) at least until the Commission establishes its long-term reform plan. Adopting the reciprocal compensation rate as an interim compensation measure will ensure that carriers are adequately compensated when exchanging VoIP traffic while at the same time minimizing or avoiding unintended regulatory consequences.

C. Commission Action on Compensation for VoIP Traffic Must Be *Prospective* in Application.

In its initial comments, XO explained that whatever intercarrier compensation framework the Commission adopts in this rulemaking proceeding should be prospective only in application.[28] Other commenters that addressed the issue agree the compensation framework adopted here should be prospective in effect, although they may disagree with XO as to the appropriate rate.[29] To date, because of the access charge exemption that has applied to telecommunications traffic undergoing a net protocol conversion, providers may justifiably treat VoIP traffic as information services subject to the enhanced service provider exemption.[30] Moreover, on numerous occasions the FCC has declined to determine whether VoIP traffic is "telecommunications services," and has thus far failed to adopt, through rulemaking, a

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27 *Id.* See also EarthLink Comments at 8 (same).

28 XO Comments at 24-31.

29 *See, e.g.,* Verizon Comments at 3, 15 (VoIP should be subject to reciprocal compensation rates); Comments of Level3 at 11 (defer the issue of VoIP compensation but any decision should be prospective only); EarthLink Comments at 2, 5 (VoIP should be subject to reciprocal compensation *and* access charges.) Most commenters did not address this issue expressly.

30 Providers of VoIP services also have the option of handling VoIP traffic as telecommunications services traffic, and some have chosen to do so. However, LECs should not have the right to impose access charges on VoIP traffic when the VoIP provider has not chosen to characterize its service as a telecommunications service.

compensation regime for such traffic or to rule that the enhanced service provider exemption does not apply to VoIP traffic despite the net protocol conversion. As XO explained, should the Commission adopt in this proceeding a compensation regime for VoIP traffic, such new rules should apply only *prospectively.*

CenturyLink and ITTA contend that access charges should apply and that the Commission should declare that they apply *retroactively*.[31] XO explains elsewhere in these replies why access charges would not be an appropriate compensation framework for VoIP traffic. However, even if the Commission extended its access charge rules to VoIP traffic in this rulemaking, there is no basis for making them apply retroactively.

The faults of CenturyLink's position are several. As an initial matter, CenturyLink contends that it does not matter whether the Commission determines whether or not VoIP traffic is an information service or telecommunications service, the Commission can simply rule that the exemption does not and has not applied to such traffic.[32] However, past Commission decisions make clear that whether traffic is a telecommunications service is at the heart of a determination whether access charges apply. Specifically, the Commission concluded in the *AT&T IP-in-the-Middle Order* that a certain form of IP telephony, namely what has come to be called IP-in-the-middle, was a telecommunications service and subject to access charges.[33] In making this determination, the Commission emphasized that its decision did not apply to IP-based telephony generally. Rather, the Commission underscored that its finding that the traffic at issue in that case was telecommunications services traffic subject to access charges was limited to situations where, for 1+ dialed calls, internet protocol is used solely for transmission purposes

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31 CenturyLink Comments at 5-6; *accord* Comments of ITTA at 12-13.

32 *Id*.

33 *See, AT&T IP-in-the-Middle Order,* ¶ 18.

and *there is no net protocol conversion, and there are no enhanced features or functionalities enabled by the use of IP*.[34] Because of the extremely narrow finding and the nature of its analysis in the *AT&T IP-in-the-Middle Order*, the Commission confirmed the position under current law that information services, including services that qualify due to the net protocol conversion test, are not subject to access charges. Similarly, in the *AT&T Enhanced Prepaid Calling Card Order*, the Commission first determined that the service at issue was a telecommunications service rather than an enhanced service as a prerequisite to concluding that access charges applied.[35] Therefore, CenturyLink's position that a service need not be classified as a telecommunications service for access charges to apply is unsupported.

CenturyLink's position is also wrong because it suggests that the Commission could enable retroactive treatment by simply deciding that the enhanced service provider exemption does not apply to VoIP traffic even if it is enhanced or information services.[36] While XO does not contest that the Commission has the authority to narrow its regulatory exemption, this does not mean the Commission has the ability to narrow the exemption rule *retroactively*.[37]

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34 *Id.*

35 *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, 20 FCC Rcd 4826, ¶ 28 (2005).

