Before the
Federal Communications Commission
WASHINGTON, D.C. 20554

In the Matters 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**

INITIAL COMMENTS OF THE
NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS

The National Association of Regulatory Utility Commissioners (NARUC) respectfully submits these initial comments on the Federal Communications Commission's ("FCC") or ("Commission") February 9, 2011 released "Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking" (*NPRM*).[1]

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1 See, *Connect America Fund*, WC Dkt 10-90, *A National Broadband Plan for Our Future*, GN Dkt 09-51, *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Dkt 07-135, *High-Cost Universal Service Support*, WC Dkt 05-337, *Developing an Unified Intercarrier Compensation Regime*, CC Dkt 01-92), *Federal-State Joint Board on Universal Service*, CC Dkt 96-45), *Lifeline and Link-Up*, WC Dkt 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-11-13A1.doc, published at 76 Fed. Reg. 11632 (Mar. 2, 2011) at: http://www.gpo.gov/fdsys/pkg/FR-2011-03-02/pdf/2011-4399.pdf, see also FCC Mar. 2, 2011 notice at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DA-11-411A1.doc.

In this *NPRM* the FCC is tackling two "Gordian Knots" of telecommunications policy – modernizing and streamlining the federal universal service fund (USF) and intercarrier compensation (ICC) policies. According to the *NPRM*, the underlying goal is to bring "affordable wired and wireless broadband – and the jobs and investment they spur – to all Americans while combating waste and inefficiency."[2] Based on four core principles,[3] the *NPRM* offers several reforms to achieve this goal. The *NPRM* presents a range of difficult choices on issues vital to NARUC's State commission membership. Each choice carries both costs and opportunities, and a decision on any one of them will have a ripple effect on all the others. Because the net benefit of different choices is likely to vary from State-to -State, NARUC will limit its comments to areas where its members have already reached consensus.[4]

As the FCC recognizes in ¶ 13, mimeo at 8, "USF and ICC are both hybrid state-federal systems, and that reforms will work best with the Commission and State regulators cooperating to achieve shared goals."

Though NARUC, like many, has serious concerns about several NPRM proposals, we commend the FCC for embarking on this effort. The association has been on record since 2004 urging the commission to consider non-preemptive approaches to ICC and appreciates the numerous requests throughout the item seeking to facilitate cooperative State-Federal action.

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2 See, FCC Proposes Modernizing and Streamlining Universal Service (News Release) (rel. February 8, 2011) at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-304522A1.doc.

3 *NPRM* at ¶ 10, mimeo at 7-8. The four principles include modernizing the FCC's universal service fund and intercarrier compensation system for broadband; exercising fiscal responsibility to control the size of the USF; requiring accountability of companies receiving support, and transitioning to market-driven policies.

4 These comments cover NARUC's concerns with all but Section XV. The association's initial comments on Section XV were filed April 1, 2011 and are available online on NARUC's website at: http://www.naruc.org/Testimony/11%200401%20NARUC%20ICC%20USF%20INITIAL%20CMTS%20.pdf

I. Commission Authority to Support Broadband

The statute is crystal clear that only *telecommunication carriers*, as defined in 47 U.S.C. § 153(44), can lawfully receive USF support. To be a *telecommunication carrier* one must provide a *telecommunications service*.[5] Moreover, as 47 U.S.C. §254(e) specifies that "only an eligible telecommunications carrier designated under [§] 214(3) of this title shall be eligible to receive specific federal universal service support..."[6]

A. Only "Telecommunications Carriers" can receive USF Support.

The FCC correctly concedes in ¶ 60, mimeo at 24, and the accompanying footnote, that the commission has "express statutory authority to extend universal service support to broadband services that providers offer as *telecommunications services*."{emphasis added} The footnote points out over 800 incumbent local companies currently offer broadband as a *telecommunication service*. In ¶ 70, mimeo at 27, the FCC argues it also has authority to direct high-cost or Connect America Fund support toward broadband-capable networks by conditioning awards of universal service support on a recipient's commitment to offer broadband service alongside supported voice services.

