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

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

PAC-WEST TELECOMM, INC.
REPLY COMMENTS

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May 23, 2011

SUMMARY

Pac-West Telecomm, Inc. ("Pac-West") submits these Reply Comments responsive to Comments of other carriers addressing Sections X-XIV and XVI of the NPRM.[1] Pac-West again encourages the Commission to modernize the intercarrier compensation regime to eliminate unsupported distinctions between types of traffic and types of carriers. First, Pac-West proposes that the Commission should remove barriers to broadband deployment by treating VoIP traffic the same as traditional TDM traffic and put an end to the self-help practices of larger carriers that unilaterally decide what, if anything, they will pay other carriers for such traffic. Second, on overall intercarrier compensation reform, Pac-West recognizes that intercarrier compensation rates will be reduced over time, but supports an incremental, disciplined, and nondiscriminatory reduction to cost-based rates within the Telecom Act's sections 251/252 framework. Third, Pac-West encourages the Commission to reiterate that *all* ISP-bound traffic is subject to reciprocal compensation. Finally, Pac-West supports the Commission's efforts to unify rates, but again urges the Commission to do so in a manner consistent with the statutory framework, without preempting the rights of the States to regulate intrastate access services.

In sum, Pac-West urges the Commission to adopt a regulatory framework that will remove market distortions, promote incremental change and, as result, provide the regulatory certainty that new entrants require to compete in the telecommunications sector.

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[1] Pac-West also filed Comments on Sections X-XIV and XVI and Reply Comments on Section XV. Comments of Pac-West Telecomm, Inc. filed April 18, 2011 ("Comments of Pac-West") in In re *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 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, NPRM & FNPRM, FCC 11-13 (rel. Feb. 2011) ("NPRM").

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I. THE COMMISSION SHOULD REMOVE BARRIERS TO BROABAND DEPLOYMENT BY INSTITUTING A GRADUAL REDUCTION OF RATES AND IMMEDIATELY TREAT VOIP TRAFFIC THE SAME AS ALL OTHER TRAFFIC

Pac-West agrees with the Commission and other commenters that "it is important for any transition to be gradual enough to enable the private sector to react and plan appropriately."[2] As Cox Communications notes, the Commission "has recognized in the past that such 'glide path' transitions are appropriate to avoid immediate financial disruptions, even in cases where the Commission believed that initial rates were excessive."[3] It appears to be a near universal experience among CLECs adopting IP-based technology, however, that they are experiencing immediate financial disruptions, not from any Commission ruling, but from the unilateral actions of large carriers exploiting their market power.[4]

Most interexchange carriers – including Verizon, Sprint, and Level 3 – have developed a policy and consistent practice of short-paying their invoices. For example, Verizon, the chief evangelist for the "bill-and-keep-light" rate of $0.0007, simply sends carriers a letter informing them that it unilaterally "has re-rated the intercarrier compensation charges that your company has billed on IP-originated or IP-terminated traffic down to a rate of $0.0007 per minute of use," which it claims "is the most generally accepted rate in the industry."[5] Left unsaid in the letter,

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2 NPRM ¶ 533; *see also* Comments of PAETEC Holding Corp., *et al.*, at 12; Comments of Cox Communications, Inc. at 13 ("The transition should occur over a reasonable period, rather than through a flash cut that drops intercarrier compensation rates immediately.").

3 Comments of Cox at 13.

4 Comments of PAETEC at 36 (collecting comments and stating "large carriers, such as Verizon and Sprint, have engaged in arbitrage and exploited their market power by refusing to pay compensation for the termination of VoIP traffic at rates set forth in lawful tariffs and/or agreements.").

5 *See* Letter from Donna Donahue, Verizon Business, to Eva Fettig, Pac-West (April 22, 2011) (Attached hereto as Exhibit A). As support for its position that VoIP is not subject to switched access tariffs or "related charges," Verizon cites *PAETEC v. CommPartners, LLC*, No. 08-0397 (D.D.C. Feb. 18, 2010) and *MetTel v. GNAPs*, No. 08-cv-3829, 2010 1326095

however, is that Verizon will simply refuse to pay access charges on *any* calls until it recoups what it believes it "wrongfully" paid,[6] while also requiring smaller LECs such as Pac-West to identify *every* call that is not transmitted in VoIP – a task that even Verizon admits is often impossible.[7] As Bright House correctly notes:

> Verizon's newly discovered approach to interconnected VoIP – that PSTN traffic is immune from any and all access charges simply because one of the end points of the call is a VoIP subscriber – is an enormous and unfair financial and competitive advantage to Verizon. Verizon cannot be unaware, for example, that a principal effect of its self-declared access charge amnesty is that it no longer makes previously substantial access charge payments to its main landline competitors....[8]

Of course, Verizon is perfectly aware of the costs it imposes on its competitors. It admits in its initial comments that "receiving carriers [ ] *incur significant costs* simply from the large volume" of traffic Verizon transfers onto their networks. Verizon transmits this traffic with no intention of paying for it, only because the traffic happens to be transmitted in IP format.[9] Unfortunately for smaller carriers, Verizon is not the only carrier to adopt a self-help policy with respect to VoIP and other traffic. The U.S. District Court for the Eastern District of Virginia recently chastised Sprint for its self-help tactics, stating:

> Sprint's justifications for refusing to pay access on VoIP-originated traffic, and its underlying interpretation of the ICAs, defy credulity. The record is unmistakable: Sprint entered into

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(S.D.N.Y. Mar. 31, 2010). Verizon fails to mention, however, is that the *MetTel* court awarded the LEC its interstate access rate for terminating GNAPs' VoIP traffic and that the *PAETEC* decision is currently before the D.C. Circuit on an interlocutory appeal. Thus, the only final decision Verizon relies upon would mandate that it pay LECs their interstate access rate for originating or terminating VoIP traffic, not $0.0007.

6 Comments of PAETEC at 37 (describing several instances of Verizon self-help).

7 Comments of Pac-West at 9.

8 Comments of Bright House Networks at 7.

9 Comments of Verizon at 13 (emphasis added) (Verizon claims here that there are significant costs of one-way traffic, but the point remains equally true if Verizon fails to pay for large volumes of VoIP traffic that both originate and terminate on another carrier's network).

> contracts with Plaintiffs wherein it agreed to pay access charges on VoIP-originated traffic. Sprint's defense is founded on post hoc rationalizations developed by its in-house counsel and billing division as part of Sprint's cost cutting efforts, and the witnesses who testified in support of the defense were not at all credible.[10]

Thus, Verizon, Sprint, Level 3 and others have simply taken the law into their own hands, using the threat of litigation to actually claw back previously paid access charges and refusing to pay prospectively to force carriers to accept a rate of $0.0007. Given this practice of accepting services but refusing to pay for them, it's not surprising to hear these same carriers declare that the free, unregulated market is working.[11] It's certainly working for the large carriers.

Verizon, AT&T and others recommend a new regime of commercial agreements to supplant the Commission's statutory 251/252 obligations. However, the Commission should not allow a system of potentially discriminatory one-off deals to supplant the carefully crafted protections of the Telecom Act. For example, the terms of Verizon's *one* commercial VoIP agreement with Bandwith.com have not been disclosed. Indeed, Verizon has refused to provide nondiscriminatory terms to Pac-West, and will not even disclose the terms of that agreement to Pac-West. Verizon also relies upon other agreements, including certain Level 3 agreements, to claim that the market is moving toward $0.0007 for all traffic.[12] What Verizon fails to mention is that these agreements concern ISP-bound traffic. It should hardly come as a surprise that Level 3 has been able to negotiate a $0.0007 rate for the exchange of ISP-bound traffic when that

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[10] Memorandum Opinion, *Central Telephone of Virginia, et al. v. Sprint Communications Co. of Virginia, Inc. et al.*, U.S. District Court, Eastern District of Virginia, Richmond Division, Civil Action No. 3:09-cv-720, at 3 (March 2, 2011).

[11] It should also be noted that agreements to exchange VoIP traffic at $0.0007 are meaningless when analyzed in a vacuum. If the traffic exchanged by two carriers is largely, but not perfectly balanced, carriers may agree to this nominal rate as an insurance mechanism against larger than average swings or to keep the other carrier honest.

[12] Comments of Verizon at 16.

has been the Commission-set rate for such traffic for over a decade. Such agreements, however, should not credibly be considered to provide support for IXC self-help campaigns.