36 CenturyLink Comments at 5.

37 CenturyLink also argues that VoIP traffic should be subject to access charges retroactively because the functions performed by the PSTN to carry a VoIP call are no different than that of other calls. CenturyLink Comments at 16-17; *see also* Comments of ITTA at 13-14 (the exemption only applies to services only that are "altogether different" from IP-to-PSTN services). While the similarity in features the PSTN performs may be accurately stated, that does not mean the exemption does not apply today and has not applied in the past. Following the reasoning of CenturyLink's argument to the extreme, there would have been no reason for an exemption to apply to any enhanced services since enhanced service providers access and use the features and functions of the PSTN to reach their customers in substantially similar ways. ITTA's argument that the exemption applies only to "altogether different" services, also suggests that there is effectively no exemption. ITTA's citing of the *Free World Dialup* case, 19 FCC Rcd 3307 (2004) is inapposite since that decision did not address whether access charges are owed for the Free World Dialup service, which never touched the PSTN. *See* ITTA Comments at 14-15.

CenturyLink cites *Qwest Services Corp. v. FCC,* in support of its proposition that if the Commission adopts rules imposing access charges on VoIP traffic, it should do so retroactively as well as prospectively. This case is inapposite, as the underlying proceeding in *Qwest Services Corp. v. FCC* was found to be an adjudication, not a rulemaking decision.[38] Here, the Commission has chosen to consider the appropriate compensation regime for VoIP traffic for the first time through a generic rulemaking, and there is a strong presumption against retroactive effect in generic rulemaking decisions. Under the Administrative Procedure Act, "rule" is defined as an "an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy."[39] More specifically, the courts have held that retroactive rulemkaing is almost always inappropriate.[40] Accordingly, should the Commission decide now that access charges apply to VoIP traffic, it may only make that decision prospectively.

Finally, CenturyLink's argument for retroactivity fails because it seeks to apply access charges to a category of traffic to which the access charge regime did not apply when Congress passed the 1996 Act. Under Section 251(g), the existing access charge regime was grandfathered to apply only to the categories of traffic to which it applied as of 1996. VoIP traffic was not exchanged with LECs as of that date, thus the access charge regime could not apply to VoIP. XO submits, as explained in its initial comments and in Section II above, that the Commission not only should not, but cannot, extend the access charge regime to this new

38 509 F.3d 531, 535.

39 5 U.S.C. § 511(4).

40 *See, e.g., Nat'l Mining Ass'n v. Dep't of Labor,* 292 F.3d 849, 859 (D.C. Cir. 2002) ("An agency may not promulgate retroactive rules absent express congressional authority.") (*citing Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 215 (1988); *see also id*. 488 U.S. at 216 (Scalia, J., concurring); *Georgetown Univ. Hosp. v. Bowen*, 821 F.2d 750 (D.C. Cir. 1987) aff'd, 488 U.S. 204 (1988).

category of traffic.[41] Rather, a compensation regime should apply under Section 251(b)(5) as XO argues herein and in its initial comments.[42]

Consequently, even if the Commission possessed the authority to add another category of traffic to the access charge regime, an issue XO does not take up at this time, it would have to do so prospectively.[43] To impose a new compensation regime retroactively across the industry would operate to generate a manifest injustice and upset the reasonable expectations of an entire industry segment based upon the Commission's enhanced service provider exemption.[44] At the very least, whether access charges applied to exchange of VoIP traffic between two providers in the past is an issue that must be addressed in case-by-case adjudications, examining the carrier tariffs at issue and the services and persons against which and whom LECs seek to assess access charges. The potential service and PSTN access scenarios are too diverse for the Commission to apply fairly with a single across-the-board rule adopted in this proceeding.

III. CHARGING THE RECIPROCAL COMPENSATION RATE FOR TERMINATING VOIP TRAFFIC REPRESENTS THE REASONABLE MIDDLE GROUND POSITION FOR TRAFFIC EXCHANGED ON A TDM BASIS.

Not surprisingly, commenters expressed widely divergent views regarding the intercarrier compensation rate that should be applied to VoIP traffic. Companies that originate large amounts of VoIP traffic suggest that LECs be required to terminate their traffic for free

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41 XO Comments at 20-21.

42 *Id.* at 19-24.

