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

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

COMMENTS OF
CBEYOND, INC., INTEGRA TELECOM, INC., AND TW TELECOM INC.

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TABLE OF CONTENTS

Page

Before the
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In the Matter of	)	
	)	
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	)	
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	)	
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Pursuant to the Commission's August 3, 2011 *Public Notice*[1] in the above-captioned dockets, Cbeyond, Inc. ("Cbeyond"), Integra Telecom, Inc. ("Integra"), and tw telecom inc. ("tw telecom") (collectively, the "Joint Commenters"), through their undersigned counsel, hereby submit these comments on the America's Broadband Connectivity Plan ("ILEC Plan" or "Plan") filed by six price-cap incumbent LECs ("Price-Cap ILECs").[2]

[1] *Further Inquiry Into Certain Issues In The Universal Service-Intercarrier Compensation Transformation Proceeding*, Public Notice, WC Dkt. Nos. 10-90, 07-135, 05-337, 03-109; CC Dkt. Nos. 01-92, 96-45; GN Dkt. No. 09-51, DA 11-1348 (rel. Aug. 3, 2011) ("*Public Notice*").

[2] Letter from Robert W. Quinn, Jr., AT&T, Steve Davis, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon, and Michael D. Rhoda, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 et al. (filed July 29, 2011) ("ILEC Plan" or "Plan").

I. INTRODUCTION AND SUMMARY.

The Joint Commenters support this Commission's efforts to accomplish comprehensive intercarrier compensation and universal service ("ICC/USF") reform. The Commission cannot, however, rely solely on price-cap ILECs' proposals to achieve reform. Indeed, the ILEC Plan blatantly favors incumbent LECs at the expense of competitive LECs. The Plan would require competitive LECs to reduce intercarrier compensation revenues more dramatically and over a shorter period of time than incumbent LECs, and competitive LECs would even be required to compensate the incumbent LECs for their losses. Moreover, the rate reductions in the Plan are targeted at switching, which incumbent LECs and competitive LECs sell to each other, but not at transport, for which incumbent LECs are significant net sellers to competitive LECs. The Plan would thus leave incumbent LECs largely free to profit handsomely from charging competitive LECs unreasonable transport prices. It also leaves the incumbent LECs free to exercise their market power over tandem transit service and IP interconnection. Accordingly, the Joint Commenters, like other parties to this proceeding, "hope that the Commission treats [the ILEC Plan] as one among many ideas for [ICC/USF] reform, not a *fait accompli* to be rubber-stamped and approved in the name of political expediency."[3] In particular, the following specific aspects of the ILEC Plan should be changed.

First, the ILEC Plan's proposed transition to a unified target rate is seriously flawed. The Plan includes an initial 18-month transition for the reduction of intrastate terminating access rates to interstate terminating access levels. This is far too short to allow competitive LECs to adjust to the substantial reductions in their intrastate terminating access revenues in many states. At the same time, the Plan establishes an access replacement mechanism ("ARM") that (1)

[3] Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 et al., at 3 (filed Aug. 2, 2011).

allows price-cap ILECs, but not competitive LECs, to recover foregone intercarrier compensation revenues during the transition to the target rate, thereby making the reduction in intercarrier rates during the Plan far more costly to competitors than to incumbent LECs; (2) effectively gives price-cap ILECs a longer overall transition than their competitors because eligibility for ARM funds extends fully three years after the unified target rate is achieved; and (3) is not subject to a cap.

Second, the uniform default rate of $0.0007 per minute—the target for rate reform under the ILEC Plan—is not cost-based as required by Section 252(d)(2) of the Act. Adoption of that rate would therefore subject the Commission to significant and unnecessary legal risk.

Third, the ILEC Plan initially subjects interconnected VoIP traffic to different intercarrier compensation rates than other voice traffic, thereby unnecessarily creating the regulatory arbitrage opportunities that the Commission seeks to prevent through comprehensive reform. The Plan also incorrectly treats interconnected VoIP traffic as inseverable and jurisdictionally interstate (and therefore, exempt from intrastate access charges).

Fourth, the ILEC Plan's treatment of transport creates significant opportunities for price-cap ILECs to raise rivals' costs, including by maintaining above-cost rates for the transmission of traffic from competitors' networks to incumbent LEC terminating end offices during the transition.

Fifth, the ILEC Plan does not reform tandem transit rates. This is so despite record evidence demonstrating that incumbent LECs offer tandem transit service at rates that are well above cost.

Sixth, the ILEC Plan permits increases to residential subscriber line charges, but it does not address business subscriber line charges. The Plan also lacks sufficient limits on price-cap ILECs' use of subscriber line charge increases in ways that would harm competition.

Seventh, the ILEC Plan proposes that IP-to-IP interconnection be governed by commercial agreements. Such an outcome will delay the transition from circuit-switched to IP networks and, more generally, harm competition.

