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 EARTHLINK, INC. ON FUTHER INQUIRY PUBLIC NOTICE

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EXECUTIVE SUMMARY

EarthLink commends the Commission for pursuing comprehensive reform of universal service distribution and intercarrier compensation. In these comments, EarthLink urges the Commission to promote both universal service and competition. EarthLink is concerned that the America's Broadband Connectivity Plan ("ABC Plan") sacrifices the latter goal. As the agency charged with implementing the Act and promoting broadband to all Americans, the Commission must balance both objectives. EarthLink supports the Competitive Amendment offered by CompTel to achieve both goals, and makes additional recommendations herein.

The ubiquitous and seamless public voice network will not survive the transition to IP if the Commission does not provide a backstop for carriers to negotiate reasonable terms and conditions for IP-IP interconnection to exchange voice traffic. IP-based providers, consumer advocates, and competitive carriers have urged the Commission to (1) affirm that incumbents must negotiate IP interconnection in good faith and (2) ensure that a forum exists to resolve disputes about IP interconnection. If the Commission feels further legal analysis is necessary before affirming which regulatory framework will govern IP interconnection, it should issue a further notice and resolve any outstanding issues expeditiously. The Commission should not prejudge the issue by adopting the ABC Plan's characterization of IP interconnection for voice traffic as subject to a "commercial agreement" framework under which incumbents have no duty to offer interconnection and competitors have nowhere to turn when incumbents refuse interconnection or impose anti-competitive terms.

The competitive broadband options that are an integral part of achieving broadband deployment will be impacted adversely by the combination of the ABC Plan's flash cut reduction of access revenue and mitigation measures designed primarily for the benefit of the incumbents.

The ABC Plan proposal to subject IP-originated and IP-terminated access traffic to interstate access rates on January 1, 2012, (1) is the flash cut that the Commission seeks to avoid and (2) would prolong arbitrage and uncertainty that the Commission seeks to end. This concession to all-IP providers is administratively unworkable and could cause a precipitous drop in revenue for incumbent and competitive carriers alike, causing further delays in the deployment of IP technology.

The ABC Plan's flash cut to interstate access for TDM traffic and a three-year transition to a uniform, below-cost rate of $0.0007 disproportionately impacts competitors to the benefit of incumbents who pay lower rates to terminate traffic at the same time they receive opportunities to make up revenue they lose from lower rates. The Commission should follow states such as Georgia, Michigan, and Wisconsin that have tailored transition plans for competitors that reflect their customer base (primarily business), the effective price ceiling established by the incumbents' business rates, and lack of access to universal service subsidies that mitigate the impact of precipitous rate decreases. EarthLink supports the Competitive Amendment's proposed straight-line, eight-year transition to a unified rate for competitive carriers.

The Commission should adopt a legal rationale and unified rate target that will survive appellate scrutiny, provide certainty for the industry, and minimize the adverse impact on the universal service fund and consumers. The federal Act requires that the uniform rate target be the current reciprocal compensation rates set by state commissions. Calls that originate and terminate in a local calling area fall into the intersection of sections 2(b) (intrastate service) and 251(b)(5). While different intrastate access rates might conflict with a national *policy* of a unified rate, the Commission cannot preempt state commissions from exercising their authority to determine rates for local telecommunications terminated by incumbents because that would be inconsistent with the federal *statute*. Although section 251(i) preserves the Commission's section 201 rulemaking authority, it does not preserve the Commission's section 205 rate setting authority. Congress gave state commissions the authority to set incumbent LECs' rates for section 251(b)(5) traffic and federal courts the power to determine if such rates comply with the Act. If uniform rates promote national policy, the Act's cooperative federalism requires that the Commission determine the methodology, states commissions apply that methodology to set the rate for incumbent LEC traffic, and rates for all other traffic mirror the cost-based rates Congress chose as the best means to promote competition in telecommunications markets.

Finally, the Commission should ensure that universal broadband does not mean a single broadband option for Americans living in rural and high cost areas. As the National Broadband Plan recognizes, wholesale access policies are key to promoting the competition that will spur investment and innovation in broadband offerings. The basis of USF support for broadband networks is that it would be uneconomic for providers to deploy and/or sustain such networks without explicit support. If a universal service recipient cannot provide a broadband network without such funding, neither can a competitor self-provision or obtain facilities from a third party. Failure to impose interconnection and unbundling obligations on broadband support recipients would discriminate against every other provider that does not have access to the same support and deny the benefits of competition to consumers. Carriers receiving broadband funding through the Broadband Technology Opportunity Program (BTOP) must agree to certain open network and non-discriminatory interconnection policies to qualify for the grants. Failure to adopt these requirements for universal service funding would discriminate against carriers currently deploying broadband under the BTOP program.

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COMMENTS OF EARTHLINK, INC. ON FUTHER INQUIRY PUBLIC NOTICE

EarthLink, Inc., on behalf of its operating subsidiaries,[1] ("EarthLink") files these comments on the Federal Communication Commission's ("FCC" or "Commission") Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding ("Further Inquiry").[2]

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

[2] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, DA 11-1348, (rel. Aug. 3, 2011) ("Further Inquiry").

I. THE COMMISSION SHOULD AFFIRM INCUMBENT LECS' DUTY TO OFFER IP-IP INTERCONNECTION UNDER 251/252 OR ADOPT A FUTHER NOTICE IF IT NEEDS MORE INFORMATION TO RULE ON THIS ISSUE

EarthLink, other competitive carriers and IP providers that have invested in deploying IP in their networks, large business end users, and consumer advocates all have urged the Commission to ensure that the transition to IP-based networks is not delayed by incumbents' refusals to negotiate IP-IP interconnection for voice services. The ABC Plan rejects such regulatory oversight and provides that IP-IP interconnection is subject to commercial agreement. The largest incumbents' call for "commercial agreements" is nothing more than a request for the ability to discriminate against their competitors by denying IP-IP interconnection to their IP networks. Without a regulatory backstop, the largest incumbents will be free to refuse interconnection and the ubiquitous public voice network will no longer permit each American to reach every other American connected to the public network. EarthLink supports the Competitive Amendment that would make an explicit finding that IP-IP interconnection is subject to Sections 251 and 252. If the Commission is not prepared to adopt the affirmative finding, at a minimum it should (1) not prejudge the issue by characterizing IP interconnection as subject to commercial agreement and (2) adopt a further notice seeking comment in this proceeding on any legal or factual issues that the Commission needs to analyze further before specifying under which section(s) of the Act incumbents will be required to offer IP-IP interconnection with their IP networks for the exchange of voice traffic.

A. Commercial Agreements Would Ensure Additional Call Delays and Failure

Providing all Americans access to broadband would be largely worthless if their broadband network provider cannot establish efficient IP-IP interconnections with other broadband networks. The value of the public voice network includes a customer's ability to reach every other customer on the public voice network. Chairman Genachowski recently responded to Congressman Latta's concern that some phone calls are not being completed to rural consumers, citing today's regulatory framework that requires all carriers to interconnect directly or indirectly for the exchange of voice traffic.[3] Current Commission policy also requires all carriers to complete calls to other networks notwithstanding any intercarrier compensation disputes.[4] Under the commercial agreements proposed by the ABC Plan, these regulatory protections would no longer apply and such call failures would likely multiply. Without mandatory IP-IP interconnection obligations for broadband network providers that carry voice traffic, broadband users will no longer be assured of the ability to call all other broadband users unless they retrofit their networks to exchange voice traffic through TDM interconnections.

IP-based providers and large business end users recently added their support to competitive carriers' and consumer advocates' call for the Commission to affirm incumbents' duty to offer IP interconnection and provide a forum for resolution of IP interconnection disputes. The IP-based providers and large business end users argue that "[i]nterconnection is the glue that holds together the network, and the statutory obligation to offer interconnection should not

[3] *See* Letter from Julius Genachowski, Chairman, FCC to Rep. Robert E. Latta, U.S. House of Representatives (Aug. 2, 2011).

