Before the
FEDERAL COMMUNICATIONS COMMISSION

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

REPLY COMMENTS OF VONAGE HOLDINGS CORP.

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SUMMARY

Despite the differences of opinion among the parties filing comments, there are a few keys issues upon which all or nearly all of the parties agree. First, it is clear the Commission has never addressed how Voice over Internet Protocol ("VoIP") fits into the intercarrier compensation system. Second, most parties agree that the Commission has the authority under Section 251(b)(5) to determine an appropriate intercarrier compensation methodology for VoIP. Third, the comments note that there is a crucial need for certainty to spur investment, promote competition and eliminate the opportunity for arbitrage. When taken together, these factors all point to bill-and-keep as the logical interim and long-term solution for VoIP.

Adoption of bill-and-keep for interconnected VoIP is consistent with applicable law and the Commission's long-term objective to move away from per-minute charges, will hasten the construction of broadband networks, and facilitate transition to IP networks. Bill-and-keep also provides certainty, is competitively neutral and eliminates arbitrage opportunities. Bill-and-keep more accurately reflects the benefits of the exchange of VoIP traffic between parties, is easy to implement and administer, avoids the complex billing and traffic reporting of the current system, and reduces the need for the FCC or state commissions to intervene or resolve disputes.

The objections to bill-and-keep in the opening comments are unavailing. First many parties argue that VoIP is either a telecommunications service or the functional equivalent of a telecommunications service and therefore should be subject to existing intercarrier compensation charges based on the jurisdiction of the call. The Commission has already determined that VoIP services are "far too multifaceted for simple identification of the user's location to indicate jurisdiction" and has specifically rejected a number of proxies to indicate the jurisdiction of VoIP service. Applying jurisdictional intercarrier charges to VoIP would not be consistent with these earlier determinations.

Further, bill-and-keep will not endanger rural broadband deployment. The Commission made clear in the Notice of Proposed Rulemaking that its long-term goal in reforming intercarrier compensation is to transition the industry form the implicit subsidies of per-minute intercarrier compensation charges to explicit support under the Connect America Fund. Adopting bill-and-keep for VoIP is the first step in the Commission's efforts to gradually phase out the current per-minute intercarrier compensation scheme and replace it with more targeted, efficient explicit support to encourage broadband deployment.

Finally, applying bill-and-keep to VoIP traffic will not lead to more arbitrage during the transition period for the rest of the industry to move to bill-and-keep. Vonage, XO and others have proposed solutions for identifying VoIP traffic in the call signaling or billing information in order to prevent carriers from avoiding access charges by labeling their traffic as VoIP. These or other solutions can be implemented by VoIP providers with minimal cost during any transition to bill-and-keep for all services. If the Commission establishes bill-and-keep for VoIP traffic and requires that VoIP providers identify their traffic as VoIP, innovators in the industry will find a way to implement the requirement.

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REPLY COMMENTS OF VONAGE HOLDINGS CORP.

Vonage Holdings Corp. ("Vonage"), through undersigned counsel, hereby submits its reply to comments filed in response to the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking[1] in this matter.

I. INTRODUCTION

Not surprisingly, the comments fall into several camps along similar interests. There are those, like Vonage, that want to move intercarrier compensation forward to facilitate a transition to broadband, all Internet Protocol ("IP") networks and away from the anachronistic, circuit-switched model. There are others that wish to impose a dying access charge regime to voice over IP ("VoIP") in order to extract inflated access revenues on a greater range of services for as long as possible, while the rest of the industry transitions to a world where per-minute charges are irrelevant. Finally,

[1] *In the Matter of 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 Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket Nos. 07-135, 10-90, 05-337 and 03-109, GN Docket No. 09-51, and CC Docket Nos. 01-92 and 96-45, FCC 11-13 (rel. Feb. 9, 2011) ("NPRM").

there are those that seek to apply a default, reciprocal compensation rate to VoIP calls that connect to the public switched telephone network ("PSTN"). However, despite the different positions among these groups on the treatment of VoIP, there are several areas of agreement that the Commission should consider in conjunction with its own long-term policy goals relating to intercarrier compensation. When taken together, these factors all point to bill-and-keep as the logical interim and long-term solution for VoIP.

