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 PAETEC HOLDING CORP.
ON FUTHER INQUIRY PUBLIC NOTICE

Dated: August 24, 2011

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EXECUTIVE SUMMARY

The Commission should adopt reforms that advance both universal service and competition. As the National Broadband Plan recognizes, competition is a key driver of investment and innovation and therefore a key pillar of any regulatory polices to increase broadband deployment.

Moving all telecommunications to section 251(b)(5) but preserving the state role to set rates for such traffic is a reasonable compromise between complete federal preemption and protracted disagreements about dividing traffic between the intrastate and interstate jurisdictions. State-set rates would comply with the Act's requirement that telecommunications traffic be exchanged with incumbent LECs at cost-based rates established pursuant to a federal methodology that is implemented by state commissions. Deferring to the state-set rate as the default for all other traffic achieves the policy goal of a unified rate to reduce opportunities for arbitrage, minimizes the amount of access revenue replacement support that consumers ultimately will fund, and continues this Commission's commitment to a federal-state partnership.

Setting the interim target rate at the applicable reciprocal compensation rates would reduce pressure on the Access Recovery Mechanism ("ARM"), which the ABC Plan estimates could reach $80 million or more in subsidies. ARM reductions could be used to achieve affordable rates for consumers, whether through lower USF contribution collections or additional resources for universal service support under the Connect America Fund ("CAF").

PAETEC submitted data that shows the revenue loss it will experience when it equalizes access rates. The ABC Plan would force PAETEC to absorb this significant revenue loss in less than two years, notwithstanding the fact that PAETEC competes primarily in business markets where ILECs are unlikely to increase their subscriber line charges. Given that PAETEC's customer contracts average between three and five years, it is highly unlikely that PAETEC could recoup that revenue loss through price increases alone. Absent opportunities to recover lost revenue, PAETEC would be forced to reduce costs or defer capital investment, both of which would have negative impacts on employment levels and the competitive broadband services PAETEC deploys to its small and medium sized business customers. To address the disparities in revenue recovery opportunities, the FCC should adopt a competitively neutral approach that gives CLECs the same timeframe as incumbents, until July 1, 2020, to adjust to reduced intercarrier compensation revenues. It should also permit CLECs to reduce each rate on a straight-line basis, rather than flash cutting intrastate access to interstate levels in less than two years.

The Commission's intercarrier compensation reform transition should include regular review requirements for all classes of carriers to ensure that the transition is proceeding as ordered and there are no unintended consequences. At a minimum, the FCC should establish a planned review of ICC and USF reform within six months after access rates are equalized to ensure ICC and USF reform are achieving the goals set out by the FCC – more broadband deployment, IP-IP interconnection for the exchange of voice traffic, and less arbitrage.

A broad spectrum of industry participants including competitive carriers, IP-based providers, large end users, state commissions, and consumer advocates have rejected the large ILECs' persistent calls for "commercial agreements," and instead call upon the Commission to promptly affirm an incumbents' duty to offer IP interconnection and provide a forum for resolution of IP interconnection disputes. Without the regulatory backstop provided by section 251(c) and 252, the largest ILECs will continue to refuse IP interconnection to all but the largest providers and the public voice network will no longer be ubiquitous, and the Commission will have done significant damage to its goal of promoting competition for broadband services in the small and medium enterprise market. The Commission should affirm ILECs' obligation to offer IP-IP interconnection under section 251(c)(2) so that the industry can start negotiating and implementing IP interconnection arrangements. If the Commission feels a need to resolve additional legal questions concerning IP interconnection, it should issue another Public Notice, establish an expedited comment schedule on any such notice, and determine which regulatory framework will govern IP interconnection disputes no later than six months after adopting the initial order reforming universal service and intercarrier compensation.

To address the problem of identifying VoIP-originated traffic, PAETEC recommends that the Commission direct NECA to create a new Operating Company Number ("OCN") code, similar to the IP Enabled Service Provider ("IPES") code, and require providers that deliver calls to a tandem to apply for an OCN and include their OCN in the signaling stream or call record. To address phantom traffic problems where one-way VoIP providers do not assign NANP telephone numbers, the FCC should require all carriers and VoIP providers to (1) pass Carrier Identification Code ("CIC") or OCN in call signaling or record data and (2) apply the Entry/Exit Surrogate ("EES") to rate VoIP traffic. Section 251(i) preserves the FCC's authority to adopt rules that implement section 251(b)(5). Because section 251(b)(5) requires LECs to enter into arrangements for the provision of such termination services, it is only logical that the terminating carrier needs information to identify the parties with whom it should establish such arrangements.

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COMMENTS OF PAETEC HOLDING CORP.
ON FUTHER INQUIRY PUBLIC NOTICE

PAETEC Holding Corp., ("PAETEC") 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").[1]

[1] *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. EXISTING, STATE-SET RECIPROCAL COMPENSATION RATES PROVIDE THE BEST INTERM TARGET FOR A FINAL UNIFIED RATE

A. Cost-Based Rates Are Necessary To Promote Competition

Congress adopted the Telecommunications Act of 1996 to "promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies."[2] In the sections designed to open local telecommunications markets to competition, Congress established a pricing standard for transport and termination.[3] There is significant evidence in the record that $0.0007 does not comply with the Act's pricing standard.[4]

[2] Preamble, Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

[3] 47 U.S.C. § 252(d)(2)(A).

