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 EARTHLINK, INC.

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EXECUTIVE SUMMARY

The Commission should exercise its authority under sections 251(g) and 251(b)(5) to adopt new, prospective rules that require carriers to rate and compensate each other for the exchange of interconnected VoIP traffic in the same manner they do today for TDM telecommunications traffic in both directions (*i.e.,* IP-PSTN and PSTN-IP). EarthLink urges the Commission to reject any VoIP-specific rate (including a rate of zero or $.0007). A VoIP-specific rate will only perpetuate the long-standing arbitrage problems the Commission seeks to resolve, as there is no industry standard to identify and distinguish VoIP-originated or terminated traffic from other traffic. While EarthLink supports a transition to IP-based networks, most traffic that originates or terminates on the PSTN today transits TDM facilities, and the vast majority of interconnection arrangements between carriers utilize TDM, not IP, interconnection. Since interconnected VoIP traffic causes terminating carriers to incur costs, the Act requires that such costs be recovered.

EarthLink objects to any access stimulation trigger that would reduce competitive carrier rates below RBOC rates, or any trigger that relies on traffic ratios. Such proposals single out certain carriers for an accelerated transition to lower rates. There is no basis to apply the 3:1 ratio of outbound and inbound traffic to access traffic, which is inherently out of balance. The Commission should also not disturb a competitive carrier's right to choose whether or not to tariff its interstate access services when it charges rates that comply with the benchmark rules. EarthLink is concerned that any mandatory detariffing would result in additional attempts by entities with market power to force competitive carriers to transition to lower access rates ahead of the transition schedule adopted for long term reform of intercarrier compensation rates.

EarthLink agrees with commenters that urge the FCC to affirm the ability of competitive carriers to impose access charges based on the benchmark rules. To the extent the FCC entertains any of the proposed revisions to its benchmark rules, it should seek additional facts supporting such changes and further input on specific proposals.

Should the Commission determine that additional rules are necessary to ensure that carriers negotiate section 251(b)(5) compensation in the absence of section 252 rights, EarthLink urges a holistic approach rather than dealing with these topics on a case-by-case basis. CMRS providers are required to negotiate mutual compensation arrangements with all local exchange carriers, and the Commission should reject calls to relieve them of such obligations. In addition, Congress chose which carriers are entitled to section 252 negotiation and arbitration rights and the FCC should not expand those rights beyond what the Act requires. Instead, the FCC should affirm that all carriers have an obligation to negotiate section 251(b)(5) compensation arrangements and that tariffs, under certain conditions, are an appropriate default mechanism to ensure symmetrical compensation at cost-based rates.

Lastly, the record makes clear that additional information is needed to identify the provider responsible for the payment of terminating compensation. The terminating provider should be permitted to bill the applicable terminating charges to any tandem provider that fails to provide information sufficient to identify the upstream provider. EarthLink urges the FCC to resist calls to adopt default rules to rate traffic as part of phantom traffic reform. Instead, the FCC should encourage carriers to reach negotiated agreement regarding the signaling information and/or factors that will be used to rate calls during the transition to a uniform rate. Consistent with its preference for negotiated agreements, the FCC could adopt a rule that requires all parties to negotiate 251(b)(5) agreements in good faith.

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REPLY COMMENTS

EarthLink, Inc., on behalf of its operating subsidiaries,[1] ("EarthLink") files these reply comments on the Federal Communication Commission's ("FCC" or "Commission") Notice of Proposed Rulemaking ("NPRM"),[2] Section XV.

[1] EarthLink, Inc.'s operating subsidiaries include New Edge Networks, Inc., DeltaCom, Inc., Business Telecom, Inc., and the operating subsidiaries of One Communications Corp.

[2] *In the Matter of 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 a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 8, 2011) ("NPRM").