To remedy these defects in the ILEC Plan, the Commission should adopt the following changes:

- Reduce competitive LECs' intercarrier compensation revenues over the same time period as ARM funds are available to price-cap ILECs in the ILEC Plan;
- Cap the size of the ARM;
- Establish TELRIC-based reciprocal compensation rates as the target rate;
- Apply the same intercarrier compensation rates to all voice telephone traffic, including interconnected VoIP traffic, from the beginning of the transition;
- Reduce all transport rates at the same pace as end office switching in each step of the transition, define "transport" as it is currently defined in the access context, and set rates for such transport at TELRIC-based levels at the end of the transition;
- Clarify that incumbent LECs have a duty to provide tandem transit service and require that such service be provided at TELRIC-based rates;
- Permit price-cap ILECs to increase their business subscriber line charges and, in all events, impute increases to price-cap ILECs before they can recover from the ARM;
- Impose limits on the extent to which price-cap ILECs can use subscriber line charge increases to shift recovery from competitive markets to less competitive markets; and
- Clarify that incumbent LECs have a duty to provide direct IP-to-IP interconnection at any technically feasible point and to negotiate VoIP interconnection agreements in good faith, as required by Sections 251 and 252 of the Act.

II. THE ILEC PLAN IS FUNDAMENTALLY FLAWED IN A NUMBER OF IMPORTANT RESPECTS.

A. The Transition Schedule And The ARM.

Under the ILEC Plan, each price-cap ILEC, competitive LEC, and CMRS provider must reduce its intrastate terminating access rates (and reciprocal compensation rates, if above its interstate terminating access rates) to interstate terminating access levels within only 18 months.[4] The ILEC Plan would then reduce intercarrier terminating rates to a target rate of $0.0007 over a four-year transition period.[5] At the same time, price-cap ILECs, but not their competitors, would be eligible to receive funds from the ARM.[6] These funds would diminish the extent to which price-cap ILECs experience revenue reductions as a result of the Plan. Importantly, price-cap ILECs would be eligible to receive funds throughout the transition to the target rate of $0.0007 and then for another three years after that target rate is achieved.[7]

There are several fundamental flaws with this plan. *First*, the transition from intrastate to interstate rates is far too short. The record in this proceeding clearly demonstrates that a gradual, multi-year reduction of intrastate terminating access rates to interstate levels is necessary for LECs to adjust to the dramatic reductions in their intrastate access revenues in many states.[8] For

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[4] The ILEC Plan presumes that a Commission order adopting the Plan will take effect on January 1, 2012 (*see* ILEC Plan, Att. 1, at 3) and proposes that intrastate terminating access rates and reciprocal compensation rates be reduced to interstate terminating access levels by July 1, 2013. *See id.*, Att. 1, at 11.

[5] *See id.*, Att. 1, at 11.

[6] *See id.*, Att. 1, at 12-13.

[7] *See id.*

[8] *See, e.g.*, Cbeyond et al. April 18, 2011 Initial Comments at 6-7; EarthLink April 18, 2011 Initial Comments at 10-13; Level 3 April 18, 2011 Initial Comments at 7-8; PAETEC et al. May 23, 2011 Reply Comments at 47-48; *see also* Frontier April 18, 2011 Initial Comments at 5 (asserting that "five years would be a preferential timeline for moving from intrastate to

example, competitive LECs enter into long-term contracts with many of their business customers and the terms of such contracts generally prevent competitive LECs from adjusting end-user customer rates to account for reduced intercarrier compensation revenues. It would take several years—not a mere 18 months—for competitive LECs to make these adjustments. Indeed, the Commission has recognized in the *USF/ICC Transformation NPRM* that "any transition [must] be gradual enough to enable the private sector to react and plan appropriately."[9] Accordingly, any plan for reducing intercarrier compensation should include an extended transition for lowering intrastate access charges. For example, the Joint Commenters have proposed that such reductions be achieved over a five-year transition.[10] Alternatively, the Commission could simultaneously reduce competitive LECs' intrastate terminating access rates and interstate terminating access rates to reciprocal compensation levels over a longer period of time, as proposed by COMPTEL.[11]

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interstate rates"); CenturyLink May 23, 2011 Reply Comments at 17 (supporting a multi-year transition period for reduction of intrastate access rates to interstate levels). In fact, the ILEC Plan includes an ARM for price-cap ILECs precisely to "prevent sharp, immediate decreases in intercarrier compensation revenue" for such carriers. ILEC Plan, Att. 5, at 43. (All references herein to "Initial Comments" and "Reply Comments" are to those filed in the above-captioned dockets, unless otherwise noted.)

[9] *See 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 an 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, 26 FCC Rcd. 4554, ¶ 533 (2011) ("*USF/ICC Transformation NPRM*").