[4] *See In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Ex Parte Letter of PAETEC, Attached Declaration of Michael Starkey of QSI, at 2, 7 (Oct. 17, 2008) ("Starkey Declaration"). Nuvox has provided similar evidence of the incurrence of traffic sensitive costs. *See* Ex Parte Letter of Nuvox, CC Docket No. 01-92 (filed Dec. 31, 2008). In 2008, a wide host of parties made clear that $0.0007 is an impractical and unworkable rate. *See* Ex Parte Presentation of NECA, CC Docket No. 01-92 and WC Dockets Nos 06-122 and 08-152, at 1, (filed Sept. 11, 2008) ("proposed $0.0007 / minute rate doesn't even cover pool members' costs of billing, let alone network costs," or the costs of investing in advanced networks); Ex Parte Presentation of NTCA, CC Docket No. 01-92 and WC Docket No. 04-36, at 1, 4-5, n. 10 and 17 (filed Sept. 18, 2008) ("NTCA Sept. 18 Ex Parte") (urging "the Commission to reject the proposed unified $0.0007 terminating access rate because it will significantly harm rural consumers, unlawfully preempt the states, and result in an unlawful taking of RoR carrier property" in violation of the 5th Amendment of the U.S. Constitution); NTCA Sept. 18 Ex Parte, at 1-2, 4-5 (viewing the proposed $0.0007 rate as so low that it not only will preclude carriers from recovering their costs and earning a reasonable return on investments made to provide service, it will "result in a confiscatory taking."); Ex Parte Interim Universal Service & Intercarrier Compensation Reform Proposal of NTCA, 19-20 (filed July 11, 2008). The Independent Telephone and Telecommunications Alliance ("ITAA"), which represents midsized LECs, also opposed $0.0007 as a unified rate in rural areas where it argues it "would harm both end users and the carriers that serve them while generating tremendous savings for larger players such as AT&T and Verizon." ITAA underscores that the proposed rate "would not cover the cost of providing terminating access services in most rural areas." ITAA members include CenturyTel, Consolidated, Embarq, FairPoint, Iowa Telecom, TDS Telecom, Frontier, Windstream and others. Ex Parte Presentation of ITAA CC Docket No. 01-92, at 1 (filed Sept. 19, 2008) (emphasis added); Ex Parte Presentation of ITAA, WC Docket No. 04-36 et al., at 4 (filed Aug. 21, 2008). *See also* Ex Parte Comments of CenturyTel, CC Docket No. 01-92, at 4 (filed Sept. 19, 2008) ("Using an unrealistic national rate, such as $0.0007, is below costs, fails to protect rural consumers, and displaces costs on other consumers."); Ex Parte Comments of Windstream, CC Docket No. 01-92, at 2 (filed Sept. 24, 2008) (maintaining the $0.0007 rate constitutes a windfall for payers of

(Footnote continued on next page.)

PAETEC has provided data to show the Commission the additional, significant revenue loss it would incur if it must reduce all intercarrier compensation rates to $0.0007 rather than cost-based reciprocal compensation rates.[5] This below-cost termination rate would force PAETEC's customers, which are primarily small and medium businesses, to *subsidize* large carriers for whom reducing intercarrier compensation *expenses* is a business priority. Since one of the primary goals of reforming intercarrier compensation was to eliminate implicit subsidies, adopting the ABC Plan[6] would fail to achieve that important goal.

As a CLEC serving primarily business customers, PAETEC estimates that its reduced intercarrier compensation expenses will not offset its reduced intercarrier compensation revenues.[7] The ABC Plan implicitly rejects the Commission's suggestion that the impact of

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access charges); Reply Comments of Embarq, CC Docket No. 01-92, at 6 (filed Sept. 6, 2008) ("Embarq Reply Comments"); Ex Parte Comments of NECA, WC Docket No. 08-152, (filed Sept. 11, 2008); NTCA Sept. 18 Ex Parte, at 1-2, 4-5; Ex Parte Comments of XO Communications Services, Inc., CC Docket No. 01-92, at 1 (filed Oct. 6, 2008) (attaching QSI study showing $0.0007 is "very far below XO's actual costs of termination"). Great Plains Communications, Inc. states that the proposed $0.0007 rate is less than its billing costs and its TELRIC costs are *30 times higher*. Ex Parte Comments of Great Plains Communications, CC Docket No. 99-68, at 6, 8 (filed Sept. 17, 2008) (emphasis added). *See* Ex Parte Comments of Great Plains Communications, Chickasaw Telephone Company, Eastex Telephone Cooperative, Consolidated Companies of Lincoln, Nebraska, and the Texas Statewide Telephone Cooperatives, Inc., CC Docket No. 96-45 et al., at 3-4 (filed Oct. 8, 2008) ("Great Plains Group Comments") (introducing evidence that in their states rural carriers' reciprocal compensation rates range between $0.020 and $0.025 per minute, several times higher than the proposed default rate, and underscoring that the $0.0007 rate does not recover even their costs of billing). *See also* Letter from Tamar E. Finn, Counsel for PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 *et al.* at 1-2, n.1 (July 19, 2011) ("PAETEC July 19 Ex Parte") (summarizing a number of state commissions that have similarly concluded that $0.0007 is not a cost-based rate). *See also* Cbeyond *et al* Comments, at 13; CenturyLink Comments, at 57-62; Comcast April 18 Reply Comments, at 7, 11-12.

[5] *See* Letter from Tamar E. Finn, Counsel for PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 *et al.* (July 28, 2011) ("PAETEC July 28 Confidential Filing").

[6] *See* 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*. (July 29, 2011) ("ABC Plan").

[7] *Id.*

reform be measured on a net basis, and provides CLECs no mechanism to mitigate lost intercarrier compensation revenues. PAETEC reiterates its objection to a final rate of $0.0007.[8] PAETEC supports the establishment of each state commission's cost-based reciprocal compensation rates as the interim target unified rate for each LEC to charge for the transport and termination of all telecommunications.

Because current TELRIC rates likely do not accurately account for today's forward looking technologies, the Commission should ask the states to re-set such rates within a specified timeframe, with the FCC stepping in to set rates only where a state fails to act in a reasonable time. As PAETEC has argued, a cost-based rate that varies by carrier would be the best way to promote competition and reduce arbitrage.[9] However, because it may not be administratively feasible for state commissions to set individual carrier rates, the Commission should adopt rules that permit state commissions to set benchmark rates based on class of carrier. CLECs like PAETEC should be benchmarked to the mid-sized incumbent LECs whose cost characteristics they most closely resemble, not the largest RBOCs.[10] In the interim, while states set new cost-based rates, the Commission could adopt a transition plan that begins with current TELRIC reciprocal compensation rates as the target, and revisit the target rate and transition plan during the review period PAETEC proposes herein (see Section I.C.).

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[8] *See* Facilities-Based CLECs April 1 Comments, at 38-42 (noting that a $.0007 rate is arbitrary and does not recover costs).

[9] *See* Letter from Tamar E. Finn, Counsel for PAETEC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92, at 2-5 (Oct. 17, 2008). *See also* Starkey Declaration, at 3, 10.

[10] *See* Letter from Tamar E. Finn, Counsel for PAETEC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92, at 2-5 & Attachment (Declaration of Michael Starkey) at 3, 10 (Oct. 17, 2008) ("PAETEC July 28 Confidential Filing") (explaining that CLECs have more in common with mid-sized ILECs than RBOCs including lower density, lower switch utilization, lack of RBOC economies of scale, and higher input costs).

