

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 Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	

**REPLY COMMENTS OF MIDCONTINENT COMMUNICATIONS**

Midcontinent Communications (“Midcontinent”), by its attorney, hereby submits its reply comments in response to the Commission’s *Request for Further Comment* seeking responses to questions concerning proposals for reform of the high cost universal service program and intercarrier compensation submitted by parties in this proceeding.<sup>1</sup>

**I. Introduction**

Midcontinent is one of the largest cable companies in the upper Midwest, providing service to customers in Minnesota, North Dakota and South Dakota. Midcontinent was one of the first cable companies to provide competitive local telephone service, and first offered telephone service in 1998. Midcontinent now has more than 124,000 customers for its facilities-

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<sup>1</sup> Further Inquiry into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, *Public Notice*, WC Docket Nos., 10-90, 07-135, -5-337, 03-109, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, FCC 11-13 (rel. Aug. 3, 2011) (the “*Request for Further Comment*”).

based voice services, and uses both circuit-switched and voice over IP technologies to serve those customers. Midcontinent also is committed to providing broadband service throughout its service area, and currently offers high speed Internet access to several communities with populations of 200 or less. Midcontinent's experience demonstrates that there are many very small communities where competitive broadband is possible and where there is no reason to assume that the only possible provider is the incumbent local exchange carrier ("LEC").

These reply comments respond to a limited set of issues raised in the comments on the *Request for Further Comment*. Most of these issues relate to intercarrier compensation reform, but Midcontinent also has significant concerns about rules that give an artificial advantage to rural incumbent LECs in obtaining funding to support broadband deployment. For the reasons described below, Midcontinent submits that the Commission, in evaluating proposals from incumbent carriers, should refocus on the broader telecommunications market, not the claimed needs of the incumbents. The result of this broader analysis will be rules that are more likely to lead to balanced competition.

## **II. The Commission Should Adopt Intercarrier Compensation Rules that Recognize that There Is No Functional Difference Between Access Provided by Incumbent LECs and Access Provided by Voice over IP Providers.**

Many of the comments concentrated on questions related to access services provided by companies that use voice over IP technology.<sup>2</sup> These comments were prompted by the ABC Proposal, which would adopt separate rates for intrastate access provided via voice over IP and access provided via more traditional technologies and would impose those rates six months before any other carriers were required to reduce their rates.<sup>3</sup> The Commission should not adopt

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<sup>2</sup> See, e.g., Comments of Bright House Networks Information Services, LLC; Comments of Level 3 Communications, LLC at 12-15.

<sup>3</sup> Letter from Walter B. McCormick, Jr., United States Telecom Association, Robert W. Quinn, Jr., AT&T, Melissa Newman, CenturyLink, Michael T. Skrivan, FairPoint, Kathleen Q. Abernathy, Frontier, Kathleen Grillo, Verizon,

this proposal because distinguishing access services based on the technology used to serve end users is not justified based on the functionality provided or the underlying economics. In practice, the only benefit of a differential rate is to give a windfall to interexchange carriers.

First, the assumption that there is something fundamentally different about access that connects voice over IP end users is simply incorrect. There is, essentially, no such thing as “voice over IP access” in the public switched telephone network because nearly all traffic is exchanged in TDM format. In practice, originating and terminating carriers have no choice, as interexchange carriers send and receive traffic that way. In other words, the technology used to serve the end user is irrelevant to the interexchange carrier because all that matters is that the traffic is exchanged as TDM. As a result, any decision to charge a different rate based on the underlying technology is entirely arbitrary.<sup>4</sup> The only benefit of imposing lower rates for IP-based services is that interexchange carriers will pay less for access, a benefit that will flow directly to their bottom lines.

The irrationality of differentiating rates is illustrated perfectly by the ABC Proposal proponents’ explanation of how their proposed “access replacement mechanism” should work. They say that the access replacement mechanism should account for revenue lost by incumbent LECs as a result of lower access charges they will receive under the special voice over IP rules.<sup>5</sup> They claim this additional support is necessary even though almost no incumbent LECs provide much voice over IP service. The reason they say the support is necessary is that incumbent

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Michael D. Rhoda, Windstream, Shirley Bloomfield, NTCA, John Rose, OPASTCO, and Kelly Worthington, WTA, to Chairman Julius Genachowski, Commissioner Michael J. Copps, Commissioner Robert M. McDowell, Commissioner Mignon Clyburn, FCC, WC Docket No. 10-90 et al. (filed July 29, 2011) (the “ABC Proposal”).

<sup>4</sup> There is no meaningful evidence that there is a real cost difference between originating and terminating traffic in IP-format and originating and terminating traffic in TDM format, even without accounting for the extra costs of converting IP traffic to TDM and vice versa. Even if there were evidence that it was cheaper to provide IP-based access service, that would not justify imposing a lower rate from the outset, because it would penalize IP-based services for having made an economically rational choice to use a lower-cost technology.