II. COMMENTS

A. Despite the Wide Divergence in Views Among the Parties Filing Comments, There are Several Key Areas of Consensus that Demonstrate Bill-and-Keep Is the Most Logical Intercarrier Compensation Solution for VoIP.

As noted, despite the differences of opinion among the parties filing comments, there are a few keys issues upon which all or nearly all of the parties agree. First, it is clear the Commission has never addressed how VoIP fits into the intercarrier compensation system.[2] Second, nearly every party agrees that the Commission has the authority to determine an appropriate intercarrier compensation methodology for VoIP, even if they disagree as to what that methodology may require. Most of these commenters cite Section 251(b)(5) as the appropriate vehicle to establish intercarrier compensation for VoIP.[3] Third, the comments note that there is a crucial need for certainty to spur investment, promote competition and eliminate the opportunity for arbitrage. These areas of agreement highlight a pathway that leads through the jungle of opposing voices mired in the circuit-switched past to a reformed universal service and intercarrier compensation system designed for the IP-based future. The record demonstrates that bill-and-keep is the best policy to address the uncertainty surrounding VoIP traffic and put the industry on this pathway without sacrificing innovation, impeding development or delaying the Commission's long-term policy goals.

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[2] *NPRM*, at ¶ 608; AT&T Comments at 25-26; Verizon Comments at 8; T-Mobile Comments at 3.

[3] *See, e.g.*, Google Comments at 9; Comcast Comments at 7-8; Megapath Comments at 6; T-Mobile Comments at 11; XO Comments at 19-22.

1. Bill-and-Keep for VOIP Provides Certainty Now While Facilitating the Transition Forward to Nationwide Broadband, IP-Based Networks.

A number of parties echo Vonage's recommendation that bill-and-keep is the best option to meet the Commission's long-term broadband and intercarrier compensation goals. Specifically, these parties note that adoption of bill-and-keep for interconnected VoIP is consistent with the Commission's long-term objective to move away from per-minute charges, will hasten the construction of broadband networks, and facilitate transition to IP networks.[4] Bill-and-keep also provides certainty, is competitively neutral[5] and eliminates arbitrage opportunities.[6] All of the other options raised by the Commission and addressed by parties in comments will delay or impede the transition to IP networks and result in inequitable impacts on VoIP providers and their customers.

As Vonage and others have demonstrated, adopting bill-and-keep for interconnected VoIP traffic is consistent with applicable law and the Commission's long-term reform objective to move away from out-dated per-minute charges.[7] The existing intercarrier compensation system is based upon differences – different rates for interstate, intrastate, and local traffic, different treatment for wireline, wireless and Internet traffic – not uniformity.[8] These differences, in turn, create uncertainties and opportunities for arbitrage and have led to the numerous intercarrier compensation disputes either already addressed by or pending before the Commission and the courts. For these reasons, the Commission correctly recognizes that the best long-term solution is an intercarrier compensation system based upon uniformity that does not include rate distinctions based upon jurisdiction or type of traffic.[9] At the same time, this Commission, state commissions and the industry acknowledge that, with modern switching technology, "the additional cost of

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[4] Vonage Comments at 5-8; Google Comments at 8; T-Mobile Comments at 12; CTIA Comments at 11; MegaPath Comments at 3-5; VON Coalition Comments at 4.

[5] Vonage Comments at 8; VON Coalition Comments at 4; MegaPath Comments at 3; Google Comments at 8.

[6] MegaPath Comments at 3-4; MetroPCS Comments at 4.

[7] Vonage Comments at 3-8, MegaPath Comments at 3-5; VON Coalition Comments at 3-4; Google Comments at 6-7.

[8] Verizon Comments at 5.