I. VOIP TRAFFIC SHOULD BE SUBJECT TO PROSPECTIVE INTERCARRIER COMPENSATION OBLIGATIONS

A. Imposing Bill-and-Keep or a Rate of $.0007 on Interconnected VoIP Traffic Will Perpetuate Arbitrage

As a number of parties stated in initial comments, any VoIP-specific rate (including a rate of zero or $.0007) will only perpetuate the long-standing arbitrage problems the Commission seeks to redress. Since there is no industry standard to identify and distinguish VoIP-originated or terminated traffic from other traffic, any rate for VoIP lower than the TDM rate would only perpetuate rate arbitrage.[3]

Windstream, Frontier, PAETEC *et al.*, and others made clear that the industry lacks the means to distinguish between interconnected VoIP traffic and TDM traffic.[4] Given this fact, carriers continue to have a significant ability to declare their traffic as TDM or interconnected VoIP, accurately or not, with little recourse. Establishing a rate that is different for VoIP traffic than for TDM traffic, such as zero (bill-and-keep) or $.0007, will ultimately prove to be unworkable and will only perpetuate arbitrage. EarthLink agrees with NECA's conclusion that "[s]ince there is no way for terminating carriers to distinguish 'IP-originated' traffic from other types of traffic terminating on their networks, rules allowing special rates for VoIP traffic will encourage providers to assert virtually all their traffic qualifies, which in turn will multiply the

3 *See, e.g.,* Comments of PAETEC, *et. al.*, 31.

4 *See, e.g.,* Comments of Frontier, 5 (noting that it cannot identify whether the traffic it receives originates as either VoIP traffic or traditional switched access traffic nor is there a simple technical solution that would enable it to do so").

number of billing disputes, effectively rendering moot any further efforts by the Commission to implement an organized and comprehensive set of ICC reforms."[5]

EarthLink agrees with the Comments of PAETEC *et al.* regarding the $.0007 rate. As they point out, "[t]he $0.0007 rate is an arbitrary figure that was never based on any cost analysis; in reality, it does not permit carriers to recover their costs unless, like Verizon and AT&T, they are extremely large with long distance, wireless and other affiliates that will receive a windfall from the reduced rates."[6] A rate of $0.0007 would "have an especially harsh effect on CLECs" because they "are not guaranteed to recover any reductions in terminating revenues from universal service."[7] PAETEC *et al.* summarized the record evidence submitted by numerous parties that argue, and show through cost studies, that a rate of $.0007 does not cover costs and would constitute a confiscatory taking.[8]

The Commission should establish prospective rules applying the same access and reciprocal compensation regimes to interconnected VoIP traffic as currently applied to TDM traffic. Doing so is the only way to prevent arbitrage, and provide needed clarity to the industry.

B. Interconnected VoIP Traffic Causes Terminating Carriers to Incur Costs, and the Act Requires Such Costs Be Recovered

EarthLink supports a transition to IP-based networks, but the fact remains that most traffic that originates or terminates on the PSTN today transits TDM facilities, and the vast majority of interconnection arrangements between carriers utilize TDM, not IP, facilities.

[5] Comments of NECA *et al.*, 14. *See also* Comments of NTCA *et al.*, 14; Comments of PAETEC *et al.*, 31; Comments of Level 3, 12.

[6] PAETEC *et al.* Comments, 38.

[7] *Id.*

[8] *Id.*, 38-42.

Failing to recognize the preeminent role of the TDM networks today, a few commenters claim that IP-enabled calls impose no per minute costs and should not be subjected to the Commission's existing intercarrier compensation regime. For example, T-Mobile claims that "the Commission has never found that VoIP traffic is subject to any ICC charges, and VoIP providers incur no traffic sensitive costs with respect to SIP servers."[9] T-Mobile also claims "that, in deploying modern switching facilities, LECs no longer incur any traffic sensitive costs with end office switching."[10] These comments fail to recognize that when LECs terminate VoIP calls on the PSTN, they incur real per minute, usage-sensitive costs.