<sup>5</sup> Joint Comments of AT&T, CenturyLink, Fairpoint, Frontier, Verizon, and Windstream, WC Docket No. 10-90 et al. (filed Aug. 24, 2011) at 24 (the “ABC Proponent Comments”).

LECs, under their proposal, will receive the voice over IP rate for traffic that *originates* from voice over IP customers.<sup>6</sup>

This makes no sense, unless the only purpose of the difference in rates is to save money for interexchange carriers. The costs of the incumbent LECs terminating this traffic (or, for that matter, any other carrier like Midcontinent that provides service using TDM) are unaffected by what happens at the originating end of the call. They provide exactly the same function, using exactly the same technology and equipment, as they do on calls that originate from end users served by TDM technology. As a matter of economics, it is utterly irrational.<sup>7</sup>

Indeed, it is nearly as irrational as a matter of policy. There is every reason to believe that the same companies that have been claiming they do not need to pay any access charges for voice over IP traffic will take the opportunity offered by a differentiated rate to claim that all of their traffic is IP-based and therefore subject to the lower rate. There is, in fact, no downside for them to do so if they can, particularly in dealing with smaller companies like Midcontinent, for which the expense of litigating a dispute over the proper percentage of traffic subject to the IP rate could exceed the revenues lost when a carrier lies about its traffic. Given the Commission's experience with phantom traffic, traffic pumping and other arbitrage schemes, there can be no doubt that this is precisely what will happen if interexchange carriers have any opportunity to determine the rate that they pay.<sup>8</sup> Even worse from a policy perspective, interexchange carriers that do not choose to game the system will find themselves at a disadvantage in the market because their access costs will be higher than those faced by less scrupulous competitors. A

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<sup>6</sup> *Id.*

<sup>7</sup> It also is irrational to provide access replacement mechanism support to incumbent LECs that lose revenue as a result of differentiated TDM and IP access rates without providing the same support to competitors that lose revenue for the same reason. Making up only the losses faced by incumbent LECs would merely add to the marketplace disadvantages that a differentiated rate system would impose on providers that use IP.

<sup>8</sup> Thus, if the Commission adopts a differentiated rate, it becomes critical to devise a way to determine what traffic is subject to that rate that does not include any role for interexchange carriers or any opportunity for them to manipulate or lie about the proportion of traffic they transmit that is subject to the IP rate.

policy like this, that systematically rewards companies that cheat and penalizes those that follow the rules, is precisely the opposite of what the Commission should seek to enact.

The correct solution to all of these concerns is to set a uniform transition for all carriers and all technologies used to provide access services. A uniform transition, with identical rates for all carriers, eliminates arbitrage opportunities, creates a level playing field for all competitors in the local voice service market. It is the best policy choice, and will ensure not just a smooth transition, but a transition that allows companies to compete on their own merits.

**III. The Commission Should Adopt Other Intercarrier Compensation Rules that Ensure that No Provider Has an Unfair Advantage in the Marketplace.**

New intercarrier compensation rules have significant potential, in the long run, to create significant consumer and marketplace benefits by eliminating an outdated structure of charges that are unrelated to costs. However, in addition to the potential harm that could be caused by differentiating access rates based on providers' technologies, there are several other elements of the ABC Proposal that should be modified to right the competitive balance during the transition and after the transition is complete. These elements are the access replacement mechanism, the rules for transit service and the rules for originating access.

**A. The Access Replacement Mechanism Should Be Limited to Smaller, Rural Carriers.**

Midcontinent does not object in principle to the proposed access recovery mechanism. Midcontinent recognizes that there may be some circumstances in which rapid reductions in access rates will have a disproportionate impact on smaller carriers, and so long as the additional support is transitional, not permanent, it is appropriate to afford those carriers some relief.

However, there is simply no reason to make access recovery mechanism funding available to large incumbent LECs. Midcontinent agrees with Cox and Time Warner that these

carriers, as the most significant beneficiaries of intercarrier compensation reform, should not be allowed to double-dip and also benefit from a fund intended for carriers that are hurt by reform.<sup>9</sup>

Moreover, including large incumbent LECs in the access recovery mechanism will make it much more expensive. Unless the Commission intends to increase its high cost support funding to account for a larger access recovery mechanism, this means that the amount of money available to support broadband deployment will be reduced. And if the Commission decides to increase the size of the fund to pay the additional costs, that means that consumers would be subsidizing carriers that are the largest beneficiaries of intercarrier compensation reform. Thus, there is no reason to include any of the large incumbent LECs in the access recovery mechanism.

**B. The Commission Should Refrain from Deregulating Transit Services.**

The ABC Proposal would deregulate rates for tandem switching, the primary component of transit.<sup>10</sup> As other commenters have suggested, the Commission should resist this effort. Indeed, the availability of transit is mandated by Section 251(c)(2) of the Communications Act.