Such conduct simply underscores why the Commission should refuse Verizon's and other large carriers' invitations to create a new category of traffic for VoIP. It would not only reward large carriers for their anticompetitive behavior, but discourage other carriers from adopting IP-based technology in the first place if such carriers knew they could receive more in intercarrier compensation by retaining older technologies. Further, as discussed above and by other commenters, it is often impossible to distinguish VoIP traffic from other forms of traffic. This impossibility militates in favor of treating IP-based traffic identically to any other type of traffic. Simply put, there is no basis in the record for the Commission to create another category of traffic; doing so would simply generate more arbitrage opportunities and more disputes.

II. THE COMMISSION SHOULD GRADUALLY REDUCE RATES OVER WHICH IT HAS JURISDICTION TO TELRIC-BASED RATES

As Pac-West has previously submitted, it encourages the Commission to reform the intercarrier compensation regime, but to consider the impact on competition and smaller carriers such as Pac-West.[13] Pac-West agrees with commenters that share the view that the reduction in rates should be gradual, incremental, predictable, and nondiscriminatory.[14] Interstate traffic appropriately subject to access charges today could be gradually reduced to section 251(b)(5) rates over time. A gradual and incremental approach will allow the Commission and the States

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13 Comments of Pac-West at 9-12.

14 *See, e.g.*, Comments of the California Public Utilities Commission at 17-22. While Pac-West supports the incremental approach advocated by the CPUC, it does not share in the view that the "end-point" should be forced bill-and-keep or $0.0007, a position that Pac-West believes would be illegal under the Telecommunications Act of 1996, which provides that carriers must be able to recoup their cost of switching, plus the possibility of a reasonable profit. 47 U.S.C. § 252(d).

to evaluate the affects of each reduction in rates on end users, carriers, and competition generally. Pac-West supports an approach like that of the California Public Utilities Commission, where after each step-down in rates, the CPUC would review the impact of the reductions on the health of carriers, consumers, and competition. The Commission should not commit to ineluctable reductions if unintended consequences prove the reductions unwise. This gradual approach also would avoid subjecting facilities-based carriers and network providers across the industry to rate shock by dramatically and suddenly reducing rates.

The end point for rate reductions, however, should be based on clear statutory authority by closely adhering to the carefully crafted federal and state roles built into the 251/252 framework. The Commission should promote voluntarily negotiated 251/252 agreements as the norm. Agreements reached in this context would, as Congress intended, be subject to public filing and opt-in requirements at the state commissions. Carriers who could not reach agreements retain the ability to arbitrate, as necessary, utilizing state commission expertise in setting TELRIC cost-based rates for all traffic brought within the sections 251/252 framework. Having this arbitration backstop if negotiations fail will mitigate the unequal bargaining power that exists in the marketplace, such as where CMRS providers currently force CLECs to terminate their traffic for free.

The preferred solution of some of the largest carriers – forced bill-and-keep – is illegal pursuant to the Telecom Act and the Commission's rules and orders. Pursuant to the Act, bill and keep is only permitted when carriers have waived their right to compensation. 47 U.S.C. § 252(d)(2)(B)(i). Similarly, mandating a rate of $0.0007 would violate the Section 252(d)(2)(A)(ii) requirement that rates be cost based, with the possibility of a reasonable profit. Rather, the Commission must make sure that a unified rate includes reasonable network cost recovery so that smaller carriers can be fairly compensated for the transport and termination functions performed on their switches and networks.[15] If the unified rate has no basis in cost and is so low that smaller carriers cannot recover costs through that unified rate, competitive carriers will not be able to compete with the largest carriers who are able to broadly carry and terminate traffic on their own networks and cross-subsidize termination costs with revenue from myriad other services. Moreover, smaller carriers simply have no leverage in the face of the largest carriers' self-help tactics and will no longer be able to compete. The result will be a handful of larger carriers facing *de minimis* competition, which in turn will lead to higher prices, stifled innovation, and fewer consumer alternatives.