[4] *See generally Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd. 11629 (2007).

be obscured by this transition."[5] They also "agree that the Commission possesses the authority to ensure that IP-to-IP interconnection is timely and efficiently implemented."[6]

EarthLink's first-hand experience with incumbents' broadband commercial agreements shows that the Commission, Congress, and consumers should expect incumbents to deny requests for IP-IP interconnection and/or demand anti-competitive conditions for the privilege of IP-IP interconnections to their IP voice networks under so-called commercial agreements. For example, three months after the *Wireline Broadband Order* was released, BellSouth required EarthLink, as a condition for renewal of its Regional Broadband Aggregation Network ("RBAN") service (RBAN is a service whereby AT&T transports data traffic from DSL lines to one or more access points in their network), to accept several anti-competitive restrictions on the use of the service.[7] BellSouth also decided to cease offering Layer 2 DSL services to one of EarthLink's subsidiaries, New Edge, after May 17, 2006, effectively ending the ability of New Edge to offer businesses in BellSouth territory an alternative Virtual Private Network service using ATM-over-DSL.[8]

More recently, when DeltaCom renewed its RBAN agreement with AT&T, AT&T refused to renegotiate the DSL price, which is significantly above AT&T's retail prices. Other services included in the agreement are similarly above retail. For example, the wholesale price for a 4MB service is three times the standard retail price for AT&T's 6MB retail service and

[5] Letter from Ad Hoc Telecommunications Users Committee, Google, Inc., Skype Communications S.A.R.L., Sprint Nextel Corp., and Vonage Holdings Corp., to Julius Genachowski, Chairman, FCC, *et al*., WC Docket No. 10-90, *et al*., at 9 (Aug. 18, 2011).

[6] *Id*., at 9.

[7] Petition to Deny of EarthLink, Inc., WT Docket No. 11-65, DA 11-799, Affidavit of Steven Brownworth, at 5 (May 31, 2011) ("Brownworth Affidavit"). *See also* Declaration of Christopher Putala, Executive Vice President, Public Policy, EarthLink, WC Docket No. 06-74 (filed June 5, 2006).

[8] Brownworth Affidavit, at 5-6.

eleven times AT&T's promotional price.[9] AT&T and other large incumbents are likely to extend this anti-competitive behavior to network interconnection if it becomes subject to commercial agreements. Unlike commercial agreements for UNE-P replacement services, there is no section 271 backstop that would require RBOCs to offer IP interconnection. The Commission's National Broadband Plan recognized the fundamental value of competition in broadband markets:

> Competition is crucial for promoting consumer welfare and spurring innovation and investment in broadband access networks. Competition provides consumers the benefits of choice, better service and lower prices.[10]

A key finding of the National Broadband Plan was that the Commission should take "expedited action" to clarify interconnection rights and obligations and encourage the shift to IP-IP interconnection where efficient.[11] Relegating IP-IP interconnection for voice traffic to commercial agreements would be inconsistent with this recommendation.

Although the diverse group of stakeholders calling for a regulatory framework to govern IP interconnection does not yet have agreement on which section(s) of the Act the Commission should rely, the Commission should not and cannot ignore the industry-wide call for some regulatory backstop. EarthLink continues to advocate that the Commission adopt the detailed legal analysis that confirms IP interconnection is a section 251(c)(2) obligation for requesting

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[9] Brownworth Affidavit, at 6-7.

[10] National Broadband Plan, at 36.

[11] *Id*. To date, the Commission has only clarified interconnection rights by issuing a declaratory ruling affirming that rural LECs are obligated to comply with their section 251(a) and (b) duties. *See Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, A National Broadband Plan for Our Future, Developing a Unified Intercarrier Compensation Regime, T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling, WC Docket No. 10-143, GN Docket No. 09-51, CC Docket No. 01-92, FCC 11-83 (rel. May 26, 2011).

LECs. EarthLink and others set forth the legal analysis supporting this in their initial and reply comments in this proceeding.[12] EarthLink will not repeat it in total, but summarizes it below. In the following section, EarthLink proposes an alternative procedural path to regulatory certainty for IP interconnection as a second-best alternative.

B. The Commission Should Adopt the Competitive Amendment that Incumbents Are Required to Offer IP Interconnection under Sections 251/252

In order for carriers to realize the efficiencies of IP broadband networks, interconnection requirements must be technology neutral. Where carriers have deployed IP facilities to connect end users to their network and to connect switches (packet and circuit) within their network, the benefits of deploying these broadband networks cannot be fully realized unless and until they are connected to other broadband networks via IP-IP interconnections. The record confirms that although IP technology is already widely deployed within the industry, carrier interconnections in IP have lagged internal network deployments because of legal uncertainty. The Commission should remove this roadblock by affirming that requesting carriers may seek IP interconnection with incumbents under sections 251/252.

First, the use of IP within internal networks and to connect different carrier networks shows that IP interconnection is "technically feasible" and therefore must be made available pursuant to section 251(c)(2).[13] For example, Cablevision explains that IP interconnection for

[12] *See, e.g.,* EarthLink April 18 Comments, at 2-9; EarthLink May 23 Comments, at 2-8.

[13] Section 251(c)(2) provides that incumbent LECs have: "The duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network -- (A) for the transmission and routing of telephone exchange service and exchange access; (B) *at any technically feasible point* within the carrier's network; (C) that is at least equal in quality to that provided by the local exchange carrier to itself or to any subsidiary, affiliate, or any other party to which the carrier provides interconnection; and (D) on rates, terms, and conditions that are just, reasonable, and

(Footnote continued on next page.)

the exchange of voice traffic is currently available through the Voice Peering Fabric and that cable providers have been developing a model to exchange traffic among themselves;[14] Neutral Tandem explains that it offers IP interconnection for the exchange of voice traffic;[15] EarthLink cited a BellSouth tariff that offers IP interconnection for the termination of long distance traffic;[16] and CompTel cited examples of each RBOC's use of IP technology within its (or its affiliates) networks.[17] Yet the record confirms that no competitor has established IP interconnection with an incumbent for the exchange of local voice traffic. Because section 251(c)(2) requires incumbents to offer any technically feasible form of interconnection, the Commission should affirm that incumbents must offer IP interconnection.[18]

Second, even if an incumbent does not currently offer IP interconnection to other carriers' networks, section 251(c)(2) requires the incumbent to modify its network to accommodate an interconnecting carrier's request.[19] Verizon and AT&T argue that incumbents cannot be compelled to permit "interconnection to a superior, as-yet-unbuilt network" that does

(Footnote continued from previous page.)

nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title." 47 U.S.C. § 251(c)(2) (emphasis added); 47 C.F.R. § 51.305(a)(2).

[14] Cablevision April 18 Comments, at 9.

[15] Neutral Tandem April 18 Comments, at 5.

[16] EarthLink April 18 Comments, at 5 & n.9.

[17] CompTel April 18 Comments, at 7 n.7.

[18] Cablevision April 18 Comments, at 8-9; EarthLink April 18 Comments, at 3-4; PAETEC *et al*. April 18 Comments, at 5-6.