Rather than ignoring these costs, or assuming that carriers are maintaining TDM networks solely to charge rates based on TDM architectures, the FCC should affirm the right of LECs to request IP-IP interconnection under the section 251/252 framework. Affirming the right to IP interconnection under sections 251 and 252 will incent a gradual transition to an IP-based PSTN as legacy networks are naturally replaced and upgraded, like the transition from analog to digital switches, for example. If carriers cannot recover TDM costs today, they will lack the means to transition to IP-based networks. And, while some parties claim that the cost of VoIP calls are not usage sensitive on wholly IP networks, others argue that terminating carriers incur per minute costs to complete VoIP calls to the PSTN. As Dr. Lee L. Selwyn explained to the Commission in 2008, "softswitch technology could well exhibit even greater traffic-sensitivity

[9] Comments of T-Mobile, 3. *Sees also* Comments of Google, 7 ("there is no evidence that the telephone compensation regime and per-minute charges – even low ones – reflect the actual costs of IP-based voice traffic.").

[10] *Id.*, 10.

than legacy circuit switching."[11] Dr. Ankum also pointed out that IP networks have capacity constraints similar to other networks, and therefore require augments as traffic thresholds rise.[12]

Because incumbent carriers have largely refused to offer IP interconnection for the exchange of voice traffic, few such arrangements exist today. Thus there is no basis to conclude that the costs of terminating VoIP traffic is not usage sensitive, whether on TDM or IP networks. In short, the FCC should not adopt a rate for VoIP traffic that presumes a cost analysis it has yet to undertake. The FCC must evaluate economic and/or cost studies on traffic termination costs incurred in IP traffic exchange and/or on IP networks before adopting an intercarrier compensation mechanism that assumes no usage sensitive costs. As such, the Commission should not establish a rate of $.0007 (or zero for that matter) for VoIP traffic based on conclusory statements unsupported by rigorous economic analysis.

II. ACCESS STIMULATION

A. The FCC Should Reject the Proposed Access Stimulation Triggers Based on a 3:1 Ratio of Outbound and Inbound Access Traffic

Several commenters have suggested that the FCC apply bill-and-keep, $.0007, or mandatory detariffing for 3:1 "out of balance" access traffic. EarthLink objects to any access stimulation trigger that would reduce competitive carrier rates below RBOC rates, or any trigger that relies on traffic ratios. Such proposals are a thinly veiled attempt to single out certain carriers for an accelerated transition to lower rates.

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[11] Declaration of Lee L. Selwyn, Economics and Technology, Inc., on behalf of Broadview Networks, Cavalier Communications, Nuvox Inc., Pac-West Telecomm, Inc., tw telecom inc. and XO Communications, WC Docket Nos. 05-337 *et al.*, 15 (dated Nov. 26, 2008).

[12] Reply Declaration of August H. Ankum, Ph.D. and Olesya Denney, Ph.D. on Behalf of PAETEC, WC Docket Nos. 03-109 *et al.*, ¶ 56 (dated Dec. 22, 2008) (noting that AT&T's comments unequivocally confirm that softswitch expansions *are* driven by trunk port expansions, which in turn *are* driven by traffic volumes). *See also id.*, ¶¶ 47-60.

Traffic ratios are inappropriate for establishing triggers on the "exchange" of access traffic between LECs and IXCs. Some parties point to the FCC's 3:1 identification presumption for ISP-bound traffic as a basis for determining when traffic is unbalanced and thus should be subject to certain rate measures.[13] There is no basis to establish a trigger that would measure *access* traffic exchanged between a LEC and an IXC that is, by definition, inherently one-way and therefore inherently out of balance. As such, the proposals calling for a 3:1 trigger on *access* traffic are over inclusive, unwarranted, and should be rejected.