Alternatively, if the FCC believes TELRIC no longer produces a cost-based rate for intercarrier compensation, it needs to refresh the record on replacing TELRIC with a new methodology that complies with 252. In contrast to the November 2008 NPRM that asked detailed questions about replacing TELRIC with a new pricing methodology,[11] the current NPRM asked only broad questions about rate recovery options that did not provide the parties sufficient notice of the Commission's intent to abolish the TELRIC regime as the basis for setting prices for traffic exchanged pursuant to section 251(b)(5) and 252.[12] As PAETEC has stressed throughout this proceeding, affirming the obligation of incumbent LECs to offer IP-IP interconnection is a key prerequisite to determining the appropriate rate structure and rate levels for such arrangements.[13]

The ABC Plan anticipates but does not resolve this procedural objection. The Legal Analysis argues that a default rate cap is a methodology, not a rate, because it prohibits states from pricing incumbent LEC section 251(b)(5) rates above $0.0007 and requires LECs to recover any additional costs of termination from end users or the universal service fund.[14] Any

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[11] *See In the Matter of High-Cost Universal Service Support, Federal-State Joint Board on Universal Service, Lifeline and Link Up, et al.,* Docket Nos. 05-337, 96-45, 03-109, 06-122, 99-200, 96-98, 01-92, 99-68, 04-36, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, at Attachment A, ¶ 240 *et seq*., Attachment C, ¶ 235 *et seq*. (rel. Nov. 5, 2008) ("2008 NPRM").

[12] *See* 5 U.S.C. § 553(b) (requiring "terms or substance" of the proposed rule be included in the public notice); *Sprint Corp. v. FCC*, 315 F.3d 369, 373-374 (D.C.Cir 2003) (distinguishing rulemaking from clarification of existing rules).

[13] *See, e.g.*, PAETEC et al April 18 Reply Comments, at 9-11 ("Because carriers have few, if any, direct IP interconnection arrangements today, it is too early for the Commission to conclude that traffic-sensitive costs are not incurred when traffic is exchanged in IP. That kind of determination requires evidentiary cost information that state commissions can best resolve through an arbitration process if negotiations fail. State commissions may find that a per-minute rate structure is not appropriate for traffic exchanged over IP interconnections, but that some other type of usage-sensitive rate element may be appropriate.").

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

methodology that *requires* carriers, in all circumstances, to recover from their end users the unrecovered costs of terminating another carrier's traffic at a rate effectively capped at $0.0007 is not consistent with the statute. As numerous parties have shown, the plain language of the Act and legislative history demonstrates that the bill and keep regime only satisfies the statute where traffic is roughly in balance or carriers voluntarily agree to such arrangements.[15]

B. Using Cost-Based Rates as The Unified Rate Would Reduce Pressure on the ARM, and Affirm State Authority Under the Act

Moving all telecommunications to section 251(b)(5) but preserving the state role to set rates for such traffic is a reasonable compromise between complete federal preemption and protracted disagreements about dividing traffic between the intrastate and interstate jurisdictions. State-set rates would comply with the Act's requirement that telecommunications traffic be exchanged with incumbent LECs at cost-based rates established pursuant to a federal methodology that is implemented by state commissions. Deferring to the state-set rate as the default for all other traffic achieves the policy goal of a unified rate to reduce opportunities for arbitrage, minimizes the amount of access revenue replacement support that consumers ultimately will fund, and continues this Commission's commitment to a federal-state partnership.

Using the state commission established reciprocal compensation rates as an interim unified rate would recognize the important role entrusted to state commissions under the Act's cooperative federalism regime. Despite the ABC Plan's characterizations of federal preemption as displacing *state compensation regimes*, the Plan asks the FCC to preempt state commission section 251(b)(5) rates that were established under the *cooperative federal regime* in which Congress assigned rate-setting to state commissions.

[15] *See, e.g.*, EarthLink May 23 Reply Comments, at 9-10.

Pursuant to Section 252(d)(2)(A), "[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."[16] If the FCC adopted $0.0007 as the default rate to displace such state rates, it would overrule the state commission findings that higher rates comply with the Act, a role specifically left to the federal courts under Section 252: "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]."[17] The only way to achieve this outcome consistent with the statute and the APA is to provide notice that the Commission intends to change the pricing methodology that applies to section 251(b)(5) traffic, adopt rules that acknowledge the change, explain why the new methodology complies with the Act, and direct state commissions to set new rates that incumbent LECs will charge for the transport and termination of all telecommunications.

Setting each carrier's final, unified rate based on cost also furthers the FCC's goal of eliminating arbitrage and subsidies. The fact that different classes of carriers 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. PAETEC agrees with the State Members of the Joint Board that "[e]ach seller [should] offer[] a uniform rate to all buyers of termination service. But not all sellers [should]

[16] 47 U.S.C. § 252(d)(2)(A) (emphasis added).

[17] 47 U.S.C. § 252(e)(6).

offer the same rate."[18] Indeed, as PAETEC has noted, the FCC has adopted different rate benchmarks based on the type of carrier in other access reform contexts.[19] Other stakeholders, including the Kansas Corporation Commission, NASUCA, NECA, and CenturyLink, have urged the Commission to unify each carrier's rate, rather than establish a national, unified rate.[20]

Setting the interim rate as the applicable reciprocal compensation rate would reduce pressure on the Access Recovery Mechanism ("ARM") and the USF. As opposed to a non-cost based $0.0007 rate, using existing reciprocal compensation rates, with a weighted average of approximately $0.0027,[21] could *reduce* the projected $80 million or more[22] in subsidies that would be collected through the ARM. To the extent access rate reductions stop at current reciprocal compensation rates, that will reduce the total size of the ARM. Any such ARM reductions could be used to achieve affordable rates for consumers, whether through lower USF contribution collections or additional resources for universal service support under the Connect America Fund ("CAF").

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[18] State Members, at viii.

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

[20] CenturyLink April 18 Comments, at iv, 57 (FCC should move intrastate to interstate access rates "on a per-carrier basis"); Kansas Corporation Commission April 18 Comments, at 12 ("rates may vary by carrier since costs vary by carrier"); NASUCA April 18 Comments, at 10 ("There **should be** a uniform ICC rate for each company, for all methods of access to the network"), 94 ("the Commission lacks the authority to set that rate, or to assure that the rate is uniform nationwide"); NECA *et al* April 18 Comments, at 20 ("uniform rate across all carriers would fail to account for the differences in costs incurred by carriers or the unique circumstances associated with providing service in high-cost rural areas of the nation.").

[21] *See* Ex Parte of Brad E. Mutschelknaus *et al*., Counsel to Nuvox, to Marlene Dortch, Secretary, FCC, Docket Nos. 01-92 & 04-36, at Exhibit (Declaration of Michael Starkey), p. 5 (Oct. 2, 2008).

[22] The ABC Plan proposes an ARM to cover revenue reductions from current reciprocal compensation rates to $0.0007. However, the $80 million estimate of ARM funding does not include such reductions. *See* Further Inquiry, at 15.

