Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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 Rate for Local Exchange Carriers	)	WC Docket No. 07-135
High-Cost Universal 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

REPLY COMMENTS OF MEGAPATH INC. AND

COVAD COMMUNICATIONS COMPANY

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REPLY COMMENTS OF MEGAPATH, INC. AND
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MegaPath Inc. and Covad Communications Company (collectively "MegaPath") submit these reply comments in response to the Commission's *Further Inquiry into Certain Issues in the Universal Service–Intercarrier Compensation Transformation Proceeding* released in the above-referenced dockets on August 3, 2011 ("*Inquiry*"), and the initial comments filed in response thereto. These reply comments specifically address the questions raised in the *Inquiry* concerning the interim treatment of interconnected VoIP traffic for intercarrier compensation purposes. As discussed herein, MegaPath opposes the application of any form of switched access charges to interconnected VoIP traffic, and urges the Commission to reject the portion of the ABC Plan that seeks to impose such charges.

I. INTRODUCTION AND SUMMARY

Currently serving more than 85,000 business customers of all sizes, MegaPath is a leading independent provider of integrated voice and data communication services, operating one of the largest end-to-end communications networks in the country. In 2010, MegaPath Inc., Covad Communications Company, and Speakeasy combined to form a single provider that offers a full suite of voice, data, Internet access, private networking and managed security solutions to business customers. The combined MegaPath entity also offers turnkey solutions that enable businesses to effectively communicate with customers, partners and employees. MegaPath's VoIP services and features have been, and continue to be, a driving force behind MegaPath's product innovation and strong consumer demand.

On April 1, 2011, MegaPath filed comments in the above-captioned dockets[1] supporting the Commission's stated objective to adopt both short-term and long-term intercarrier compensation reform, and – as part of such effort – to clarify such obligations concerning interconnected VoIP traffic. As those comments explained, the Commission should adopt intercarrier compensation rules and policies that will both protect VoIP as an emerging technology and encourage further innovation and investment in IP-based products. The current VoIP market encourages innovation by companies like MegaPath, Skype and Google. Any interim requirement imposing access-level charges on VoIP carriers would choke off this innovation, which is inconsistent with the current regime and the FCC's stated goals for the future.

Nonetheless, the Commission has been presented with a reform proposal (the ABC Plan) which seeks to change the current regulatory treatment of interconnected VoIP traffic and subject these calls to switched access charges for the first time.[2] As discussed below, this plan lacks merit. The Commission should clarify that interconnected VoIP traffic is not subject to any access charges, and should instead seek to minimize or eliminate charges for termination of this traffic, as urged in MegaPath's April 1 comments.

II. THE COMMISSION SHOULD REJECT PROPOSALS TO IMPOSE ACCESS CHARGES ON VOIP TRAFFIC

As MegaPath discussed in its April 1 comments, the Telecommunications Act of 1996 explicitly establishes reciprocal compensation, which may include bill-and-keep arrangements,

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[1] Comments of MegaPath, Inc. and Covad Communications Company, WC Dockets No. 10-90 *et al.*, filed April 1, 2011.

[2] The State Plan does not directly address VoIP service, but urges the Commission not to preempt State commission decisions subjecting VoIP traffic to intrastate access charges. For the same reasons discussed herein, MegaPath opposes the State Plan to the extent it would permit individual States to impose access charges on VoIP traffic.

as the default compensation scheme for all forms of telecommunications traffic. Access charges, which are inconsistent with this default, apply only to the extent they were explicitly "grandfathered" by Section 251(g), and then only until the Commission modifies those legacy rules. As multiple courts have explained, access charges apply only where there was a "pre-Act obligation relating to inter-carrier compensation."[3] Since VoIP was developed after the Telecommunications Act of 1996 was enacted, there was no pre-Act access charge obligation concerning VoIP.[4] Therefore, from a legal standpoint, VoIP traffic may only be subject to reciprocal compensation obligations (such as bill-and-keep) and may not be made subject to access charges.[5]

The ABC Plan would violate these legal restrictions on access charges, and also would be poor public policy. This plan would require VoIP traffic to pay interstate (but not intrastate) access charges effective Jan. 1, 2012, which would result in a massive cost increase to the users of VoIP services. Only later, as intrastate access charges were reduced in stages starting July 1,

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[3] *WorldCom, Inc. v. FCC*, 288 F.3d 429, 433 (D.C. Cir. 2002).

[4] *Southwestern Bell Tel., L.P. v. Missouri Pub. Serv. Comm'n*, 461 F.Supp.2d 1055, 1080 (E.D. Mo. 2006) ("Because IP-PSTN is a new service developed after the Act, there is no pre-Act compensation regime which could have governed it, and therefore § 251(g) is inapplicable...As a result, IP-PSTN traffic falls within the statutory mandate that reciprocal compensation be used to compensate carriers for transporting traffic between calling and called parties that subscribe to different carriers."); *see also PAETEC Communications, Inc. v. CommPartners, LLC*, 2010 WL 1767193 at *3 (D.D.C. 2010).