[10] The Commission should then unify, over a period of one to two years, all terminating rates (including intrastate access, interstate access, reciprocal compensation, and the ISP-bound terminating rate) to a single TELRIC-based level. *See* Cbeyond et al. April 18, 2011 Initial Comments at 4.

[11] *See* COMPTEL August 24, 2011 Initial Comments, Attachment 2, Competitive Amendment to the ICC Provisions of the ABC Plan, at 4-5.

Second, there is no basis for permitting price-cap ILECs to recover foregone intercarrier compensation revenues from an ARM. This is especially true if the Commission adopts a cost-based target rate equal to reciprocal compensation for the exchange of all traffic, as the Joint Commenters have proposed.[12] Cost-based rates for transport and termination (and, as explained, TELRIC-based rates qualify as cost-based),[13] fully compensate price-cap ILECs for those functions.

Moreover, price-cap ILECs should not be permitted to recover from the ARM foregone intercarrier compensation revenues from the provision of service to business customers. Such recovery would effectively insulate those revenues from competition. That is, price-cap ILECs alone would be eligible for money from the ARM whereas requiring all carriers to recover this money from end users (if possible) would enable competitive LECs to compete to recover this revenue.

Third, permitting price-cap ILECs—but not their competitors—to receive funds from the ARM would mean that incumbent LECs experience a smaller revenue reduction than competitive LECs during the transition. In addition, extending eligibility for ARM funds until July 1, 2020, three years after the target rate is achieved under the ILEC Plan, effectively enables incumbent LECs to extend the length of the transition to the target rate three years beyond the transition for competitive LECs. Just to add insult to injury, competitors would also presumably be required to contribute to the ARM in the form of universal service contributions. Thus, the ARM would yield significant benefits for incumbent LECs while depriving their competitors of those advantages and affirmatively increasing competitors' costs.

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[12] *See* Cbeyond et al. April 18, 2011 Initial Comments at 15.

[13] *See infra* Part II.B.

There is no basis for this discrimination. The incumbent LECs' rationale for proposing the ARM appears to be that they, unlike competitive LECs, need explicit universal service support to fulfill their obligations to provide service in high-cost areas.[14] But as the Price-Cap ILECs acknowledge, many states have already eliminated or scaled back carrier-of-last-resort ("COLR") obligations,[15] and many more are actively considering eliminating such obligations.[16] What is more, the Price-Cap ILECs propose eliminating COLR obligations in the ILEC Plan.[17] In addition, COLRs can often recover the costs of providing service to remote areas covered by their COLR obligations by assessing construction charges on end users.[18] And some states have deregulated local service rates,[19] thereby allowing incumbent LECs to recover the costs of providing service through increased local service rates. Thus, there is no reason that price-cap ILECs, but not competitive LECs, should be permitted to recover foregone intercarrier compensation revenues from the ARM.

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[14] *See, e.g.*, FairPoint April 18, 2011 Initial Comments at 4-5 (arguing that it would be unreasonable to expect rural incumbent LECs such as FairPoint to continue providing service in high-cost areas absent a sufficient revenue recovery mechanism); *see also* ILEC Plan, Att. 5, at 52 (explaining that one carrier—the incumbent LEC—should not be required to offer service to substantially all customers in a designated service territory without sufficient universal service support).

[15] *See* ILEC Plan, Att. 5, at 7.

[16] *See id.*, Att. 5, at 59-60.

[17] *See id.*, Att. 5, at 6-8.

[18] *See, e.g.*, Peter Bluhm & Dr. Phyllis Bernt, National Regulatory Research Institute, *Carriers of Last Resort: Updating a Traditional Doctrine*, at 8 (July 2009); Qwest Corporation Minnesota Exchange and Network Services Tariff No. 1, § 4.1.B.1 (effective Jan. 1, 2006) (where construction required to provide a requested service "would not, in the opinion of the Company, constitute a prudent investment," construction charges may be assessed on the customer); Qwest Corporation Arizona Exchange and Network Services Price Cap Tariff, § 4.2.2.A (effective Sept. 19, 2007) (capping new construction charges to rural customers at $5000).

[19] *See USF/ICC Transformation NPRM* ¶ 583.