43 CenturyLink implies that, because the Commission in 2006 made interconnected VoIP subject to universal service obligations, imposing access charges on VoIP traffic prospectively and presumably retroactively would be justified. CenturyLink Comments at 9-11. Without addressing here whether that argument is defensible regarding *prospective* application of access charges, what the Commission did in 2006 does not justify retroactive application of access charges in 2011 if the Commission were to decide, for the first time, to apply access charges to VoIP traffic.

under "bill and keep" arrangements, or at rates so low that they are tantamount to free. On the other end of the spectrum, LECs that terminate disproportionate volumes of VoIP traffic for other service providers ask that they be able to charge above-cost, subsidy-laden switched access charge rates for VoIP traffic. Neither position is correct. LECs should not be required to terminate traffic for VoIP providers at confiscatory rates, but neither should they be permitted to require innovative VoIP services to underwrite their legacy networks. As XO suggested in its initial comments,[45] the fair middle ground is to apply the reciprocal compensation framework to VoIP traffic exchanged on a TDM basis,[46] since it permits LECs to recover their cost of providing the service while not burdening VoIP services with legacy access charge subsidy flows.

A. **<u>"Bill and Keep" Arrangements Can Be Confiscatory, While Access Charges Would Be Overcharging.</u>**

While XO applauds the Commission's intent to finally establish an intercarrier compensation rate applicable to VoIP traffic, the FCC must fashion an outcome that is fair to *both* VoIP providers *and* LECs that terminate traffic for them. The suggestion of many VoIP providers that LECs always be required to terminate their traffic *for free* pursuant to so-called "bill-and-keep" arrangements fails that test.[47] While the Communications Act anticipates and approves the use of "bill-and-keep" arrangements as an intercarrier compensation system, their use is statutorily limited to situations where they provide for the "mutual and reciprocal recovery

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45 XO Comments at 31-35.

46 XO believes that a different intercarrier compensation system from this interim solution should apply when VoIP traffic is exchanged via IP-to-IP interconnection arrangements. XO will address that topic in the companion comments filed in this proceeding today in response to the Commission's request for comment on long term, comprehensive reform of intercarrier compensation arrangements.

47 *See, e.g.*, Comments of Vonage Holdings Corp., WC Docket No.10-90, at 3-4 (April 1, 2011)("Vonage Comments"); Comments of the Voice on the Net Coalition, WC Docket No. at 3-7 (April 1, 2011)("VON Comments"); Comments of Google Inc., WC Docket No. 10-90, at 8-9 (April 1, 2011)("Google Comments").

by each carrier of the costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier."[48] The statute permits compensation arrangements that "waive" the need to assess per minute charges,[49] but only where the services provided by carriers are sufficiently mutual such that each is able to reasonably recover its cost of service *in kind* by obtaining reciprocal service from the counterparty carrier. A bill-and-keep system passes muster only when either the traffic exchanged between carriers is reasonably balanced or the cost of termination is effectively zero. However, when VoIP traffic is exchanged via TDM interconnection,[50] neither of these factors is true; the cost of the termination of circuit-switched traffic has been established in numerous state proceedings that set reciprocal compensation rates, and VoIP-only providers such as Vonage seek end office termination without providing end office services of their own.

The VoIP providers' rationale for free-riding LEC networks is not persuasive. The VON Coalition submits that the Commission must establish an "intercarrier compensation system that treats all traffic equally."[51] However, its proposed bill-and-keep solution fails that test by requiring LECs to terminate VoIP traffic for free while assessing per minute termination charges for local and interexchange traffic. Vonage suggests that bill-and-keep is appropriate because VoIP "does not fit within the historic circuit-switched-based regime."[52] However, this is true and relevant only when VoIP traffic is exchanged on an IP-to-IP basis, not when it is routed

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48 47 U.S.C.§ 252(d)(2)(B)(i).

49 *Id.*

50 The situation can be dramatically different when VoIP traffic is exchanged via direct IP-to-IP interconnection. The cost of service is completely different which warrants a differing intercarrier compensation arrangement, as XO describes in its companion comments filed today in the second phase of this proceeding.

51 VON Coalition Comments at 3.

52 Vonage Comments at 3.

for termination over TDM-based interconnection arrangements. Making VoIP calling the only traffic that is exempt from intercarrier compensation charges would permit VoIP providers to unfairly shift part of their cost of services to terminating LECs, and give them an artificial cost advantage over traditional interexchange carriers and CMRS providers.