The 3:1 ratio was adopted by the Commission for section 251(b)(5) traffic because of the difficulty of ascertaining which locally-dialed traffic is ISP-bound.[14] However, there is no basis to apply that ratio to *access* traffic, which is inherently out of balance. In this regard, the 3:1 trigger is more likely to identify a carrier that has a long-distance affiliate or that is reselling the long distance service of an IXC than to identify traffic stimulation. The Commission should therefore reject those proposals calling for a 3:1 ratio as unworkable, over inclusive, and inappropriate for traffic that is inherently unbalanced.

B. The FCC Should Reject Proposals to Mandatorily Detariff Traffic Subject to Revenue Sharing Agreements

The Commission should not disturb a competitive carrier's right to choose whether or not to tariff its interstate access services when it charges rates that comply with the benchmark rules. AT&T[15] and Sprint[16] propose that the Commission mandatorily detariff access rates for traffic

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[13] *See, e.g.,* Comments of Sprint Nextel, 8-9, 18; Comments of T-Mobile, 2, 7-8; Comments of Ohio PUC, 15; Comments of Leap Wireless/Cricket, 6-7; Comments of CTIA, 8-9. Some of these commenters also suggest that such traffic be subject to a rate of $.0007/MOU.

[14] *Intercarrier Compensation for ISP-Bound Traffic*, CC Dockets 96-98 and 99-68, Order on Remand and Report and Order, FCC 01-131, ¶ 79 and n. 150 (rel. April 27, 2001).

[15] AT&T Comments, 13-15.

competitive carriers send to end users with which they engage in revenue sharing. EarthLink is concerned that any mandatory detariffing would result in additional attempts by entities with market power to force competitive carriers to transition to lower access rates ahead of the transition schedule adopted for long term reform of intercarrier compensation rates.

AT&T would apply the mandatory tariffing sanction to all LECs that engage in revenue sharing, which as EarthLink and others have explained, is not an accurate indicator of access stimulation.[17] There is also widespread agreement that sanctions against those engaging in revenue sharing, such as mandatory detariffing, would discriminate in favor of vertically integrated companies such as AT&T that can share revenues without making payments.[18]

AT&T also supports its proposal for mandatory detariffing with two generalized allegations that are both overbroad and unfounded, and therefore do not provide a basis to adopt its proposed remedy. First, AT&T alleges that "traffic-pumping CLECs do not at all perform services functionally equivalent to ILECs when they complete calls to their free calling service partners."[19] Second, AT&T alleges that "traffic pumping CLECs . . . do not actually offer any services to ordinary residents and businesses in the rural area."[20] Assuming, *arguendo*, that AT&T could prove these assertions with respect to any particular competitive carrier, the

(Footnote continued from previous page.)

[16] Sprint Comments, 20.

[17] *See* CenturyLink Comments, 35 ("there are obviously situations where the sharing of revenues in a legitimate marketing arrangement can be appropriate"); EarthLink Comments, 19-21 (revenue sharing is common practice in the industry, which the FCC has explicitly approved).

[18] *See* Sprint Comments, 15 (LEC sharing revenues within the same company would have "an open-ended *carte blanche* to engage in traffic pumping schemes").

[19] AT&T Comments, 14.

[20] AT&T Comments, 15.

existence of such a competitive carrier would not justify adopting mandatory detariffing for *all* competitive carriers with traffic subject to revenue sharing agreements, both urban and rural.

Contrary to AT&T's arguments, EarthLink has serious doubts that IXCs would be willing to compensate competitive carriers "at market-based rates."[21] As numerous parties indicated in initial comments, IXCs are refusing to pay even tariffed access rates or, in Verizon's case, unilaterally deciding to pay a rate of $.0007.[22] In short, AT&T's reference to "market-based rates" can be read as code for entities with market power seeking an avenue to force a faster transition to lower access rates by carving out specialized traffic categories for discriminatory transition periods.