Accordingly, if the Commission adopts an ARM, the principle of competitive neutrality requires that, at a minimum, the Commission provide competitive LECs with a transition that is as similar as possible to the transition available to price-cap ILECs. Specifically, the Commission should extend the proposed transition schedule for competitive LECs such that they achieve the target rate on July 1, 2020 rather than July 1, 2017. In so doing, the Commission would also reduce the level of the rate reductions in each year, thereby effectively giving competitors a benefit analogous to eligibility for ARM funds.[20]

Fourth, the ILEC Plan contains no explicit cap for the size of the ARM. This is contrary to the Commission's goal of controlling the size of the universal service fund.[21] Accordingly, the Commission should establish an explicit cap on the size of the ARM.[22]

B. The Target Rate.

Under the ILEC Plan, all terminating intercarrier compensation rates would ultimately be reduced to a uniform default rate of $0.0007 per minute.[23] The rationale for this proposal is that (1) the $0.0007 rate is "*already* the default rate for a substantial portion of the traffic that carriers exchange today (such as wireless and ISP-bound traffic)" pursuant to the Commission's so-

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[20] While there are several ways in which the Commission could implement these changes, the Joint Commenters support COMPTEL's proposal to reduce all competitive LEC terminating rates in equal steps over an eight-year transition. *See* COMPTEL August 24, 2011 Initial Comments, Attachment 2, Competitive Amendment to the ICC Provisions of the ABC Plan, at 4-5. In this way, the competitive LECs would achieve the target rate in the same year that eligibility for ARM funds would be eliminated under the ILEC Plan.

[21] *See USF/ICC Transformation NPRM* ¶ 10.

[22] If the Commission adopts a target rate that is higher than $0.0007, the price-cap ILECs' need for an ARM will be reduced accordingly. Similarly, as discussed below, if the Commission imputes to price-cap ILECs higher business subscriber line charge revenues, the need for an ARM would be reduced even further. The Commission should adjust the size of the ARM to account for these factors.

[23] *See* ILEC Plan, Att. 1, at 10.

called "mirroring rule";[24] and (2) the $0.0007 rate is consistent with the rates contained in certain recently negotiated agreements between incumbent LECs and competitive LECs.[25] This proposal and the underlying rationale are flawed for several reasons.

First and most importantly, the Commission lacks the authority to adopt a unified terminating rate of $0.0007. That rate is not cost-based and is therefore inconsistent with the "additional costs" standard of Section 252(d)(2) of the Act.[26] In fact, there is substantial evidence in the record demonstrating that a rate of $0.0007 would not cover carriers' costs of terminating traffic.[27] In addition, while the Commission has the authority to establish a rate *methodology* for traffic subject to Sections 251(b)(5) and 252(d)(2), it does not have the authority to set *specific rates* for such traffic.[28] Although the Commission set a specific rate of

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[24] *Id.*, Att. 5, at 34 (emphasis in original).

[25] *See id.*, Att. 5, at 34-35.

[26] *See* 47 U.S.C. § 252(d)(2)(A)(ii) (providing that rates for the termination of telecommunications traffic subject to Section 251(b)(5) are not just and reasonable unless they allow for the recovery of the "additional costs" of termination).

[27] *See* PAETEC et al. April 1, 2011 Initial Comments at 38-42 (discussing studies and comments submitted by NECA, NCTA, ITTA, CenturyTel, Windstream, Embarq, XO Communications, NuVox, PAETEC, and others).

[28] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (holding that "the Commission has jurisdiction to design a pricing methodology" under its rulemaking authority in Section 201(b) of the Act); *see id.* at 384 ("It is the States that will apply th[e] [pricing] standards [of Section 252(d)] and implement that methodology, determining the concrete result in particular circumstances."); *see also Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000) ("The Supreme Court held that the FCC 'has jurisdiction to design a pricing methodology.' However, the FCC does not have jurisdiction to set the actual prices for the state commissions to use. Setting specific prices goes beyond the FCC's authority to design a pricing methodology and intrudes on the states' right to set the actual rates pursuant to § 252(c)(2).") (internal citation omitted), *aff'd in part and rev'd in part*, 535 U.S. 467 (2002).

$0.0007 for ISP-bound traffic, it did so pursuant to Section 201(b).[29] The Commission could not have adopted a specific rate pursuant solely to Sections 251(b)(5) and 252(d)(2), as it must for traffic, such as terminating intrastate access, subject to the ILEC Plan.

Second, the fact that a portion of traffic that is exchanged today is already subject to a rate of $0.0007 is irrelevant. Under the Commission's mirroring rule, an incumbent LEC can avail itself of the $0.0007 rate cap for termination of ISP-bound traffic only if it offers to exchange all traffic subject to Section 251(b)(5) at that rate.[30] Thus, there is traffic exchanged today at a rate of $0.0007 not because it is a cost-based rate but because incumbent LECs sought to protect themselves from the purported regulatory arbitrage schemes involving ISP-bound traffic.

Similarly, the fact that some carriers have agreed to the $0.0007 rate in some interconnection agreements does not lead to the conclusion that that rate is cost-based. As tw telecom has explained previously, (1) the fact that an incumbent LEC agrees to a rate of $0.0007 in interconnection agreements in situations where the incumbent LEC is a net terminator of traffic has no bearing on whether the incumbent LEC's own terminating costs are equal to or less than $0.0007; (2) interconnection agreement negotiations include give-and-take on dozens of issues and a carrier might well agree to below-cost termination rates in return for more valuable

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[29] *See High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, ¶¶ 17-21 (2008).