[19] The FCC's rules provide that a type of interconnection may be "technically feasible" even if the ILEC is not currently using it, and even if the ILEC must incur additional costs. The FCC's definition of "technically feasible" provides: "[t]he fact that an incumbent LEC must modify its facilities or equipment to respond to such request does not determine whether satisfying such request is technically feasible." 47 C.F.R § 51.5; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, ¶¶ 198-202 (1996) ("*First Local Competition Order*"); Cablevision, at 9; EarthLink, at 4-6; PAETEC *et al*., at 8.

not exist.[20] As CompTel argued, the IP network exists. First, it exists in the FIOS, SIP-PBX, and similar connections that *incumbent LECs* offer to their end user customers. Second, although the incumbents are attempting to shield it from regulatory obligations through an affiliate shell game where the "three largest incumbent LEC enterprises – AT&T, Verizon and CenturyLink/Qwest – all have extensive [wholesale] IP networks" but "[i]n an apparent effort to shield their IP networks and SIP termination services from negotiated or arbitrated interconnection agreements with other carriers, AT&T, Verizon and CenturyLink/Qwest offer their Internet/IP services through various affiliates (AT&T Internet Services, Verizon Business, Qwest Long Distance) rather than through their regulated local exchange carrier operating companies."[21]

As CompTel notes, the D.C. Circuit vacated a Commission order that would have enabled an RBOC "to avoid its Section 251(c) obligations by setting up a wholly owned affiliate to offer advanced services."[22] In that case, the Court held that "to allow an ILEC to sideslip § 251(c)'s requirements by simply offering telecommunications services through a wholly owned affiliate seems to us a circumvention of the statutory scheme."[23] Likewise, the Commission should not permit the incumbents to circumvent the section 251(c)(2) statutory requirements by alleging IP networks are "unbuilt" where the incumbents use IP for interoffice transport and end user connections but claim their wholesale SIP and IP interconnection interfaces are owned by the incumbents' non-dominant affiliates.

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[20] Comments of Verizon and Verizon Wireless, WC Docket No. 11-119, at 2, 8-11 (Aug. 15, 2011).

[21] CompTel April 18 Comments, at 7-8.

[22] CompTel April 18 Comments, at 8; *Association of Communications Enterprises v. FCC*, 235 F.3d 662, 668 (D.C. Cir. 2001) (The FCC acted unreasonably in allowing statutory resale obligations under section 251(c)(4) to be avoided by providing certain advanced services through a subsidiary.).

[23] *Association of Communications Enterprises*, 235 F.3d at 666.

Third, even if so-called commercial agreements were available, because the impairment analysis does not apply to requests for IP interconnection, those agreements would not absolve incumbents of their duty to offer it under sections 251 and 252.[24] Fourth, nothing in the Act limits incumbents' interconnection obligations to circuit-switched networks.[25]

Competitive carriers, both wireline and cable, uniformly urged the FCC to promote the transition to IP networks by making clear IP-IP interconnection is subject to sections 251 and 252.[26] But competitive carriers were not alone in suggesting that the NPRM targets the wrong roadblock to IP interconnection. As noted above, a broad spectrum of industry participants, including consumer advocates and large business end users, support Commission affirmation of the obligation to interconnect IP networks for the exchange of voice traffic. Google recently urged the Commission to "clarify the IP traffic interconnection obligations of local carriers"[27] because

> Facilitating IP interconnection is a necessary part of this process [of moving to IP networks]. To this end, Google believes it would be useful for the FCC to clarify and *affirm the statutory obligations of local telecommunications carriers to offer IP interconnection*.[28]

Similarly, the New Jersey Division of Rate Counsel, a consumer advocate, recently argued that:

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[24] EarthLink April 18 Comments, at 6-7; PAETEC *et al*. April 18 Comments, at 8.

[25] CompTel April 18 Comments, at 5-7.

[26] *See, e.g.,* CompTel April 18 Comments, at 35; Cox April 18 Comments, at 18; EarthLink April 18 Comments, at 6; PAETEC April 18 Comments, at i, 3-4; Time Warner Cable April 18 Comments, at 12-13; XO April 18 Comments, at 20.

[27] *See, e.g., Ex parte* Comments of Google, Inc., WC Docket Nos. 10-90, 07-135 *et al.*, at 2 (Aug. 1, 2011).

[28] *In the Matter of tw telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, Comments of Google, Inc. at 2 (Aug. 15, 2011) (emphasis added).

> Regulatory clarity is essential so that as consumers migrate away from "traditional" telecommunications services to those that rely on newer forms of technology, these essential interconnection obligations are not eroded. ILECs have been able to construct and maintain a public switched telephone network as a direct result of their historic monopoly and their historic access to a source of ratepayer-guaranteed revenues. Consumers have a unique and compelling interest in ensuring that the public switched telephone network — which they have helped to fund — is configured and operated in a manner that encourages efficient and seamless interconnection, regardless of providers' choice of technology.[29]

NASUCA found no proof in the record of this docket showing the current access regime over compensates certain recipients such that they lack incentives to invest in IP-based platforms.[30] To the contrary, the State Members observed that "many more rural LECs seem to have deployed soft switches than have major incumbent carriers."[31] Indeed, NECA reports that approximately 19 percent of host switches in its traffic sensitive pool have been replaced by soft switches.[32] Implicit in these observations is that the rural LECs' higher access charges have ***not*** removed incentives for them to deploy soft switches. Yet a rural LEC consultant implicitly confirmed legal uncertainty about section 251(c)(2) obligations is hindering direct IP interconnection by noting that rural LECs are not likely to offer direct IP interconnection to soft switches even where they have deployed them.[33] The Commission should remove any such uncertainty and affirm a requesting carriers' right to IP interconnection under sections 251 and 252. The obligation to interconnect at any technically feasible location, regardless of the

[29] *In the Matter of tw telecom Inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, Comments of New Jersey Division of Rate Counsel, at 3 (Aug. 15, 2011).

[30] NASUCA April 18 Comments, at 89-90.

[31] State Members April 18 Comments, at 152-153.

[32] NECA *et al*. April 18 Comments, at n. 54.

[33] TCA April 1 Comments, at 28.

technology utilized, is a critical component of public policy that insures the broadest possible participation in the deployment of broadband facilities and the consumer benefits that only vigorous competition can provide.

C. In the Alternative, the Commission Should Issue a Further Notice on any Legal or Factual Issues that Need Additional Development and Analysis

The ABC Plan states that its intercarrier compensation framework "applies only to TDM interconnection," and "IP-IP interconnection would continue to be governed by commercial agreements."[34] The Commission should reject the incumbents' recurring invitations to let the commercial market govern IP-IP interconnection for voice telecommunications.[35]

If the Commission is not prepared to confirm that incumbents must offer IP interconnection under sections 251/252, it should not prejudge the issue by characterizing IP interconnection as governed by commercial agreements and negotiated pricing. Instead, the Commission should issue another Public Notice in this docket to solicit additional comment on any outstanding legal or factual issues that require further analysis. For example, the Commission may wish to consider a combination of legal bases to order IP interconnection, such as 251(c)(2) for requesting carriers and 251(a)(1) and 256 for those providers that do not qualify as requesting carriers. EarthLink agrees with the IP-based providers that the Commission need not adopt detailed rules governing all aspects of IP interconnection at this time. It is too early to

[34] 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, FCC, WC Docket No. 10-90 et al., at Attachment 1, p. 10, n. 10 (filed July 29, 2011) ("ABC Plan").

[35] *See*, *e.g.*, AT&T April 18 Comments, at 16-17 (recommending a "free-market end state" that eliminates existing regulatory mechanisms altogether); CenturyLink April 18 Comments, at 73 (recommending no FCC action to "force LECs to accept traffic in IP now or during any transitional ICC regime."); Verizon April 18 Comments, at 16 (recommending IP interconnection be implemented by "negotiated commercial agreements" and "governed by the competitive market").

tell whether IP-based networks connected through IP interconnection methods will incur additional costs that are traffic sensitive. While a per minute rate may not recover costs in the manner in which they are incurred, a flat-rated or capacity charge might be the appropriate cost recovery mechanism. It is imperative, however, that the Commission act expeditiously to affirm that a regulatory framework will apply to IP interconnection for the exchange of voice traffic. Without such a regulatory backstop, carriers will not gain the IP-IP interconnection experience necessary to determine the most efficient means to implement such interconnections (including developing rates to recover costs). Without basic rules to ensure that calls are exchanged between IP network providers and completed to end users, the Commission, Congress and consumers can expect call failures to multiply as the industry moves toward IP-IP interconnections.