Sprint's rationale for mandatory detariffing also falls short of supporting such FCC action. Sprint argues that the Commission "has previously found that eliminating the ability of competitive providers to invoke the filed rate doctrine would be in the public interest."[23] To support this proposition, Sprint cites a 1996 request by competitive carriers for *voluntary* detariffing,[24] an FCC Notice that resulted in the FCC's *Seventh Report & Order*, in which the FCC decided *not* to mandatorily detariff competitive carrier access charges that comply with the benchmark rules,[25] and the FCC's mandatory detariffing of basic interexchange rates.[26] In

[21] AT&T Comments, 14.

[22] *See, e.g.,* PAETEC *et al*. Comments, 34.

[23] Sprint Comments, 20.

[24] *Hyperion Telecommunications, Inc. Petition Requesting Forbearance; Time Warner Communications Petition for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146, Memorandum Opinion and Order and Notice of Proposed Rulemaking, 12 FCC Rcd 8596 (1997).

[25] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001).

contrast to the switched access market where a handful of IXCs hold and exercise market power, the basic interexchange market is comprised of millions of individual customers with no market power. The mandatory detariffing remedy proposed by Sprint and AT&T would deny competitive carriers complying with the benchmark rules the right to file tariffs for certain traffic, thus further eroding the protection the filed rate doctrine affords to competitive carriers against IXCs with market power. The FCC should reject this proposal.

C. Competitive Carrier Benchmark Issues

EarthLink agrees with commenters that urge the FCC to affirm the ability of competitive carriers to impose access charges based on the benchmark rules.[27] EarthLink notes that some parties propose revisions to the benchmark rules without stating the basis for the revision, or specifying what, if any, situations have arisen that are indicative of the FCC's request to identify additional instances of so-called arbitrage. To the extent the FCC entertains any of these proposed revisions, it should seek additional facts supporting changes to current rules and further input on specific proposals.[28] Moreover, the FCC should be wary of any claim that a competitive

(Footnote continued from previous page.)

[26] *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as Amended,* CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20760 (1996).

[27] *See* Comments of Bluegrass Telephone Co. *et al.*, 19-23 (FCC should make clear that the CLEC is entitled to the "full" benchmark rate). As EarthLink explained in its comments, some IXCs have erroneously argued that the benchmark rules do not entitle a competitive carrier to bill end office switching when the competitive carrier's customer is a VoIP provider or another carrier that is entitled to bill access but who contracts with the competitive carrier instead of billing its own access charges.

[28] For example, the US Telecom proposed rule adds language that does not track current Commission rules regarding the benchmark and should be rejected. *See* Letter from Glenn T. Reynolds, VP for Policy, United States Telecom Association, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, at 8 (filed Oct. 8, 2010) ("A CLEC billing a customer for interstate switched exchange access under this section of the Rules may not tariff rate elements or charges for any switched access service function (e.g., tandem switching or local end office switching) that it does not provide."). In addition,

(Footnote continued on next page.)

carrier should reduce its access rate below the rate charged by the ILEC. The FCC should not permit parties to use claims of arbitrage to justify singling competitive carriers out for a transition to lower access rates that is faster than the transition developed in the long term reform stage of this proceeding.

III. DUTY TO NEGOTIATE COMPENSATION ARRANGEMENTS

Another issue related to the proper compensation for the exchange of traffic is the ability of carriers to negotiate section 251(b)(5) compensation in the absence of section 252 negotiation and arbitration rights. Should the Commission determine that additional rules are necessary, EarthLink urges a holistic approach rather than dealing with these topics on a case-by-case basis.

A. CMRS Providers Are Required to Negotiate Mutual Compensation Arrangements

In 2005 the FCC made clear its "preference for [negotiated] contractual arrangements for non-access CMRS traffic."[29] Although T-Mobile acknowledged at that time that any refusal to negotiate would *ipso facto* constitute bad faith,[30] neither it nor other wireless carriers have acknowledged their duty to negotiate such compensation in their initial comments. Indeed, some

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Level 3 proposes that if a CLEC does not directly interconnect with an interexchange carrier, the CLEC should not be permitted to rely on monthly rates for direct interconnections or to import end office rate elements to derive any "per minute" charges. It is not clear what end office rate elements Level 3 is referring to, nor does Level 3 explain if and how such charges constitute arbitrage.