[30] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Memorandum Opinion and Order, 16 FCC Rcd. 9151, ¶¶ 8, 89 (2001).

concessions on other issues; and (3) many, if not most, carriers have not agreed to the $0.0007 rate, supporting the conclusion that such carriers do not view it as cost-based.[31]

For these reasons, the Commission should adopt the Joint Commenters' proposal to unify all terminating rates to a single TELRIC-based level.[32] The Price-Cap ILECs raise two objections to such a proposal, neither of which has merit. *First*, they point out that "[n]othing in the statute compel[s] the Commission to adopt the TELRIC methodology for § 252(d)(2)."[33] That is true. Section 252(d)(2) does, however, require that rates for Section 251(b)(5) traffic be cost-based, and the Commission has already found that the TELRIC methodology satisfies the additional costs standard of Section 252(d)(2).[34]

Second, the Price-Cap ILECs assert that "the TELRIC methodology [is] incompatible with the clearly demonstrated need for a uniform intercarrier compensation regime."[35] However, in order to eliminate the inefficient incentives created by the current intercarrier compensation system, every carrier must charge a single, cost-based terminating rate for all traffic. But that rate need not be the same for every carrier. That is, so long as every carrier is required to apply a single, cost-based terminating rate to *all traffic that traverses its network*, and that rate is *cost-*

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[31] *See* Letter from Thomas Jones, Counsel for tw telecom inc. and One Communications Corp., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 05-337 et al., Att., at 3 (filed Oct. 6, 2008).

[32] *See* Cbeyond et al. April 18, 2011 Initial Comments at 4, 11-12.

[33] ILEC Plan, Att. 5, n.12.

[34] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, First Report and Order, 11 FCC Rcd. 15499, ¶ 1054 (1996) ("*Local Competition Order*") (finding that "the 'additional cost' standard permits the use of the forward-looking, economic cost-based pricing standard that we are establishing for interconnection and unbundled elements").

[35] ILEC Plan, Att. 5, n.12.

based, carriers will no longer have the incentive to (1) misidentify the traffic at issue in order to pay the lowest intercarrier compensation rate or receive the higher intercarrier compensation rate; or (2) inflate the amount of minutes subject to intercarrier compensation payments.

In order to implement the Joint Commenters' proposal, the Commission should simply adopt a rule requiring that, at the end of the transition to the target rate, competitive LECs and CMRS providers must charge the TELRIC-based terminating rate of the incumbent LEC in the territory in which the competitive LEC or CMRS provider operates. A competitive LEC or CMRS provider should also be permitted to file a tariff with the Commission that sets forth that rate and the tariff should be effective until such time as the competitive LEC or CMRS provider enters into an interconnection agreement with the other carrier with which it is exchanging traffic.

C. The Treatment Of Interconnected VoIP Traffic.

The ILEC Plan's proposed treatment of interconnected VoIP traffic is flawed in at least two respects. *First*, as the Commission recognizes, under the Plan, "VoIP access traffic would be subject to intercarrier compensation rates different from rates applied to other access traffic during the first part of the transition."[36] Specifically, during the first 18 months of the proposed transition, all "toll" VoIP traffic would be subject to current interstate access rates regardless of whether it is intrastate or interstate.[37] But treating interconnected VoIP traffic in this manner creates precisely the type of regulatory arbitrage opportunities that the Commission seeks to eliminate in this proceeding. As the record makes abundantly clear, LECs cannot differentiate

[36] *See Public Notice* at 17 (citing ILEC Plan, Att. 1, at 10).

[37] *See* ILEC Plan, Att. 1, at 10-11.

interconnected VoIP traffic from other voice traffic on their networks.[38] Accordingly, if all interconnected VoIP traffic is subject to (lower) interstate access rates (and exempt from any intrastate access charges), originating carriers will have a strong incentive to misidentify all of their long-distance voice traffic as VoIP long-distance traffic in order to minimize their intercarrier compensation liability. This would effectively result in an immediate reduction of intrastate access rates to interstate access rates with no transition whatsoever. For this and other reasons,[39] the Commission should apply the same intercarrier compensation rates to all voice telephone traffic, including interconnected VoIP traffic, from the beginning of the transition. Indeed, the Price-Cap ILECs themselves recognize that, otherwise, "artificial rate disparities for functionally substitutable services will continue to destabilize the industry as a whole."[40]

Second, under the ILEC Plan, interconnected VoIP traffic would be inseverable and jurisdictionally interstate (and therefore, intrastate access charges would not apply to such traffic as they do to intrastate voice traffic).[41] But tw telecom has already explained at length that there

[38] *See, e.g.*, Cbeyond et al. April 1, 2011 Initial Comments at 6; Cablevision and Charter April 1, 2011 Initial Comments at 4; Kansas Corporation Commission April 1, 2011 Initial Comments at 15; PAETEC et al. April 1, 2011 Initial Comments at 31 ("Facilities-based CLECs are not aware of any industry standard, published or commonly accepted, to distinguish [IP-originated traffic from TDM-originated traffic]."); Windstream April 1, 2011 Initial Comments at 7 (explaining that terminating carriers lack the ability to verify claims that traffic is in fact VoIP-originated).

