

budgets across different auctions.

1284. Under this option, as with our other competitive bidding proposals, we seek comment on the appropriate geographic area to use as a minimum geographic unit for bidding, and how that choice relates to whether and how we might provide for bidding on packages of areas.²³³⁰ We also seek comment on how to establish the number of units in eligible geographic areas. For instance, should we apply a means test to determine the number of qualifying locations that must be served? Further, we seek comment on whether and how to score different performance dimensions, and, whether providers should specify as part of their bids the retail prices they would charge consumers and, if so, how to include such prices in evaluating the bids.²³³¹ We also ask whether we should prioritize areas currently lacking availability of any terrestrial broadband service at any speed by, for example, providing a form of bidding credit that would give an advantage to such areas in across-area bidding.

1285. *Competitive Bidding Procedures.* Should we use any of our competitive bidding alternatives, we would generally structure the procedures as we have done for Mobility Fund Phase I and proposed for Phase II and for the CAF auction for price cap areas. We propose to use the same general auction rules as adopted or proposed for other contexts, including rules on potential auction designs, and rules on governing an auction application phase, a bidding phase, and a post-auction process whereby selected providers would show they are legally, technically and financially qualified to receive the support. As with other adopted and proposed auctions for CAF components, we propose to delegate to the Bureaus authority to establish, consistent with the general rules, detailed auction procedures and take all other actions to implement a competitive bidding process and other program aspects of the subsidies for remote areas to be determined through competitive bidding. We describe the elements of our proposed auction framework briefly below, beginning with an outline of how we would approach the competitive bidding phase.

1286. *Auction Design.* We propose to use the same general rules established for the Mobility Fund Phase I and proposed for the Mobility Fund Phase II, regarding various auction design options and parameters, which would form the basis on which the Bureaus would establish auction procedures to implement a specific design as part of the pre-auction notice and comment proceeding. We contemplate that the specific procedures to be adopted for this auction would be identified in a public notice. Among other issues, we propose to give the Bureaus discretion to consider various procedures for grouping eligible areas to be covered with one bid – package bidding – that could be tailored to the needs of prospective bidders as indicated during the pre-auction notice and comment period. We seek comment on these proposals and invite commenters to identify any alternatives or changes to these general rules that would be appropriate for this competitive bidding process.

1287. *Potential Bidding Preference for Small Businesses.* We also seek comment on whether small businesses should be eligible for a bidding preference if we use any of our competitive bidding alternatives to provide support from the Remote Areas Fund, and whether such a bidding preference would be consistent with the objective of providing such support. The preference would be similar to the small business preference on which we seek comment for auctions of Mobility Fund Phase II support, and would act as a “reverse” bidding credit that would effectively reduce the bid amount of a qualifying small

²³³⁰ This approach is similar to what we have done for Mobility Fund Phase I and proposed for other competitive bidding processes in this FNPRM.

²³³¹ In the discussion of the competitive bidding process in areas where incumbent LECs have declined a state-level commitment, we seek comment on an approach that would allow individual providers to propose different prices at which they would be willing to offer services at different performance levels, with selection of the winning bids based on both prices and performance scores. *See supra* para. 1204.

business for the purpose of comparing it to other bids.²³³² We also seek comment on the size of any small business bidding credit, should the Commission adopt one, that would be appropriate to increase the likelihood that the small business would have an opportunity to win support in the auction. We also seek comment on how we should define small businesses if we adopt a small business bidding credit for auctions to award support in remote areas. Specifically, for the reasons provided in our discussion of Mobility Fund Phase II, we seek comment on whether a small business should be defined as an entity with average gross revenues not exceeding \$40 million for the preceding three years.²³³³ Alternatively, should we consider a larger size definition for this purpose, such as average gross revenues not exceeding \$125 million for the preceding three years?²³³⁴ In determining an applicant's gross revenues under what circumstances should we attribute the gross revenues of the applicant's affiliates? We seek comment on these definitions and invite input on whether an alternative basis for a size standard should be established.

1288. *Application, Auction and Post-Auction Process.* We propose to use the same two-stage application process described more completely in the Mobility Fund Phase I Order and proposed for Mobility Fund Phase II.²³³⁵ Similarly we propose to use the same rules and procedures regarding permissible communications and public disclosure of auction-related information, and regarding delay, suspension, or cancellation of bidding as adopted in the Mobility Fund Phase I Order and proposed for Mobility Fund Phase II. We also propose to use the same rules regarding the post-auction long-form application process and the same rules regarding auction defaults and performance defaults.

1289. We seek comment on all of these proposals. Specifically, we ask whether there are reasons related to the specific circumstances we seek to address in remote areas that should cause us to deviate from the process established for the Mobility Fund.

5. Competitive Evaluation Approach

1290. We seek comment on structuring CAF for remote areas as a competitive proposal evaluation process, or RFP process. With this option we would solicit proposals to provide broadband service in eligible areas, consistent with our technical requirements, and award support for a fixed term to those proposals that offered the best value in terms of meeting our stated criteria. Using such an RFP process, perhaps modeled after the RUS-BIP program,²³³⁶ might permit us more flexibility than an auction in balancing evaluation criteria – for example, with respect to quality standards such as capacity and latency, or quality and price.

²³³² Similar to the proposal made for Mobility Fund Phase II, the preference would be available with respect to all census blocks on which a qualified small business bids.

²³³³ See e.g., *In re Reallocation and Service Rules for the 698-746 MHz Spectrum Band (Television Channels 52-59)*, Report and Order, GN Docket No. 01-74, 17 FCC Rcd 1022, 1087 ¶ 172 (2002).

²³³⁴ The Commission established a size definition for entrepreneurs eligible for broadband PCS C block spectrum licenses based on gross revenues of less than \$125 million in each of the last two years and total assets of less than \$500 million. *In re Section 309(j) of the Communications Act – Competitive Bidding, Fifth Report and Order*, PP Docket No. 93-253, 9 FCC Rcd 5532, *36 ¶ 115 (1994); see also 47 C.F.R. § 24.709(a)(1). Although this definition was used more than a decade ago in the context of spectrum auctions, we seek comment on whether it would be appropriate to use the gross revenues standard of the definition in this universal service context as it would encompass more small businesses.

²³³⁵ See *supra* paras. 416, 417 and 1161.

²³³⁶ See United States Department of Agriculture, About the Recovery Act Broadband Initiatives Program, http://www.rurdev.usda.gov/utp_bip.html (last visited Oct. 17, 2011). We note that the RUS-BIP program is a grant program, not a procurement as contemplated here

6. Other Issues**a. Certification and Verification of Eligibility**

1291. Our obligation to minimize waste, fraud and abuse in Commission programs suggests that we should require individuals who are eligible for CAF support for remote areas be required to certify as to their eligibility and periodically verify their continued eligibility.²³³⁷ Given the Commission's experience in administering the Lifeline program, we propose to adopt the Lifeline certification and verification procedures proposed by the Commission in connection with the Lifeline and Link Up Reform and Modernization NPRM. We seek comment on this proposal and on whether any modifications would be necessary to reflect the differences between the Lifeline and Link Up programs and the Remote Areas Fund.²³³⁸ Would other, Remote Areas Fund specific rules be more appropriate? For instance, to the extent that the proposals for Lifeline contemplate that states be permitted to implement additional verification procedures, should we consider permitting similar state-specific procedures here? Should we consider the same uniform sampling methodology proposed for Lifeline? What other modifications to the Lifeline and Link Up rules might be necessary to reflect the differences between the Lifeline program and the proposed CAF support for remote areas?

b. Accountability and Oversight

1292. Except for disbursing support, we propose to apply to our program of support for remote areas the same rules for accountability and oversight as we do for CAF. Thus, recipients of this support would be subject generally to the same reporting, audit, and record retention requirements that apply to recipients of CAF support. We propose to disburse support for the remote areas budget on a quarterly, per-location served basis, beginning upon notification that a qualifying location has contracted with the designated support recipient for service consistent with the program technical requirements described above.

1293. We propose that providers notify us quarterly of newly served locations by submitting a certification specifying the number of signed contracts for qualifying locations, along with a certification that each location meets the qualifying criteria (*e.g.*, a means test) established in this proceeding. Signed contracts would be covered by the record retention requirements applicable to all recipients of CAF support.

1294. We propose that payments for newly acquired customers be submitted and paid quarterly. We seek comment on how often support for continuing qualifying customers should be paid out, *e.g.*, in quarterly installments.

1295. In structuring an appropriate payment plan, we are mindful that we must comply with the Anti-Deficiency Act, which prohibits any officer or employee of the U.S. Government from involving the "government in a contract or obligation for the payment of money before an appropriation is made unless authorized by law."²³³⁹ Commenters are invited to address how to structure an award of support that provides recipients with the requisite level of funding and certainty, while ensuring that the Commission's Anti-Deficiency Act obligations are met.

²³³⁷ "Certification" refers to the initial determination of eligibility for the program; "verification" refers to subsequent determinations of ongoing eligibility. *See, e.g., Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2822-24, paras. 158-66; *see also, e.g., 2010 Recommended Decision*, 25 FCC Rcd at 15,606-11, paras. 23-34.

²³³⁸ *See Lifeline and Link Up Reform and Modernization NPRM*, 26 FCC Rcd at 2822-31, paras. 158-98.

²³³⁹ 31 U.S.C. § 1341(a)(1)(B).

L. Introduction to Intercarrier Compensation

1296. In this portion of the FNPRM, we seek comment on additional topics that will guide the next steps to comprehensive reform of the intercarrier compensation system initiated in the Order. First, we seek comment on the transition to bill-and-keep for rate elements that are not specifically addressed in the Order, including origination and transport. Next, in section N we seek comment on interconnection and related issues that must be addressed to implement bill-and-keep. Then, in section O, we seek comment on the reform of end user charges and the future elimination of the ARC adopted in the Order. In section P we invite comment on IP-to-IP interconnection, including scope, incentives, and statutory issues that will help guide the development of an IP-to-IP policy framework. In section Q, we seek comment on the development of additional call signaling rules for one-way VoIP service providers. Finally, in section R we seek comment on the adequacy of the new and revised rules to reflect the reform adopted in this Order.