II. ANY CARVE OUT FOR VOIP TRAFFIC IS ADMINISTRATIVELY UNWORKABLE AND WOULD PERPETUATE ARBITRAGE AND CARRIER DISPUTES (FURTHER INQUIRY, SECTION II.E)

As the FCC recognizes through its VoIP implementation questions, any VoIP-specific rate (whether the ABC Plan's interstate access or the IP-providers' bill-and-keep proposal) will only perpetuate the long-standing arbitrage problems the Commission seeks to redress. Since there is no industry standard to identify and distinguish VoIP-originated or terminated traffic from other traffic, any rate for VoIP lower than the TDM rate would only perpetuate rate arbitrage.[36] Under any VoIP carve out, carriers would continue to have a significant ability to declare their traffic as VoIP-originated or terminated, accurately or not, with little recourse.

[36] *See*, *e.g.*, PAETEC *et. al.* April 1 Comments, at 31.

A. VoIP Implementation Problems

EarthLink answers the Commission's VoIP implementation questions below.

How would VoIP traffic subject to the ICC framework be identified for purposes of the proposed tariffing regime?

To the extent interstate access charges are adopted for VoIP traffic, EarthLink supports the Commission's implicit assumption, and the Competitive Amendment's proposal, that federal tariffs be used as a mechanism to collect intercarrier compensation in the absence of carrier-to-carrier agreements. Negotiating bi-lateral agreements with the hundreds of LECs, IXCs, and VoIP providers that exchange traffic with EarthLink today would be impossible and a waste of industry resources. Federal tariffs are an appropriate mechanism to implement the default rates during and after the transition to a unified intercarrier compensation regime.

As EarthLink argued in its Section XV reply comments, carriers have difficulty distinguishing VoIP traffic from other forms of traffic and any VoIP-specific rate would only encourage further arbitrage.[37] Windstream, Frontier, PAETEC *et al.*, and others made clear that the industry lacks the means to distinguish between interconnected VoIP traffic and TDM traffic.[38] EarthLink agrees with NECA's conclusion that "[s]ince there is no way for terminating carriers to distinguish 'IP-originated' traffic from other types of traffic terminating on their networks, rules allowing special rates for VoIP traffic will encourage providers to assert virtually all their traffic qualifies, which in turn will multiply the number of billing disputes, effectively rendering moot any further efforts by the Commission to implement an organized and

[37] EarthLink April 18 Reply Comments, at 2-3.

[38] *See, e.g.,* Frontier April 1 Comments, at 5 (noting that it cannot identify whether the traffic it receives originates as either VoIP traffic or traditional switched access traffic nor is there a simple technical solution that would enable it to do so").

comprehensive set of ICC reforms."[39] In the case of the ABC Plan proposal, the VoIP carve out would essentially flash cut intrastate access rates to interstate rate levels on January 1, 2012 because it would perpetuate carrier incentives to disguise or represent traffic as IP-originated and carrier disputes about the applicable rates. In the case of the IP-based provider proposal, the VoIP carve out would flash cut the majority, if not all, intercarrier compensation to bill and keep because the incentives to misclassify traffic as VoIP would be even greater.

The FCC should reject any VoIP carve out and adopt the Competitive Amendment that would treat VoIP traffic like all other TDM traffic beginning January 1, 2012. The Commission and industry should focus their resources on broadband deployment and adjusting business plans, rather than wasting time developing interim rules to segregate VoIP traffic—rules that would be obsolete by July 1, 2013 under the ABC Plan.

Would it be feasible to use call record information or factors or ratios to identify the portion of overall traffic that is (or reasonably is considered to be) relevant VoIP traffic, perhaps subject to certification or audits?

EarthLink is not aware of any call signaling data or call record information that can be used to distinguish VoIP from TDM traffic. To the extent it is technically possible to use such data to do so, it would take considerable time to develop an industry standard to govern the population, use and exchange of such data.

Individual carrier traffic factors would be imprecise, administratively burdensome, and unlikely to end disputes. If both IP-originated and IP-terminated minutes are subject to the carve out, the terminating carrier has no data about what percentage of IP-originated traffic it receives. And because IP-based providers such as Vonage do not deliver traffic directly to the terminating

[39] NECA *et al.* April 1 Comments, at 14. *See also* NTCA *et al.* April 1 Comments, at 14; PAETEC *et al.* April 1 Comments, at 31; Level 3 April 1 Comments, at 12.

carrier, intermediaries such as Global Crossing need to rely on their customers to identify IP-originated traffic, which makes their factor difficult to audit.

With respect to IP-terminated traffic, it would take a carrier considerable time and effort to develop an accurate IP-terminated traffic estimate. Most carriers use some mix of IP and TDM customer connections within their networks. For example, Verizon offers FIOS and traditional TDM service throughout its service territory. Assuming FIOS connections count as IP-terminated, Verizon would need to develop a traffic study that identifies the FIOS connections, the access minutes of use terminated to those FIOS connections, and its total terminating access minutes of use in order to develop its IP-terminated access traffic ratio. Other LECs with mixed IP/TDM networks would need to develop similar traffic studies, which would take considerable time to design and complete.

Reconciling the IP-originated and IP-terminated traffic factors presents yet another problem. If the delivering carrier estimates that 60 percent of its traffic is IP-originated and the terminating carrier estimates 20 percent is IP-terminated, how would they be reconciled absent some arbitrary rule that chooses the higher percentage? An accurate percentage requires one traffic study that includes detail about the originating and terminating nature of each call during a sample period. Because of the sheer number of carriers this would involve, an accurate traffic ratio is not administratively feasible.

Should the Commission identify a "safe harbor" percentage of VoIP traffic for use in this context? If so, what should be the factual basis for such a safe harbor? For example, Global Crossing estimates "that on average roughly fifty to sixty percent of the traffic [on its network] is VoIP." Would that, or other data, provide a basis for a safe harbor?

An industry-wide safe harbor would be inaccurate because each carrier has a different mix of IP and TDM customer connections deployed within its network. For example, the 50-60 percent estimate by Global Crossing likely grossly underestimates the amount of Vonage traffic that would qualify for the carve out. At the same time it likely grossly overestimates the amount of traditional wireline LEC traffic that would qualify for the carve out.

Are there alternative mechanisms besides tariffs that could be used to determine the amount of VoIP traffic exchanged between two carriers for purposes of the VoIP ICC framework, and if so, what would be the relative merits of such an approach?

EarthLink is not aware of alternatives beyond those discussed above. To the extent other parties propose alternatives, EarthLink reserves its right to respond to such proposals.

B. Defining VoIP Traffic Subject to Any Carve Out

The Further Inquiry states that the VoIP carve out would apply to one-way interconnected VoIP.[40] The ABC Plan, however, covers IP-originated and IP-terminated traffic.[41] If the FCC can resolve the significant concerns about identifying traffic subject to the VoIP carve out, it must tightly define what traffic is subject to the carve out. Consistent with the Further Inquiry's supposition that the ABC Plan intends to apply the carve-out to one-way VoIP, EarthLink proposes that the FCC adopt a rule defining one-way VoIP traffic. For example, the FCC could modify its current interconnected VoIP definition (for intercarrier compensation purposes only) as follows:

> VoIP Traffic is a call enabled by a service that: (1) Enables real-time, two-way voice communications; (2) Requires a broadband connection from the user's location; (3) Requires Internet protocol-compatible customer premises equipment (CPE); and (4) Permits users generally to receive calls that originate on the public switched telephone network and/or to terminate calls to the public switched telephone network.

[40] Further Inquiry, n.57.

[41] ABC Plan, at Attachment 1, p.10.

C. Effective Date of Any VoIP Carve Out

Reducing VoIP to interstate access or bill-and-keep immediately penalizes LECs that have invested in the IP networks the FCC is trying to promote. At a minimum, if the FCC adopts any VoIP carve out, it should start at the same time all other rate reductions begin, July 1, 2012. As explained above, each of the proposed means to identify VoIP traffic will take time to develop, and will not be ready by January 1, 2012.