[9] *NPRM*, at ¶ 495. *See also* Comments of Bright House Networks Information Services, LLC at 2-3.

terminating a telephone call is approximately zero."[10] Consequently, the Commission has indicated its preference for a reformed intercarrier compensation system based entirely on bill-and-keep.[11] This preference is supported in the initial comments[12] and throughout the record.[13]

The Commission stated in the NPRM that long-term intercarrier compensation reform "would gradually phase out the current per-minute ICC system" and replace the implicit subsidies of this system with explicit support from the Connect America Fund ("CAF").[14] Since the Commission's ultimate goal is to get all intercarrier compensation to bill-and-keep, it cuts against this goal to impose on VoIP the very same anachronistic, unworkable access charges the Commission seeks to eliminate. As the comments note, it makes little sense to go from the current situation, where no charges apply to VoIP, to imposing access charges on VoIP, only to revert back to bill-and-keep as the long-term intercarrier compensation solution.[15] Indeed, even some of those parties that recommend a solution other than bill-and-keep for VoIP agree that "[i[t would be counterproductive to subject VoIP-originated traffic to the current patchwork of inefficient and unsustainable ICC arrangements."[16] Doing so would be a significant step backwards and would invariably delay the transition to all-IP networks.[17] The more logical solution is to impose bill-and-keep on VoIP immediately. This approach: (1) provides the certainty all agree is needed; (2) is forward, rather than backward-looking; (3) reflects the nature of VoIP traffic and of IP-based networks in general; (4) and "would send a strong signal regarding the Commission's commitment to the 'end state'" of bill-and-keep.[18]

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[10] T-Mobile Comments at 10 (quoting *Ace Tel. Ass'n v. Koppendrayer*, 432 F.3d 876, 880 (8th Cir. 2005)).
[11] *NPRM*, at ¶ 530.
[12] Vonage Comments at 5-8; Google Comments at 8; T-Mobile Comments at 12; CTIA Comments at 11; MegaPath Comments at 3-5; VON Coalition Comments at 4; MetroPCS Comments at 4.
[13] MegaPath Comments at 3 fn.1;
[14] *NPRM*, at ¶ 34.
[15] MegaPath Comments at 7-8; VON Coalition Comments at 5-6;
[16] Comcast Comments at 5; Verizon Comments at 3.
[17] VON Coalition Comments at 4-5; Google Comments at 6-7.
[18] CTIA Comments at 11.

Moreover, unlike those services currently operating under the broken intercarrier compensation system, VoIP does not need a glide path to bill-and-keep. VoIP is currently not saddled with the inefficiencies, billing and payment structure, or implicit subsidies of traditional voice services. VoIP services are developed, provided and priced without an expectation that some portion of the cost of the service will be recovered through intercarrier compensation charges. Likewise, VoIP is priced and delivered as a bundled, anywhere, anytime service so considerations of geography, distance or jurisdiction do not play a factor in setting prices. Finally, many VoIP providers do not receive access charges. As a result, VoIP providers do not need to be weaned off access charges in order to transition to the Commission's long-term bill-and-keep model. VoIP providers can transition to an IP-based, bill-and-keep pricing model immediately.

On the other hand, imposing the existing access charge regime on VoIP providers would require them to make costly investments in equipment to make jurisdictional distinctions and convert traffic to time division multiplexing ("TDM"). As the Commission recognizes and the comments demonstrate, an intercarrier compensation regime that perpetuates TDM connections and circuit-switched methodologies only serves to delay the inevitable and highly coveted transition to IP networks.[19]

VoIP and IP-based services are, by definition, based upon an IP network. In that environment, unlike the TDM, circuit-switched networks of the past, minutes-of-use and per-minute charges do not exist; nor is geographic location or distance a consideration. Voice is provided over an IP network in the same manner as any other data; it is packetized, disassembled, routed over multiple paths, and reassembled at the other end. The cost of originating, transporting or terminating these data packets does not depend upon time, distance, the type of service at either end or the number associated with the VoIP equipment. Rather, as the National Broadband Plan confirms, in an all-broadband, IP-based world, compensation for the exchange of IP traffic is based

[19] *In the Matter of High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, at ¶ 189 (2008); NPRM at ¶¶ 524-525; T-Mobile Comments at 12; Comcast Comments at 5.

upon the amount of bandwidth consumed in a month.[20] In fact, as noted, in the comments, the series of interconnected network providers that comprise "the Internet" exchange traffic either without compensation or based upon the value of the exchange, rather than through per-minute rates.[21] The number of minutes exchanged between the parties never comes into the equation because each user of the network owners pays for its share of network costs based upon the amount of the network used.[22] The similarities between the exchange of VoIP traffic and IP traffic over the Internet warrant the same bill-and-keep treatment for VoIP.