C. FCC Should Periodically Review the Status of ICC and USF Reforms To Ensure Its Goals Are Being Met

The joint letter submitted by the ABC Plan sponsors and rural LEC associations provides that "[d]uring the fifth year the Commission would evaluate the transition for rate-of-return companies and determine then whether to modify in any way the transition for areas served by rate-of-return companies."[23] This review is an important safeguard that the Commission should extend to all carriers. In the past, the Commission has adopted access charge reforms that anticipated further Commission action, such as the CALLS transition, which did not always occur in a timely manner. Pursuant to Congress' directive, the Commission reviews its regulations on a regular basis to eliminate unnecessary and burdensome regulations.[24] The Commission's intercarrier compensation reform transition should include similar, regular review requirements to ensure that the transition is proceeding as ordered and there are no unintended consequences. At a minimum, the FCC should establish a planned review of ICC and USF reform within six months after access rates are equalized to ensure ICC and USF reform are achieving the goals set out by the FCC – more broadband deployment, IP-IP interconnection for the exchange of voice traffic, and less arbitrage.

II. THE ABC PLAN WOULD DISPROPORTIONATELY AFFECT COMPETITIVE LECS AND THEIR SMALL AND MEDIUM SIZED BUSINESS CUSTOMERS

CLECs and other small and mid-sized carriers need a measured intercarrier compensation transition that avoids "flash cuts" and provides predictable glide paths. The ABC Plan, unfortunately, does not meet this requirement. Instead, it would create a flash cut for CLECs

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[23] *See* Letter from Jonathan Banks, U.S. Telecom, to Marlene Dortch, Secretary, FCC, CC Docket Nos. 01-92 *et al.*, at Attachment, p. 3 (joint letter to FCC Commissioners concerning ABC Plan and noting rate recovery system for rate-of-return carriers.)

[24] *See* 47 U.S.C. § 161.

(who are not permitted to recoup any lost revenues from the ARM) to transition their rates on an extremely fast timeline. As proposed, the ABC Plan would equalize all LEC intrastate and interstate access rates by July 1, 2013, in less than two years.[25] Given the additional time necessary for the FCC to issue an order, and for that order to become effective, this fast transition would cause the type of "disruption" that the FCC is trying to avoid. As PAETEC's data shows, forcing CLECs to equalize intrastate and interstate rate levels in short order means that the bulk of the revenue reduction would be realized in the near term rather than over a reasonable glide path contemplated by the original NPRM. It also ignores numerous state commission requests for a measured transition to equalize access rates over longer timeframes.[26] While the ABC Plan would require all types of carriers to transition rates over this short timeframe, it only provides a means to mitigate the impact of the revenue shortfall for incumbent LECs, not CLECs.[27] Given CLECs' focus on small and medium business customers, it will be these types of customers that will most acutely feel the disruption caused by the ABC Plan to the extent CLECs can recoup lost revenues from end user business customers. As such, PAETEC respectfully requests the FCC adopt such mitigation measures to protect small and medium business CLEC customers.

A. For CLECs, the ABC Plan Does Not Meet the FCC's Goals for a Measured Transition

The FCC seeks to ensure that any intercarrier compensation rate transition avoid flash

[25] *See* ABC Plan, Attachment 1, at p. 11.

[26] A number of state commissions have advocated for longer transition timeframes. *See, e.g.*, Michigan PSC, at 16; Mississippi PSC, at 14-15; Missouri PSC, at 24; Massachusetts DTC, at 22; Washington UTC, at n.28. Non-BOC carriers including EarthLink, Cbeyond *et al*., Frontier (prior to the ABC Plan submission), and XO have also supported a longer transition period. *See* EarthLink, at 11; Cbeyond *et al*., at 4; Frontier, at 5-6; XO, at 18.

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

cuts and disruptions:

> we intend to avoid sudden changes or 'flash cuts' in our policies, acknowledging the benefits of measured transitions that enable stakeholders to adapt to changing circumstances and minimize disruption. We note that if additional funding were available for USF and ICC reform, it could accelerate and ease the necessary transitions.[28]

As noted above, ARM funding is not available to CLECs under the ABC Plan. Accordingly, the proposed timing in the ABC Plan would not comport with the FCC's stated goals. Where such additional support is not available, the Commission suggests using transitions and glide paths to assist carriers adapt to reforms over time. "Change to USF and ICC policies need not and should not be sudden or overly disruptive…."[29] Where the Commission's goal is to create a framework that is predictable, and will enable service providers and investors time to react and plan appropriately,[30] less than two years to equalize access rates undermines those Commission goals.

B. CLECs Like PAETEC Will Face Steeper Revenue Declines Than Large ILECs, Putting them at a Competitive Disadvantage in Retail Broadband Markets

As proposed, the ABC Plan would be more disruptive for CLECs than it would be for ILECs. PAETEC has submitted intercarrier compensation revenue, expense, and MOU data that includes an estimate of the impact, by state, of the potential revenue loss that would result from equalizing its access rates. As Ms. Spocogee explained, although intercarrier compensation

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[28] *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, ¶ 12 (rel. Feb. 8, 2011) ("NPRM").

[29] NPRM, at ¶ 17.

[30] *See* NPRM, at ¶ 490. *See also id.*, at ¶ 533.

makes up only approximately 7% of PAETEC's revenue overall, far less than the 30-40% figure often quoted for rural LECs, equalizing intrastate and interstate access charges would nevertheless have a real financial impact on PAETEC.[31]

PAETEC submitted data that shows the revenue loss and negative net impact it will experience when PAETEC equalizes its access rates and pays other carriers equalized rates.[32] The ABC Plan would force PAETEC to absorb this significant revenue loss in less than two years, notwithstanding the fact that PAETEC competes primarily in business markets where ILECs are unlikely to increase their subscriber line charges. Given that PAETEC’s customer contracts average between three and five years, it is highly unlikely that PAETEC could recoup that revenue loss through price increases alone.[33] Absent opportunities to recover lost revenue, PAETEC would be forced to reduce costs or defer capital investment, both of which would have negative impacts on employment levels. PAETEC has estimated the cost, in terms of reduced head count, that access rate equalization for New York alone would have on the Company.[34]

In prior filings, PAETEC and others have analyzed the existing interstate and intrastate access rates filed by NECA and switching rates filed by AT&T. This analysis show the disparities between intra and interstate access rates on a state-by-state basis.[35] The AT&T rate

[31] *See* Letter from Tamar E. Finn, Counsel for PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 *et al*., at Exhibit 1 (Declaration of Tami Spocogee), ¶ 11 (July 28, 2011) (“PAETEC May 23 Confidential Filing”).

[32] *See* PAETEC July 28 Confidential Filing, at Exhibit 1.

[33] *See* PAETEC May 23 Confidential Filing, at Exhibit 1 (Declaration of Tami Spocogee), ¶ 11.