[39] *See, e.g.*, Cbeyond et al. April 1, 2011 Initial Comments at 4-5 (explaining that the Commission should subject interconnected VoIP traffic to the same intercarrier compensation rates as other voice telephone traffic because, among other things, it would (1) ensure a level playing field among all providers of voice service, and (2) minimize costly disputes about which rates apply).

[40] ILEC Plan, Att. 5, at 3; *see also id.*, Att. 5, at 28 (explaining that "*[a]ny* situation with non-uniform intercarrier compensation rates" will perpetuate wasteful attempts to game the system) (emphasis in original).

[41] *See id.*, Att. 5, at 21.

is no basis for treating geographically fixed VoIP service as inseverably interstate.[42] Moreover, while the Price-Cap ILECs claim that "it is no longer practical to distinguish between [interstate and intrastate] traffic,"[43] the Commission could simply establish a safe harbor for the percentage of interconnected VoIP traffic that is interstate and intrastate for purposes of assessing access charges. In fact, the Commission has already established such a safe harbor for purposes of assessing universal service contributions.[44]

D. Transport Rates.

The ILEC Plan's treatment of transport is flawed in several respects. *First*, it would create significant opportunities for price-cap ILECs to raise rivals' costs by maintaining above-cost rates for the transmission of traffic to a terminating end office switch. Under the Plan, if a carrier's intrastate or reciprocal compensation "transport" rates exceed the carrier's interstate access rate, then such transport rates are reduced to equal the interstate access transport rate by July 1, 2013.[45] While carriers' "end office rates" would then ultimately be reduced to $0.0007 by July 1, 2017, each carrier's transport rates would remain unchanged between July 1, 2013 and

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[42] *See* Letter from Thomas Jones, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC, CC Dkt. Nos. 01-92 et al., at 2-8 (filed Oct. 23, 2008) (explaining that fixed VoIP service is not inseverable because (1) there is no meaningful difference, at least for purposes of jurisdictional analysis, between the communications initiated by fixed VoIP subscribers and those initiated by circuit-switched telephone service subscribers; and (2) there is no meaningful difference for these purposes between the network architectures utilized to provide fixed VoIP service and circuit-switched telephone service).

[43] ILEC Plan, Att. 5, at 34.

[44] *See Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, ¶ 53 (2006) (establishing a safe harbor of 64.9%); *see also* Instructions to the Telecommunications Reporting Worksheet, FCC Form 499-A (2011), at 23 ("2011 Form 499-A Instructions").

[45] *See* ILEC Plan, Att. 1, at 11.

July 1, 2017.[46] The practical consequence of maintaining transport rates at higher interstate levels (at least for some traffic) is that competitors would make large net payments to price-cap ILECs during the transition between July 1, 2013 and July 1, 2017. This is because competitors often must purchase transport from incumbent LECs to carry traffic to the incumbent LECs' end offices whereas incumbent LECs—whose networks are ubiquitous—can carry traffic to competitors' switches on the incumbent LECs' own networks, without purchasing transport from competitors.

Second, the Plan's treatment of transport includes significant ambiguities that price-cap ILECs could exploit to harm competitors. To begin with, the Plan does not define the term "transport." In the reciprocal compensation context, transport essentially means transport between the point of interconnection and the end office serving the called party.[47] In the access context, "tandem-switched transport" and "direct-trunked transport" essentially mean the transmission between the long distance carrier's point of presence (i.e., the "serving wire center" in the parlance of the Commission's rules) and the end office serving the called party.[48] It is unclear which of these definitions applies, and in what circumstances, under the ILEC Plan. It is also unclear whether, and in what circumstances, the cost-based prices for transport applicable to

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[46] *See id.*

[47] *See* 47 C.F.R. § 51.701(c) (defining transport as "the transmission and any necessary tandem switching of telecommunications traffic subject to section 251(b)(5) of the Act from the interconnection point between the two carriers to the terminating carrier's end office switch that directly serves the called party, or equivalent facility provided by a carrier other than an incumbent LEC").

[48] *See id.* §§ 69.2(oo), (ss). In the case of tandem-switched transport, this transmission is accomplished by using the tandem switching function in combination with dedicated transport from the serving wire center to the tandem office and between the tandem office and the end office serving the called party. In the case of direct-trunked transport, the transmission is accomplished via a dedicated connection between the serving wire center and the end office serving the called party.

reciprocal compensation apply and in what circumstances the much higher interstate access prices for transport apply.