2. Bill-and-Keep is the Most Effective, Economically Efficient and Easiest to Implement and Administer Solution for VoIP Intercarrier Compensation.

A number of comments agree with Vonage that bill-and-keep is the most logical and effective manner for the Commission to bring certainty to the intercarrier compensation treatment of VoIP traffic. Bill-and-keep more accurately reflects the benefits of the exchange of VoIP traffic between parties, is easy to implement and administer, avoids the complex billing and traffic reporting of the current system, and reduces the need for the FCC or state commissions to intervene or resolve disputes. In the past, the calling-party-pays policy underlying intercarrier compensation assumed that only the originating party receives a benefit from having the ability to place a call to the called party. Like the zero compensation exchange of traffic between Internet providers that reflects the value of the exchange to both parties, bill-and-keep for VoIP better reflects the value of the communication to both parties, *i.e.*, both parties and their customers benefit from the ability to place calls to or receive calls from the other party's customers. In addition, because bill-and-keep eliminates artificial economic signals that lead carriers to seek compensation from their competitors in the form of access charges rather than from their customers, it provides appropriate price signals to consumers that reflect the actual cost of the service.[23] This information, in turn, enables

[20] National Broadband Plan at 142.
[21] Verizon Comments at 12-13.
[22] Google Comments at 7-8.
[23] MetaPath Comments at 3; Google Comments at 8.

consumers to make rational economic decisions about adopting a particular service based upon the quality, efficiencies and operations of the service.

Bill-and-keep is also easy to implement and administer. It does not require the installation or modification of billing systems, or the addition of equipment to jurisdictionalize traffic, and it does not require tariff filings or cost support. In addition, because bill-and-keep is not a payment-based system, carriers do not need to monitor usage or develop complex billing algorithms or traffic studies in order to exchange traffic. Thus, the efficient exchange of traffic is not dependent upon external factors that are subject to interpretation, manipulation, or dispute. For similar reasons, bill-and-keep reduces the need for the Commission or a state commission to intervene to resolve disputes between parties regarding regulatory classification or the jurisdiction of traffic. Finally, because no payment exchanges hands under a bill-and-keep regime, it takes away the incentive and ability of terminating carriers to leverage their monopoly control of the called party to extract uneconomic rates from their competitors.

B. Objections to Bill-and-Keep Are Misdirected and Unavailing.

A number of parties raise objections to the adoption of bill-and-keep for VoIP claiming that interconnected VoIP is essentially the same as traditional voice service, uses the network in the same manner, and imposes the same costs on terminating carriers and, therefore, should be subject to the same access charges. Some of these objections are the same tired and stale arguments initially raised to support regulation of VoIP in the first instance; arguments which have been flatly rejected by the Commission. Most of the commenters taking this position are rural carriers, rural carrier associations, and state regulators. A handful of CLECs that are or would be net recipients of VoIP access charges round out the list. Each of these entities has a direct interest in maintaining the existing, broken intercarrier compensation system and, more importantly, in expanding it to include interconnected VoIP. With the exception of Verizon Wireless, all of the wireless commenters support bill-and-keep. Verizon Wireless is also opposed to the imposition of access charges on VoIP but proposes a uniform $0.0007 rate for all VoIP traffic rather than bill-and-keep. These wireless providers are, together with the technology company commenters, the only parties that cannot currently collect access charges and, therefore, do not have an economic incentive to maintain the old system to artificially preserve revenues.

Rural carriers, or their CLEC affiliates, have some of the highest access rates in the country. It is, therefore, not surprising they would want the opportunity to expand those inflated rates to a broader range of services in order to continue to generate uneconomic revenues based on an outdated system bearing no correlation to the actual costs of processing VoIP calls. Rather than facilitate the transition to all IP networks, these providers grasp onto the past. However, the Commission has already made clear its long-term goal in this proceeding to eliminate the implicit subsidies inherent in inflated access charges and replace them with explicit support from the CAF.[24] It is precisely because of such significant differences in access charges that companies have developed creative ways to game the system in order to generate excessive access traffic. For the reasons provided above and throughout the comments in this proceeding, it makes no sense to squeeze VoIP, even if only temporarily, into this broken and untenable system.