Further, as discussed above, the Commission must make clear that any unified rate established by the Commission applies to all traffic, regardless of technology.[16] The deregulatory nirvana recalled by some carriers with respect to VoIP traffic simply never existed. Although previously the Commission experimented with deregulated phone service, the Commission was soon required to recognize the critical necessity of traditional phone regulation, implementing regulation of 911 service, TRS, and USF and the jurisdictional apportionment of nomadic VoIP services, to name a few. Now that widespread litigation has arisen as a result of some carriers' unilateral decision to halt payments on VoIP traffic, the Commission could continue to eliminate a great deal of industry uncertainty by clarifying that the same traditional intercarrier payment obligations apply to VoIP traffic. By establishing that VoIP is like any other telecommunications traffic, the Commission can avoid litigation and arbitrage-inducing definitional issues, while ensuring that the rates for VoIP traffic would then trend downwards on

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[15] PAETEC Comments at 38-42.

[16] *See also* Cox Comments at 4 n.3.

the same schedule as all other rates. The end point for this gradual reduction of rates should be based on the Commission's authority within the sections 251/252 framework to bring rates down to a unified TELRIC-based rate.

III. THE COMMISSION SHOULD CLARIFY THAT *ALL* ISP-BOUND TRAFFIC IS SUBJECT TO RECIPROCAL COMPENSATION

Pac-West agrees with Level 3 that the Commission should clarify, to the extent it is not clear already, that all ISP-bound traffic is subject to reciprocal compensation.[17] Certain carriers like CenturyLink have tried to create subcategories of ISP-bound traffic (*e.g.*, "VNXX ISP-bound traffic") that have never been recognized by the Commission. Some have gone so far as to assert that not only is the terminating carrier that serves the ISP not entitled to any compensation, but such terminating carriers also owe the originating carrier access charges. This self-serving position has no support in the Commission's regulatory treatment of ISP-bound traffic, for the reasons discussed below, and should be expressly repudiated by the Commission to end needless litigation and reduce uncertainty.

The Commission has issued several ISP-bound traffic compensation orders, with the latest being the November 2008 *Core ISP Order*,[18] which resolved the Commission's statutory authority to create such a subcategory of telecommunications traffic and to subject all ISP-bound traffic to that separate rate regime. Although carriers have been asserting makeweight arguments for years with respect to VNXX ISP-bound traffic, the *Core ISP Order* puts to rest any doubt that terminating carriers are entitled to $0.0007/minute. A brief review of the Commission's orders

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17 Comments of Level 3 at 13-18; *see also* NPRM ¶ 687.

18 *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Developing a Unified Intercarrier Compensation Regime, Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, 01-92, *et al.*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, 24 FCC Rcd. 6475, 2008 WL 4821547 (rel. Nov. 5, 2008) ("*Core ISP Order*").

concerning ISP-bound traffic demonstrates that – whatever excuses originating carriers *could have made* to condone their self-help tactics – any ambiguity concerning ISP-bound traffic was settled by the *Core ISP Order*. Yet carriers continue to litigate the issue two and a half years later.

When the Commission first adopted rules implementing the 1996 Telecommunications Act, the Commission determined that reciprocal compensation obligations under Section 251(b)(5) "apply only to traffic that originates and terminates within a local area."[19] The Commission further provided that carriers would be compensated for the costs of interstate or intrastate non-local calls through the existing access charge regime, and that state commissions had authority to identify the geographic areas of local exchanges.[20]

The Commission subsequently addressed for the first time the nature of intercarrier compensation for ISP-bound traffic in 1999 in its *Declaratory Ruling.*[21] There the Commission determined that ISP-bound traffic was interstate in nature and subject to the jurisdiction of the FCC based upon an end-to-end analysis of an ISP-bound call.[22] The Commission then concluded that, because ISP-bound traffic is jurisdictionally "non-local interstate traffic," "the reciprocal compensation requirements of section 251(b)(5) and of the Commission's rules do not govern inter-carrier compensation for this traffic."[23] On appeal, the D.C. Circuit Court of Appeals vacated the *Declaratory Ruling*, finding that the Commission had not explained why

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19 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,* First Report and Order, 11 FCC Rcd. 15499, ¶ 1034 (1996) .

20 *Id.* ¶¶ 1034-35.

21 *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic* , Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd. 3689 (1999) ("*Declaratory Ruling*").

22 *Id.* ¶ 13.

23 *Id.* ¶ 26 n.87.