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5 47 U.S.C. § 153(44) states that "The term "telecommunications carrier" means any provider of telecommunications services . . . A telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services..." available online at: http://law.onecle.com/uscode/47/153.html

6 47 U.S.C. § 254(e) available online at: http://law.onecle.com/uscode/47/254.html.

But the commission also seeks comment on its authority to provide universal service support to broadband services that are offered as *information services*.

Specifically, in ¶ 61 – 62, mimeo at 24-24, the FCC asks if it can:

> provide support to information service providers consistent with section 254(e), which states that "only an eligible telecommunications carrier designated under section 214(e) shall be eligible to receive specific Federal universal service support,"[] and 214(e), which sets forth the framework for designating "telecommunications carrier[s] . . . eligible to receive universal service support."

The FCC's authority to support broadband services with USF funds is suspect in only two cases.[7]

First, where the broadband service the FCC wishes to fund is being offered in tandem with a real-time point-to-point fee based voice service that has yet to be classified as a "telecommunications service" – e.g., VoIP services.

NARUC has already pointed out VoIP services obviously fit "precisely the functional definition of a "telecommunications service".[8] This scenario evaporates once the FCC properly classifies the service.

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[7] The FCC must make appropriate findings consistent with the four elements outlined in 47 U.S. C. § 254(c) (1) as a prerequisite to supporting such services. This is in addition to the three legal "solutions" outlined, *infra*, in this section of NARUC's comments.

[8] See April 1, 2011 Comments of the National Association of Regulatory Utility Commissioners at: http://www.naruc.org/Testimony/11%200401%20NARUC%20ICC%20USF%20INITIAL%20CMTS%20.pdf.

Second, there is a potential legal challenge if (1) the funded broadband provider is not providing any voice service and (2) has chosen not to offer the service as a *telecommunications service*.[9]

There are obvious FCC solutions that are both consistent with the express statutory text and effectively eliminate the prospect of any successful legal challenges to FCC support.

First, consistent with the Joint Board's 2007 Recommended Decision and the FCC's own priorities,[10] the FCC should confirm the statute allows direct universal service support *only* to networks that provide both "advanced services *as well as voice services*."[11] (emphasis added)

Second, the FCC should immediately classify fee-based voice services offered to the public indiscriminately that use VoIP technology as a *telecommunications service*.

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[9] The FCC, in ¶ 65 of the NPRM, implies it would like to be able to fund just stand-alone broadband without requiring the provision of voice (or mobility) service. Given the text of the statute and the current classification of services – it appears that standalone voice or a standalone mobile voice service could properly be funded, but that standalone broadband – offered as an information service could not qualify.

[10] See NRPM at ¶ 80, mimeo at 31, stating that: "First, the program must preserve and advance voice service. Even as we refocus USF to support broadband, we are committed to ensuring that Americans have access to voice service, while recognizing that over time, such voice service could be provided over broadband networks, both fixed and mobile."

[11] *Federal State Joint Board on Universal Service Recommended Decision*, 22 FCC Rcd at 20492, ¶ 62, available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-07J-4A1.pdf ; *Federal State Joint Board on Universal Service 2010 Recommended Decision*, 25 FCC Rcd at 15625, ¶ 75, available online at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-10J-3A1.pdf.

Third, the FCC should require carriers that want to provide standalone broadband (without any voice service), as a condition of getting the subsidy, to offer it as a *telecommunications service*.

B. Section 706 cannot justify bypass of § 254 and § 214(e) requirements.

In ¶ 67, mimeo at 26, the FCC asks a series of questions about its authority pursuant to Section 706(a) and (b) (47 U.S. C § 1302). Specifically, the FCC asks:

> Would providing support for broadband information services under section 706 be inconsistent with the definition of universal service in section 254(c) or the limitation of support to ETCs in section 254(e)? If we act pursuant to section 706 alone, would we have authority to collect universal service contributions and disburse them to eligible recipients under the current universal service mechanisms, or should we develop a separate mechanism under our section 706 authority?