The state regulators filing comments want the Commission to impose access charges on VoIP in order to preserve their jurisdiction over intrastate access charges and gain jurisdiction over VoIP traffic. In fact, notwithstanding the Commission's clear decisions on this issue, one state regulator suggests interconnected VoIP services should be subject to state certification authority.[25] The Commission has already determined that VoIP services are subject to its exclusive jurisdiction,[26] and has only provided states limited authority to regulate interconnected VoIP for purposes of state universal service funds.[27] Moreover, the Commission concludes in the NPRM that it has authority

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[24] *NPRM*, at ¶ 34.
[25] Iowa Utilities Board Comments at 7.
[26] *Vonage Holdings Corporation Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, Memorandum Opinion and Order, 19 FCC Rcd. 22404, ¶¶ 15-17 (2004) ("*Vonage Preemption Order*"), *aff'd sub nom. Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007).
[27] *In the Matter of Universal Service Contribution Methodology; Petition of Nebraska Public Service Commission and Kansas Corporation Commission for Declaratory Ruling or, in the Alternative,*

under Sections 201 and 251(b)(5) to adopt reciprocal compensation rules for all telecommunications, whether intrastate or interstate.[28] The only way in which the Commission can truly provide certainty regarding intercarrier compensation for VoIP, the one issue that every commenter agrees is critical for moving forward, is to exercise exclusive jurisdiction over VoIP intercarrier compensation. If the Commission does not explicitly rule that it has exclusive jurisdiction to set intercarrier compensation rates for all VoIP services, it may find its efforts to reform intercarrier compensation, eliminate per-minute charges and implicit subsidies, and transition to an all-IP network stymied by separate, inconsistent rulings on the treatment of VoIP traffic from state regulators.

1. The Commission Has Already Determined that VoIP Should Not Be Regulated Like Traditional Voice Telecommunications.

Most of those parties seeking to impose access charges on VoIP services assert that VoIP looks like a traditional voice service (from a network and routing standpoint), is sold as substitute for traditional voice service, and uses the network in the same manner as a traditional voice service. Therefore, they argue VoIP should be subject to the same intercarrier compensation regime as traditional voice service. Putting aside the fact that most of these parties also said the existing intercarrier compensation system is severely broken and needs reform, the Commission has already flatly and repeatedly rejected the argument that interconnected VoIP should be regulated like traditional voice because it resembles that service.

In the *Vonage Preemption Order*, the Commission identified a number of key distinctions between interconnected VoIP and circuit-switched voice services that warranted different treatment. The Commission noted that "in contrast to traditional circuit-switched telephony" Vonage does not necessarily assign telephone numbers to customers based upon their "home" location.[29] The

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Adoption of Rule Declaring that State Universal Service Funds May Assess Nomadic VoIP Intrastate Revenues, Declaratory Ruling, WC Docket No. 06-122, 25 FCC Rcd 6953, (2010).

[28] *NPRM*, at ¶ 515.

[29] *Vonage Preemption Order*, at ¶ 9.

Commission went on to explain "again in marked contrast to traditional circuit-switched telephony, a call to a Vonage customer's NANP number can reach that customer anywhere in the world and does not require the user to remain at a single location."[30] The Commission also found that Vonage offers consumers "any-distance" service without distinguishing between local and long-distance minutes of use.[31] In other words, unlike some providers that might offer unlimited long distance or unlimited local calling, under Vonage's offering, both distance and geography are irrelevant.