[5] MegaPath notes that this analysis is not dependent on the ultimate classification of VoIP as a "telecommunications service" or "information service." In fact, MegaPath supports the classification of VoIP as a "telecommunications service" under the Act, as such a decision would further encourage competition by allowing VoIP providers access to UNEs. Such classification is entirely consistent the Commission's prior decisions, since VoIP is functionally equivalent to TDM from the end-user's perspective. *See In re Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, GN Docket No. 00-185, 17 FCC Rcd. 4798, Declaratory Ruling and Notice of Proposed Rulemaking at ¶ 35 (rel. March 15, 2002) (holding that the classification of a particular service depends upon the service's functionality, *i.e.*, how the service is viewed from the perspective of the end-user).

2014, the cost of terminating VoIP calls would start to decline. Not only is there no good reason to subject users of VoIP services to these additional costs, but it is entirely irrational to increase a price that the Commission intends in the long run should be *decreased* to nearly zero. Indeed, the proponents of the ABC Plan do not even attempt to offer any rational legal or policy basis for their proposal – instead, they acknowledge that it is the classic "horse designed by a committee." As they state, "This was a carefully negotiated compromise among the signatories to the Plan, who have widely divergent views about the intercarrier compensation rules that do and should apply to VoIP."[6] Their argument, in short, is that the Commission should adopt this proposal *not* because it is right, but because six large incumbent LECs agreed to it as a compromise. These companies apparently do not care whether this compromise is in anyone else's interest besides their own, or (more importantly) the public interest.

MegaPath instead urges the Commission to adopt the approach advocated by Ad Hoc, Google, Skype, Sprint Nextel, and Vonage in their joint filing of August 18, 2011. As these companies correctly state, "Applying bloated access charges to [VoIP] traffic will not 'accelerate the deployment' of VoIP services and is legally problematic. ... Certainly, applying interstate access rates to such traffic for several years, and then ultimately utilizing a rate of $.0007, established years ago in another context and used by some today, is overly compensatory, well beyond the actual costs of traffic origination and termination. Moreover, imposing such an arbitrary rate would have a devastating effect on IP advanced services deployment, contrary to the goals of Section 706 and the stated objectives of this proceeding."[7] MegaPath agrees with their proposal that traffic exchange and

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[6] Comments of AT&T *et al.* (ABC Plan sponsors) at 35, WC Dockets No. 10-90 *et al.*, filed August 24, 2011.

[7] Ad Hoc *et al.* filing at 8-9, WC Dockets No. 10-90 *et al.*, filed August 18, 2011.

termination for IP traffic should be governed by market forces, and therefore believes the Commission should establish a default bill-and-keep model for VoIP traffic.[8]

This proposal is fully consistent with the Commission's statutory authority and applicable law governing intercarrier compensation. The Commission has broad authority under Section 201(b) of the Federal Communications Act of 1934, as amended (the "Act"), to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions [of the Act]."[9] The U.S. Supreme Court has explained that this grant of authority gives the Commission "rulemaking authority to carry out the 'provisions of [the Act],' which include Sections 251(b)(5) and 252, added by the Telecommunications Act of 1996."[10] This broad authority thus includes implementation of Section 251(b)(5), which governs the "reciprocal compensation arrangements for the transport and termination of telecommunications."[11] As the Commission has already found, the plain language of this section broadly applies to all telecommunications – *i.e.*, interstate and intrastate telecommunications – such that the Commission's authority to implement reciprocal compensation rules is not limited solely to local traffic.[12]

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[8] Alternatively, if the Commission does impose a rate for VoIP termination, it should be no greater than $0.0007 per minute, for the reasons explained in MegaPath's April 1 comments.

[9] 47 U.S.C. § 201(b).

[10] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999).

[11] 47 U.S.C. § 251(b)(5).

[12] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Intercarrier Compensation of ISP-Bound Traffic*, Order on Remand and Report and Order, Docket Nos. CC 96-98 and 99-68, 16 F.C.C. Rcd. 9151 (2001) [hereinafter "*ISP-Remand Order*"] (stating that the Commission was mistaken in the Local Competition Order to have characterized Section 251(b)(5) as limited to local traffic, since "'local'...is not a term used in section 251(b)(5) or Section 251(g)").

III. CONCLUSION

For the reasons presented, the Commission should immediately eliminate mandated transport and termination charges for VoIP traffic, and permit termination of this traffic on a market basis. This reform will protect VoIP as an emerging technology, promote competition and competitive neutrality, encourage investment and innovation, and advance consumer choice and welfare.

Respectfully submitted,

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