III. THE FINAL UNIFIED RATE SHOULD BE SECTION 251(B)(5) RATES ESTABLISHED BY STATE COMMISSIONS

EarthLink continues to object to a final rate of $0.0007.[42] EarthLink supports the Competitive Amendment that would establish each state commission's cost-based reciprocal compensation rates as the final unified rates for each LEC to charge for the transport and termination of all telecommunications. As explained in Section V, this rate respects the Act's direction that telecommunications traffic be exchanged with incumbent LECs at cost-based rates established pursuant to a federal methodology that is implemented by state commissions.

This final rate is not only the most legally defensible, it is also the best means to address important policy objectives. First, a cost-based transport and termination rate could *reduce* the projected $80 million or more[43] in subsidies that would be collected through the Access Recovery Mechanism ("ARM"). To the extent access rate reductions stop at the reciprocal

[42] *See* EarthLink April 18 Reply Comments, at 2-3 (noting that a $.0007 rate is arbitrary and does not recover costs and would amount to a confiscatory taking, would only perpetuate arbitrage, would lead to industry confusion given the lack of ability to distinguish between VoIP and TDM traffic, and would have an especially harsh effect on competitors because they are not entitled to recover reductions in terminating revenues via the USF).

[43] The ABC Plan proposes that the ARM would fund reductions from current reciprocal compensation rates to $0.0007, but the $80 million estimate of ARM funding does not include such reductions. Further Inquiry, at 15.

compensation rate, that will reduce the size of the ARM. Minimizing the ARM is important not only to free up universal service support for the Connect America Fund ("CAF"), but also to ensure that explicit support is not excessive. As the Tenth Circuit found, sections 254(b)(1) and 254(e) require the FCC to ensure that USF mechanisms do not collect *more* than is necessary to preserve and advance universal service: "excessive subsidization arguably may affect the affordability of telecommunications services, thus violating the principle in § 254(b)(1)."[44]

Second, because the FCC's section 251(b)(5) framework is designed to permit interconnecting LECs to recover equal pay for equal work, regardless of their network architecture, it furthers the principle of competitive neutrality:

> Where the switch of a carrier other than an incumbent LEC serves a geographic area comparable to the area served by the incumbent LEC's tandem switch, the appropriate rate for the carrier other than an incumbent LEC is the incumbent LEC's tandem interconnection rate.[45]

The ABC Plan, in contrast, would discriminate against new networks and therefore local competition. During steps three through six, the ABC Plan appears to apply a functional test that would permit incumbents, but not competitors, to charge for tandem switching and transmission in addition to the end office switching rate of $0.0007. This discriminates against competitors that have deployed more efficient networks and technology rather than the traditional incumbent hub-and-spoke network architecture. As the *Alenco* Court noted, "[t]he FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the

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[44] *Qwest Communications Int'l, Inc. v. FCC*, 398 F.3d 1222, 1234 (10th Cir. 2005) (directing the FCC to balance all seven Section 254(d) principles when defining "sufficient," including affordability).

[45] 47 C.F.R. § 51.711(a)(3). SBC and other incumbents later claimed that a competitor is not entitled to the tandem rate unless it meets the geographic equivalence test and provides the functional equivalent of tandem switching (*i.e.*, trunk to trunk switching). *Cost-Based Terminating Compensation for CMRS Providers*, Order, 18 FCC Rcd 18441, 18488 (2003). The FCC rejected this argument, finding that "the plain language of section 51.711(a)(3), [] expressly establishes the conditions for receiving the tandem interconnection rate, and requires *only* the comparable geographic area test." *Id.*

other."[46] Because the FCC's section 251(b)(5) rules ensure a competitor is not penalized by virtue of its more efficient network design, the geographic comparability test should apply during the transition to the unified rate regime.

Setting each carrier's final, unified rate at the state-set reciprocal compensation rate also furthers the FCC's goal of eliminating arbitrage. Under the FCC's rules, reciprocal compensation rates are symmetrical unless one LEC proves to the state commission that it incurs higher costs to terminate traffic.[47] The FCC has posited that the terminating carrier has the ability to seek above-cost charges because of its monopoly on delivering calls to its customer. The fact that a RBOC, competitor, mid-sized incumbent, and rate-of-return incumbent have different rates for terminating calls to their end user customers does not pose the same danger as the current system under which a single carrier imposes different rates for calls to its customer based on the type of call. Indeed, as PAETEC *et al.* noted, the FCC has adopted different rate benchmarks based on the type of carrier in other access reform contexts.[48]

Verizon does not provide a single practical example of how a carrier could engage in arbitrage where each carrier charges its own cost-based unified rate.[49] To the contrary, Sprint argued that each terminating carrier possesses "a monopoly in connection with terminating *voice* traffic" such that

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[46] *Alenco Communications, Inc. v. FCC*, 201 F. 3d 608, 615-616 (5th Cir. 2000) (emphasis in the original).

[47] 47 C.F.R. § 51.711(a).

[48] *See generally* PAETEC, *et al.* April 18 Reply Comments, at 24-29. *See also* PAETEC *et al*. May 23 Reply Comments, at 41-45; EarthLink Reply Comments, at 41-45.

[49] *See* Verizon May 23 Reply Comments, at 24 ("as long as some providers are permitted to charge higher rates than others, there will be a financial incentive for terminating carriers to manipulate traffic to route it to, and through, those carriers that are permitted to charge the higher rates and, conversely, for originating carriers to manipulate routing so as to avoid those higher rates").

> whether an IP network operator connects to AT&T's IP network directly or indirectly is irrelevant, because in either case all traffic destined to AT&T's voice customers must still *always* be sent to AT&T's IP network for completion. Whether it uses TDM, IP or a future protocol, AT&T thus controls a bottleneck monopoly over the facilities it uses to terminate calls originating on other networks.[50]

In short, all traffic terminating to a particular telephone number will be subject to the unified termination rate of the LEC serving that telephone number. Because the unified rate will be a cost-based rate set by the state commission, which applies to all LECs in the incumbent's service territory under the FCC's symmetrical rate rules, there is no opportunity for arbitrage by assigning the telephone number to a competing LEC with a higher rate, even if such assignment were practical on a call-by-call basis (it is not).

IV. GLIDE PATH AND TRANSPORT

The ABC Plan's intercarrier compensation transition proposal is discriminatory in at least four ways: (1) incumbents get six years to reach $0.0007 plus three years of ARM revenue replacement (longer transition); (2) incumbents get ARM support that makes up 90% of lost revenue through July 1, 2018, and a declining percentage during the remaining two years until support is eliminated July 1, 2020; (3) incumbents continue charging tandem switching and transport during steps three through six while competitors may not be permitted to do so; and (4) the Plan does not clearly subject dedicated facilities that competitors buy (and incumbents sell) for transport and termination to cost-based rates under the section 251(b)(5) framework.

The FCC should remedy this discrimination by adopting the Competitive Amendment that would establish a separate transition plan for non-ILECs to the final rate on July 1, 2020 in nine steps (*e.g.*, intrastate access would not be brought to interstate at step two), remove the cap

[50] Sprint May 23 Reply Comments, at 11-12 (emphasis in original).

on multiline business SLCs to give competitors an effective opportunity to mitigate some revenue losses, and make clear that incumbents must offer dedicated facilities used for transport and termination of all traffic under the 251(b)(5)/252 standards.