The Commission also noted that Vonage offered a suite of integrated capabilities and features together with any-distance calling and concluded that, these functionalities "form an integrated communications service designed to overcome geography, not track it."[32] The Commission added that these features are not unique to Vonage's services and are, instead, characteristics of most, if not all, IP-based services.[33] The Commission also rejected arguments "that the traditional dual regulatory scheme must nevertheless apply to DigitalVoice *because it is functionally similar* to traditional local exchange and long distance voice service."[34]

Finally, the Commission concluded that "it is the total lack of dependence on *any* geographically defined location that most distinguishes DigitalVoice from other services."[35] In short, contrary to the claims of some comments, the Commission has already determined that VoIP does not exhibit a functional equivalence to traditional telecommunications services and, therefore, should not be regulated in the same manner. For these reasons and as demonstrated in the comments, applying jurisdictional charges to interconnected VoIP would be a giant step backwards at a time when the Commission, state regulators and the industry as a whole should be looking to the future.

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[30] *Vonage Preemption Order*, at ¶ 9.
[31] *Vonage Preemption Order*, at ¶ 27.
[32] *Vonage Preemption Order*, at ¶ 25.
[33] *Vonage Preemption Order*, at ¶ 25 n.93.
[34] *Vonage Preemption Order*, at ¶ 22 (emphasis in original).
[35] *Vonage Preemption Order*, at ¶ 25 (emphasis in original).

2. Concerns that Bill-and-Keep Would Endanger Broadband are Misplaced.

A number of parties favor the imposition of access charges on VoIP, and opposing bill-and-keep, assert that applying bill-and-keep to VoIP will reduce incentives for carriers to upgrade their networks by taking away access charge revenue. These parties seek to continue the inefficient implicit subsidies that have predominantly benefited rural carriers under the existing intercarrier compensation system. The NPRM makes clear that these implicit subsidies should be removed through the gradual elimination of all per-minute charges and replaced with explicit support from the CAF. As the Commission notes, "we want to create incentives for companies to move away from relying on intercarrier compensation revenues as the market shifts from telephone service to broadband."[36] Thus, while the nature of the support may change, the Commission has not indicated it will disappear. As a result, there is no need to extend the irrationality of the existing access charge system to VoIP in the name of preserving broadband funding.

Explicit support from the USF or CAF is a better means of supporting broadband development than imposition of artificially high access charges, especially with respect to VoIP. Implicit subsidies hidden in access charges make it difficult for regulators, consumers and others to determine the real cost of the service or to ensure that a legitimate need for support is met by appropriate funding. For instance, the additional revenue generated by high access charges can be used to offset the price of an unrelated service in such a way that the price no longer reflects the actual cost of that service, which distorts the pricing signals given to consumers. On the other hand, explicit support, which comprises a specific amount of funding directed to a specific company for a specific purpose, makes it easier to determine that there is need and whether that need is addressed. Explicit support also creates less pricing distortion, which, in turn, causes an appropriate response by the market.

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[36] *NPRM*, at ¶ 587.

By imposing bill-and-keep on VoIP traffic and thereby eliminating the implicit subsidies that would have been created through access charges, the Commission is not signaling that rural areas should fall behind or be left out. To the contrary, under a bill-and-keep regime, the removal of non-economic costs provides customers with the opportunity to make rational economic choices because any decision to adopt broadband would be based solely on the efficiencies of the networks and operations as well as the quality of service. By shifting from implicit to explicit support, the Commission is ensuring that subsidies are dispensed in a more efficient manner. Increased efficiency in the distribution of broadband support means that support can be more accurately targeted to those locations where it is needed the most. Establishing bill-and-keep for VoIP while all other intercarrier compensation also moves toward bill-and-keep facilitates a transition to explicit broadband support. Thus, bill-and-keep promotes the cost-effective development of broadband through targeted, efficient distribution of funds. In contrast, imposing the existing above cost access charge regime on VoIP would only further reinforce the implicit subsidy model and make it more difficult to move away from this inefficient system in the future.

Moreover, as noted in some of the comments, maintaining a system of intercarrier compensation payments, rather than bill-and-keep, actually provides disincentives to transitioning to an all-IP network. It provides an incentive for carriers to maintain their legacy, high-cost and inefficient TDM infrastructure. It even creates the incentive for carriers that have the ability to carry calls in IP from end-to-end to unnecessarily convert calls to TDM for the sole purpose of trying to collect access charges.[37] As long as carriers are able to collect intercarrier compensation for TDM terminations, they will maintain their costly and inefficient TDM connections and require other parties to terminate traffic to them in TDM. At the same time, in order to interconnect with or terminate traffic to these entities, VoIP providers and other carriers that have converted to IP, will have to maintain their TDM infrastructure. This type of structure imposes unnecessary, duplicative

[37] AT&T Comments at 29; YMax Comments at 3.

costs on those entities that have taken the steps, desired and encouraged by the Commission, to transition to IP, while rewarding those entities that have failed or refused to do so.