While a credible argument can be made that Congress' instruction to the FCC (and States) in Section 706 contemplates that broadband might properly be added to supported services and thus be eligible for USF funding, that section cannot provide a basis to ignore or bypass the requirements imposed by either § 254 or § 214(e).

C. The FCC cannot forbear from § 254 and § 214(e) requirements.

After noting in ¶¶ 84 and 88, mimeo at 32 and 34, that "Federal law charges States with the designation of carriers as ETCs..", and that "[w]hen designating an ETC, the state…defines the ETC's service area," the FCC again talks about ways to bypass these explicit Congressional delegations in ¶ 89, mimeo at 35:

> We seek comment on whether the Commission could or should forbear from requiring that recipients of universal service support be designated as ETCs at all.[] Commenters asserting that the Commission has the authority to forbear from imposing this requirement should address the scope of the Commission's authority under section 10 and in particular should address whether the Commission could forbear from applying section 254(e) to entities that are not telecommunications carriers to allow their receipt of universal service support to serve rural, insular and high-cost areas under the Act.

At the heart of this inquiry about forbearance and § 214 is one question:

Did Congress actually intend for the FCC to be able to selectively reallocate *continuing* federal-State jurisdictional responsibilities based on the authority granted in 47 U.S.C. § 160(a)?

The answer is obvious.

Congress clearly did not.

The plain language of the act – as well as the legislative history – is not susceptible of such an interpretation.

Section 10 specifies that FCC can only forbear from statutory provisions (or FCC regulations) that the FCC "appl[ies] to a telecommunications carrier or a class of telecommunications carriers". The FCC does not "apply" the Section 706 and 254 duties for both the FCC and States to assure universal service and promote advanced services to carriers.

Congress did.

Similarly, the FCC does not in any sense "apply" Section 214(e)(2)'s reservation of State authority to designate carriers as ETCs.

Congress did.

Moreover, both the legislative history of the section and the express text of §160(b)[12] make clear Congress provided the FCC this tool to eliminate rules *only* in circumstances where flourishing competition made them no longer necessary. It makes absolutely no sense to apply a tool designed to assure regulators get out of the way of a competitive market to areas where the economic conditions are so bad even one carrier cannot make a business case for providing telecommunications services along with retail broadband internet access.

Instead the FCC would still – albeit using a different process - not eliminate anything. Rather the FCC would continue to designate who gets the funds and just bypass the Congressionally specified procedure specifying a State role. Indeed, the FCC's proposal does more than simply relax regulatory requirements. It permits universal service funding for carriers that Congress has not authorized to receive it --- namely carriers that have not been designated as ETCs.

That is not "forbearance." It is, on its face, a rewrite of Section 254 to expand the universe of carriers Congress specified could receive support.

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[12] 47 U.S.C. §160(b) specifies that the FCC "shall" consider if the forbearance from enforcing the provision will promote the competitive market….including the extent to which such forbearance will enhance competition among providers of telecommunications services.

II. Commission Lacks Authority to Unify Intercarrier Compensation Regimes

In section X, ¶491, mimeo at 148, the FCC outlined its proposals for reform of the intercarrier compensation regime.

The first approach purports to allow States to retain authority to reform intrastate access charges. As a modification of that approach, the FCC asks if it should set a glide path to reform wireless termination charges, possibly including intrastate access charges paid by or to wireless providers.

Under the second approach, the FCC would re-interpret the text of the statute to justify unifying all intercarrier rates, including those for intrastate calls, under the reciprocal compensation framework. Under this framework, the Commission would establish a methodology for intercarrier rates, which states then work with the Commission to implement.

In March of 2004, NARUC adopted a series of reform principles. Those principles are attached to these comments. Among them is the stated preference that "State commissions . . . continue to have a significant role in establishing rates and protecting and communicating with consumers." NARUC believes the FCC's first approach best captures that sentiment.

Moreover, we respectfully suggest that the FCC's legal analysis[13] to support the second approach is fatally flawed. The Commission is relying on a rationale first advanced in a proposed order released under a prior administration.

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13 *NPRM* at ¶¶513-518, mimeo at 159-161.