A. Because the ABC Plan's Glide Path Discriminates Against Competitors, the FCC Should Adopt a Straight Line Transition for Non-ILECs from Each Current Rate to the Final Rate on July 1, 2020

The ABC Plan flash cuts all LECs' intrastate access rates to interstate levels by July 1, 2013, a period of *less than two years* from today, let alone adoption of any FCC order. Unifying intrastate and interstate access rates within 18 months of the effective date of an FCC Order is the flash cut the NPRM seeks to avoid and ignores the numerous and varied calls for a longer, measured transition to equalized access rates.[51]

Although unifying access rates could cause a precipitous drop in revenue for incumbent and competitive carriers alike, the ABC Plan proposes to ease the revenue shortfall *only for incumbent carriers*. The SLC caps increase for residential customers but not business customers and only incumbents have access to the ARM.[52] Competitors in general, and EarthLink in particular, serve a majority of business customers. According to the FCC's most recent Local Competition Report, approximately 59.6% of incumbents' combined access lines were provided

[51] In general, state commissions that addressed this issue supported five years to equalize access rates. Michigan PSC April 18 Comments, at 16 (requesting that the Commission give states four years to begin, not complete, the necessary reforms); Mississippi PSC April 6 Comments at 14-15 (minimum of five years for access rates to reach parity),; Missouri PSC April 6 Comments, at 24 (minimum of five years for access rates to reach parity); Massachusetts DTC April 15 Comments, at 22 (requesting three to five years for states to complete reforms); Washington UTC April 18 Comments, at n.28 (four years is a reasonable transition period to equalize access rates, but some states may need more time). Non-BOC carriers including EarthLink, Cbeyond *et al.*, Frontier (prior to the ABC Plan submission), and XO similarly supported a five year transition period to equalize access rates. EarthLink April 18 Comments, at 11; Cbeyond *et al*. April 18 Comments, at 4; Frontier April 18 Comments, at 5-6; XO April 18 Comments, at 18.

[52] *See* ABC Plan, at Attachment 1, pp. 11-13.

to residential customers (59,895,000 residential lines of 100,426,000 total switched access lines). Competitors' combined residential lines, on the other hand, only accounted for 21.2% of their total switched access lines (4,628,000 of 21,849,000 total switched access lines). Likewise, 40.4% of incumbent access lines, and 78.8% of competitor access lines were provided to business customers (40,531,000 of 100,426,000 total lines, and 17,221,000 of 21,849,0900 total lines, respectively).[53]

Given that competitors serve vastly fewer residential customers on average, their opportunity to make-up lost access revenue through SLC increases is limited. In short, the ABC Plan's flash cut in access revenue for competitors threatens their ability to invest in IP-based networks and services for the small and medium sized business customers that they primarily serve. The Competitive Amendment addresses this discriminatory recovery opportunity by removing the cap on multiline business SLCs.

At least three states have rejected the ABC Plan's position that competitors should reduce access rates on the same schedule as large incumbents. The Michigan Commission explained why competitors get four years longer than incumbents to equalize access rates:

[53] *See* FCC, Industry Analysis and Technology Division, Wireline Competition Bureau, *Local Telephone Competition: Status as of June 30, 2010*, at Table 7 (March 2011).

> While it is true that disbursements from the ARM are limited to eligible providers, which by definition excludes CLECs, it is important to note that the Michigan Telecommunications Act also treats CLECs differently with respect to the timeframe for reductions in intrastate access charges. Rather than having to immediately lower intrastate rates to no higher than interstate levels as of September 13, 2010, CLECs in Michigan are able to take advantage of a 5 year step-down process in which the first reductions (of 20% of the differential between intra- and interstate access rates) did not occur until January 1, 2011. In fact, CLECs have until January 1, 2015 before their intrastate access rates are required to be no higher than their corresponding interstate access rates, i.e. four years of additional time not allotted to eligible providers.[54]

Wisconsin adopted a law that requires large competitors (those with more than 10,000 access lines in Wisconsin) to bring access rates into parity within six years, with the reductions beginning four years after the Act becomes law.[55] Likewise, Georgia provided a ten-year transition process for competitive carriers.[56] These states all adopted transition periods that differ based on the type of carrier, with large incumbents required to reduce rates on a faster schedule than competitors.

The FCC should follow Georgia, Michigan and Wisconsin and adopt a different transition period for competitors that recognizes their unique circumstances, including limited revenue recovery opportunities and the negative impact on the small and medium business customers they serve. The Competitive Amendment recognizes these unique circumstances by proposing a straight-line transition period to a final rate.

First, competitors should not be required to reach the final rate until incumbents realize the full impact of the final rate on July 1, 2020, when incumbents no longer receive ARM support for lost intercarrier compensation revenues. Second, competitors should not flash cut

[54] Michigan PSC May 23 Reply Comments, at 13.

[55] JR1SB-13, Section 77, amending 196.212(2)(b).

[56] *See* Ga. H.B. 168 (June 2010).

intrastate access to interstate levels in eighteen months. Instead, competitors should step down each rate to the final rate on July 1, 2020. For example, assume that a competitor charges $0.01 per minute of use for intrastate access, $0.0035 for interstate access, and $0.002 for reciprocal compensation. The intrastate rate of $0.01 would step down in uniform annual increments starting July 1, 2012 and ending at the final uniform rate of $0.002 (the state-set reciprocal compensation rate) on July 1, 2020. Similarly, the interstate access rate would step down in annual increments from July 1, 2012 through July 1, 2020 to the uniform rate of $0.002.

The fact that rate reforms have been proposed for many years does not mean that carriers have incorporated lower rates in their business plans. As many parties argued, a measured transition plan is necessary to ensure financial stability and continued investment, not only in broadband networks but also by private investment firms. Reducing competitors' intrastate and interstate access rates over a longer transition period that recognizes their limited ability to recover and/or adjust their business plans to lost intercarrier compensation revenues would "moderate the impact on consumers and allow higher broadband adoption" while at the same time minimizing "the risk that reform will have a negative impact on private investment."[57] As a matter of prior public policy and historical fact the incumbents reduced access rates to their current interstate level over a much longer period of time even though they were able to replace those revenues with end user charges and rate increases on other services that were possible due to their position of market power during the transition. During much of the transition, incumbents advocated and regulators endorsed a revenue make whole philosophy to ensure no financial harm due to reduced access charge revenues. Those transitional safeguards are not

[57] CenturyLink April 18 Comments, at 60.

available to CLECs as they adjust their business plans to the lower access charge revenues. The Commission should account for this by adopting a longer transition period that gives competitors additional time to adjust their business plans to the lost revenues.

B. If All Traffic Is Brought Under Section 251(b)(5), Rates for All Transport Elements Must Also Be Subject to Section 251(b)(5) (Further Inquiry II.B.)

The ABC Plan's premise that all telecommunications traffic is subject to section 251(b)(5) is not applied consistently to all rate elements. As discussed above, during steps three through six the ABC Plan would permit only incumbents to charge higher per minute of use rates than competitors by virtue of their hierarchical network architecture, notwithstanding the fact that the FCC's section 251(b)(5) rules recognize competitors serving comparable geographic areas are entitled to the same tandem rates.

The ABC Plan also discriminates against competitors through its dedicated transport rules. Nothing in the ABC Plan requires incumbent LECs to price dedicated facilities used as transport to deliver traffic to end offices at section 251(b)(5) rate levels. In short, the ABC Plan perpetuates distinctions between access and local traffic because it reforms rates for the "termination" function that incumbents *buy* from competitors but does not reform rates for the "transport" function incumbents *sell* to competitors.

Unless the FCC adopts rules to bring all transport functions under section 251(b)(5), the framework will not be uniform and arbitrage opportunities will continue. For example, interconnection agreements typically require the originating LEC to establish direct end office trunks ("DEOTs") when traffic reaches a certain volume, for example, one DS-1 (approximately 200,000 minutes of use) for three consecutive months. Under the ABC Plan, as of July 1, 2017, an incumbent would be limited to charging a competitor $0.0007 for a minute of use delivered to its tandem switch and terminated to the incumbent's end user. But the incumbent could invoke a

DEOT trigger in the interconnection agreement to require the same carrier to deliver traffic to the end office and impose the same rate of $0.0007 PLUS a dedicated transport rate that varies in proportion to the type of traffic carried on the DEOT. Nothing in the ABC Plan prevents an incumbent from continuing to impose interstate access rates for dedicated transport to the end office used to carry access traffic.[58] The ABC Plan therefore perpetuates disparate rates for transport depending on traffic type, incentives to disguise traffic as non-access, and carrier disputes.

The FCC should address this deficiency by adopting the Competitive Amendment that would make clear dedicated transport rates must be reduced to cost-based section 251(b)(5) levels for the exchange of all traffic.