Rather than trying to establish an efficient market through regulation, the Commission should let the market determine what is efficient and what is not. Under a competitively neutral intercarrier compensation regime, service providers can make effective decisions about broadband deployment and compete based upon the quality and value of their service. Bill-and-keep sends the correct pricing signals for broadband so that consumers will have meaningful pricing information upon which to base their purchasing decisions.

3. The Threat of Further Arbitrage Raised by Some Parties in Response to Bill-and-Keep is Overstated.

Several parties opposed to bill-and-keep claim that it will create another arbitrage opportunity as carriers attempt to characterize their traffic as VoIP in order to avoid access charges.[38] The Commission recognized this concern, seeking comments on ways to eliminate or reduce it, and Vonage, XO Communications, and ZipDX offered solutions that would address this issue. Specifically, Vonage proposed requiring the originating service provider to include, in the call signaling or billing information, an appropriate indicator to identify the call as an interconnected VoIP call and to prohibit service providers from falsely indicating that a call is an interconnected VoIP call under the proposed Call Signaling Rules. Vonage suggested the Calling Party's Category ("CPC") field that is used to interface between Session Initiation Protocol ("SIP") messages and the PSTN network, could be a good candidate to be used for identifying VoIP calls.

XO Communications LLC ("XO") noted that some carriers, pursuant to agreements already in place, are currently exchanging VoIP traffic via local interconnection trunks and populating the Jurisdictional Indicator Parameter ("JIP") field on the call record to designate the traffic as VoIP

[38] Cablevision Comments at 3-5; Cbeyond Comments at 6; Frontier Comments at 6-7; Nebraska Rural Independent Companies at 6-7.

traffic exempt from access charges.[39] Likewise, ZipDX suggests defining a special value range for the "Charge Number" field that is included in signaling.[40] This solution, combined with the restriction already in the Commission's Call Signaling Rules that prohibits altering or stripping information in the Charge Number field, would provide a method for identifying VoIP traffic that would be easy to implement and monitor.

There are likely other, viable solutions that would make the identification of VoIP traffic relatively easy without requiring onerous or costly billing system changes. To date, there has not been a business, regulatory or other reason to justify developing a universal method for identifying VoIP traffic. If the Commission confirms bill-and-keep as the de facto compensation methodology applicable to VoIP traffic and also requires VoIP providers to identify their traffic as VoIP, innovators in the industry will find a way to implement the requirement. The important point is that if this is a real issue during the transition to bill-and-keep for all traffic, it is one that can easily be addressed.

C. <u>Any New Rules Governing Intercarrier Compensation for VoIP Should be Prospective Only.</u>

The Commission and commenting parties correctly note that VoIP has never been a part of the Commission's intercarrier compensation regime.[41] Thus, a determination as to the intercarrier compensation treatment of VoIP is not an interpretation or clarification of existing law, but rather substitution of new law for old law that was reasonably clear and, therefore, can only be applied prospectively.[42] Likewise, any new rules adopted by the Commission in this proceeding should be subject to prospective application only.[43] Where the Commission or the courts have applied a

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[39] XO Comments at 33.

[40] ZipDX Comments at 2.

[41] *NPRM*, at ¶¶ 73, 604; Verizon Comments at 4; T-Mobile Comments at 3; AT&T Comments at 25-26.

[42] *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006). *See also Verizon Tel. Cos. v. FCC,* 269 F.3d 1098, 1109 (D.C.Cir.2001)([t]he governing principle is that when there is a "substitution of new law for old law that was reasonably clear," the new rule may justifiably be given prospectively-only effect in order to "protect the settled expectations of those who had relied on the preexisting rule.") (quoting *Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1554 (D.C.Cir.1993).)