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

[30] *See* Letter from Harold Salters *et al*., Director, Federal Regulatory Affairs, T-Mobile USA, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, at 7 (filed July 9, 2004); *see also T-Mobile Declaratory Ruling,* at 4864 n.61.

wireless carriers have used this proceeding to argue for a change in policies to exempt them from their mutual compensation obligations altogether.[31]

FCC Rule 20.11(b) requires LECs and CMRS providers to comply with "principles of mutual compensation" and that each "must pay reasonable compensation in connection with terminating traffic on the other carrier's network."[32] Further, Rule 20.11(c) provides that CMRS providers must likewise comply with applicable provisions of part 51,[33] which in turn makes clear that *every* local exchange carrier is entitled to receive reasonable reciprocal compensation for the exchange of traffic.[34] Some CMRS carriers will try to fix the traffic ratio at a static percentage (e.g., 35% wireline to mobile and 65% mobile to wireline) regardless of the actual volumes of traffic exchanged or only "negotiate" bill-and-keep compensation arrangements. Where traffic between a LEC and a CMRS carrier is not roughly in balance, a bill-and-keep arrangement does not "comply with the principles of mutual compensation" under FCC Rule 20.11(b), which clearly applies to the termination of intraMTA CMRS traffic.[35]

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[31] *See* Comments of T-Mobile, 9-12. *See also* Comments of CTIA, 3, 12; Comments of Sprint Nextel, 2, 6.

[32] 47 C.F.R. § 20.11(b).

[33] *See* 47 C.F.R. § 20.11(c).

[34] *See* 47 C.F.R. § 20.11(c) and 47 C.F.R. §§ 51.701-51.703. *See also North County Communications Corp. v. MetroPCS California LLC*, File no. EB-06-MD-007, Order on Review, 24 FCC Rcd 14036 (2009).

[35] 47 C.F.R. § 20.11(b)(2) (stating that "A commercial mobile radio service provider shall pay reasonable compensation to a local exchange carrier in connection with terminating traffic that originates on the facilities of the commercial radio service provider."). *See also T-Mobile Declaratory Ruling*, ¶ 3 (citing *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 16014, ¶ 1036 (1996) (noting that traffic to or from a CMRS network that originates and terminates within one Major Trading Area (MTA) is subject to reciprocal compensation obligations under section 251(b)(5))).

Some CMRS providers not only ignore their reciprocal compensation obligations under the FCC's rules, they also ask the FCC to apply any compensation prospectively only after an agreement has been signed. This conflicts with current law,[36] as explained in the FCC's brief on appeal in *North County*. Although the FCC is waiting for the state to set the appropriate rate, any such rate may still apply to past traffic, not merely prospectively.[37] In sum, the FCC should enforce the plain text of Rule 20.11 and affirm the right of LECs to mutual compensation at reasonable rates, not overturn the rule by granting requests for a zero rate for CMRS traffic.

B. The FCC Should Not Extend Negotiation and Arbitration Rights To Only One Type of Carrier

While the FCC prohibited all LECs from tariffing compensation for the termination of intraMTA traffic, it granted to ILECs the right to negotiate and arbitrate CMRS compensation agreements. Naturally, the Commission's failure to grant the same rights to competitive carriers has led to a failure of CMRS providers to comply with the plain requirements of Rule 20.11.[38] The FCC should not compound this problem by extending such rights only for ILECs again.