M. Transitioning All Rate Elements to Bill-and-Keep

1297. Today, we adopt a bill-and-keep pricing methodology as the default methodology that will apply to all telecommunications traffic at the end of the complete transition period.²³⁴⁰ As discussed in the Order, we find that a bill-and-keep methodology has numerous consumer benefits, best addresses access charge arbitrage, and will promote the transition from TDM to all-IP networks. Although we specify the implementation of the transition for certain terminating access rates in the Order, we did not do the same for other rate elements, including originating switched access, dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching. In this section, we seek further comment to complete our reform effort, and establish the proper transition and recovery mechanism for the remaining elements. Commenters warn that failure to take action promptly on these elements could perpetuate inefficiencies, delay the deployment of IP networks and IP-to-IP interconnection, and maintain opportunities for arbitrage.²³⁴¹ We agree, and seek to reach the end state for all rate elements as soon as practicable, but with a sensible transition path that ensures that the industry has sufficient time to adapt to changed circumstances.²³⁴² As a result, we seek comment on transitioning the remaining rate elements consistent with our bill-and-keep framework, and adopting a new recovery mechanism to provide for a gradual transition away from the current system.

1298. *Origination.* Other than capping interstate originating access rates and bringing dedicated switched access transport to interstate levels, the Order does not fully address the complete transition for originating access charges.²³⁴³ Instead, it provides on an interim basis that interstate originating switched access rates for all carriers are to be capped at current levels as of the effective date of the rules adopted pursuant to this Order.²³⁴⁴ As we acknowledge in the Order, section 251(b)(5) does not explicitly address originating charges.²³⁴⁵ We determine, therefore, that such charges should be

²³⁴⁰ See *supra* Section XII.A.

²³⁴¹ See *supra* Section XII.A.1; see *infra* para. 1307.

²³⁴² See, e.g., iBasis *August 3 PN* Comments at 2 (“Prepaid Calling Card Providers also emphasize[] the need to establish a uniform rule on a going-forward basis to create certainty in the industry and establish a level playing field among all prepaid card providers.”).

²³⁴³ For price cap carriers, intrastate originating access charges are also capped at current levels as of January 1, 2012. See *supra* para. 805; see also *USF/ICC Transformation NPRM* at para. 554 n.832.

²³⁴⁴ See *supra* Section XII.C.

²³⁴⁵ See *supra* paras. 777-778.

eliminated at the conclusion of the ultimate transition to the new intercarrier compensation regime.²³⁴⁶ Below, we seek comment on that final transition for *all* originating access charges.

1299. Beyond the interim steps set forth in the Order, we seek comment on the need for an additional multi-year transition for originating access as part of the final transition to bill-and-keep. Commenters warn that establishing separate transitions for different intercarrier charges invites opportunities for arbitrage.²³⁴⁷ Should any final transition of originating access be made to coincide with the final transition for terminating access adopted today? Should a separate transition schedule be established for originating access only after the transition we adopt today for terminating access is complete? If a separate transition schedule is established after the transition above is complete, would a two-year²³⁴⁸ transition beginning in year 2018 for price cap carriers and 2020 for rate of return carriers be an appropriate time period? If not, what other time period should be considered and when should it commence? Should rate of return carriers be given additional time to transition such rates? If so, how much? How should reductions of originating access rates be structured? Should rates be reduced in equal increments over a period of years? Should the timing of rate reductions vary by type of carrier? We seek comment on an appropriate schedule, and the timing of any necessary interim steps.

1300. In the *August 3 Public Notice* the Wireline Competition Bureau asked whether the Commission should treat originating access revenue differently from terminating access revenues for recovery purposes.²³⁴⁹ The *August 3 Public Notice* acknowledged that, in many cases, incumbent LECs provide retail long distance through affiliates. For this reason, at least one commenter stated that for many calls, originating access is simply “an imputation, not a real payment,” but that originating access remains problematic for independent long distance carriers and competitive LECs and should be “phased out rapidly.”²³⁵⁰ The Bureau’s *August 3 Public Notice* also asked about the possibility of flat-rated per-customer charges for the recovery of originating access revenues, though several commenters opposed this approach.²³⁵¹

1301. Although parties commented on the *August 3 Public Notice*’s questions regarding possible recovery for originating access,²³⁵² the comments do not provide a sufficient basis for us to

²³⁴⁶ See *id.*; see also *Local Competition First Report and Order*, 11 FCC Rcd at 16016, para. 1042 (“Section 251(b)(5) specifies that LECs and interconnecting carriers shall compensate one another for termination of traffic on a reciprocal basis. This section does not address charges payable to a carrier that originates traffic. We therefore conclude that section 251(b)(5) prohibits charges such as those some incumbent LECs currently impose on CMRS providers for LEC-originated traffic.”).

²³⁴⁷ See *Vonage August 3 PN Comments* at 8; *Google August 3 PN Comments* at 18; *iBasis August 3 PN Comments* at 3.

²³⁴⁸ We note the Order adopts a similar two-year timeframe to transition intrastate access charges to interstate levels. See *supra* para. 801.

²³⁴⁹ See *August 3 Public Notice*, 26 FCC Rcd at 11126.

²³⁵⁰ Compare *CRUSIR August 3 PN Comments* at 11-12; *Missouri Commission August 3 PN Comments* at 13 (“MoPSC supports efforts to limit any recovery mechanism from recovering reduced access revenues of an incumbent’s long distance affiliate.”), with *Rural Broadband Alliance August 3 PN Comments*, Attach. 1 at 32, 36-37 (stating that it would be “inequitable” to deprive recovery where a portion of originating access had been assessed against a carrier’s affiliate).

²³⁵¹ See *August 3 Public Notice*, 26 FCC Rcd at 11126; *CRUSIR August 3 PN Comments* at 12-13 (disfavoring a flat-rated approach to recovery); *Rural Broadband Alliance August 3 PN Comments* Attach. 1 at 37 (same); *Texas Statewide Tel. Coop. August 3 PN Comments* at 7 (same); *AT&T et al. August 3 PN Comments* at 27-28 (same).

²³⁵² See, e.g., *COMPTEL August 3 PN Comments* at 15 (suggesting that there is no need for the Commission to address originating access charge rate levels); *Cincinnati Bell August 3 PN Comments* at 3 (same); *Cox August 3 PN* (continued...)

proceed at this time. Thus, we seek further comment as to what, if any, recovery would be appropriate for originating access charges and how such recovery should be implemented. For instance, should any recovery be limited to those incumbent LECs that do not provide retail long distance through affiliates? In addition, we ask for comment on the legal basis for the Commission to provide or deny recovery for originating access. We seek comment on how to minimize any additional consumer burden associated with the transition of originated access traffic, and how best to promote IP-to-IP interconnection in this transition.

1302. We also seek the input of the states on how to transition to bill-and-keep for originating access charges. Although the Commission can exercise its authority to implement a transition, as it does in the Order today, the Commission could also defer to the states to create a transition to bill-and-keep for originating access. Since originating intrastate access rates are not capped for rate of return carriers, we ask whether we should initially defer the transition to bill-and-keep for originating access to the states to implement. If so, how much guidance should we provide states? Should we provide the date that the transition must be complete? Should states also be responsible for determining any appropriate recovery mechanism?

1303. Relatedly, we also seek comment on the appropriate treatment of 8YY originated minutes. In the case of 8YY traffic, the role of the originating LEC is more akin to the traditional role of the terminating LEC in that the IXC carrying the 8YY traffic must use the access service of the LEC subscribed to by the calling party. Stated differently, in the case of 8YY traffic, because the calling party chooses the access provider but does not pay for the toll call, it has no incentive to select a provider with lower originating access rates. For this reason, we ask parties to address whether we should distinguish between originating access reform for 8YY traffic and originating access reform more generally.

1304. The Bureaus' *August 3 Public Notice* sought data and comment on the relative proportion of 8YY originated minutes to traditional originated minutes.²³⁵³ In its response, the Nebraska Companies estimated that approximately 20-30 percent of originating traffic is to an 8YY number, while Texas Statewide Telephone Cooperative suggested that this figure could be as much as 50 percent.²³⁵⁴ Are these figures commensurate with the average number of minutes that customers originate to 8YY numbers on other networks? We again invite carriers to provide us with this data to help evaluate originating access reform, and the need for a distinct 8YY resolution.²³⁵⁵ The Nebraska Companies further contend that a 251(b)(5) regime "in which originating compensation does not exist, is unworkable

(Continued from previous page) _____

Comments at 16 (same); AT&T et al. *August 3 PN* Comments at 22, 26 (urging the Commission not to undermine support for the ABC Plan by ordering reductions to originating access charges); *compare* Consolidated *August 3 PN* Comments at 20-21 (leaving originating access charges unaddressed could invite arbitrage), with CRUSIR *August 3 PN* Comments at 12 (urging action on originating access charges and disfavoring a flat-rated approach to recovery); Nebraska Companies *August 3 PN* Comments at 69-72 (urging that recovery for originating access be made available, but not on a flat rate basis); Rural Broadband Alliance *August 3 PN* Comments, Attach. 1 at 32, 36-37 (stating that it is "essential" that the Commission address originating access); Texas Statewide Tel. Coop. *August 3 PN* Comments at 7-8 (urging the Commission to treat originating and terminating access reform in the same manner); *see also* SureWest *August 3 PN* Comments at 14 (urging the Commission to address originating access in a subsequent proceeding); ITTA *August 3 PN* Comments at 28 (same).

²³⁵³ *See August 3 Public Notice*, 26 FCC Rcd at 11127.