ISP-bound calls being jurisdictionally interstate was relevant to whether the calls were "local" for purposes of reciprocal compensation.[24]

In 2001, the Commission released its *ISP Remand Order*[25] following the D.C. Circuit's *Bell Atlantic* decision. In this order, the Commission again held that ISP-bound traffic is not subject to reciprocal compensation under Section 251(b)(5), but rather determined that Section 251(g) excludes ISP-bound traffic from reciprocal compensation obligations. The Commission also modified its decision in the *First Report and Order* that only "transport and termination of local traffic" is subject to reciprocal compensation, finding that all telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.[26] In 2002, however, the D.C. Circuit Court of Appeals rejected the Commission's findings that Section 251(g) excluded ISP-bound traffic, and remanded the matter to the Commission.[27] The Court did not vacate the order, however, finding that there was a "non-trivial likelihood" that the Commission had authority to adopt its pricing rules for ISP-bound traffic on other grounds.[28]

The D.C. Circuit subsequently granted a petition for a writ of mandamus that was filed to compel the Commission, on remand from the court's earlier *WorldCom* decision, "to explain the legal authority upon which [the Commission's interim pricing] rules [for ISP-bound traffic] are based."[29] The Court directed the Commission to issue a final, appealable order by November 5,

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[24] *Bell Atlantic Tel. Co. v. FCC*, 206 F.3d 1, 8 (D.C. Cir. 2000).

[25] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151 (2001) ("*ISP Remand Order*").

[26] *Id.* ¶ 46. The Commission also adopted a series of declining caps on the rates for ISP-bound traffic, a "mirroring rule," and "growth cap" and "new markets" rules limiting the number of minutes of ISP-bound traffic for which a local exchange carrier could seek payment under the new regime. *Id.* ¶¶ 78, 80-81

[27] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 432 (D.C. Cir. 2002).

[28] *Id.* at 434.

[29] *In re Core Commc'ns, Inc.*, 531 F.3d 849, 850 (D.C. Cir. 2008).

2008.[30] On that date, the Commission issued its *Core ISP Order* and held that "although ISP-bound traffic falls within the scope of section 251(b)(5), this interstate, interexchange traffic is to be afforded different treatment from other section 251(b)(5) traffic pursuant to [the Commission's] authority under section 201 and 251(i) of the Act."[31]

Critically, however, the Commission did not distinguish between calls to an ISP from its customers in different local exchanges from traffic to an ISP from its customer in the same exchange. Indeed, any contrary result would have collided with the Commission's long-held view that for jurisdictional purposes, ISP-bound traffic is viewed without regard to "intermediate points of switching or exchanges between carriers."[32] Rather, the Commission noted that Section 251(b)(5) imposes a duty on all LECs to "establish reciprocal compensation arrangements for the transport and termination of telecommunications," with the term "telecommunications" not being "limited geographically ('local,' 'intrastate,' or 'interstate') or to particular services…."[33] The Commission, and not the states, therefore has the authority to establish "just and reasonable" rates for this traffic after correctly reaffirming its consistent finding "that ISP-bound traffic is jurisdictionally interstate" because it is jurisdictionally mixed and inseverable.[34]

The Commission thus responded to the D.C. Circuit's *WorldCom* decision by repudiating its reliance on Section 251(g), as the court there noted that "there had been *no* pre-Act obligation relating to intercarrier compensation for ISP-bound traffic."[35] Relying instead on Sections 201 and 251(i) to place ISP-bound traffic within the confines of Section 251(b)(5), the Commission

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30 *Id.* at 862.
31 *Core ISP Order*, ¶ 6.
32 *ISP Remand Order*, ¶ 57.
33 *Core ISP Order*, ¶ 8.
34 *Id.* ¶ 21.
35 *WorldCom*, 288 F.3d at 433 (emphasis in original).

held "that the transport and termination of *all telecommunications* exchanged with LECs is subject to the reciprocal compensation regime in sections 251(b)(5) and 252(d)(2)."[36] The Commission thereby mandated that ISP-bound traffic is governed by reciprocal compensation, and not the mutually exclusive access charge regime.[37] It is therefore irrelevant whether this jurisdictionally mixed and inseverable traffic is called "local" or "VNXX" from a LEC's standpoint. All telecommunications not excluded by Section 251(g) are subject to reciprocal compensation.[38] And all ISP-bound traffic is subject to the rate regulation set forth in the *Core ISP Order*. Indeed, in successfully defending challenges to the *Core ISP Order*, the Commission reiterated that the dialing pattern of a call to an ISP – whether seven or ten digits – was irrelevant to its analysis.[39] *All* ISP-bound traffic must therefore be exchanged at the Commission's separate rate of $0.0007, and the imposition of countervailing access charges for such traffic is prohibited.[40]