Price-cap ILECs would have an incentive to exploit these ambiguities to increase competitors' transport costs. They could do so by, among other things, asserting that the higher rates applicable to transport in the access context should apply during the transition between July 1, 2013 and July 1, 2017.

In addition, the description of the manner in which transport would be included in the unified $0.0007 rate as of July 1, 2017 is unclear. Under the Plan, beginning on July 1, 2017, the combined price for transport and termination will be $0.0007 "consistent with some existing interconnection agreements that have adopted the 'ISP remand' rate."[49] It is unclear what the phrase "consistent with some existing interconnection agreements that have adopted the 'ISP remand' rate" means. Without access to the terms of those agreements, it is impossible to know what this phrase means. It seems likely, however, that price-cap ILECs would seek to exploit this ambiguity by construing interconnection agreements that include the $0.0007 rate in ways that disadvantage competitors.

Third, the Plan states that, beginning on July 1, 2017, the $0.0007 rate would cover the cost of transmission from the tandem to the end office (including apparently tandem switching and transport between the tandem office and the end office) as well as end office switching where the terminating carrier owns the tandem and end office switch.[50] The $0.0007 rate would cover the cost of end office switching only where the terminating carrier owns only the end

[49] *See* ILEC Plan, Att. 1, at 11.

[50] *See id.*

office switch.[51] It is unclear what would happen if and when incumbent LECs retire tandem switches (as they are doing now). Where this occurs, the $0.0007 rate will only be available for end office switching for traffic terminated on the incumbent LEC network. Many competitors will nevertheless need to purchase transport from the incumbent LECs to carry traffic from the competitors' networks to the incumbent LECs' end offices. Price-cap ILECs would have the incentive to charge as high a price for that transport as possible.

In light of these problems, the ILEC Plan's treatment of transport should be modified in three ways. *First*, all transport rates should be reduced at the same pace as end office switching in each step of the transition to the target rate.

Second, during the transition, transport for both reciprocal compensation traffic and access traffic should be defined as it is in the access context. That is, for all traffic, transport should consist of the transmission from the calling party's network to the called party's end office in the same LATA, consistent with the terms of many interconnection agreements.

Third, beginning on the date when the end-point for rate reform is reached, all transport should continue to be defined as just described. All such transport should be priced at TELRIC-based rates. Moreover, the Commission should not reference any specific interconnection agreements as guidelines for implementing reform of transport and termination. In this manner, the Commission can diminish the extent to which the ILEC Plan's treatment of transport offers price-cap ILECs the opportunity and incentive to raise rivals' costs.

E. Tandem Transit Rates.

The ILEC Plan fails to address tandem transit rate regulation. Record evidence demonstrates that the market for tandem transit service is not effectively competitive and that

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[51] *See id.*

incumbent LECs have exercised their market power in the provision of this service by offering tandem transit service at rates well above cost.[52] The Commission should therefore clarify that incumbent LECs have a duty to provide tandem transit service and require that such service be provided at TELRIC-based rates.[53] Indeed, it would be absurd for the Commission to pursue reform of access charges on the basis that they are above cost but allow providers of tandem transit service to charge above-cost rates when that service includes nearly all of the same functionalities.

F. Subscriber Line Charges.

The treatment of subscriber line charges ("SLCs") in the ILEC Plan is flawed in at least two respects. *First*, the Plan fails to address business line SLCs. Under the Plan, price-cap ILECs are permitted to increase their residential line SLCs and those SLC increases are imputed to price-cap ILECs before they become eligible for recovery from the ARM.[54] Given that the intercarrier compensation rates subject to the reductions proposed in the Plan include business line traffic as well as residential line traffic, it makes sense for the Commission to allow price-cap ILECs to recover forgone intercarrier revenues through increases in business line SLCs as

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[52] *See* Cbeyond et al. April 18, 2011 Initial Comments at 20-21 & Attachments A-B; Cbeyond et al. May 23, 2011 Reply Comments at 16-17; *see generally* Letter from Thomas Jones, Counsel for Cbeyond et al., to Marlene H. Dortch, Secretary, FCC, WC Dkt. Nos. 10-90 et al. (filed July 29, 2011).

[53] *See* Cbeyond et al. May 23, 2011 Reply Comments at 18-19 (explaining that incumbent LECs have a duty to provide tandem transit service under the Act and that the Commission has the statutory authority to require such service to be provided at TELRIC-based rates).