[34] *See* PAETEC May 23 Confidential Filing, at Exhibit 1 (Declaration of Tami Spocogee), ¶ 11.

[35] *See* Comments of Facilities-Based CLECs, at 19-23. The NECA-reported rates analysis was undertaken using the “*Rural Association Intercarrier Model for Common Line 2010 Pool Members State Level Disaggregation (Calendar Year 2009 Data)*” as reported by NECA to the FCC on December 30, 2010. *See* Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H.

(Footnote continued on next page.)

comparison shows that the difference between intrastate and interstate access rates is less than 300% in all but one state, and in half of the reported states the intrastate rate is *equal to or less* than the interstate rate. In short, *AT&T will experience no revenue loss during the first two years of the plan in one-half of the states where it is the incumbent*. The analysis of the NECA rates, on the other hand, demonstrated that the rate differential varies from intrastate rates being *lower* than interstate rates to greater than 500% of interstate rates (*i.e.*, five times higher), and the intrastate rate was equal to or less than the interstate rate in only *six* out of the forty-one states reported by NECA. The data PAETEC has provided the Commission shows that PAETEC's delta between intrastate and interstate access rate looks much more like the NECA companies than large RBOCs such as AT&T.[36] Clearly, the disruptions caused by an abbreviated transition to access rate equalization will negatively impact CLECs and their small and medium sized business customers significantly more than it will affect the large ILECs.

C. CLECs Will Lack The Same Opportunities As Large ILECs to Offset Revenue Losses Through SLC or End User Rate Increases

The ABC Plan is designed to assist incumbents mitigate access and other intercarrier compensation revenue losses, but does not provide corresponding relief to competitive carriers. First, the ABC Plan would give only incumbent LECs access to the ARM. Second, while not entirely clear, it appears to increase SLC caps for residential customers but not business customers. This artificial distinction would affect the business-oriented CLEC industry much more significantly than the residential-oriented ILEC industry.

(Footnote continued from previous page.)

Dortch, Secretary, FCC, CC Docket Nos. 96-45 & 80-286, and GN Docket No. 09, at Attachment (filed Dec. 30, 2010).

[36] *See* PAETEC May 23 Confidential Filing, at Exhibit A, at tab *Term. Rates - Combined*.

According to the FCC's data, CLECs serve more business customers than residential customers as a percentage of their total customer base. Compared to incumbents, the CLECs' business-oriented customer base distribution is significant: residential customers make up about 60% of incumbents' total switched access lines, but only 21% of CLECs' access lines.[37] This means that incumbents have a significantly larger customer base on a percentage basis over which they can increase SLCs to offset the terminating access reductions. Given that competitors serve vastly fewer residential customers on average, they have a much more limited opportunity to make-up lost access revenue, especially over the short term.

Further, the ABC Plan's SLC proposal could leave many CLECs at a competitive disadvantage in the business market. First, because the SLC caps for business customers appear not to increase under the Plan, the market will constrain CLECs' ability to increase business end user rates. Second, most CLECs provide services to their business customers under contracts that typically do not allow the CLEC to increase recurring prices during the term of the agreement. Thus, CLECs will be unable to increase rates to the majority of their customer bases until existing contracts expire (to the extent they can at all given the pressure they will face in the business services market).

While these revenue mitigation measures may help incumbents address a flash cut transition in rates, they leave competitors with scant ability to adjust their businesses and importantly, to address customer contract issues affected by the change. The fast transition will also force CLECs to absorb the impact of reduced access revenues in a much shorter time frame in comparison to the incumbents against whom they compete. Since CLECs have larger

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

disparities between their intrastate and interstate rates, any flash cut will be felt more acutely by them. Further, such a fast transition may disrupt broadband deployment and other important policy goals of the Commission. As the Commission found in the Broadband Plan, competition in the broadband markets is critical to promoting consumer welfare and spurring innovation and investment in broadband access networks.[38] To avoid disruptions in the access and broadband markets, the Commission should adopt fair revenue loss mitigation measures tailored to address the characteristics of CLECs.

D. The Best Way to Mitigate the Impact of Access Revenue Reductions on CLECs and Ensure Competitive Neutrality is to Extend the Timeframe for Equalizing Access Rates

As PAETEC has shown, any plan to equalize access rates must provide for a measured transition and avoid disruptions for all classes of carriers, not just ILECs. The CLECs are not alone in calling for a balanced transition approach. A number of states have designed access rate transitions that give CLECs and small carriers adequate time to transition their rates[39] and still others have called on the Commission to provide four or five years for LECs to equalize access

[38] *See* National Broadband Plan, at 36 (calling for competition in the broadband market as a means to spur investment and innovation).

[39] "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." Michigan PSC May 23 Reply Comments, at 13. *See also* Wisc. JR1SB-13, Section 77, amending 196.212(2)(b) (giving competitors (with more than 10,000 access lines in Wisconsin) more time to unify access rates--six years, with the reductions beginning four years after the Act becomes law); *See* Ga. H.B. 168 (June 2010) (adopting a ten-year transition process in Georgia for competitive carriers);

rates.[40] Clearly, a common-sense approach of treating classes of carriers differently is necessary when establishing transition periods. Large incumbents should reduce rates on a shorter timeframe than competitors because they have the means to do so, benefit from access recovery mechanisms that aid them with the transition and, at least in the case of AT&T, stand to suffer minimal revenue losses at the same time they experience substantial expense savings from steep reductions in access rates they pay to CLECs and rate-of-return LECs with large access rate differentials. The ABC Plan differentiates between small rate-of-return incumbents, who do not transition to the final rate until three years later, and larger price cap LECs,[41] but does not differentiate with respect to CLECs.

The FCC should adopt a competitively neutral approach that recognizes the unique circumstances of CLECs, including the limited revenue recovery opportunities they are provided under the ABC Plan. In particular, the Commission should mitigate the negative impacts of the ABC Plan on the small and medium business customers CLECs serve. Under the ABC Plan, price cap LECs get until July 1, 2017 to reach the proposed unified rate of $0.0007, plus ARM support that makes up 90% of lost revenue through July 1, 2018, and a declining percentage during the remaining two years until ARM support is eliminated July 1, 2020.[42] PAETEC

[40] Mississippi and Missouri requested a minimum of five years for access rates to reach parity, Massachusetts requested three to five years for states to complete reforms, and Washington agreed four years is a reasonable transition period to equalize access rates, but recognized that some states may need more time. Michigan PSC April 18 Comments, at 16; Mississippi PSC April 18 Comments, at 14-15; Missouri PSC April 18 Comments, at 24; Massachusetts DTC April 18 Comments, at 22; Washington UTC April 18 Comments, at n.28.