²³⁵⁴ *See* Nebraska Companies *August 3 PN* Comments at 71; Texas Statewide Tel. Coop. *August 3 PN* Comments at 8.

²³⁵⁵ *See August 3 Public Notice*, 26 FCC Rcd at 11126-27.

in an environment of originating 8YY traffic and equal access obligations.”²³⁵⁶ We seek comment on this conclusion and any alternatives.

1305. Finally, we seek comment on other possible approaches to originating access reform, including implementation issues and our legal authority to adopt any such reforms.²³⁵⁷

1306. *Transport and Termination.* The initial transition described in section XII.C above does not fully address tandem switching and transport charges. For rate-of-return carriers, these charges are capped at interstate levels. For price cap carriers, where the terminating carrier owns the tandem in the serving area, these charges are subject to the transition established in the Order but we do not address the transition for tandem switching and transport charges if the price cap carrier does not own the tandem in the serving area.²³⁵⁸ The following figure provides an illustration of how these elements may be structured in a carrier’s network:

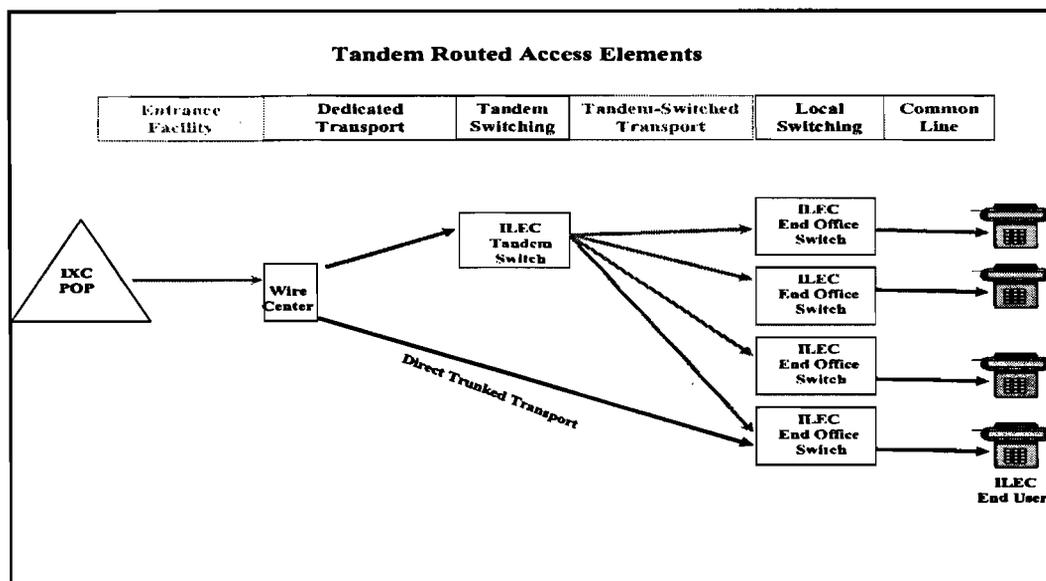


Figure 13

Because our Order does not address the transition for all transport charges and the relationship between these charges and interconnection obligations more generally, we seek further comment on the proper transition for these charges. We seek comment on the proper scope of our reform and on the transition for these elements.

²³⁵⁶ Nebraska Companies August 3 PN Comments at 71.

²³⁵⁷ For example, the New York Commission highlighted that one possibility for originating access charge reform would be to modify requirements relating to equal access obligations. See New York Commission August 3 PN Comments at 15-16. According to the New York Commission, “[i]t is possible that this action will cause the industry to self-remedy the originating access issue by migrating to exclusively bundled local/toll service for its subscribers, similar to the packages offered by wireless and cable telephony providers.” *Id.* at 15. Meanwhile, Cox argues that precisely because of equal access obligations, there is no need to address originating access. Cox August 3 PN Comments at 16. According to Cox, the equal access rules “give customers the ability to choose their long distance carriers, and therefore create opportunities for market pressures to affect originating access rates.” *Id.* at 16.

²³⁵⁸ With regard to tandem switching and tandem transport, at the end of the transition specified in the Order, rates will be bill-and-keep in the following cases: (1) for transport and termination within the tandem serving area where the terminating carrier owns the tandem serving switch; and (2) for termination at the end office where the terminating carrier does not own the tandem serving switch. See *infra* Section XII.C.

1307. Several commenters express concern about the treatment of transport and tandem services under the ABC Plan and Joint Letter. T-Mobile asserts that as rates are reduced, “ILECs will have powerful incentives to shift costs from end office functions to transport and tandem switching functions, requiring the Commission to devote additional time and effort to its scrutiny of ILEC tariff filings.”²³⁵⁹ Sprint raises concern that “transport rate elements bear no relationship to the miniscule incremental cost of performing the traffic termination functions” and that these rates serve as a disincentive for efficient interconnection and may have potential to extend arbitrage behavior.²³⁶⁰ Competitive LECs argue that, even at interstate levels between the years 2013 to 2017, transport rates “create significant opportunities for price cap ILECs to raise rivals’ costs” and, at the end state, “[p]rice-cap ILECs would have the incentive to charge as high a price for [] that transport as possible.”²³⁶¹ Commenters further argue that there are definitional ambiguities about the scope of transport that deserve clarification.²³⁶² We agree that such elements must be transitioned to bill-and-keep at the end state, as required by the Order, and seek comment on the final transition to bill-and-keep for these charges.

1308. We invite comment regarding the appropriate transition for tandem switching and transport charges, and the need for any additional recovery mechanisms. At what point in time should tandem switching and transport charges be transitioned? Some commenters suggest that transport rates be reduced at a pace that coincides with our current transition for end office switching.²³⁶³ Alternatively, tandem switching and transport rates could be reduced after the conclusion of the transition for end office switching. We seek comment on these proposals as well as other possible transition timeframes. Should the transition for these rate elements differ based upon the type of carrier? We ask parties to comment on what, if any, unintended consequences may arise in connection with a longer transition for these charges, and whether any delay would impede the transition to IP-to-IP interconnection.

1309. We also seek comment on possible recovery for tandem switching and transport as part of our recovery mechanism. Should recovery be made available for these charges? If a tandem switching and transport provider renegotiates an agreement for these services in anticipation of reform, should any increased revenue it receives be offset against eligible recovery? Should any recovery for these rate elements differ based upon the type of carrier?

1310. We note that some of these issues are closely related to the discussion in section N of the network edge for purposes of delivering traffic.²³⁶⁴ In the traditional access charge system, tandem switching and transport charges were typically assessed against interexchange carriers. Meanwhile, in the traditional reciprocal compensation system, the originating carrier was typically responsible for transport to the point of interconnection, which may be located at the end office of the called party’s carrier. As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport. EarthLink has suggested that

²³⁵⁹ T-Mobile *August 3 PN* Comments at 8.

²³⁶⁰ Sprint *August 3 PN* Comments at 11-16.

²³⁶¹ CBeyond et al. *August 3 PN* Comments at 15-18.

²³⁶² *Id.* at 16-17 (“It is... unclear whether, and in what circumstances, the cost-based prices for transport applicable to reciprocal compensation apply and in what circumstances the much higher interstate access prices for transport apply.”); Comptel *August 3 PN* Comments at 17 n. 51 (“The ABC Plan’s recommendations regarding transport are not a model of clarity.”).

²³⁶³ CBeyond et al. *August 3 PN* Comments at 18.

²³⁶⁴ *See infra* para. 1320.

charges such as tandem switching and transport charges could become “obsolete” in an all-IP world.²³⁶⁵ Is this correct? If so, how should it impact possible reform?

1311. *Transit.* Currently, transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier’s network.²³⁶⁶ Thus, although transit is the functional equivalent of tandem switching and transport, today transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic. As all traffic is unified under section 251(b)(5), the tandem switching and transport components of switched access charges will come to resemble transit services in the reciprocal compensation context where the terminating carrier does not own the tandem switch. In the Order, we adopt a bill-and-keep methodology for tandem switched transport in the access context and for transport in the reciprocal compensation context. The Commission has not addressed whether transit services must be provided pursuant to section 251 of the Act; however, some state commissions and courts have addressed this issue.²³⁶⁷

1312. Commenters also express concern that, as a result of the reforms adopted in the Order, transit providers will have the ability and incentive to raise transit service rates both during the transition and at the end state of reform.²³⁶⁸ Specifically, one commenter alleges that without regulation of transit, ILECs would have opportunities to “exploit their termination dominance.”²³⁶⁹ Commenters also express concern with the end state for tandem switching and transport for price cap carriers when the tandem

²³⁶⁵ EarthLink *USF/ICC Transformation NPRM* Comments at 9 (“EarthLink anticipates that IP interconnections will make tandem/end office connections obsolete and carriers may prefer to interconnect at one point per state for the exchange of all traffic, without establishing separate trunk groups for previously distinct categories of traffic such as interstate access and local.”).

²³⁶⁶ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4776-77, para. 683; see also *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4737-44, paras. 120-33; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6650, App. A., para. 347; *id.* at 6849, App. C, para. 344. The term transport is often used interchangeably with transit service. These are two different services. Transport service is a tariffed exchanged access service. See, e.g., 47 C.F.R. § 69.4. Transit service is typically offered via commercially-negotiated interconnection agreements rather than tariffs.

²³⁶⁷ See, e.g., *Qwest Corp. v. Cox Nebraska Telcom, LLC*, 2008 WL 5273687 (D. Neb. 2008) (finding that an ILEC must provide transit pursuant to its interconnection obligations under section 251); *Brandenburg Tel. Co. v. Windstream Kentucky East, Inc.*, Case No. 2007-0004, Order, 2010 WL 3283776 (Ky PSC Aug. 16, 2010) (cancelling a transit tariff and requiring the parties to negotiate an interconnection agreement for transit pursuant to sections 251 and 252); compare Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1-2, 4 (filed Oct. 19, 2011) (Cox October 19, 2011 *Ex Parte* Letter), and Letter from J.G. Harrington, Counsel to Cox Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45, at 1-3 (filed Oct. 21, 2011), with Letter from John R. Harrington, Senior Vice President, Regulatory & Litigation, Neutral Tandem, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, GN Docket No. 09-51, CC Docket No. 01-92, at 2-3 (filed Oct. 20, 2011) (Neutral Tandem Oct. 20, 2011 *Ex Parte* Letter).