V. STATE-FEDERAL FRAMEWORK (FURTHER INQUIRY II.A.2)

Notwithstanding its varied and creative legal arguments, the ABC Plan does not provide a defendable answer to the dilemma about the FCC's jurisdiction to set a unified intercarrier compensation *rate* for *all* telecommunications traffic. As the tortured history of ISP-bound compensation makes clear, the Commission risks prolonged industry uncertainty if it attempts to achieve policy objectives at the expense of legal sustainability. The touchstone of any Commission decision with respect to intercarrier compensation must be well grounded in the statutory framework.

In order to achieve a unified rate for all traffic a LEC terminates, one regulator must determine the rate that is applied to all classes of traffic. Assuming that it is economically and operationally inefficient for carriers to distinguish intrastate from interstate traffic, the ABC

[58] The ABC Plan transitions dedicated transport rates to interstate levels over the first two steps. ABC Plan, at Attachment 1, p. 11.

Plan's conflict preemption legal theory still fails because Congress determined that state regulators should set incumbent LECs' rates for the exchange of all telecommunications.[59] Congress limited the Commission role to that of a "backstop" in cases where a state commission refuses to perform its section 252 responsibilities.[60] In other words, while high intrastate access rates might conflict with a national *policy* of a unified rate, the FCC cannot preempt state commissions from exercising their authority to determine incumbent LECs' rates for all telecommunications because it would be inconsistent with the *federal statute*.

A. Section 251(i) Preserves the Commission's Section 201 Rulemaking Authority but not Its Section 205 Ratemaking Authority

The ABC Plan repeatedly confuses the FCC's rulemaking and ratemaking authority and treats them as interchangeable by asserting, for example, that the FCC "may promulgate *rules* adopting a uniform default *rate*."[61] The Commission's authority to set rates does not arise under section 201. Section 201 provides for the Commission to ensure that "charges, practices, classifications, and regulations" are "just and reasonable."[62] The Commission's authority to prescribe rates arises under section 205.[63] Nothing in section 251(i) indicates that the Commission's authority under *section 205* is somehow preserved in the face of sections 251(b)(5) and 252(d)(2).

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[59] 47 U.S.C. § 252(d)(2).

[60] 47 U.S.C. § 252(e)(5).

[61] ABC Plan, at Attachment 5, p. 9 (emphasis added).

[62] 47 U.S.C. § 201(b).

[63] 47 U.S.C. § 205 ("[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . .").

The Second Circuit's decision in *AT&T Co. v. FCC*[64] provides a comprehensive discussion of the FCC's rate-prescription authority under the Act. The Court started "with the proposition that Congress, rather than purporting 'to transfer its legislative power to the unbounded discretion of the [FCC],' intended a specific statutory basis for the Commission's authority."[65] "Sections 203 through 205" of the Act "establish precise procedures and limitations" regarding the FCC's authority to set rates.[66] Section 203 allows carrier to file tariffs; section 204 empowers the FCC to suspend a tariff or allow it to take effect; and section 205 authorizes the FCC "to determine and prescribe what will be the just and reasonable charge," but only "after full opportunity for a hearing."[67]

The D.C. Circuit reviewed the FCC's authority to prescribe rates and acknowledged "strong doubts that the FCC acted within its statutory authority" when prescribing rates, even on an interim basis, without the hearing compelled by section 205.[68] The Court found that in order to proscribe rates the FCC must satisfy the statutory requirements in section 205.[69]

The ABC Plan ignores the distinction between sections 201 and 205 and invites the FCC to rely on section 201 to set the default rate for the exchange of all telecommunications at $0.0007,[70] a rate that carriers allegedly negotiated voluntarily at arms-length.[71] To quote the

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[64] 487 F.2d 865 (2d Cir. 1973).

[65] *AT&T*, 487 F.2d at 872 (citation omitted).

[66] *Id.*, at 873.

[67] 47 U.S.C. § 205.

[68] *Southwestern Bell Tel Co. v. FCC*, 168 F.3d 1344, 1349-51 (D.C. Cir. 1999). In *Core*, the Court declined to address whether section 201 gave the FCC authority to prescribe rates for ISP-bound traffic on the basis that Petitioners had not included that argument in their opening brief. *Core Communications, Inc. v. FCC*, 592 F.3d 139, 145-46 (D.C. Cir. 2010), *cert denied*, 131 S. Ct. 597, 626 (2010).

[69] *Southwestern Bell*, at 1349.

[70] ABC Plan, at Attachment 5, p. 14.

Second Circuit, the FCC cannot rely on its "claimed broad inherent regulatory power" in 201(b) to "defeat the purpose of [s]ection 205 and vitiate the specific statutory scheme."[72] The FCC's section 205 authority to prescribe rates is limited to interstate traffic. Nothing in section 251(i) expands the FCC's authority to prescribe rates for intrastate traffic, including incumbent LEC rates for section 251(b)(5) traffic that originates and terminates in the same state.

Although the *Core* Court found that the Commission had authority to set prices for ISP-bound traffic because it fell into a unique category of traffic represented by the intersection of sections 201 (interstate service) and 251(b)(5),[73] calls that originate and terminate in a local calling area or state do not fall into that unique category. Instead, they fall into the category of traffic represented by the intersection of sections 2(b) (intrastate service) and 251(b)(5). The cooperative federalism regime designed by Congress for such traffic limits the FCC to setting the compensation methodology and grants state commissions the authority to set rates.

B. The FCC Cannot Preempt Section 251(b)(5) Rates Set By State Commissions Pursuant to the Act's Cooperative Federalism Regime

Courts apply a presumption against preemption.[74] Despite the ABC Plan's numerous characterizations of federal preemption as displacing *state compensation regimes*, a careful reading of section 252 shows that the ABC Plan asks the FCC to preempt state commission

(Footnote continued from previous page.)

[71] ABC Plan, at Attachment 5, p. 4. Although the ABC Plan argues that courts have found negotiated rates satisfy the just and reasonable standard, the legal analysis does not cite any case law finding that negotiated rates satisfy section 252(d)(2)'s additional cost standard. ABC Plan, at Attachment 5, pp. 4, 34-37.

[72] *AT&T*, 487 F.2d at 874-75.

[73] *Core*, 592 F.3d at 144.

[74] *Ting v. AT&T*, 319 F.3d 1126, 1136 (9th Cir. 2003).

section 251(b)(5) rates that were established under the *cooperative federal regime* in which Congress assigned a significant role to state commissions.

Section 252(d)(2)(A) provides that "[f]or the purposes of compliance by an incumbent local exchange carrier with section 251(b)(5), a *State* commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless" they provide for mutual and reciprocal recovery of costs determined "on the basis of a reasonable approximation of the additional costs of terminating such calls."[75]

The ABC Plan first argues that Congress did not grant state commissions jurisdiction to set section 251(b)(5) rates for non-incumbent carriers.[76] As explained above, nothing in sections 251(i) and 201(b) grant the FCC to set such rates either. Current FCC rules address this by requiring non-incumbent carriers' rates to be symmetrical (absent a state commission determination that the non-incumbent is entitled to a higher rate). The ABC Plan provides no explanation why it is a plausible reading of the statute to reverse the current rule and have incumbent LEC section 251(b)(5) rates mirror section 251(b)(5) rates set by the FCC for all other LECs.

Even assuming, *arguendo*, that section 252(c)(2) limits state pricing jurisdiction to arbitrated interconnection agreements,[77] the states have exercised such authority to set incumbent LEC rates that comply with the Act and the FCC's pricing methodology. If the FCC adopted $0.0007 as the default rate to displace such state rates, it would effectively overrule the state commission findings that higher rates comply with the Act. The Act assigns this review function

[75] 47 U.S.C. § 252(d)(2)(A) (emphasis added).

[76] ABC Plan, at Attachment 5, p. 13.