First, transit service remains a necessary component of interconnection. Midcontinent's experience is typical: It interconnects directly with other providers whenever it is economically and technically feasible, yet there still are circumstances that make direct interconnection with other carriers impracticable. In those circumstances, Midcontinent needs to interconnect through another carrier. That other carrier nearly always is an incumbent LEC because only incumbent LECs interconnect with all other carriers.<sup>11</sup> In other words, as a practical matter, Midcontinent can interconnect with all other carriers only if it can obtain transit from the incumbent LEC. It is, simply, a necessity.

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<sup>9</sup> Comments of Cox Communications at 11-12 ("Cox Comments"), Time Warner Warner Cable Inc. at 13 (proposing that access replacement mechanism be limited to rate of return carriers).

<sup>10</sup> ABC Proposal, Attachment 1 at \_\_.

<sup>11</sup> There are some companies that offer transit service, but none of them interconnect with all other carriers, and their services are not available ubiquitously.

Second, there should be no question that transit qualifies as a form of interconnection under Section 251(c)(2).<sup>12</sup> Other commenters have explained why transit is a form of Section 251(c)(2) interconnection in great detail.<sup>13</sup> Equally important, every state regulator and every federal court that has decided the issue has reached the same conclusion and required incumbent LECs to provide transit at cost-based rates. The Commission should acknowledge these decisions and confirm their correctness in its order in this proceeding.

**C. There Is No Need to Adopt Rules Concerning Originating Access Rates.**

Originating access is very different from terminating access. Originating access is much more subject to bypass and to customer choice than terminating access. After all, a customer can choose to connect directly to its carrier of choice, or can determine that it will change local carriers if it will obtain better long distance rates as a result. Further, as more consumers and small businesses purchase “all you can eat” long distance plans from their local telephone companies, originating access is becoming a much smaller component of long distance costs.<sup>14</sup>

These factors mean that originating access is subject to much greater competitive pressure than terminating access, and therefore rates for originating access are much more likely to fall on their own over time than rates for terminating access. Given these considerations, the imperative for adopting reform of originating access rates is not nearly as significant as for reforming terminating access. Indeed, in the absence of a significant need to reform originating access, the Commission should instead let market forces do their work, with originating access rates falling naturally over time. Economic incentives will ensure that they remain just and reasonable without regulatory intervention.

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<sup>12</sup> 47 U.S.C. § 251(c)(2).

<sup>13</sup> See, e.g., Comments of the National Cable and Telecommunications Association at 19-25; Cox Comments at 14-15.

<sup>14</sup> Typically, when a local provider offers all you can eat plans, it either provides the long distance service itself or resells the long distance service of another carrier, which negotiates rates based on the traffic being delivered to the long distance carrier free of charge. In either case, the local carrier’s originating access rate is irrelevant.

**IV. The Connect America Fund Should Be Structured to Avoid Giving Any Carriers Unnecessary Advantages.**

Midcontinent supports the Commission’s efforts to create the Connect America Fund (the “CAF”). The CAF will focus high cost support more directly to areas where service would not be provided in the absence of support, ensuring that funds are spent more efficiently. However, the Commission must make a series of decisions about how the fund will work that will have a significant impact on just how efficiently those funds are spent, and the extent to which they actually will go to places where competition cannot occur. Midcontinent urges the Commission to avoid adopting rules that assume that rural incumbent LECs should be given special advantages of any sort because the evidence shows that competition can occur and thrive in many places where it seems unlikely.

Midcontinent’s experience is instructive. As noted above, Midcontinent provides broadband service, often in competition with the incumbent LEC, in communities with fewer than 200 residents. This is a partial list of some of the smallest communities where Midcontinent provides broadband Internet access:

<b>Community</b>	<b>Population</b>
Wolsey, South Dakota	376
Scranton, North Dakota	281
Wimbledon, North Dakota	216
Wilton, Minnesota	204
Frederick, South Dakota	199
Roslyn, South Dakota	183
Rhame, North Dakota	169
Bisbee, North Dakota	126
Starkweather, North Dakota	117

None of these communities is part of any metropolitan area within Midcontinent's footprint. In many of these communities, more than half of the households purchase Midcontinent's broadband service. In all of them, Midcontinent has constructed the facilities used to provide broadband service without any subsidies.

This illustrates two points. First, the Commission should not assume that subsidies are necessary based purely on the size of the community. Second, if Midcontinent is willing to serve these communities, all of which have telephone service provided by incumbent LECs that receive significant subsidies from the federal universal service fund and that are eligible for Rural Utilities Service loans and grants, there is no reason to believe that there is any benefit to granting incumbent LECs a right of first refusal or any other advantage in the process for obtaining CAF support. Rather, Midcontinent's experience demonstrates that there will be many cases in which the incumbent LEC will be a less efficient provider of broadband and will require much more support than a competitor. In other words, if the Commission grants incumbent LECs special advantages, CAF support will be spent less efficiently than if the Commission gives all potential providers an equal opportunity. For that reason, the Commission should not consider a right of first refusal or any other rule that will make it difficult or impossible for non-incumbents to compete.