[54] *See* ILEC Plan, Att. 1, at 11-12. Under the residential rate benchmark proposed in the ILEC Plan, it appears that only revenues that a price-cap ILEC earns from voice service are included. *Id.*, Att. 1, at 12. It is critical, however, that the Commission take into account the high per-line revenues that incumbent LECs earn when selling voice bundled with broadband and/or video service before allowing recovery from the ARM. All revenues that a price-cap ILEC earns from an access line—including revenues from broadband and video service—should be included in the residential rate benchmark.

well as residential line SLCs. Accordingly, price-cap ILECs should be permitted to increase all business line SLCs. Moreover, if the Commission does not adopt the Joint Commenters' above-mentioned recommendation to prohibit recovery of foregone intercarrier compensation revenues from business lines from the ARM,[55] then the Commission should, at a minimum, impute both business line SLC and residential line SLC increases to price-cap ILECs before they become eligible for ARM funds.

Second, the ILEC Plan lacks any limits on the extent to which price-cap ILECs can use SLC increases to shift recovery from competitive markets to less competitive markets. To address this problem, the Commission should (1) not permit price-cap ILECs to recover lost intercarrier compensation revenues by selectively raising SLCs in geographic areas with little or no competition, while lowering them in areas subject to greater competition; and (2) only permit price-cap ILECs to recover foregone intercarrier compensation revenues associated with business lines through higher SLCs imposed on business customers, not residential customers.

G. IP-To-IP Interconnection.

In a footnote in the ILEC Plan, the Price-Cap ILECs propose that IP-to-IP interconnection would "be governed by commercial agreements."[56] If the Commission seeks to achieve its stated goal of accelerating the transition from circuit-switched to IP networks,[57] the Commission must reject this proposal. In fact, as the record demonstrates, the Commission cannot achieve this goal without addressing the issue of IP-to-IP interconnection.[58] Specifically,

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[55] *See supra* Part II.A.

[56] ILEC Plan, Att. 1, n.10.

[57] *See USF/ICC Transformation NPRM* ¶¶ 10, 14.

[58] *See* COMPTEL April 18, 2011 Initial Comments at 4 ("The most important action the Commission can take to attain its overarching goal of promoting the deployment of broadband

the Commission must clarify that incumbent LECs have a duty to provide direct IP-to-IP interconnection at any technically feasible point and to negotiate VoIP interconnection agreements in good faith, as required by Sections 251 and 252 of the Act.[59] Absent such a clarification, incumbent LECs will continue to act on their incentive to protect their dominant market position—derived from their vastly larger base of end-user customers—to deny, delay, and degrade IP-to-IP interconnection.[60] Indeed, as the Joint Commenters have already explained, contrary to incumbent LECs' arguments, market forces alone will not ensure that competitors can obtain VoIP interconnection agreements.[61]

H. Other Issues.

Under the ILEC Plan, the Commission would eliminate not only legacy eligible telecommunications carrier regulations imposed on price-cap ILECs, but also "*all remaining*

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and IP technology is to confirm in no uncertain terms that IP-to-IP interconnection is subject to Sections 251 and 252 of the Communications Act."); Cox April 18, 2011 Initial Comments at 3; PAETEC et al. April 18, 2011 Initial Comments at 4 (arguing that "[i]n order to achieve the FCC's objectives, stated in the [National] Broadband Plan and the *NPRM*, of fostering the expansion of broadband services to all areas of the U.S. as rapidly as possible," the Commission should "confirm immediately that provision of [IP-to-IP] interconnection falls within incumbent LECs' duty under section 251(c)(2), and that the terms of such interconnection can be arbitrated under the process set forth in section 252"); *see also* Sprint April 18, 2011 Initial Comments at 20 ("Obviously, IP network deployment and use will not be promoted if ILECs in particular are allowed either to refuse to interconnect at all or to impose conditions [on IP-to-IP interconnection] that are patently unreasonable."); Time Warner Cable April 1, 2011 Initial Comments at 11.

[59] *See* Cbeyond et al. May 23, 2011 Reply Comments at 5-10; *see also* Petition for Declaratory Ruling of tw telecom inc., WC Dkt. No. 11-119, at 15-20 (filed June 30, 2011) (explaining that incumbent LECs have an obligation under Section 251(c)(2) of the Act to provide direct IP-to-IP interconnection at any technically feasible point for the transmission and routing of facilities-based VoIP traffic on just and reasonable terms and conditions).

[60] *See* Cbeyond et al. May 23, 2011 Reply Comments at 5-6 & 10-12.

[61] *See id.* at 10-12.

federal rate and other service regulations imposed on price cap incumbent LECs."[62] The Commission should reject this sweeping proposal for deregulation and require price-cap ILECs to instead file petitions for forbearance from the specific Commission rules and specific provisions of the Act from which they seek relief. In all events, the Commission should not eliminate unbundling obligations, interconnection obligations, or any other regulation of facilities or services over which price-cap ILECs retain market power.

III. CONCLUSION.

For the foregoing reasons, the Commission should take the actions recommended herein by the Joint Commenters.

Respectfully submitted,

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[62] ILEC Plan, Att. 1, at 13 (emphasis added).