Specifically, the FCC claims it can "bring all telecommunications traffic (intrastate, interstate, reciprocal compensation, and wireless) within the reciprocal compensation framework of §251(b)(5) and determine a methodology for such traffic.

Theories that attempt to expand §251(b)(5) reciprocal compensation to include intrastate access charges flounder on any examination of either the legislative history or the unambiguous statutory text.

Section 251(b) specifies interconnection requirements applicable to *LOCAL exchange carriers* in *competitive LOCAL markets*.

Subsection (b)(5) specifies the LEC duty to transport *and terminate* the traffic of other LECs competing *in the same local exchange service area*. On its face, it has no applicability to interstate or intrastate exchange access services. LECs have never established "reciprocal compensation arrangements" with interexchange carriers. Indeed, Congress specifically distinguished *exchange access services* from the "reciprocal compensation" transport and termination arrangement required by §251(b)(5), when it specified that competitive LECs can utilize the facilities and equipment of incumbent's "for the transmission and routing of telephone exchange service and exchange access." 47 USC §251(c)(2)(A).[14]

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[14] Indeed, in the Conference report, the Senate's specification that "[t]he obligations and procedures proscribed in this section do not apply to interconnection arrangements between local exchange carriers and telecommunications under section 201..for the purposes of providing interexchange service, and nothing in this section is intended to affect the Commission's access charge rules" morphed into new section 251(i). H.R. CONF. REP. 104-458, at pp 117, 123.

Section 252(d)(2)(A) adds further support to this view – when it talks about an "incumbent local exchange carrier's" compliance with §251(b)(5) and specifies "mutual and reciprocal recovery by each carrier of 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." Although toll traffic is usually passed on to an intervening carrier by a LEC, it rarely terminates on such carrier's carrier network. Courts will look to the common usage of a word.[15] Congress' selection of this term, in context, tracked the commonly used and widely understood meaning at the time the 1996 legislation[16] was being drafted.[17]

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15 Cornell University Law School, Legal Information Institute, http://topics.law.cornell.wex/statutory_construction.

16 Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (codified at 47 U.S.C. §151 et. seq.).

17 See, Communications Daily (Warren Publ. 6/23/95) Vol. 15, No. 121; Pg. 7 ("[The PA PUC] … adopt "bill-and-keep" model for reciprocal compensation *between competing local exchange carriers*,"); Communications Daily (Warren Publ. 12/21/95) Vol. 15, No. 245; Pg. 3 ("Fla. PSC approved 2-year interconnection agreement involving competitive access provider Intermedia Communications and BellSouth. . . sets terms for rates, reciprocal compensation."); "Industry Lukewarm on FCC Plan To Collect Data on Competition", Communications Daily (Warren Publ. 12/13/95) Vol. 15, No. 239; Pg. 4 ("[S]urvey has 2 "fundamental flaws": (1) Bureau "omitted requests for data on the essential elements for [local] competition" -- such as reciprocal compensation, interconnection, number portability."); Communications Daily (Warren Publ 19/21/95) Vol. 15, No. 224; Pg. 6 ("(PT) and MFS Communications announced interconnection agreement in Cal. … grants co-carrier status to MFS, including provisions for number portability . . . reciprocal compensation."); Brief Transmission MFS, Pac Bell Form Local Telecomms Pact, Telecomworldwire (M2 Communications Ltd. 10/21/95) MFS Communications has aligned in an agreement with Pacific Bell to provide the first Californian competitive local telephone company and its customers to receive the financial and operational benefits of co-carrier status. MFS says the pact will promote effective local telephone competition in California as well as providing number portability, reciprocal compensation, unbundled local loops.") NARUC Convention; Work Group Urges Fewer Telecom Entry Barriers, Communications Daily (Warren Publishing Nov. 17, 1995) Vol. 15, No. 222; Pg. 2 State regulators should work to remove telecom entry barriers even though competition could develop in current environment, said NARUC Communications Subcommittee local competition work group in recommendations issued at convention here….Interconnection terms must be "reasonable and nondiscriminatory," offered to all competitors, said group on interconnection and technical standards. It said those terms must include functions and switching software at any location, number portability and dialing