[36] *AirTouch Cellular v. Pacific Bell*, File No. E-97-46, Memorandum Opinion and Order, 16 FCC Rcd 13502, ¶ 15 (2001) (finding that parties do not need an agreement to implement the 20.11 right to mutual compensation). *See id.* at n.24 ("We also agree with AirTouch that, although it cannot recover damages dating back to the 1994 inception of the Interconnection Agreement, it can recover damages for alleged violations during the two year period from September 20, 1995 (two years back from the filing date of the complaint) to March 25, 1997 (the effective date of the new interconnection agreement that included reciprocal compensation provisions).").

[37] *See North County Communications Corp. v. MetroPCS California, LLC*, Order on Review, File No. EB-06-MD-007, FCC No. 09-100, ¶ 26 (rel. Nov. 19, 2009); *MetroPCS California, LLC v. FCC*, Case No. 10-1003, Brief for the Respondents, at 35 (May 27, 2010) ("if the California PUC were to specify a termination rate outside of a bill-and-keep regime, MetroPCS might well owe North County additional compensation for past traffic under its 'mutual compensation' obligation.").

[38] *See, e.g.*, Letter from John B. Messenger, VP & Associate General Counsel, PAETEC Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 (filed Mar. 19, 2007) (discussing PAETEC's difficulty negotiating satisfactory interconnection agreements with a large CMRS providers, and generally the adverse impact on CLECs of the changes to 47 C.F.R. § 20.11 made by the Commission's *T-Mobile Declaratory Ruling*).

In the context of phantom traffic reform, several ILECs have sought a rule allowing them to demand negotiations and arbitration with competitive carriers. However, doing so would plainly be contrary to the Act. As XO explains, Section 252 does not apply to ILEC demands for negotiation and/or arbitration[39] and there is no basis to expand it and ignore the limitations imposed by Congress. The section 252 process is also cumbersome and likely to result in significant expense for carriers and state commissions if it is opened up to all carriers entitled to section 251(b)(5) compensation arrangements. Under certain conditions, EarthLink believes that permitting LECs to tariff section 251(b)(5) arrangements at TELRIC rates would reduce transaction costs and provide incentives to reach negotiated agreements.[40] If LECs could use tariffs as a default mechanism to implement section 251(b)(5) duties, it would reduce intercarrier disputes as well as help move the industry closer to unified rates for all traffic, in support of the Commission's goals in this proceeding.

IV. PHANTOM TRAFFIC

A. CIC/OCN Should Be Required In Order to Identify the Provider Responsible for Payment

Based upon a review of the initial comments, it appears that many parties are in agreement that certain information is often needed to identify the financially responsible party. For example, in cases of indirect interconnection arrangements, tandem providers and terminating providers generally agree that the Carrier Identification Code ("CIC") or Operating

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[39] *See* Comments of XO, 39.

[40] *See, e.g.*, 47 C.F.R. § 51.711(a)(2) ("In cases where both parties are incumbent LECs, *or neither party is an incumbent LEC*, a state commission shall establish the symmetrical rates for transport and termination based on the larger carrier's forward-looking costs."). For example, LECs could be required to provide particular language in their tariffs concerning provisions for mutual compensation, options to negotiate an agreement and opt-out of the tariff, establishing the rate as that set by the applicable state commission, etc. *See* Comments of Cavalier Telephone *et al.*, Section VI.E. (filed Dec. 7, 2006).

Company Number ("OCN") should be delivered to the terminating carrier to identify the party responsible for compensation.[41]

AT&T, however, disagrees, claiming that its tandems cannot identify the financially responsible party. It also does not explain whether it can pass CIC and/or OCN information in signaling or EMI records.[42] In order to ensure that they are not held responsible for compensation, tandem providers must provide information necessary to identify the upstream carrier, whether through records and/or signaling information. Therefore, AT&T's statements lead to questions about what information it provides today and what it is capable of providing. AT&T clearly has the means to bill for the tandem/transit services it provides. If AT&T is not capable of providing such information, or prefers not to invest in upgrading its switches to provide it, EarthLink agrees that the terminating provider should be permitted to bill AT&T, or any other tandem provider that fails to provide information sufficient to identify the upstream provider, the applicable terminating charges.[43]