[41] *See* Letter from Jonathan Banks, United States Telecom Association, to Marlene H. Dortch, FCC, WC Docket No. 10-90 *et al.*, at Attachment Letter, p. 3 (July 29, 2011) ("These reductions would be phased in over six years for areas served by price cap companies and over eight years … for areas served by rate-of-return companies…").

[42] *See* ABC Plan, at Attachment 1, pp. 12-13.

suggests that CLECs have the same timeframe, until July 1, 2020, to reduce rates to the final target rate. PAETEC also respectfully requests that the Commission lift the cap on ILEC multi-line business SLCs so that CLECs are not effectively constrained from increasing their business customer rates. With these adjustments, the revenue loss faced by CLECs would be significantly less disruptive than under the ABC Plan as currently proposed.

PAETEC does not believe that establishing different transition timeframes for different types of carriers would raise any policy concerns.[43] Rather, the Commission should recognize that not all carriers are the same, and ensure that intercarrier compensation reforms do not provide one class of carrier a competitive advantage in the market. Each carrier (or class of carriers) today has its own unique access rates. The fact that a carrier's rate is higher at the outset of the transition is a reasonable basis for giving that carrier a longer, not shorter, transition timeframe to equalize its rates.[44] Any attempt to equalize all carrier rates earlier in the transition would only put unnecessary pressure on end user rates, the ARM, and carrier business plans. Public policy would be better served by addressing existing arbitrage problems (such as those posed by phantom traffic) and providing a measured transition that recognizes the differences between different types of carriers.

[43] *See* Public Notice, at 13.

[44] *Id.* Even when access rates are equalized, they will not be uniform across all carriers (until the uniform rate is reached) because each carrier's interstate access rate is unique, and may vary state by state and service area by service area. Moreover, the ABC Plan proposes that the date for the final uniform rate will differ for price cap and rate of return LECs, July 1, 2017 and July 1, 2020, respectively.

III. IP INTERCONNECTION

A. A Broad Spectrum of Industry Participants Oppose Commercial Agreements and Support a Regulatory Obligation and Backstop for Negotiating Fair and Reasonable IP-to-IP Interconnection

In the NPRM, the Commission asked what actions it should take "to encourage the deployment of more efficient technologies and interconnection."[45] The Commission and a host of others have recognized that certain ILECs are hindering progress to all-IP networks because they refuse requests for IP interconnection and instead require that an interconnecting carrier convert VoIP calls to time-division multiplexing ("TDM").[46] CompTel and others demonstrate that the ILEC practice of requiring needless conversions from IP to TDM often "increases inefficiencies and costs and reduces voice quality through unnecessary protocol conversion."[47] In order to accelerate the progress toward to IP-to-IP interconnection, as recommended in The National Broadband Plan, the Commission should confirm that IP-to-IP interconnection is within the scope of ILEC obligations under Section 251(c)(2).

[45] NPRM, at ¶ 679 (rel. Feb. 9, 2011).

[46] NPRM, at ¶¶ 506, 527 ("Specifically, certain carriers may require an interconnecting carrier to convert IP traffic to [TDM] traffic even if IP-to-IP interconnection would be more efficient, to ensure the continued collection of intercarrier compensation."); *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 CompTel, at 2-5 (Aug. 15, 2011) ("CompTel Comments"); Comments of CBeyond, Comptel, Covad, Intrado, and TW Telecom, NBP Public Notice No. 25, at 4 (Sept. 22, 2009) ("CBeyond Comments") ("Verizon recently responded to a request by Bright House Networks for an interconnection agreement that would include the exchange of telecommunications traffic in IP format as an 'outrageous' demand.").

[47] CompTel Comments, at 3. *see*, Petition of TW Telecom, at 5; Comments of Google, at 5 ("IP interconnection barriers imposed by some local carriers can arbitrarily increase the operating costs of connecting network providers and degrade service quality, preventing them from realizing the full benefits of IP network upgrades."); Comments of Cablevision Systems Corporation and Charter Communications, Inc., WC Docket No. 11-119, at 2, 4 (Aug. 15, 2011) ("ILECs' refusal to honor their section 251(c) obligations forces competing CLECs to incur additional network costs and inhibits the Commission's goal of encouraging carriers to migrate to more efficient IP-based networks.") ("Cablevision TWTC Comments").

A broad spectrum of industry participants including competitive carriers, IP-based providers, large end users, state commissions, and consumer advocates have rejected the large ILECs' persistent calls for "commercial agreements," and instead call upon the Commission to promptly affirm an incumbents' duty to offer IP interconnection and provide a regulatory backstop when negotiations for IP interconnection fail to produce terms and conditions that are acceptable to both the ILEC *and* CLEC.[48] For example, Google has urged the Commission to "clarify the IP traffic interconnection obligations of local carriers"[49] 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*.[50]

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

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[48] *See, e.g,* PAETEC Comments on TWTC Petition, at 2-3; Cablevision Comments, at 2 ("Cablevision and Charter thus urge the Commission to affirm, as TWTC requests, that ILECs have the duty under section 251(c)(2) to provide IP-to-IP interconnection."); CBeyond Comments, at 5 ("Verizon's assertion that IP-interconnection is 'voluntary' is simple a polite way to claim that it may deny - or, equally troubling, define - interconnection on its own terms."). *See, also,* Ex parte comments of Google, Skype, Vonage, Sprint, and the Ad Hoc Telecommunications Users Committee, WC Docket No. 10-90 *et al*, (Aug. 18, 2011) ("we all agree that the Commission possesses the authority to ensure that IP-to-IP interconnection is timely and efficiently implemented, and to protect end-users from abusive practices and unreasonable rates."); *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 the Oho PUC at 5 (Aug. 17, 2011) ("Ohio PUC Comments") ("In addition to facilities-based VoIP service, the Ohio Commission supports TWTC's request for a declaratory ruling clarifying that it has the right to direct IP-to-IP interconnection with ILEC networks for IP-in-the-middle voice services."); *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 the Wisconsin PSC, at 4 (Aug. 11, 2011) (commercial arrangements "may not be the most efficient process, perhaps even amounting in some cases to an effective barrier to entry.").

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

[50] *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) ("Google Comments").

> 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*.[51]

CompTel, Google, Cablevision and Charter Communications have noted that ILECs' refusal to permit IP interconnection needlessly increases their competitor's costs. Cablevision for example states that: "ILECs' failure to recognize their statutory duty to provide IP-to-IP interconnection causes inefficiency, increases VoIP providers' costs, and degrades call quality by adding unnecessary failure points."[52] As suggested by Cablevision and others, these ILECs are likely well aware that they "obtain a competitive advantage over VoIP providers, and CLECs that carry VoIP traffic, precisely by forcing them to incur these unnecessary costs."[53]

The IP-based providers and large end users agree with competitive providers that "[i]nterconnection is the glue that holds together the network, and the statutory obligation to offer

[51] *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) (emphasis added).