Moreover, any reliance on §201 authority over "interstate or foreign communication" necessarily excludes by definition – and the action of §152(b)[18]– intrastate access. Section 152 operates in tandem with other sections of the 1996 legislation to <u>mandate</u> reservation of continuing State authority to "establish access and interconnection obligations of local exchange carriers."[19]

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parity, reciprocal compensation, "equal status in and control" over databases.'); Communications Daily, (Warren Publ. 12/01/95) Vol. 15, No. 211; Pg. 4 (Wis. PSC granted local exchange certificate to Teleport. . .will meet Dec. 4 to discuss interconnection, number portability, reciprocal compensation issues.") Communications Daily (Warren Publ. 07/26/95) Vol. 15, No. 143; Pg. 8 ("Cal. PUC issued long-awaited decision Mon. opening local telephone service to competition. It permits competitors to enter local market by building own facilities or by reselling services of incumbent LECs. . . and sets interim rules for reciprocal compensation, interconnection and number portability.") Prepared Testimony of Robert Annunziata, President, Chairman and CEO, Teleport Communications Group before the Subcommittee on Telecommunications and Finance, Commerce Committee, U.S. House of Representatives H.R. 1555, Communications Act of 1995 May 11, 1995 ("but the legislation that is finally passed must be the right legislation. The single most important "right" element of H.R. 1555 is the requirement for reciprocal compensation for the mutual exchange of local traffic.")

[18] <u>See</u>, 47 USC Sec. 152(b) (1996), which reserves States authority over intrastate rates and services – specifying: "nothing in this Act shall be construed to apply or to give the Commission jurisdiction with respect to (1) charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier."

[19] <u>See</u>, 47 USC Sec. 251(d)(3) (1996): "Preservation of State Access Regulation: In prescribing and enforcing regulations to implement the requirements of this section, the Commission shall not preclude the enforcement of any regulation, order, or policy of a State commission that (a) establishes access and interconnection obligations of local exchange carriers; (b) is consistent with the requirements of this section "

Exceptions to this authority are,[20] and must be express[21] and explicit.[22]

Conclusion

NARUC has consistently confirmed the widely held principle that functionally equivalent services should be treated the same and that regulators should not intervene in markets by favoring one technology over another.

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20 47 USC Sec. 223 – 227 (1996)

21 See, Section 601(c)(1) [note to 47 USC Sec. 153 (1996)] entitled "Effect on Other Laws", states "[t]his Act and the amendments made by this Act shall not be used to modify, impair or supersede or authorize the modification, impairment, or supersede Federal, State, or local law unless *expressly so provided* in such acts or amendment." {Emphasis added}

22 See, *Louisiana Public Service Commission v. FCC*, 106 S.Ct. 1890, 476 U.S. 355, 90 L.Ed.2d 369, n.4 (1986) (*Louisiana*). Agency attempts to achieve a policy goal via an unsupported reading of other statutory provisions to expand preemptive authority has been a feature of several FCC orders. In *Louisiana*, the Supreme Court considered and fully rejected the argument that the Commission should be able to preempt state authority in order to foster federal policy:

> "While it is certainly true, and a basic underpinning of our federal system, that state regulation will be displaced to the extent that it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, *Hines*, 312 U.S., at 67, 61 S.Ct., at 404, it is also true that *a federal agency may pre-empt state law only when and if it is acting within the scope of its congressionally delegated authority.* This is true for at least two reasons. First, an agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency. Section 152(b) constitutes, as we have explained above, a congressional *denial* of power to the FCC to require state commissions to follow FCC depreciation practices for intrastate ratemaking purposes. *Thus, we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy.* An agency may not confer power upon itself. To permit an agency to expand its power in the face of a congressional limitation on its jurisdiction would be to grant to the agency power to override Congress. This we are both unwilling and unable to do *Louisiana* at pp. 374-375. {emphasis added}.

The 1996 Act *requires* a functional approach. An approach that treats services that are substitutable for/functionally equivalent to existing telephony services differently is inconsistent with Congressional intent.