As noted in Section XII.C, our Order does not intend to affect existing agreements not addressed by its reforms, including for transit services. See Letter from Mary McManus, Senior Director FCC and Regulatory Policy, Comcast, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Docket No. 01-92, 96-45, at 1-2 (filed Sept. 22, 2011).

²³⁶⁸ See, e.g., Comcast *August 3 PN* Comments at 8-10; Cox *August 3 PN* Comments at 13-15; NCTA *August 3 PN* Comments at 19-20.

²³⁶⁹ T-Mobile *August 3 PN* Comments at 8.

owner does not own the end office,²³⁷⁰ which, under section 251 framework is typically considered a transit service. As part of the transition for price cap carriers, the Order provides that bill-and-keep will be the pricing methodology for all traffic and includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch. However, the Order does not address the transition in situations where the tandem owner does not own the end office. NCTA states that in this regard the “ABC Plan is unclear” and may “attempt[] to significantly undermine competition by suggesting that such services would fall outside of the regulatory regime.”²³⁷¹ As a result, commenters suggest that these services are transit services and should be provided pursuant to section 251 at “cost-based and reasonable rates.”²³⁷²

1313. We seek comment on the need for regulatory involvement and the appropriate end state for transit service.²³⁷³ Given that transit service includes the same functionality as the tandem switching and transport services subject to a default bill-and-keep methodology, should the Commission adopt any different approach for transit traffic given that providers pay for transit for IP services and transit may apply to get traffic to a network “edge” in a bill-and-keep framework? We invite parties to comment on the current market for these services.²³⁷⁴ Does the transit market demonstrate the hallmarks of a competitive market? If transit services are not being offered competitively, how prevalent is this? How might the market evolve in light of the reforms adopted in the Order? If the Commission were to regulate these charges, what legal framework is appropriate and what pricing methodology would apply during the transition?

1314. *Other Charges.* Our transition to a bill-and-keep framework may implicate other charges. For example, commenters have highlighted that the ABC Plan and Joint Letter fail to specify what transition applies to dedicated transport or to other flat-rated charges.²³⁷⁵ We invite parties to comment on any rate elements or charges that require additional reform. What transition should apply to these charges?

N. Bill-and-Keep Implementation

1315. In the *USF/ICC Transformation NPRM* the Commission also sought comment on issues related to the implementation of a bill-and-keep pricing methodology.²³⁷⁶ Now that the end point to comprehensive intercarrier compensation reform has been determined, we seek comment on any interconnection and related issues that must be addressed to implement bill-and-keep in an efficient and equitable manner. As discussed in the Order, we expect that the reforms adopted today will not upset existing interconnection arrangements or obligations during the transition.

²³⁷⁰ NCTA August 3 PN Comments at 19-20.

²³⁷¹ *Id.* at 20.

²³⁷² *Id.*; Cox August 3 PN Comments at 15.

²³⁷³ We note that commenters have previously suggested a range of regulatory outcomes. See Charter *USF/ICC Transformation NPRM* Comments at 13 (proposing a cost-based pricing standard); Level 3 *USF/ICC Transformation NPRM* Comments at 19 (proposing a just and reasonable pricing standard); MetroPCS August 3 PN Comments at 21-22 (proposing a default rate).

²³⁷⁴ Compare Cox October 19, 2011 *Ex Parte* Letter at 3-4, with Neutral Tandem October 20, 2011 *Ex Parte* Letter at 1.

²³⁷⁵ See Level 3 August 3 PN Comments at 11-12; COMPTTEL August 3 PN Comments at 18-20.

²³⁷⁶ See *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774-76, paras. 680-82.

1316. *Points of Interconnection.* Currently, under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point.²³⁷⁷ The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect at a single point of interconnection (POI) per LATA.²³⁷⁸ As a threshold matter, does the Commission need to provide new or revised POI rules at some later stage of the transition to bill-and-keep or provide one set of rules to be effective at the end of the six-year transition for price cap carriers and nine-year transition for rate-of-return carriers described above and maintain the current regime until that time?²³⁷⁹ For instance, do commenters anticipate potential arbitrage schemes²³⁸⁰ emerging as a result of maintaining the current POI rules until the transition is complete, or will the defined transition path and accompanying rate reductions we adopt in this Order prevent such practices?

1317. Also, section 251(c) does not currently apply to all rural LECs or non-incumbent LECs.²³⁸¹ How do commenters envision POIs functioning for these carriers? We seek to better understand the nature of interconnection arrangements with rural carriers today. For example, is interconnection typically pursuant to negotiated agreements, rules, or another type of framework? Is indirect interconnection the primary means of interconnection with small, rural carriers? If the Commission needs to mandate the use of POIs for rural LECs and non-incumbent LECs, should this requirement begin during or after the transition to the stated end point?

1318. We seek comment on whether the Commission needs to prescribe POIs under a bill-and-keep methodology. One possible approach could be to permit interconnection at “any technically feasible point” on the other providers’ network with a default POI being used for compensation purposes when there is no negotiated agreement between the parties.²³⁸² What are the pros and cons of such an approach? To what extent does the Commission’s regulatory authority over interconnection allow it to prescribe POIs as described above? Alternatively, CenturyLink proposes the use of traffic volumes to “dictate the number of POI locations for traffic exchanged with an ILEC (including traffic flowing in both

²³⁷⁷ 47 U.S.C. § 251(c)(2)(B). IP-to-IP interconnection is addressed later in this FNPRM section. See *infra* Section XVII.P.

²³⁷⁸ *Application of SBC Communications Inc., Southwestern Bell Tel. Co, and Southwestern Bell Communications Service, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, para. 78, n.174 (2000).

²³⁷⁹ See CenturyLink *USF/ICC Transformation NPRM* Comments at 74 (the Commission “should clarify now the rules for POIs and network edges for purposes of any transitional TDM ICC rate reform”). As discussed in the *USF/ICC Transformation NPRM*, and noted by commenters, flexible proposals to accommodate evolving network architectures and IP networks are the preferred approach. See e.g., *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4775, para. 681.

²³⁸⁰ “If the Commission fails to adequately address POI and network edge issues in connection with TDM-ICC plans, carriers will be prevented from having adequate cost recovery and new forms of arbitrage will arise. For example, bad actors will no doubt seek to free ride on transport and transit networks.” CenturyLink *USF/ICC Transformation NPRM* Comments at 74.

²³⁸¹ See 47 U.S.C. § 251(c) “Additional Obligations of Incumbent Local Exchange Carriers.” Section 251(f)(1) of the Act details the exemption to interconnection obligations for rural telephone companies. See 47 U.S.C. § 251(f)(1).

²³⁸² See, e.g., *U.S. West v. Jennings*, 304 F.3d 950, 961 (9th Cir. 2002); *MCI Telecomm. Corp. v. Bell Atl.-PA*, 271 F.3d 491, 517-18 (3d Cir. 2001).

directions).²³⁸³ We seek comment on this proposal and any other alternatives concerning POI obligations under a bill-and-keep regime.

1319. We seek comment below on how to promote IP-to-IP interconnection and facilitate the transition to all-IP networks.²³⁸⁴ Some of these questions may affect the POI issues raised here. For instance, if the Commission were to adopt its proposal to require a carrier that desires TDM interconnection to pay the costs of any IP-TDM conversion, how would that affect commenters' opinions or responses to the POI questions herein? How would they be affected if the Commission adopted other IP-to-IP interconnection obligations?

1320. *The Network Edge*. A critical aspect to bill-and-keep is defining the network "edge" for purposes of delivering traffic. The "edge" is the point where bill-and-keep applies, a carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge. Past "proposals to treat traffic under a bill-and-keep methodology typically assume the existence of a network edge, beyond which terminating carriers cannot charge other carriers to transport and terminate their traffic."²³⁸⁵ In the *USF/ICC Transformation NPRM* we recognized that there are numerous options for defining an appropriate network edge.²³⁸⁶ For example, the edge could be "the location of the called party's end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway."²³⁸⁷ We have not received significant comment on the network edge issue up to this point.

1321. As discussed in the Order, we believe states should establish the network edge pursuant to Commission guidance. We seek comment on this and other options for defining the network edge. Assuming that defining the network edge remains a critical aspect of the transition to bill-and-keep, we seek comment on the appropriate network edge and related issues. For instance, should the Commission adopt a "competitively neutral" location for the network edge, such as "where interconnecting carriers have competitive alternatives—other than services or facilities provided by the terminating carrier—to transport traffic to the terminating carrier's network"?²³⁸⁸ In its comments, CTIA describes a Mutually

²³⁸³ CenturyLink *USF/ICC Transformation NPRM* Comments at 75. CenturyLink includes four additional rule clarifications to facilitate proper traffic exchange. *See id.*

²³⁸⁴ *See infra* Section XVII.P.

²³⁸⁵ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774, para. 680.