Thus, since 2008, the law has been clear – if it was not already after the *WorldCom* decision finding there was no pre-Act obligation for ISP-bound traffic – that all ISP-bound traffic is subject to reciprocal compensation at the Commission-set rate of $0.0007. Although ISP-bound traffic has certainly declined, it remains the most economical means, and in some cases,

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36 *Core ISP Order*, ¶ 15 (emphasis added).

37 *See PAETEC Communications, Inc. v. CommPartners, LLC*, 08-cv-00397, 2010 WL 1767193, *7 (D.D.C. Feb. 18, 2010) ("Reciprocal compensation and access charges are mutually exclusive methods of intercarrier compensation.")

38 *Core ISP Order*, ¶ 15; *ISP Remand Order*, ¶ 46.

39 *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139 (D.C. Cir. 2010), Brief for Federal Communications Commission at 29 (filed May 1, 2009) ("Nor is Core correct that this analysis is changed by the Commission's recognition that end users sometimes dial seven digits to connect to an ISP. Jurisdictional analysis focuses on the overall communication – not the dialing pattern – and the Commission has repeatedly found that Internet communications are interstate.") (internal citations omitted).

40 *See* 47 C.F.R. § 51.703(b) ("A LEC may not assess charges on any other telecommunications carrier for telecommunications traffic that originates on the LEC's network.")

the only means, to serve consumers that wish to reach the Internet but do not have access to wireline or wireless broadband. The Commission should thus use the opportunity afforded by this rulemaking proceeding to reaffirm that it will continue to apply with consistency its rules and orders. As such, the Commission should reiterate that all ISP-bound traffic, including so-called VNXX ISP-bound traffic, cannot be subject to access charges, but rather, is subject to the rate of $0.0007 payable to the terminating carrier.

IV. THE COMMISSION SHOULD ALSO ADDRESS INTRASTATE ACCESS WITHIN THE EXISTING STATUTORY FRAMEWORK

Pac-West, like most commenters, supports the Commission's goals to gradually introduce a unified rate that applies to all traffic over which the Commission has rate-setting authority. As one of its alternative proposals, the Commission proposes to use section 251(b)(5) and apply it to "all telecommunications traffic exchanged with LECs, including intrastate and interstate access traffic."[41] However, even Verizon, the largest proponent of a unified $0.0007 rate, has misgivings about extending section 251(b)(5) too far.[42] Pac-West shares these concerns and urges the Commission not to rely on section 251(b)(5) to claim authority over intrastate access rates. Rather, Pac-West encourages the Commission to obtain express Congressional authority over intrastate access rates, if necessary, to reduce intrastate access rates.

Congress has explicitly given the Commission authority to ensure that rates for interstate communications services are "just and reasonable."[43] In enacting the Telecommunications Act of 1996, however, Congress was also clear that the Commission's new authority under section

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41 NPRM ¶ 512.

42 Verizon Comments at 24 ("Nonetheless, the Commission probably could not use section 251(b)(5), alone, to replace the existing regime of disparate state rates with a single, uniform default rate.").

43 47 U.S.C. § 201.

251(b)(5) would not affect the long-standing jurisdiction of state public service commissions over intrastate access charges. Section 251(d)(3), Preservation of State Access Regulations, specifically provides that "[i]n 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…."[44]

Further, the Commission's authority to prescribe rates under sections 251 and 252 has only been found to be lawful in the context of *interstate* traffic exchange *between* LECs. As the D.C. Circuit Court of Appeals stated in the 2010 *Core* decision:

> Dial-up internet traffic is special because it involves interstate communications that are delivered through local calls; it thus simultaneously implicates the regimes of both § 201 and of §§ 251-252. Neither regime is a subset of the other. They intersect, and dial-up internet traffic falls within that intersection. Given this overlap, § 251(i)'s specific saving of the Commission's authority under § 201 against any negative implications from § 251 renders the Commission's reading of the provisions at least reasonable.[45]

Last week, the same court also upheld the Commission's decision to have state public service commissions set reasonable rates for traffic exchanged between CLECs and CMRS providers. In doing so, it ruled that

> allowing state agencies to set intrastate termination rates furthers the federal policy of encouraging and compensating interconnection while retaining the dual regulatory structure created by subsections 152(a) and (b) of the Communications Act. *That there are fifty states to deal with in the context of intrastate services is a consequence of congressional respect for federalism, not the FCC's approach. More fundamentally, the FCC's reasonable reading of the Communications Act and Rule 20.11(b) is not disturbed by MetroPCS's wish* ***that the FCC do it all, which***

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[44] 47 U.S.C. § 251(d)(3)(A) (emphasis added).