Indeed, the express terms of the Act does not permit, and an appropriate policy approach would not countenance either the intrusion into retail intrastate rate design inherent in any preemption of State access charges or attempts to bypass Congressional procedures through inapplicable forbearance procedures or overbroad reliance on a limited grant of authority.

Respectfully Submitted,

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N A R U C

National Association of Regulatory Utility Commissioners

THE NATIONAL ASSOCIATION OF REGULATORY UTILITY COMMISSIONERS
STUDY COMMITTEE ON INTERCARRIER COMPENSATION
GOALS FOR A NEW INTERCARRIER COMPENSATION SYSTEM

May 5, 2004

I. INTRODUCTION:

Portions of the current intercarrier compensation system are rapidly becoming unsustainable. There is disagreement among stakeholders over the appropriate solutions. Various industry groups have been working separately to develop intercarrier compensation proposals. The proposals are reportedly designed to replace some or all of the existing intercarrier compensation mechanisms, and are expected to be submitted to the FCC.

"Intercarrier compensation" controls how various carriers compensate one another for handling calls or for leasing dedicated circuits. "Reciprocal compensation," the fee for handling local traffic, has increasingly flowed from the Incumbent Local Exchange Carriers ("ILECs")[23] to the CLECs by virtue of such developments as CLECs terminating an increasing share of ISP traffic. "Access charges" are intercarrier fees for handling toll traffic. "Long distance" or toll compensation between carriers existed for decades under the old AT&T Bell System monopoly, and it supported a portion of the cost of common wires and facilities. Following divestiture, "access charges" were created for toll traffic.

The emergence of new communications technologies has placed stress on the current compensation system. Because it was assembled piecemeal over time, the current intercarrier compensation system has inconsistencies that can result in discriminatory practices, arbitrage or "gaming" of the current system, and other unintended outcomes.

In hopes of leading to a balanced solution, a group of the NARUC's commissioners and staff has drafted this set of guiding principles against which the various proposals can be measured and evaluated. These principles address the design and functioning of, and the prerequisites to, a new intercarrier compensation plan. They do not address the amount or appropriateness of costs recovered by particular carriers through intercarrier compensation.

II. APPLICABILITY:

A. An integrated intercarrier compensation plan should encompass rates for interconnecting CLEC and ILEC local traffic as well as access charges paid by interexchange carriers.

[23] A "local exchange carrier" is defined generally by the Telecommunications At of 1996 as any entity engaged in the provision of telephone exchange service or exchange access. In this document, it refers to both the traditional local providers of wire-line telephone service, referenced as the Incumbent Local Exchange Carriers or ILECs, and their competitors/any competing service, referenced in this document as Competing Local Exchange Carriers or CLECs.

B. CLECs, IXCs, ISPs, VoIP, wireless, and any other companies exchanging traffic over the Public Switched Telecommunications Network should be covered ("Covered Entities").

C. No Covered Entity should be entitled to purchase a service or function at local rates as a substitute for paying intercarrier compensation.

III. ECONOMICALLY SOUND:

A. The compensation plan should minimize arbitrage opportunities and be resistant to gaming.

B. Intercarrier compensation should be designed to recover an appropriate portion of the requested carrier's[24] applicable network costs. At a minimum, this will require compliance with the jurisdictional separations and cost allocation rules, applicable case law in effect at any point in time, and 47 U.S.C. 254(k).

C. A carrier that provides a particular service or function should charge the same amount to all Covered Entities to whom the service or function is being provided. Charges should not discriminate among carriers based on:

1. the classification of the requesting carrier[25];
2. the classification of the requesting carrier's customers;
3. the location of the requesting carrier's customer;
4. the geographic location of any of the end-users who are parties to the communication; or,
5. the architecture or protocols of the requested carrier's network or equipment.

D. Intercarrier compensation charges should be competitively and technologically neutral and reflect underlying economic cost.

E. The intercarrier compensation system should encourage competition by ensuring that requested carriers have an economic incentive to interconnect, to carry the traffic, and to provide high-quality service to requesting carriers. In limited circumstances, carriers may voluntarily enter into a bill and keep arrangement.