[43] *Verizon Tel. Cos. v. FCC,* 269 F.3d 1098, 1109 (D.C.Cir.2001) [t]he governing principle is that when there is a "substitution of new law for old law that was reasonably clear," the new rule may

decision retroactively, including those cited in the comments, *e.g.*, *AT&T Prepaid Calling Card Order*,[44] it has generally been in the context of an adjudication, not a rulemaking, and the Commission has explicitly stated that the decision involved a clarification of existing law, not a change of law. For instance, in the *AT&T Prepaid Calling Card Order*, the Commission stated that the classification decisions it was making in that order "fall into the category of new applications of existing law, clarifications and additions."[45] Since the Commission has never classified interconnected VoIP as a telecommunications or an information service, doing so now would be the substitution of new law for old law, rather than a new application of existing law. Retroactive application of access charges or reciprocal compensation would have a significant adverse economic and competitive effect on VoIP providers. This will, in turn, delay the transition to IP networks

At least one party suggests intercarrier compensation for VoIP should be determined based upon how the traffic is terminated to the terminating carrier.[46] According to these comments, if a call is terminated over local trunk groups, it should be treated as local traffic subject to reciprocal compensation. If it is terminated over interexchange trunk groups, it should be subject to access charges. This logic is fatally flawed because many of the interconnections and infrastructure over which VoIP traffic is exchanged were not established with the jurisdiction of the traffic in mind or with the expectation that the network configuration would determine the intercarrier compensation charges that apply. Rather, most of these arrangements were put in place under the terms of the parties' interconnection agreements, a tariff or other arrangement, and designed to facilitate the exchange of traffic of all types. Further, this argument breaks down completely where multi-

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justifiably be given prospectively-only effect in order to "protect the settled expectations of those who had relied on the preexisting rule." *Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1554 (D.C. Cir. 1993).

[44] *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006) ("*AT&T Prepaid Calling Card Order*"), *affi'd in part rev'd in part Qwest Services Corp. v. FCC, 509 F.3d 531 (D.C. Cir. 2007)*; *AT&T Corp. Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services*, Order and Notice of Proposed Rulemaking, WC Docket No. 03-133, 20 FCC Rcd 4826 (2005), aff'd , AT&T v. FCC, 454 F.3d 329, 334 (D.C. Cir. 2006).

[45] *AT&T Prepaid Calling Card Order*, 21 FCC Rcd. 7290, at ¶ 41.

[46] XO Comments at 2-3.

jurisdictional trunk groups are available. For example, it is not clear how a terminating carrier would classify VoIP traffic terminated over a trunk group that allows the simultaneous exchange of local, intrastate and interstate traffic.

D. If the Commission Elects Not to Establish Bill-and-Keep for VoIP, it Should Adopt a Low, Uniform, Non-Jurisdictional Rate that Will Foster Development of and a Transition to IP Networks.

If the Commission does not apply bill-and-keep to VoIP, Verizon's proposal to apply a uniform, non-jurisdictional rate of $0.0007 to VoIP would be the best alternative. Because this rate would not differ based upon the jurisdiction of an interconnected VoIP call or the location of a party to the call, it advances the goal of eliminating rates based upon non-cost-based jurisdictional distinctions. This alternative proposal also still advances the Commission's goal of transitioning to IP networks even if it does not go as far as bill-and-keep to move toward the Commission's goal of no per-minutes rates for intercarrier compensation. However, a uniform, non-jurisdictional rate does not have the same economic efficiencies and does not minimize regulatory burden as much as a bill-and-keep model.

For one thing, a uniform rate still requires each carrier or service provider to calculate, bill and collect the charge from the parties with whom it exchanges VoIP traffic. In addition, no matter how small the rate, a payment-based system inevitably leads to disputes and litigation over the amount due one party from another. As a result, this Commission and state commissions will continue to have intercarrier compensation disputes to resolve. Finally, rather than transitioning network operators from implicit subsidies to the explicit support of universal service, either the USF or CAF, a uniform rate perpetuates some level of implicit subsidies.

III. CONCLUSION

For the reasons discussed herein and in its previously filed Comments, Vonage respectfully requests that the Commission adopt a bill-and-keep regime for interconnected VoIP intercarrier compensation.

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