LEC suggestions that full switched access charges should apply to VoIP traffic are equally disingenuous.[53] There can be no debate that access charges are not cost-based. The 1996 Act established that intercarrier compensation charges should be "based on the cost (determined without reference to a rate of return or other rate-based proceeding) of providing the interconnection."[54] Section 251(g) of the Act created a very limited and transitional exception for access charges already being assessed when the 1996 Act was enacted.[55] The intent of the provision was to permit LECs a reasonable timeframe to reduce their reliance on subsidies paid by these "grandfathered" pre-1996 Act services, not to guarantee revenue neutrality even when pre-1996 Act services were replaced by new applications. There can be no doubt that VoIP services arose long after the 1996 Act became law, and VoIP providers are correct that deployment of these innovative new services cannot and should not be burdened by the weight of non-cost-based access charges.[56]

The claims of LECs that want to charge full blown switched access charges to VoIP providers cannot survive scrutiny. Some LECs assert that they must charge access charges to recover their costs of service;[57] however, reciprocal compensation charges established in

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53 *See, e.g.* ITTA Comments at 7-16; Frontier Comments at 4-9; NECA Comments at 4-15; CenturyLink Comments at 6-17; Windstream Comments at 3-12.

54 47 U.S.C. § 252(d)(1)(A)(i).

55 47 U.S.C. § 251(g).

56 *See* VON Coalition Comments at 4-5.

57 ITTA Comments at 9-10.

accordance with the FCC's TELRIC rules guarantee both cost recovery *and* a reasonable profit. Other LECs maintain that they will subsidize their competitors if they cannot assess access charges;[58] but the reverse is true – collection of over-priced access charges would force VoIP providers to subsidize LECs. LEC claims that VoIP providers must pay access charges to preserve universal service are even more outrageous.[59] Section 254 was enacted specifically to make universal service support explicit and divorce it from the intercarrier compensation framework. Indeed, the creation of the CAF implements that notion. Continuing LEC pleas for access charge-based subsidy flows – a full 15 years after enactment of the 1996 Act – is nothing more than a case of LECs trying to "have their cake and eat it too" – *i.e.* both create a USF High Cost fund for support *and* preserve indefinitely the legacy subsidy flows built into switched access charge rates, even to the point of imposing these costs upon new classes of service.

B. A $0.0007 Rate Would Not Fairly Compensate Terminating LECs.

Verizon alone suggests that the Commission select $0.0007 per minute as a default rate for the termination of VoIP traffic.[60] While not strictly "free" termination akin to bill-and-keep arrangements, the proposed rate is approximately 70-80 percent lower than the cost-based reciprocal compensation rates established by state commissions pursuant to TELRIC rules. Verizon justifies its proposed rate on two grounds.

First, Verizon suggests that $0.0007 per minute already is the default rate for dial up ISP-bound traffic and intraMTA wireless traffic. However, ISP-bound traffic has different cost characteristics and calling patterns typified by much longer duration data calls than VoIP traffic. Comparing this to VoIP termination is "comparing apples and oranges," and the cost of

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58 Frontier Comments at 9.

59 CenturyLink Comments at 6-8; NECA Comments at 6-7.

60 Verizon Comments at 15-19.

terminating relatively short duration landline switched voice traffic already has been calculated repeatedly by state commissions in their reciprocal compensation rate proceedings. Furthermore, there is no such regulated "default" rate for terminating intraMTA wireless traffic. As the Commission is well aware, disputes continue over the appropriate termination rate for CMRS-CLEC intraMTA traffic, and the only state that has adopted an applicable rate found that the ILEC reciprocal compensation rate was appropriate to apply to such traffic.[61] In fact, XO urged the Commission in its initial comments in this proceeding to adopt an interim compensation rate for CMRS-CLEC intraMTA traffic in the absence of a state decision.[62]

Second, Verizon contends that $0.0007 is a "market rate" established through private negotiation in numerous commercial agreements.[63] The truth is, however, that Verizon has established only *one* such agreement with a landline VoIP provider, Bandwidth.com.[64] Verizon's other agreements specifying the $0.0007 rate apply to termination of local traffic, ISP-bound traffic or wireless services.[65] Thus, while the Commission has agreed in the past that intercarrier compensation rates established by a pattern of arms-length negotiations can be evidence that such rates are just and reasonable, in this case the evidence does not support Verizon's proposition because the commercial agreements cited mostly are for services different than the termination of landline VoIP traffic. Accordingly, Verizon's proposal for the Commission to adopt a default rate of $0.0007 must be rejected.

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61 *XChange v. Sprint Nextel*, Cases 07-C-1541 & 09-C-0370, *Order Granting Motion To Dismiss In Part And Denying In Part And Granting Complaint In Part And Denying In Part* (N.Y. PSC, Jan. 19, 2010).