[52] Cablevision TWTC Comments, at 4-5; TWTC Petition, at 5-6; Comments of Google, at 5 ("IP interconnection barriers imposed by some local carriers can arbitrarily increase the operating costs of connecting network providers and degrade service quality, preventing them from realizing the full benefits of IP network upgrades.").

[53] Cablevision TWTC Comments, at 5; *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 YMax, at 4 (Aug. 15, 2011) ("It may be in the interest of incumbent carriers to lock their competitors into TDM interconnection for years, to prevent those competitors and their customers from realizing the full economic and operational benefits of IP networks; but it is not in the public interest, and the Commission should act to prevent them from exploiting their bottlenecks in this way.").

interconnection should not be obscured by this transition" to all IP networks.[54] Without the regulatory backstop provided by section 251(c) and 252, the largest ILECs will continue to refuse IP interconnection to all but the largest providers and the public voice network will no longer be ubiquitous. As the Wisconsin Commission has argued, commercial arrangements "may not be the most efficient process, perhaps even amounting in some cases to an effective barrier to entry."[55]

B. The Commission Should Clarify ILEC Obligations Under Section 251(c)(2) Include IP-to-IP Interconnection

PATEC strongly urges the Commission to eliminate existing uncertainty and burgeoning disputes concerning the scope of ILEC obligations under Section 251(c)(2). Under the plain statutory language, ILECs are obligated to offer any form of interconnection that is "technically feasible," and this obligation is in no way limited by the particular technology or method of interconnection requested by the interconnecting carrier.[56] The equipment needed to enable IP interconnection is now widely available and deployed within both CLEC and ILEC networks, so that there is no doubt that such interconnection is technically feasible. PAETEC and others maintain that the terms of IP interconnection should be subject to good faith negotiation and, in the event of impasse, arbitration by state commissions pursuant to sections 251(c) and 252 of the Act.[57]

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[54] 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).

[55] *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 the Wisconsin PSC, at 4 (Aug. 11, 2011).

[56] PAETEC Comments on TWTC Petition, at 2; Comments of Ohio PUC, at 2 (The 251(c)(2) "obligation is not conditioned upon the use of a specific protocol or technology where the requesting party is a telecommunications carrier.").

[57] PAETEC Comments on TWTC Petition, at 2.

Under section 251(c)(2), ILECs (except those covered by the rural exemption) have a duty to provide to "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 nondiscriminatory."[58]

There should be no doubt that IP-to-IP interconnection is technically feasible as that term is used in the Commission's rules implementing section 251(c)(2). A form of interconnection may be "technically feasible" even if the incumbent is not currently using it, and even if the incumbent must incur some additional cost in order to provide it. In fact, the definition of "technical feasibility" expressly excludes consideration of economic concerns in the determination of technical feasibility:

> The determination of *technical feasibility does not include consideration of economic*, accounting, billing, space, or site concerns, except that space and site concerns may be considered in circumstances where there is no possibility of expanding the space available. The fact that an *incumbent LEC must modify its facilities* or equipment to respond to such request does not determine whether an interconnection request is technically feasible.[59]

The Commission held in the First Local Competition Order that "it is reasonable to interpret Congress's use of the term 'feasible' in sections 251(c)(2) and 251(c)(3) as encompassing more than what is merely 'practical' or similar to what is ordinarily done.[60] Thus, if an ILEC uses SIP, ATM or

[58] 47 U.S.C. § 251(c)(2) (emphasis added); 47 C.F.R. § 51.305(a)(2).

[59] 47 C.F.R. § 51.5 (emphasis added).

[60] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, Docket No. 96-98, 11 FCC Rcd 15499, ¶¶ 198, 202 ("First Local Competition Order"). The Commission's definition of "technically feasible" was affirmed by the Eighth Circuit in Iowa Utils. Bd. v. FCC, 219 F.3d 744, 757 (8th Cir. 2000), *aff'd in relevant part and rev'd in part,* Verizon Comms., Inc. v. FCC, 535 U.S. 467 (2002).

any other IP-to-IP interconnection methods in its network, then such method is obviously "practical" and demonstrably technically feasible such that it becomes a mandatory method and form of interconnection under the Commission's rules and section 252(c) of the Act.[61] The record demonstrates that many ILECs have already deployed and utilize IP within their internal networks or those of their affiliates.[62] Thus, these ILECs could not possibly bear their burden to demonstrate before a state commission that IP interconnection is not technically feasible. Moreover, even if an ILEC does not currently use these methods in its network, it does not mean that these methods are not technically feasible. The ILEC would still need to demonstrate some "technical or operational concerns that prevent the fulfillment of a request by a telecommunications carrier for such interconnection …."[63] Given the wide availability and use of IP-compatible equipment and the growing use of IP interconnection throughout the industry, PAETEC doubts that it would be possible for any ILEC to show any technical or operational issues that were so severe as to "prevent" IP interconnection.[64] TWTC, for example, reports that it "has entered into direct IP-to-IP interconnection arrangements with at least two long distance carriers as well as with a provider of

[61] *See* 47 C.F.R. § 51.305(c)-(d) ("Previous successful interconnection at a particular point in a network, using particular facilities, constitutes substantial evidence that interconnection is technically feasible at that point, or at substantially similar points, in networks employing substantially similar facilities. *Adherence to the same interface or protocol standards shall constitute evidence of the substantial similarity of network facilities*.") (emphasis added).

[62] CompTel April 18 Comments, at 7 n.7 (citing examples of each RBOC's use of IP technology within its (or its affiliates) networks); EarthLink April 18 Comments, at 5 & n.9.

[63] 47 C.F.R. § 51.5.

[64] *See, e.g.*, Neutral Tandem April 18 Comments, at 5 (Neutral Tandem offers IP interconnection for the exchange of voice traffic); (Cablevision notes that IP interconnection for 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); *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 MegaPath, Inc., PAETEC Holding Corp., *et al*., at 7, n.14 (Aug. 15, 2011) (providing examples of ILECs using IP technologies within their networks for switching and/or transmission of voice traffic, even if they do not offer to interconnect with other carriers using these methods.) ("PAETEC Comments on TWTC Petition").

E911 service.[65] Given such precedent, it would be difficult for an ILEC to argue such interconnection is not technically feasible.