F. Volume of use should be considered when setting intercarrier compensation rates. Available capacity may be used as a surrogate for volume of use.

G. Any intercarrier compensation system should be simple and inexpensive to administer.

IV. COMPETITIVE INTERCARRIER MARKETS NOT PRICE-REGULATED:

Market-based rates should be used where the market is determined to be competitive. A rigorous definition of "competitive market" is needed in order to prevent abuses.[26]

V. NON-COMPETITIVE INTERCARRIER MARKETS PRICE-REGULATED:

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[24] "Requested carrier" means a carrier that receives a request for telecommunications service. An example would be a LEC that receives traffic for termination on the loop of one of the LEC's customers.

[25] "Requesting carrier" means a carrier that requests another carrier to transport, switch, or process its traffic.

[26] Markets that have been competitive can become non-competitive, requiring the re-imposition of regulation to protect consumers.

A. An intercarrier compensation system should ensure that telecommunications providers have an opportunity to earn a reasonable return and that they maintain high- quality service. It should also encourage innovation and promote development of competitive markets.

B. Government should limit the ability of carriers with market power to impose excessive charges.

C. Where charges are restricted by government action, carriers have the protections of due process, and confiscation is not permitted.

D. If any ILEC property or operations in the future could give rise to a confiscation claim, in a rate case or otherwise, then a practical way should be defined to exclude property and operations that are in competitive markets.

VI. APPROPRIATE FEDERALISM:

A. The reciprocal compensation system should ensure that revenues, cost assignment, and the risk of confiscation are jurisdictionally consistent for all classes of traffic.

B. State commissions should continue to have a significant role in establishing rates and protecting and communicating with consumers.

C. To avoid creating harmful economic incentives to de-average toll rates by some interexchange carriers, the FCC should have the authority to pool costs within its defined jurisdiction whenever intercarrier compensation rates are high in some areas.

D. State commissions should retain a role in this process reflecting their unique insights, as well as substantial discretion in developing retail rates for services provided by providers of last resort, whether a dual or unified compensation solution is adopted.

E. A proposal preserving a significant State role that fits within the confines of existing law is preferable.

VII. UNIVERSAL SERVICE AND CONSUMER PROTECTION:

A. The transition to a new intercarrier compensation system should ensure continuity of existing services and prevent significant rate shock to end-users. Penetration rates for basic service should not be jeopardized.

B. A new intercarrier compensation system should recognize that areas served by some rural local exchange carriers are significantly more difficult to serve and have much higher costs than other areas.

C. Rural customers should continue to have rates comparable to those paid by urban customers. End-user basic local exchange rates should not be increased above just, reasonable, and affordable levels.

D. Any intercarrier compensation plan should be designed to minimize the cost impact on both federal and State universal service support programs.

VIII. ACHIEVABILITY AND DURABILITY:

A new intercarrier compensation system should not only recognize existing circumstances but should also anticipate changes at least over the intermediate term, and should provide solutions that are appropriately resilient in the face of change.

IX. PREREQUISITES FOR PLAN IMPLEMENTATION:

A. The estimated cost impact on a carrier-by-carrier basis, by State, must be computed before a decision is made whether to adopt a new intercarrier compensation plan.

B. The FCC should identify, quantify, and evaluate the total of all federal high cost universal service fund payments received by each company today. The federal universal service support mechanisms should be revisited as an intercarrier compensation plan is implemented to ensure that telecommunications services remain accessible and affordable to all Americans.

C. The FCC should be required to regularly revisit its cost allocation rules for regulated/nonregulated services. Costs that should not be recovered through regulated rates ought to be excluded from the computation of intercarrier compensation rates.

D. Before any new intercarrier compensation plan is implemented, the effect of the plan on local exchange rates, including both interstate and intrastate SLCs, should be computed.

E. Even when a referral to a Joint Board is not mandated by law, in order to ensure State input the FCC should make a referral, and the Joint Board should act on that referral, in an expedited manner. Similarly, referrals to Joint Conferences should be handled on an expedited basis.