²³⁸⁶ *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4775, para. 681. The Commission has previously sought comment on alternative schemes for intercarrier compensation premised on bill-and-keep approaches underpinned by default interconnection rules. *See, e.g., Intercarrier Compensation NPRM*, 16 FCC Rcd at 9620-22, paras. 22-30. First, Patrick DeGraba's "Central Office Bill and Keep" (COBAK) proposal relied on two principal rules: (1) no carrier may recover any costs of its customer's local access facilities from an interconnecting carrier; and (2) the calling party's network is responsible for the cost of transporting the call to the called party's central office. For interexchange calls, the second rule would be modified to make the calling party's LEC responsible for delivering the call to the IXC's point of presence and the IXC responsible for delivering the call to the called party's central office. *Id.* at 9620-21, para. 23 & n. 41 (citing Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* (FCC, OPP Working Paper No. 33, Dec. 2000)). Second, Jay Atkinson and Christopher C. Barnekov's "Bill Access to Subscribers-Interconnection Cost Split" (BASICS) proposal was also premised on two rules: (1) networks should recover all intra-network costs from their end-user customers; and (2) networks should divide equally the costs that result purely from interconnection. *See id.* at 9621, para. 25 (citing Jay M. Atkinson & Christopher Barnekov, *A Competitively Neutral Approach to Network Interconnection* (FCC, OPP Working Paper No. 34, Dec. 2000)).

²³⁸⁷ *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4774, para. 680 (citing *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6619-20, App. A, para. 275; *id.* at 6818-19, App. C, para. 270).

²³⁸⁸ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4775-76, para. 682.

Efficient Traffic Exchange (“METE”) proposal “pursuant to which carriers would bear their own costs to deliver traffic to each other at specified network ‘edges.’”²³⁸⁹ Is this an appropriate way to define the network edge under a bill-and-keep approach? Do commenters have alternative suggestions on how best to define carrier obligations under a bill-and-keep approach? We seek comment on these questions and on any alternative proposals regarding the network edge.²³⁹⁰

1322. *Role of Tariffs and Interconnection Agreements.* We believe that generally continuing to rely on tariffs while also allowing carriers to negotiate alternatives during the transition is in the public interest²³⁹¹ because it provides the certainty of a tariffing option, which historically has been used for access charges, while still allowing carriers to better tailor their arrangements to their particular circumstances and the evolving marketplace than would be accommodated by exclusively relying on “one size fits all” tariffs.²³⁹² We seek comment on whether the Commission needs to forbear from tariffing requirements in section 203 of the Act and Part 61 of our rules²³⁹³ to enable carriers to negotiate alternative arrangements pursuant to this Order.²³⁹⁴

1323. As carriers transition from the existing access charge regime to the section 251(b)(5) framework and bill-and-keep methodology adopted in this Order, we believe they will rely primarily on negotiated interconnection agreements rather than tariffs to set the terms on which traffic is exchanged. Specifically, section 251(b)(5) imposes on all LECs the duty to enter reciprocal compensation arrangements, and section 252 outlines the responsibility of incumbent LECs to negotiate interconnection agreements upon receipt of a request for interconnection pursuant to section 251.²³⁹⁵ Although we maintain a role for tariffing as part of the transition, we believe the reliance on interconnection agreements is most consistent with this Order’s application of reciprocal compensation duties to all carriers. We seek comment on this view. If so, do commenters believe we need to modify or eliminate any of our interconnection rules?

²³⁸⁹ CTIA *USF/ICC Transformation NPRM* Comments at 39. CTIA continues that “[u]nder the METE proposal, the originating carrier would be responsible for assuming the costs of delivering a call, including securing any necessary transport services, to the terminating carrier’s network edge, and could determine how to do so. Each carrier, including wireless carriers, would be required to designate at least one edge to receive traffic in every LATA it serves. For the direct exchange of traffic, originating and transiting carriers could select a delivery point from among the terminating carrier’s designated edges in the LATA, but would be required to use different trunk groups for each of the terminating carrier’s terminating switching facilities in the LATA.” *Id.*

²³⁹⁰ In Section XV above we establish an interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between rural, rate-of-return LECs and CMRS providers. We found that such an interim rule was necessary because we establish bill-and-keep as an immediate default methodology for this category of traffic. We make clear however that with the adoption of this rule we do not intend to prejudice any outcome or otherwise affect the ability of states to define the network edge for intercarrier compensation under bill-and-keep as a general matter. *See supra* Section XV.

²³⁹¹ *See* 47 U.S.C. § 160(a)(3).

²³⁹² *See, e.g.,* paras. 963-967; *see also* para. 1362.

²³⁹³ *See* 47 U.S.C. § 203; 47 C.F.R. §§ 61.31-.59.

²³⁹⁴ *See* Letter from Heather Zachary, Counsel to AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, 04-36, GN Docket No. 09-51, CC Docket Nos. 01-92, 96-45 at 8 (filed Oct. 19, 2011) (suggesting that the Commission grant forbearance from tariffing requirements insofar as necessary to allow carriers to negotiate alternatives to a default rate).

²³⁹⁵ *See* 47 U.S.C. §§ 251(b)(5), 252.

1324. Given the potential primary reliance on interconnection agreements, we seek comment on the possibility of extending our interconnection rules to all telecommunications carriers to ensure a more competitively neutral set of interconnection rights and obligations. As discussed in Section XII.C.5, the *T-Mobile Order* extended to CMRS providers the duty to negotiate interconnection agreements with incumbent LECs under the section 252 framework to address interconnection and mutual compensation for non-access traffic.²³⁹⁶ We seek comment on whether we should extend the interconnection agreement process adopted in the *T-Mobile Order* to all telecommunications carriers, including competitive LECs or other interconnecting service providers such as interexchange carriers. Competitive LECs have requested that the Commission expand the scope of the *T-Mobile Order* and require CMRS providers to negotiate agreements with competitive LECs under the section 251/252 framework.²³⁹⁷ In addition, rural incumbent LECs urged the Commission to “extend the T-Mobile Order to give ILECs the right”²³⁹⁸ to require all carriers to negotiate interconnection agreements under the section 252 framework. These requests stem largely from concerns about payment of intercarrier compensation charges.²³⁹⁹ Thus, we seek comment on whether, in light of the reforms adopted herein, any further modification to our interconnection rules is still warranted for the end of the transition period, and the legal basis of any such modifications.

1325. *Possible Arbitrage Under a Bill-and-Keep Methodology.* We note that several commenters to the *USF/ICC Transformation NPRM* suggest that a bill-and-keep approach may promote arbitrage opportunities in the industry. For example, some commenters suggest that a bill-and-keep framework may promote traffic dumping on terminating carriers’ networks.²⁴⁰⁰ Based on the current record, we disagree with these concerns, which we find speculative.²⁴⁰¹ Nonetheless, to the extent our predictive judgment is incorrect, we take this opportunity to establish a record to ensure that the Commission is prepared to act swiftly to address any potential arbitrage situations. We ask parties to provide more detail on traffic dumping and its negative effects. Have there been incidents of traffic dumping in the wireless industry that operates largely under bill-and-keep today? How should we define traffic dumping for purposes of analyzing its effect on the network. Are there concerns of traffic congestion or other harm to the network?²⁴⁰² If so, we note in the Order that carriers may include traffic grooming language in their tariffs to address such concerns.²⁴⁰³ Are there any additional measures the Commission can and should take to prevent such practices? Other commenters suggest that this practice

²³⁹⁶ See *supra* Section XII.C.5.

²³⁹⁷ See, e.g., Pac-West *USF/ICC Transformation NPRM* Comments at 3; Letter from Michael B. Hazzard, Counsel for Xspedius Communications, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 7 (filed Aug. 10, 2005); *Supra* Telecommunications and Information Systems *Ex Parte* Comments and Cross-Petition for Limited Clarification, CC Docket No. 01-92 at 10 (filed July 14, 2005).

²³⁹⁸ Rural Associations Section XV Comments at 29 n.67, 30.

²³⁹⁹ See *id.* at 30 (“Small carriers often have difficulty convincing other carriers to negotiate interconnection agreements with them, particularly where those other carriers can easily terminate their traffic via a transit or tandem provider and thus have no direct contact with the terminating rural carrier at all. In such circumstances, sending carriers are increasingly arguing that because there is no interconnection agreement, they can pay the terminating rural carrier whatever rate they deem appropriate, if anything at all.”).

²⁴⁰⁰ See Verizon *USF/ICC Transformation NPRM* Comments at 13-14; Level 3 *USF/ICC Transformation NPRM* Comments at 9.

²⁴⁰¹ See *supra* Section XII.A.1.

²⁴⁰² See Verizon *USF/ICC Transformation NPRM* Comments at 13.

²⁴⁰³ See *supra* para. 754.

could result in carriers having “every incentive to keep traffic from terminating on their networks.”²⁴⁰⁴ Do commenters agree?

O. Reform of End User Charges and CAF ICC Support

1326. We seek comment below on a number of questions related both to the recovery mechanism adopted in this Order as well as the pre-existing rules regarding subscriber line charges (SLCs). In particular, with respect to the recovery adopted in this Order, we seek comment on the long-term elimination of that transitional recovery mechanism beyond the provisions for reduction and elimination of elements of that recovery already adopted in the Order. In addition, some commenters question whether existing SLCs—which we do not modify in this Order—are set at appropriate levels under pre-existing Commission rules²⁴⁰⁵ or whether they should be reduced, particularly for price cap carriers where the Commission has not evaluated the costs of such carriers in nearly ten years. We therefore seek comment on the appropriate level and, longer-term, the appropriate regulatory approach to such charges, as carriers increasingly transition to broadband networks.

1327. *ARC Phase-Out.* As part of our recovery mechanism, we allow incumbent LECs to impose a limited access replacement charge (ARC).²⁴⁰⁶ Because the ARC is, among other constraints, limited to the recovery of Eligible Recovery, and because we define Eligible Recovery to decline over time, the ARC will phase down and approach \$0 under the terms of the Order.²⁴⁰⁷ This will take some time, however, under the ten percent annual reductions in Price Cap Eligible Recovery, and smaller annual percentage reductions in Rate-of-Return Eligible Recovery. We note, by contrast, that intercarrier compensation-replacement CAF support for price cap carriers is subject to a defined sunset date.²⁴⁰⁸ Should we likewise adopt a defined sunset date for ARC charges? Should those charges sunset at the same time price cap carriers’ intercarrier compensation-replacement CAF support sunsets,²⁴⁰⁹ or at some other time? Similarly, as with intercarrier compensation-replacement CAF support for price cap carriers, should the ARC be phased out after the end of intercarrier compensation rate reforms or, given that it already is subject to an independent phase-down, should it simply be eliminated? Would other modifications be appropriate for the ARC charges adopted in this Order, given carriers’ transition to broadband networks and associated business plans relying more heavily on revenues from broadband services?