In sum, because IP-to-IP interconnection is technically feasible and falls within an ILEC's obligations under section 251(c)(2), the terms and conditions of such interconnection, including pricing, are subject to negotiation and, if necessary, arbitration under section 252. Contrary to the plain language of Section 251, the ABC Plan states that the intercarrier compensation framework proposed in the Plan "applies only to TDM interconnection," and "IP-IP interconnection would continue to be governed by commercial agreements."[66] The Commission should promptly reject this aspect of the proposed ABC Plan and the ILECs' calls for reliance on commercial agreements, and instead confirm that IP interconnection falls within the scope of section 251(c)(2).

At a minimum, if the Commission is not prepared to confirm that ILECs must offer IP interconnection under sections 251(c)(2) and 252, it should not prejudge the issue by characterizing IP interconnection as governed by commercial agreements and negotiated pricing as advocated in the ABC Plan. If the Commission feels a need to resolve questions about whether LECs offer telephone exchange service and exchange access and whether VoIP providers have interconnection rights under 201, 251(a)(1), or 256, it should issue another Public Notice in this docket to solicit additional comment on any outstanding legal or factual issues that it determines require further analysis. Like the current Notice, the Commission should establish

[65] *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, Petition for Declaratory Ruling, at 20-21, Attachment A: Declaration of Michael E. McNamara, at ¶ 10 (June 30, 2011) ("TWTC Petition").

[66] ABC Plan, at Attachment 1, p. 10, n. 10.

an expedited comment schedule on any such public notice and establish a regulatory framework no later than six months after adopting the initial order reforming universal service and intercarrier compensation.

IV. PHANTOM TRAFFIC

In this section, PAETEC recommends that the Commission explore two potential solutions to the VoIP implementation questions included in the further inquiry. First, to address the problem of identifying VoIP-originated traffic,[67] PAETEC recommends that the Commission direct NECA to create a new Operating Company Number ("OCN") code, similar to the IP Enabled Service Provider ("IPES") code, and require providers that deliver calls to a tandem to apply for an OCN and include their OCN in the signaling stream or call record.[68] Second, to address phantom traffic problems where one-way VoIP providers do not assign NANP telephone numbers,[69] the FCC should require all carriers and VoIP providers to (1) pass Carrier Identification Code ("CIC") or OCN in call signaling or record data and (2) apply the Entry/Exit Surrogate ("EES") to rate VoIP traffic.

The FCC originally adopted the EES to measure interstate and intrastate usage over access lines where Automatic Number Identification ("ANI") is not available and for use with Feature Group A and B arrangements.[70] Under the EES method, the carrier may substitute the point where a call first enters its network (*e.g.*, its Point of Presence) for the call origination point

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[67] *See* Further Inquiry, at 17-18.

[68] *See* Letter from Tamar E. Finn, Counsel for PAETEC Holding Corp., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-92 *et al.* , at 1-2(June 13, 2011) ("PAETEC June 13 *Ex Parte*").

[69] *See* Further Inquiry, at 17-18.

[70] *See Determination of Interstate of Intrastate Usage of Feature Group A and Feature Group B Access Service*, Memorandum Opinion and Order, CC Docket No. 85-124, 4 FCC Rcd 8448 (1989).

in the context of determining the jurisdiction of a call. For example, a call without ANI that enters the carrier's network in Maryland would be jurisdictionally intrastate when the call terminates in Maryland. The FCC has also allowed the use of the EES to determine the jurisdiction of a call in other limited circumstances where the carrier cannot identify the origination point of the call. Explicitly applying the EES method to VoIP-originated traffic would assist carriers determine how to rate traffic where CPN is not assigned.

As PAETEC, NTCA and others have argued, such CIC/OCN information is needed regardless of whether rates vary by jurisdiction or are unified in order for the terminating carrier to identify the party responsible to pay the terminating rate.[71] To the extent that technical limitations exist and a CIC/OCN cannot be passed through signaling, the tandem provider should be required to identify in call records the provider that delivered the call to the tandem.

The Commission could require the provision of CIC/OCN information as necessary to implement the section 251(b)(5) duty to enter into arrangements for the exchange of all telecommunications. The FCC has acknowledged that its current rules do not address situations where two carriers lack contractual arrangements for the exchange of section 251(b)(5) traffic.[72] Section 251(i) preserves the FCC's authority to adopt rules that implement section 251(b)(5).

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[71] *See* Comments of Blooston Rural Carriers, at 10; Comments of Consolidated Communications, at 36-37; Comments of GVNW, at 5; Comments of Nebraska Rural Independent Companies, at 21-22; Comments of NECA *et al*., at 21; Comments of PAETEC *et al*., at 8; Comments of the Rural LEC Group, at 11; Comments of Sprint, at 26; Comments of TCA, at 6-7; Comments of TDS, at 9; Comments of Toledo Telephone, at 6; Comments of the Washington UTC, at 10.

[72] *See Developing a Unified Intercarrier Compensation Regime*, *T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, CC Docket No. 01-92, FCC 05-42, at ¶ 4 (rel. Feb. 24, 2005) ("Although section 251(b)(5) and the Commission's reciprocal compensation rules reference an "arrangement" between LECs and other telecommunications carriers, including CMRS providers, they do not explicitly address the type of arrangement necessary to trigger the payment of reciprocal compensation or the applicable compensation regime, if any, when carriers exchange traffic without making prior arrangements with each other.").

Because section 251(b)(5) requires LECs to enter into arrangements for the provision of such termination services, it is only logical that the terminating carrier needs information to identify the parties with whom it should establish such arrangements.

The Commission also could rely on section 222(b) to require that tandem providers share the information necessary for a terminating carrier to provide a telecommunications service, whether terminating access or reciprocal compensation. Under section 222(b), "[a] telecommunications carrier that receives or obtains proprietary information from another carrier for purposes of providing any telecommunications service shall use such information only for such purpose, and shall not use such information for its own marketing efforts." A terminating carrier may use carrier proprietary information such as CIC/OCN "for the purposes of providing any telecommunications service," namely termination of the call. Adopting an affirmative obligation to provide CIC/OCN information for the carrier delivering traffic for termination would be consistent with section 222(b)'s recognition that a telecommunications carrier may "obtain" such information. It would also resolve the problem of service providers denying liability for terminating compensation when they deliver calls to a tandem, yet refusing to cooperate in an audit and/or provide information necessary to verify the rate that should apply to the call.

V. CONCLUSION

The Commission should adopt reforms that advance both universal service and competition. As the National Broadband Plan recognizes, competition is a key driver of investment and innovation and therefore a key pillar of any regulatory polices to increase broadband deployment. PAETEC looks forward to working with the Commission to develop measured, competitively neutral reforms that will ensure the public switched voice network maintains universal connectivity for all Americans during the industry transition to IP networks that are connected through IP-IP interconnection arrangements.

Respectfully submitted,

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Dated: August 24, 2011