This compensation obligation should be of little concern to most tandem providers as it appears most already provide such information necessary to identify the responsible party. For example, Verizon states that pursuant to industry standards the EMI records identify the carrier

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[41] *See* Comments of Blooston Rural Carriers, 10; Comments of Consolidated Communications, 36-37; Comments of GVNW, 5; Comments of Nebraska Rural Independent Companies, 21-22; Comments of NECA *et al*., 21; Comments of PAETEC *et al*., 8; Comments of the Rural LEC Group, 11; Comments of Sprint Nextel, 26; Comments of TCA, 6-7; Comments of TDS, 9; Comments of Toledo Telephone, 6; Comments of the Washington UTC, 10.

[42] *See* Comments of AT&T, 25. Some rural LECs, however, explain that AT&T uses a Charge Number ("CN") associated with the upstream provider's connection to AT&T, which they claim creates problems for rating traffic. *See* Comments of the Rural LEC Group, 10-11.

[43] *See* Comments of NECA *et al.*, 26, Comments of GVNW, 6, Comments of Rural LEC Group, 12.

responsible for payment.[44] Likewise, Neutral Tandem notes that it always provides records to the terminating carrier identifying the carrier that delivered the traffic to Neutral Tandem.[45] Incorporating this sound business practice into Commission policy will be a significant step in the elimination of phantom traffic.

B. Phantom Traffic Rules Should Not Include Default Rules for Rating Traffic

While information identifying the upstream provider likely will still be required in IP interconnection, the information necessary to jurisdictionalize traffic today will ultimately be unnecessary under IP interconnection subject to a unified rate regime.[46] Comments show a diversity of positions on whether traffic should be rated by comparing originating CPN with the terminating number during the transition to a unified rate. For example, CPN might be populated with a call back number rather than the originating number;[47] calls originating from a PBX may be populated with pseudo-NANP or private numbers;[48] 8YY and other types of calls originated from parties without dial in services may not have CPN that aids in jurisdictionalizing calls.[49] These situations and the general lack of agreement in this area ultimately results from the fact that signaling requirements were developed to complete calls, not to bill for traffic.

Given the lack of consensus on what signaling information should be used to rate calls, and the Commission's primary goal of unifying rates, EarthLink urges the FCC to resist calls to adopt default rules to rate traffic as part of phantom traffic reform. Instead, the FCC should

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[44] *See* Comments of Verizon and Verizon Wireless, 46-46.

[45] Letter from Mark D. Schneider, Counsel for Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92 *et al*., at Attachment p. 3 (dated Oct. 28, 2008).

[46] Comments of Mr. Romano at FCC April 6 Workshop on ICC/USF Reform.

[47] *See* Comments of ATIS, 4.

[48] *See* Comments of AT&T, 24.

[49] *See* Comments of Hypercube, 16.

permit carriers to continue to use tariffs and negotiated agreements that specify how signaling information and/or factors will be used to rate calls during the transition to a uniform rate. Consistent with its preference for negotiated agreements, the FCC could adopt a rule that requires all parties to negotiate 251(b)(5) agreements in good faith. Since the rate is often in dispute in such negotiations, it would also be helpful if the FCC would affirm that the requirement of symmetrical rates applies to 251(b)(5) compensation in the absence of state rules.[50]

V. CONCLUSION

EarthLink urges the FCC to implement the changes to the rules recommended herein and in its April 1 Comments to reduce arbitrage without creating competitive disadvantages or moving the industry further away from a unified rate. EarthLink looks forward to working cooperatively with the Commission and industry to overhaul current intercarrier compensation policies.

Respectfully submitted,

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[50] *See* 47 C.F.R. § 51.711.