[45] *Core Commc'ns, Inc. v. FCC*, 592 F.3d 139, 144 (D.C. Cir. 2010), *cert. denied*, 131 S. Ct. 597, 626 (2010).

> ***finds no expression in the statute.*** *See Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 726 (1995) (Scalia, J., dissenting) ("The Act must do everything necessary to achieve its broad purpose" is the slogan of the enthusiast, not the analytical tool of the arbiter.").[46]

The state commissions now have a clear mandate from both the FCC and the D.C. Circuit to set reasonable compensation for the termination of CMRS traffic.

Thus, even with respect to wireless traffic over which Congress did grant the Commission special authority via section 332, the court found "no expression in the statute" that would supplant the states' traditional power over intrastate traffic or permit the Commission to "do it all."[47] In light of this recent ruling and with the express prohibition against Commission preemption of state access regulations contained in section 251(d)(3), the Commission should not consider addressing intrastate access rates under section 251(b)(5).

Ultimately, therefore, Pac-West believes it would be counterproductive for the Commission to assert authority over intrastate access rates at this time and encourages the Commission to take a more incremental approach to unifying rates.

CONCLUSION

Pac-West appreciates the Commission's willingness to develop targeted solutions for the specific issues challenging the current intercarrier compensation system. But the Commission should proceed within the bounds of the carefully crafted framework of the Telecom Act to ensure that competition continues to take hold and that consumers will continue to reap its attendant benefits.

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[46] *MetroPCS California, LLC v. FCC*, Order at 7, Civ. No. 10-1003 (rel. May 17, 2011).
[47] *Id.*

Respectfully submitted,

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Date: May 23, 2011

EXHIBIT A

April 22, 2011

Ms. Eva Fettig
Pac-West Telecomm, Inc.
555 12th Street
Oakland, CA 94607

Re: ***Compensation for VOIP Traffic***

Dear Ms. Fettig,

I am writing to notify you that Verizon is disputing a portion of the intercarrier compensation charges that your company billed to Verizon.

Consistent with two recent federal district court rulings, Verizon does not believe that IP-originated or IP-terminated traffic is subject to switched access tariffs or related charges.[1] Accordingly, Verizon disputes your company's intercarrier compensation charges for this type of traffic and has re-rated the intercarrier compensation charges that your company has billed on IP-originated or IP-terminated traffic down to a rate of $0.0007 per minute of use, which is the most generally accepted rate in the industry. Attachment A to this letter details the billing account numbers, the specific minutes of use that Verizon has re-rated, and the amount of the charges that Verizon is disputing and withholding.

Verizon looks forward to entering into a commercial agreement with your company that establishes reciprocal rates, terms, and conditions for the exchange of this traffic, and which will resolve this dispute. Verizon invites your company to contact Earl Hurter at earl.hurter@verizonbusiness.com, as soon as possible so we can arrange a meeting to make progress towards a resolution of this matter.

Very truly yours,

Donna Donahue
Verizon Business
Manager
Usage Analysis

[1] In *PAETEC v. CommPartners, LLC*, No. 08-0397, slip. op. (D.D.C. Feb. 18, 2010), the court ruled that VoIP traffic that undergoes a net protocol conversion from Internet Protocol format to Time Division Multiplexing ("TDM") format is an information service, and that access tariffs do not apply to information services. In *MetTel v. GNAPs*, No. 08-cv-3829, 2010 WL 1326095 (S.D.N.Y. Mar. 31, 2010), the court decided not to apply tariffed switched access charges to VoIP traffic but rather decided that the local exchange carrier was entitled to receive the reasonable value of the benefit it conferred on a VoIP provider, under the equitable theory of unjust enrichment.