1328. *CAF ICC Support Phase-Out.* Although the intercarrier compensation-replacement CAF support for price cap carriers is already subject to a defined phase-out under the Order, should we modify the phase-out period based on a price cap carrier’s receipt of state-wide CAF Phase II support?²⁴¹⁰ If so,

²⁴⁰⁴ NASUCA contends that if the Commission adopts bill-and-keep “carriers will have every incentive to dump traffic on to other carriers’ networks, and likewise, carriers will have every incentive to keep traffic from terminating on their networks.” NASUCA *USF/ICC Transformation NPRM* Comments at 101. We note that the Commission has a clear prohibition on call blocking practices. See generally *Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629 (issued to remove any uncertainty surrounding the Commission’s prohibition on call blocking).

²⁴⁰⁵ See, e.g., NASUCA *USF/ICC Transformation NPRM* Comments at 98; Free Press *August 3 PN* Comments at 12-13.

²⁴⁰⁶ See *supra* XIII.F.1.

²⁴⁰⁷ See *supra* XIII.E.

²⁴⁰⁸ See *supra* para. 920.

²⁴⁰⁹ *Id.*

²⁴¹⁰ See *supra* Section VII.C.2.

how and why? Should intercarrier compensation-replacement CAF support for rate-of-return carriers be subject to a defined phase-out? If so, should it be modeled after the approach used for price cap carriers, or based on a different approach? Would other modifications be appropriate for the intercarrier compensation-replacement CAF support adopted in this Order, given carriers' transition to broadband networks and associated business plans relying more heavily on revenues from broadband services?

1329. *Treatment of Demand in Determining Eligible Recovery for Rate of Return Carriers.* In years one through five, Rate-of-Return Eligible Recovery will decrease at five percent annually, with both ARC and ICC-replacement CAF provided based on a true-up process.²⁴¹¹ We did so to enable such carriers time to adjust and transition away from the current system. But, we believe that five years is a sufficient time to adjust and, for years six and beyond, we seek comment on how to modify the recovery baseline. We seek comment on decreasing Rate-of-Return Eligible Recovery by an additional percent each year for a maximum of five years, up to a maximum decrease of 10 percent. In addition, we seek comment on an alternative approach to the use of true-ups for determining recovery after five years. For example, in place of annual true-ups, should the Commission use the average MOU loss based on data reported by rate of return carriers in years one through five? If we do so, should it be instead of or in addition to changing the baseline, should the Commission use the same 10 percent decline it uses for price cap carriers, or would commenter recommend another mechanism to replace the true-up process?

1330. *Magnitude and Long-Term Role of SLCs.* Some commenters contend that SLCs are not set appropriately today, particularly for price cap carriers whose costs are no longer evaluated. Moreover, given carriers' transition to business plans relying more heavily on broadband services, it is not clear what the appropriate role is for regulated end-user charges for voice service over the longer term. We thus seek comment on whether SLCs are set at appropriate levels today and whether, longer term, the Commission should retain such regulated charges under existing or modified rules, or if those charges should be eliminated.

1331. When the Commission increased the residential and single-line business SLC cap above \$5.00 it first sought comment on "whether an increase in the SLC cap above \$5.00 is warranted and, if not, whether a decrease in common line charges is warranted."²⁴¹² In light of the evolution of network technology over time and any other marketplace developments raised by commenters,²⁴¹³ we seek comment on whether the magnitude of carriers' revenues currently associated with the common line are appropriate, or too high (or low). In particular, as in the past, we seek "forward-looking cost information associated with the provision of retail voice grade access to the public switched telephone network."²⁴¹⁴ in addition to other data or information that commenters wish to provide in this respect. We further seek comment on how the costs of the local loop have been allocated between its use for regulated voice telephone service and its use for other services, such as broadband Internet access, video, or other

²⁴¹¹ See *supra* Section XIII.E.

²⁴¹² See *Initiation of Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Public Notice, 16 FCC Rcd 16705 at 16706 (2001) (quoting *CALLS Order*, 15 FCC Rcd at 12994, para. 83).

²⁴¹³ See, e.g., Free Press *August 3 PN Comments* at 12-14; Consumer Federation of America and Consumers Union *August 3 PN Reply* at 3-4; Letter from S. Derek Turner, Research Director, Free Press, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 05-337; CC Docket Nos. 01-92, 96-45; GN Docket No. 09-51 at 2 (filed Aug. 2, 2011) (Free Press Aug. 2, 2011 *Ex Parte* Letter).

²⁴¹⁴ See *Initiation of Cost Review Proceeding for Residential and Single-Line Business Subscriber Line Charge (SLC) Caps*, CC Docket Nos. 96-262, 94-1, Public Notice, 16 FCC Rcd 16705 (2001) (quoting *CALLS Order*, 15 FCC Rcd at 12994, para. 83).

nonregulated services.²⁴¹⁵ Are carriers' regulated common line recovery bearing an appropriate share of the cost of the local loop, or too much (or too little)?

1332. More broadly, if carriers increasingly are moving to IP networks, to what extent is voice telephone service simply one of many applications on that network, such that regulated charges specific to voice might no longer be appropriate?²⁴¹⁶ In particular, should the Commission eliminate SLCs? If so, when should they be eliminated, and through what process? Should the Commission eliminate SLCs as of a date certain absent a showing by a carrier that such revenue is justified?²⁴¹⁷ If so, should the Commission require a showing comparable to that required under the Total Cost and Earnings Review,²⁴¹⁸ or some other showing? Likewise, to the extent that some carriers continue to receive revenue from a universal service mechanism specifically designed to address common line recovery, such as ICLS, as a supplement to SLC revenues, should that be eliminated or modified, as well? If so, when, and how, should that support be eliminated? If not, how would that continuing support mechanism operate in the absence of SLCs?

1333. Even if the overall magnitude of common line revenues are justified and SLCs are retained, we seek further comment on the operation of the SLCs and the specific levels of the SLC caps, including whether they should be modified in any respect. For example, should the Commission require greater disaggregation or deaveraging of SLCs, either in terms of classes of customers or services or in terms of geographic areas? If so, what is the appropriate scope of customers, services, or geography? Would new cap(s) be appropriate for the new categories of SLCs, and if so, at what level? Conversely, as part of our intercarrier compensation reform, we allow the ARC to be set at the holding-company level. Would that, or another more aggregated or averaged approach be warranted, and if so, what?

1334. *Advertising SLCs.* As described in the Order, although the ARC is distinct from the SLC for regulatory purposes, we expect incumbent LECs to include the new ARC charges as part of the SLC charge for billing purposes.²⁴¹⁹ However, commenters observe that SLC charges frequently are not included in the advertised price for incumbent LECs' services, making it more difficult for customers to evaluate and compare the price of service among different providers.²⁴²⁰ Thus, we seek comment on requiring incumbent LECs (and other carriers, if they charge a SLC or its equivalent) to include such charges in their advertised price for services subject to SLC charges. Could the Commission require that carriers include SLC charges (including ARCs) in their advertised price for services, or condition their ability to impose SLCs or ARCs or to receive CAF support on their doing so? Are there alternative approaches the Commission should take to ensure greater disclosure of such charges to customers in a way that advances price comparison and evaluation?²⁴²¹ Could the Commission adopt such requirements pursuant to its authority under section 201(b) of the Act²⁴²² or on another basis?

²⁴¹⁵ See, e.g., NASUCA *USF/ICC Transformation NPRM* Reply at 157-158.

²⁴¹⁶ See, e.g., NASUCA *USF/ICC Transformation NPRM* Comments at 98 n. 281; NASUCA *USF/ICC Transformation NPRM* Reply at 158 (citing AT&T *USF/ICC Transformation NPRM* Comments at 24).

²⁴¹⁷ Cf. NASUCA *August 3 PN* Comments at 57-60; AARP *August 3 PN* Comments at 2.

²⁴¹⁸ See *supra* Section XIII.G.

²⁴¹⁹ See *supra* Section XIII.F.1.

²⁴²⁰ See, e.g., CRUSIR *August 3 PN* Comments at 17; NASUCA *August 3 PN* Comments at 24 n.54, 72; Illinois AG Oct. 25, 2006 Missoula Plan Comments, CC Docket No. 01-92 at 7.

²⁴²¹ See, e.g., *Consumer Information and Disclosure; Truth-in-Billing and Billing Format; IP-Enabled Services*, CG Docket No. 09-158, CC Docket No. 98-170, WC Docket No. 04-36, Notice of Inquiry, 24 FCC Rcd 11380, 11389- (continued...)