62 XO Comments at 47-49.

63 *Id.* at 15-17.

64 *Id.* at 15-16.

65 *Id.*

C. The Reciprocal Compensation Rate Is the Only Price That Is Established Using A Prescribed Forward-Looking Cost Standard and Record Evidence.

Although it is not fair either to require LECs to terminate VoIP traffic for free (or nearly free) or to saddle VoIP providers with over-priced, subsidy-laden charges, a fair middle ground is readily available. As XO suggested in its initial comments,[66] the appropriate intercarrier compensation rate to apply for termination of VoIP traffic that is exchanged on a TDM basis is the reciprocal compensation rate. State commissions have established TELRIC-based reciprocal compensation rates nationwide for traffic not subject to access charges and terminated by LECs over TDM-based interconnection and circuit switching platforms. Under existing TELRIC rules, reciprocal compensation rates ensure the terminating LEC is able to recover its forward-looking costs plus a reasonable return on its investment. At the same time, since TELRIC methodology does not permit inclusion of subsidy flows or inordinate recovery of overhead (or other joint and common costs), originating carriers are not required to pay an uneconomic rate for termination services. Thus, with respect to TDM traffic, the reciprocal compensation rate would achieve a fair balance between the legitimate interests of the VoIP providers and terminating LECs.

IV. 8YY DATABASE QUERY CHARGES ARE NOT PROPERLY PART OF THIS PROCEEDING.

In its Comments, AT&T raises the issues of 8YY database query charges, proposing that such charges be made subject immediately to the CLEC benchmarking regime under Section 61.26.[67] AT&T argues with little detail that at least some CLECs, including XO, have database query charges in excess of the national average and proposes that the Commission

[66] XO Comments at 31-32.

[67] AT&T Comments at 6, 40-41.

make database query charges subject to the CLEC benchmarking rules. The Commission should decline to take the requested action.

As a threshold matter, the issue of 8YY database query charges is not one that the Commission raises in the *NPRM*. Nor does the *NPRM* raise the question of CLEC benchmarking as a general matter. Tellingly, AT&T does not, in its discussion of the 8YY database query charges, tie it to any portion of the *NPRM.* If AT&T wishes to convince the Commission to address this matter, which the agency should decline to do, it should file a petition for rulemaking with the Commission. In short, the issue raised by AT&T is outside the scope of the rulemaking and it is not a "logical outgrowth" of the issues raised in the *NPRM*. While many matters regarding access charges were raised in the *Notice*, this does not mean that any issue that a commenter wishes to "bring to the party" regarding the Commission's access charge rules can appropriately be addressed by the Commission in this proceeding.

In any event, AT&T fails to provide even mildly persuasive reasons for the Commission to take up the matter of 8YY database query charges in this proceeding, even assuming it could do so consistent with the limitations placed on it under the Administrative Procedure Act (which it cannot). As AT&T notes, database query charges are not subject to the current CLEC benchmarking regime.[68] AT&T also observes that the Commission declined to take up this issue in 2001, when adopting the current CLEC access charge regime (modified in 2004). At that time, the Commission found that there was "a dearth of evidence" that CLEC database query charges were unreasonable and being used to "make up for access revenues that the benchmark system denies [CLECs]."[69] AT&T presents no data in its initial comments that

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[68] *Id.* at 40.

[69] *CLEC Access Charge Order*, 16 FCC Rcd 9923, 9946-47, ¶56 & n.128 (2001) (subsequent history omitted).

makes up for the lack of evidence already found by the Commission. AT&T does not present data regarding the alleged national average charge for 8YY database inquiries,[70] and it fails to even state what its own affiliated LECs' charges are. AT&T's allegations and characterizations of XO's database query charges as excessive should be given the short shrift they deserve. Justification for the Commission examining the per-call query charges for 8YY calls, and whether it can properly be said that LECs generally are using them to make up for access revenues shortfalls[71] so as to justify a generic rulemaking proceeding on this issue, requires considerably more substantiation that AT&T has provided.[72]

70 *See* AT&T Comments at 40-41.

71 *See CLEC Access Charge Order,* n.128.

72 8YY calls on average, are longer than other toll calls, spreading the database query charge of originating LECs out over a larger volume of minutes. As such, XO's rate can hardly serve the purpose of making up any shortfall, as AT&T alleges.

CONCLUSION

For the forgoing reasons, XO respectfully requests that the Commission adopt compensation rules for the termination of VoIP traffic in a manner consistent with the proposals contained herein and in XO's initial comments.

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