[77] ABC Plan, at Attachment 5, p. 13.

to the federal courts, not the FCC: "a party aggrieved by such [state] determination may bring an action in an appropriate Federal district court to determine whether the agreement… meets the requirements of section 251 and this section [252]."[78]

Perhaps to avoid this direct conflict with state findings, the ABC Plan argues that a default rate cap is a methodology, not a rate.[79] In other words, the FCC can replace its current TELRIC methodology with a methodology that prohibits states from pricing incumbent LEC section 251(b)(5) rates above $0.0007 because they can recover any additional costs of termination from end users or the universal service fund. As EarthLink has previously shown, a methodology in which carriers recover from their end users the costs of terminating another carrier's traffic is not consistent with the statute.[80] The legislative history shows that bill and keep only satisfies the statute where traffic is roughly in balance or carriers voluntarily agree to such arrangements.[81]

The ABC Plan's legal analysis also argues that nothing in the Supreme Court's *Iowa Utilities Board* order limits the FCC to setting a cost methodology.[82] The analysis stretches the court's language beyond credulity. The Supreme Court's *Iowa Utilities Board* decision found that the Commission's TELRIC pricing methodology "no more prevents the States from establishing rates than do the statutory 'Pricing Standards' set forth in § 252(d). *It is the States that will apply those standards and implement that methodology, determining the concrete result*

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[78] 47 U.S.C. § 252(e)(6).

[79] ABC Plan, at Attachment 5, pp. 16-17.

[80] EarthLink April 1 Comments, at 9-13.

[81] EarthLink May 23 Reply Comments, at 9-10.

[82] *See* ABC Plan, at Attachment 5, pp. 9-17.

in particular circumstances."[83] The ABC Plan would have the Commission ignore the Eighth Circuit's interpretation of this language,[84] which vacated the FCC-set proxy prices for transport and termination,[85] in favor of its own expansive interpretation of the Commission's section 201 rulemaking powers to implement section 251. As explained above, however, the FCC's section 201 rulemaking powers do not authorize it to prescribe rates.

The ABC Plan next argues that the section restricting both state commissions and the FCC from engaging in rate proceedings provides evidence that Congress intended the FCC to set rates.[86] Although section 252(d)(2)(B)(ii) could be interpreted as not *constraining* the FCC's rulemaking authority, it does not grant the FCC authority to set incumbents' 251(b)(5) rates. To the contrary, section 252(e)(5) makes clear that the FCC may only step in where it finds a state commission has failed to act to carry out its responsibilities under "this section." "This section" includes the state commissions' power to determine whether an incumbent's 251(b)(5) rate is just and reasonable. Only where a state refused to act, as Virginia did, can the FCC exercise its authority to set incumbents' section 251(b)(5) rates.

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83 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 384 (1999) (emphasis added).

84 Relying upon the Supreme Court's determination that the Commission's role was limited to resolving "general methodological issues," the Eighth Circuit found that "[s]etting specific prices goes beyond the [Commission's] authority to design a pricing methodology," and concluded that Commission establishment of interim rates would "intrude[] on the states' right to set the actual rates." *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000), *aff'd in part and rev'd in part*, *Verizon Comm's, Inc. v. FCC*, 535 U.S. 467 (2002), and *vacated in part*, *Iowa Utils. Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002).

85 Upon remand, the Court of Appeals found that the Supreme Court's decision called into question *all* of the Commission's proxy prices, including "the rates for transport and termination," and thus vacated *all* of the proxy pricing rules. *See Iowa Utils. Bd. v. FCC*, 219 F.3d at 756-57.

86 ABC Plan, at Attachment 5, p. 17.

VI. THE FCC SHOULD IMPOSE INTERCONNECTION AND ACCESS OBLIGATIONS ON CAF RECIPIENTS

Noticeably lacking from the ABC Plan is any requirement to provide unbundled access and interconnection to the CAF-funded networks.[87] Section 254(b)(2) provides that "[a]ccess to advanced telecommunications services and information services should be provided in all regions of the Nation." The ABC Plan relies on this as one of the bases for extending universal service support to services that are not classified as telecommunications services. The Commission also characterizes this principle as "directly relevant" to the operation and size of the high-cost program[88] and asks how it "should weigh other section 254(b) principles, including the principle that universal service support should be competitively neutral."[89] The courts have already answered this question: "[t]he FCC must see to it that *both* universal service and local competition are realized; one cannot be sacrificed in favor of the other."[90]

The ABC Plan would violate this requirement by sacrificing local competition to achieve greater broadband deployment. The FCC has removed incumbent LECs' obligations to offer unbundled access to a variety of packet-switched services and broadband-capable networks based on the impairment standard.[91] The basis of USF support for broadband networks is that it

[87] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, ¶ 92 *et seq*. (rel. Feb. 8, 2011) ("NPRM").

[88] NPRM, ¶ 77.

[89] NPRM, ¶ 82.

[90] *Alenco Communications, Inc. v. FCC*, 201 F. 3d 608, 615-616 (5th Cir. 2000) (emphasis in the original).

[91] *See, e.g., Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order

(Footnote continued on next page.)

would be uneconomic for providers to deploy and/or sustain such networks without explicit support.[92] This is the very definition of impairment.[93] If a CAF recipient cannot provide a broadband network without CAF funding, neither can a competitor self-provision or obtain facilities from a third party. If the Commission fails to impose interconnection and unbundling obligations on CAF recipients, it will discriminate against every other provider that does not have access to the same support. Moreover, it will deny the benefits of competition to consumers in areas served by CAF recipients. As the National Broadband Plan recognizes, wholesale access policies are key to promoting the competition that will spur investment and innovation in broadband offerings.[94] The Plan therefore recommended that the Commission take "expedited action" to ensure wholesale inputs to broadband services are made available to competitive carriers:

> ➢The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and take expedited action based on that framework to ensure widespread

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(Footnote continued from previous page.)

and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, ¶¶ 288 & 537 (2003) (subsequent history omitted) ("TRO") (the Commission declined, inter alia, "to require incumbent LECs to unbundle the next-generation network, packetized capabilities of their hybrid loops," did not require "incumbent LECs to unbundle any transmission path over a fiber transmission facility between the central office and the customer's premises (including fiber feeder plant) that is used to transmit packetized information," and held "that competitors are not impaired without access to packet switching, including routers and DSLAMs" and therefore "declin[ed] to unbundle packet switching as a stand-alone element").

[92] NPRM, ¶ 1 ("in areas of the country where it is not economically viable to deploy and/or operate broadband networks, including many rural areas, public support is needed to spur private investment").

[93] 47 C.F.R. 51.317(b) ("A requesting carrier's ability to provide service is 'impaired' if, taking into consideration the availability of alternative elements outside the incumbent LEC's network, including elements self-provisioned by the requesting carrier or acquired as an alternative from a third-party supplier, lack of access to that element poses a barrier or barriers to entry, including operational and economic barriers, that are likely to make entry into a market by a reasonably efficient competitor uneconomic.").

[94] *See* National Broadband Plan, at 36.

> availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.[95]

In short, the ABC Plan's lack of interconnection and access obligations for CAF recipients violates the Act, the principle of competitive neutrality, and one of the key findings of the National Broadband Plan.

To remedy this discrimination, the Commission should impose obligations on CAF recipients to provide access and interconnection. Where the CAF recipient is an incumbent LEC, it should be subject to section 251/252 obligations for all broadband networks in service areas where it receives support. Where the CAF recipient is not an incumbent LEC, the FCC should condition receipt of CAF support on providing access and interconnection to competitors.[96]

VII. CONCLUSION

EarthLink commends the Commission for its commitment to reforming the intercarrier compensation and universal service systems to support advanced, broadband networks. EarthLink looks forward to working cooperatively with the Commission to ensure its reforms achieve both universal service and competition.

Respectfully submitted,

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[95] *Id*.

[96] NPRM, ¶ 71 ("Nothing in section 254 prohibits the Commission from conditioning the receipt of support, and the Commission has imposed conditions in the past.").