P. IP-to-IP Interconnection Issues

1335. As recommended by the National Broadband Plan, the Commission has set an express goal of facilitating industry progression to all-IP networks,²⁴²³ and ensuring the transition to IP-to-IP interconnection is an important part of achieving that goal. As stated in recommendation 4.10 of the National Broadband Plan, “[t]he FCC should clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection.”²⁴²⁴ Likewise, in the *USF/ICC Transformation NPRM* the Commission sought comment on “steps we can take to promote IP-to-IP interconnection.”²⁴²⁵ We received some comment on the issue but hope to develop a more complete record on IP-to-IP interconnection issues, in light of the reforms undertaken in the Order.²⁴²⁶ As we state in the Order above, the duty to negotiate in good faith has been a longstanding element of interconnection requirements under the Communications Act and does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise.²⁴²⁷ Commission requirements implementing the duty to negotiate IP-to-IP interconnection in good faith could take their primary guidance from one or more of various provisions of the Communications law—Sections 4, 201, 251(a), or 251(c) of the Communications Act, or 706 of the 1996 Act. We seek comment on which of the available approaches is most consistent with our statutes as a whole and sound policy. We therefore seek comment on the implementation of the good faith negotiation requirement, and also seek comment on any additional actions the Commission should “take to encourage transitions to IP-to-IP interconnection where that is the most efficient approach.”²⁴²⁸

1. Background and Overview

1336. Interconnection among communications networks is critical given the role of network effects. Network effects arise when the value of a product increases with the number of consumers who

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92, 11395 paras. 25-34, 45 (2009) (seeking comment on information needed by consumers to make purchasing decisions); *Truth-in-Billing and Billing Format*, CC Docket No. 98-170, CG Docket No. 04-208, Second Report and Order, Declaratory Ruling, and Second Further Notice of Proposed Rulemaking, 20 FCC Rcd 6448, 6476-77, paras. 55-56 (2005) (seeking comment on disclosures at the point of sale and “tentatively conclude that carriers must disclose the full rate, including any non-mandated line items and a reasonable estimate of government mandated surcharges, to the consumer at the point of sale”).

²⁴²² See, e.g., *NOS Communications, Inc. and Affinity Network Inc.*, File No. EB-00-TC-005, Apparent Liability for Forfeiture, 16 FCC Rcd 8133, 8140, para. 15 (2001) (finding that certain long distance carriers “have apparently engaged in unjust or unreasonable marketing practices in violation of section 201(b) of the Act”).

²⁴²³ National Broadband Plan at 49.

²⁴²⁴ *Id.*

²⁴²⁵ *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4773, para. 678.

²⁴²⁶ We note that the Commission’s Technical Advisory Council (TAC) is also evaluating issues relating to the transition of networks to IP, and seeking comment on these issues at this time avoids prejudging the issues they are considering. See, e.g., Technical Advisory Council Chairman’s Report (Apr. 22, 2011) available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-306065A1.pdf; Technology Advisory Council, Status of Recommendations, June 29, 2011 available at <http://transition.fcc.gov/oet/tac/TACJune2011mtgfullpresentation.pdf>.

²⁴²⁷ See *supra* Section XIV.

²⁴²⁸ National Broadband Plan at 49.

purchase it.²⁴²⁹ For example, telephone service to an individual subscriber becomes more valuable to that subscriber as the number of other people he or she can reach using the telephone increases. Because telecommunications carriers interconnect their individually-owned networks, their subscribers may complete a call to subscribers on all other carriers' networks. This likewise advances the Act's directive to "make available, so far as possible, to all people of the United States . . . a rapid, efficient, Nation-wide, and world-wide wire and radio communications service."²⁴³⁰

1337. In some circumstances, network owners may have incentives to refuse reasonable interconnection to other network operators.²⁴³¹ For example, the Commission previously has found "that incumbent LECs have no economic incentive . . . to provide potential competitors with opportunities to interconnect with and make use of the incumbent LEC's network and services."²⁴³² Consequently, "[n]egotiations between incumbent LECs and new entrants are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires."²⁴³³ In principle, similar incentives can arise between other types of carriers with disparate negotiating leverage.²⁴³⁴

1338. Given these considerations, both the Act and Commission rules have required interconnection among carriers under different policy frameworks, which varied both in scope and specificity based on the particular circumstances. For example, all carriers are subject to a general duty to interconnect directly or indirectly,²⁴³⁵ with LECs also subject to certain rate regulations,²⁴³⁶ and

²⁴²⁹ See, e.g., *Applications of AT&T Wireless Services, Inc. and Cingular Wireless Corporation For Consent to Transfer Control of Licenses and Authorizations*, WT Docket Nos. 04-70, 04-254, 04-323, Memorandum Opinion and Order, 19 FCC Rcd 21522, 21578, para. 143 (2004) (citing Carl Shapiro and Hal Varian, *Information Rules*, Harvard Business School Press, Boston, 1999, at 13).

²⁴³⁰ 47 U.S.C. §151.

²⁴³¹ See, e.g., *Interconnection and Resale Obligations Pertaining to Commercial Mobile Radio Services*, CC Docket No. 94-54, Second Notice of Proposed Rule Making, 10 FCC Rcd 10666, 10682-83, paras. 31-32 (1995) (*CMRS Interconnection Second NPRM*); see also *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended, et al.*, WC Docket No. 10-143, CC Docket No. 01-92, GN Docket No. 09-51, Declaratory Ruling, 26 FCC Rcd 8259, 8266-67, paras. 13-14 (2011) (*Interconnection Clarification Order*).

²⁴³² *Local Competition First Report and Order*, 11 FCC Rcd at 15528, para. 55. See also *Applications of Ameritech Corp., Transferor, and SBC Communications Inc., Transferee*, CC Docket No. 98-141, Memorandum Opinion and Order, 14 FCC Rcd 14712, 14818, para. 238 (1999).

²⁴³³ *Local Competition First Report and Order*, 11 FCC Rcd at 15528, para. 55. See also *id.* ("The inequality of bargaining power between incumbents and new entrants militates in favor of rules that have the effect of equalizing bargaining power in part because many new entrants seek to enter national or regional markets.").

²⁴³⁴ See, e.g., *CMRS Interconnection Second NPRM*, 10 FCC Rcd at 10682-83, paras. 31-32 (describing CMRS providers' possible incentives to deny reasonable interconnection to competitors under certain circumstances).

²⁴³⁵ 47 U.S.C. § 251(a)(1) ("[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers"). Even prior to the 1996 Act, the Commission required interconnection pursuant to section 201 and, in the context of CMRS providers, section 332. See, e.g., *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9137-38, paras. 59-61 (2004); *Implementation of Sections 3(n) and 332 of the Communications Act; Regulatory Treatment of Mobile Services*, GN Docket No. 93-252, Second Report and Order, 9 FCC Rcd 1411, 1497-98, para. 230 (1994) (*CMRS Second Report and Order*).

²⁴³⁶ Compare, e.g., *Investigation of Access and Divestiture Related Tariffs; MTS and WATS Market Structure*, CC Docket No. 83-1145 Phase I, CC Docket No. 78-72 Phase I, Memorandum Opinion and Order, 98 FCC 2d 730 (continued...)

incumbent LECs subject to a more detailed framework.²⁴³⁷ In other contexts—notably, interconnection among Internet backbone providers—the Commission historically has chosen not to “monitor or exercise authority over” such interconnection on the grounds “that premature regulation ‘might impose structural impediments to the natural evolution and growth process which has made the Internet so successful.’”²⁴³⁸

1339. The voice communications marketplace is currently transitioning from traditional circuit-switched telephone service to the use of IP services. There are conflicting views regarding what role interconnection requirements should play in an increasingly IP-centric voice communications market. Some competitive providers seek to ensure that existing interconnection protections continue to apply as voice traffic migrates from TDM to IP.²⁴³⁹ Other providers see various shortcomings in existing interconnection regimes, and advocate a modified regulatory approach for IP-to-IP interconnection that they believe would result in improvements over the existing regimes.²⁴⁴⁰ Similarly, other providers seek to have interconnection requirements imposed more broadly than just for voice services.²⁴⁴¹ Even some smaller incumbent LECs cite concerns about a lack of negotiating leverage relative to other providers in the absence of a right to IP-to-IP interconnection.²⁴⁴² At the same time, other incumbent LECs contend that, whatever their historical marketplace position with respect to voice telephone services, their position with respect to IP services does not position them to use interconnection to disadvantage other providers, and does not warrant singling out incumbent LECs for application of legacy interconnection requirements.²⁴⁴³ They also suggest caution regarding overly-prescriptive approaches based on the

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(1984) (holding that “the Commission is authorized to establish charges for carrier interconnections”) *with, e.g., Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers; Equal Access and Interconnection Obligations Pertaining to Commercial Mobile Radio Service Providers*, CC Docket No. 94-54, 95-185, Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5025, para. 11 (1996) (“In the absence of market power or other distortions, efficient forms of interconnection may develop through private negotiation. For example, small interexchange carriers interconnect with one another, and purchase and resell one another’s services, with little or no outside involvement.”).

²⁴³⁷ 47 U.S.C. § 251(c)(2) (requiring incumbent LECs to provide for direct, physical interconnection between the incumbent’s network and the competing provider’s network). *See also* 47 U.S.C. § 251(c)(1) (requiring incumbent LECs to negotiate in good faith to implement the requirements of section 251(b) and (c)); 47 U.S.C. § 252 (providing for arbitration of interconnection agreements involving incumbent LECs).

²⁴³⁸ *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, CC Docket No. 98-146, Report, 14 FCC Rcd 2398, 2451-52, para. 105 (1999); *see also Applications filed by Global Crossing Limited and Level 3 Communications, Inc. for Consent to Transfer Control*, IB Docket No. 11-78, Memorandum Opinion and Order and Declaratory Ruling, DA 11-1643, paras. 18-19 (WCB, IB rel. Sept. 29, 2011).

²⁴³⁹ *See, e.g., COMPTEL USF/ICC Transformation NPRM Comments* at 4-9.

²⁴⁴⁰ *See, e.g., Sprint USF/ICC Transformation NPRM Comments* at 16-18.

²⁴⁴¹ *See, e.g., Google USF/ICC Transformation NPRM Comments* at 10-11. *See also AT&T USF/ICC Transformation NPRM Reply* at 9 (“[S]ome commenters ask the Commission to regulate Internet peering and transit relationships: the arrangements that allow *broadband ISPs* to exchange packets containing data from various applications, including voice, between their respective subscribers.”).

²⁴⁴² *See, e.g., Nebraska Rural Companies August 3 PN Comments* at 60.

²⁴⁴³ *See, e.g., CenturyLink USF/ICC Transformation NPRM Comments* at 54-55.

potential for carrier-by-carrier variations in determining the timing of an efficient transition to IP-to-IP interconnection and complexities in the implementation of such requirements.²⁴⁴⁴

1340. The comprehensive reforms we adopt today takes initial steps to eliminate barriers to IP-to-IP interconnection. In this regard, we note that the intercarrier compensation transition we adopt in the Order specifies default rates but leaves carriers free to negotiate alternative arrangements.²⁴⁴⁵ We conclude that the preexisting intercarrier compensation regime did not advance technology neutral interconnection policies because it provided LECs a more certain ability to collect intercarrier compensation under TDM-based interconnection, with less certain compensation for IP-to-IP interconnection. Under our new framework, even if a carrier historically has relied on intercarrier compensation revenue streams, it need not wait until intercarrier compensation reform is complete to enter IP-to-IP interconnection arrangements. Rather, to the extent that certainty regarding intercarrier compensation is important to a particular carrier during the transition, it is free to negotiate appropriate compensation as part of an arrangement for IP-to-IP interconnection under our transitional framework.

1341. Some commenters express concern that additional protections are needed to ensure IP-to-IP interconnection, however.²⁴⁴⁶ As discussed above, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic, and that such good faith negotiations will result in interconnection arrangements between IP networks,²⁴⁴⁷ and we seek comment below on which of the various possible statutory provisions as well as standards and enforcement mechanisms we should adopt to implement our expectation that carriers negotiate in good faith. We also seek comment on actions the Commission could take to, at a minimum, encourage the transition to IP-to-IP interconnection where efficient. In particular, we propose that if a carrier that has deployed an IP network receives a request to interconnect in IP, but instead requires TDM interconnection, the costs of the IP-to-TDM conversion would be borne by the carrier that elected TDM interconnection. We seek comment on this proposal. We also seek comment on other measures that Commission might adopt to encourage efficient IP-to-IP interconnection.

1342. We also seek comment on proposals to require IP-to-IP interconnection in particular circumstances under different policy frameworks. In this regard, we observe that section 251 of the Act is one of the key provisions specifying interconnection requirements, and that its interconnection requirements are technology neutral—they do not vary based on whether one or both of the interconnecting providers is using TDM, IP, or another technology in their underlying networks. The specific application of the interconnection requirements of section 251 depend upon factual circumstances and other considerations, and we seek comment below on the resulting implications in the context of IP-to-IP interconnection, along with other legal authority that might bear on the Commission's ability to adopt any particular IP-to-IP interconnection policy framework. Moreover, we seek comment on how to carefully circumscribe the scope of traffic or services subject to any such framework to leave issues to the marketplace that appropriately can be resolved there.

1343. Finally, we seek comment on proposals that the Commission leave IP-to-IP interconnection to unregulated commercial agreements. Although the Commission has relied on such an approach in some contexts in the past, we seek comment on the factual basis for whether, and when, to adopt such an approach here.

²⁴⁴⁴ See, e.g., Verizon *USF/ICC Transformation NPRM* Reply at 36-37.

²⁴⁴⁵ See *supra* Section XII.C.

²⁴⁴⁶ See generally *infra* Section XVII.P.4.

²⁴⁴⁷ See *supra* Section XVI.

2. Scope of Traffic Exchange Covered By an IP-to-IP Interconnection Policy Framework

1344. It is important that any IP-to-IP interconnection policy framework adopted by the Commission be narrowly tailored to avoid intervention in areas where the marketplace will operate efficiently. We thus seek comment on the scope of traffic exchange that should be encompassed by any IP-to-IP interconnection policy framework for purposes of this proceeding. We stated in the Order that we expect carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic. But, we note that various types of services can be transmitted in IP format, and commenters recognize that many pairs of providers are exchanging both VoIP traffic and other IP traffic with each other.²⁴⁴⁸ Further, different commenters appear to envision IP-to-IP interconnection policy frameworks encompassing different categories of services provided using IP transmission. We seek comment on those issues below, along with any other recommendations commenters have for defining the scope of an IP-to-IP interconnection policy framework in this context. For any proposed scope of IP-to-IP interconnection, we also seek comment on whether it is necessary, or appropriate, to address classification issues associated with particular IP services.

1345. Some comments proposed that an IP-to-IP interconnection framework address the exchange of voice traffic. For some commenters, this would broadly encompass all VoIP traffic, whether referred to as “packetized voice” traffic, “IP voice” traffic, or simply “VoIP.”²⁴⁴⁹ Is it technologically possible to adopt such an approach? Does it make sense as a policy matter to adopt an IP-to-IP interconnection framework focused specifically on voice service, and how would such an approach be implemented? For example, would this approach have the result of compelling providers to exchange VoIP traffic under a different technological or legal arrangement from what those providers use to exchange other IP traffic? Could the interconnection framework be structured to provide certain interconnection rights with respect to the exchange of VoIP traffic, while giving those providers the freedom to exchange other IP traffic in a consistent manner? What impact, if any, would such an approach have on any preexisting arrangements for the exchange of non-voice IP traffic?

1346. Other comments propose IP-to-IP interconnection frameworks that would encompass narrower categories of VoIP services, such as “managed” or “facilities-based” VoIP, as distinct from “over the top” VoIP.²⁴⁵⁰ Are there advantages or disadvantages to focusing on this narrower universe of voice traffic as a technological, policy, or legal matter? For example, are there different costs or service quality requirements associated with such services such that those services would warrant distinct treatment? How would such traffic or services be defined? Would interconnection for other VoIP services be left unaddressed at this time? Or would they be subject to a different policy framework, and if so, what framework would be appropriate?

²⁴⁴⁸ See, e.g., *id.* at 24; AT&T *USF/ICC Transformation NPRM Reply* at 15.

²⁴⁴⁹ See, e.g., Sprint *USF/ICC Transformation NPRM Comments* at 16-28; T-Mobile *USF/ICC Transformation NPRM Comments* at 17, 20-21; XO *USF/ICC Transformation NPRM Comments* at 17; Cablevision *USF/ICC Transformation NPRM Reply* at 3; Cox *USF/ICC Transformation NPRM Reply* at 2-3; Letter from Tamar E. Finn, Counsel for PAETEC, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket Nos. 05-337, 07-135, 10-90; GN Docket No. 09-51 at 1 (filed July 19, 2011).

²⁴⁵⁰ See, e.g., Cbeyond et al. Section XV Comments at 10 & n.28; Cbeyond et al. *USF/ICC Transformation NPRM Reply* at 7-8 & nn.12, 13; COMPTTEL Aug. 11, 2011 *Ex Parte Letter*, Attach. at 2-3 & n.2.

1347. Alternatively, other comments seem to anticipate that IP interconnection policies could encompass IP traffic other than voice.²⁴⁵¹ Would it be appropriate to encompass any non-voice IP traffic or services in such a framework, and how would they be defined? We note, for example, that the Commission historically has not regulated interconnection among Internet backbone providers. If a different interconnection policy framework were adopted in this context, how would it be distinguishable? To what extent would an IP-to-IP interconnection policy framework address interconnection rights for both voice and non-voice traffic, or to what extent would providers simply have the freedom to use otherwise-available interconnection arrangements to exchange particular IP traffic or services?

3. Good Faith Negotiations for IP-to-IP Interconnection

a. Standards and Enforcement for Good Faith Negotiations

1348. Building upon our statement in the Order that the duty to negotiate in good faith under the Act does not depend upon the network technology underlying the interconnection, whether TDM, IP, or otherwise, we seek comment below on the particular statutory authority that provides the strongest basis for the right to good faith negotiations for IP-to-IP interconnection. As a threshold matter, however, we seek comment on the appropriate scope and nature of requirements for good faith negotiations generally that should apply, as well as the associated implementation and enforcement.²⁴⁵² For example, should the Commission focus on all carriers generally, or adopt differing standards for particular subsets of carriers such as terminating carriers, incumbent LECs, or carriers that may have market power in the provision of voice services, or should we focus on some other scope of providers? Should the right to good faith negotiations for IP-to-IP interconnection be limited to traffic associated with particular types of services?²⁴⁵³ How would the Commission determine whether or not a particular provider negotiated in good faith under such an approach? For example, should such claims be evaluated in the same manner as claims that a carrier failed to negotiate in good faith as required by section 251(c)(1) of the Act,²⁴⁵⁴ or regulatory frameworks from other contexts?²⁴⁵⁵ Are there other criteria that commenters believe the

²⁴⁵¹ See, e.g., Google *USF/ICC Transformation NPRM* Comments at 10-11 (“As part of its reform, the FCC also should affirm that broadband service providers have a duty pursuant to Section 251(a)(1) of the Communications Act to interconnect with other network providers for the exchange of telecommunications traffic, including local traffic encoded in IP.”); AT&T *USF/ICC Transformation NPRM* Reply at 9 (“[S]ome commenters ask the Commission to regulate Internet peering and transit relationships: the arrangements that allow *broadband ISPs* to exchange packets containing data from various applications, including voice, between their respective subscribers.”); Google June 16, 2011 *Ex Parte* Letter at 3 (“While many IP-based services (including VoIP) may be properly classified as information services, telecommunications carriers remain subject to the requirements of § 251(a) insofar as they are engaging in transport of telecommunications.”). Cf. Cox *USF/ICC Transformation NPRM* Reply at 4 (“Cox encourages the Commission to recognize that there should be continuing review of the regulatory framework for IP-based interconnection of voice and other interconnected services.”).

²⁴⁵² See, e.g., Sprint July 29, 2011 *Ex Parte* Letter at 10-11 (advocating a requirement to negotiate in good faith); Letter from Ad Hoc *et al.* to Hon. Julius Genachowski, Chairman, FCC, *et al.*, WC Docket Nos. 10-90, 07-135, 06-122, 05-337, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51 at 10 (filed Aug. 18, 2011) (Ad Hoc Aug. 18, 2011 *Ex Parte* Letter) (same).

²⁴⁵³ See *supra* Section XVII.P.2.

²⁴⁵⁴ See, e.g., 47 C.F.R. § 51.301(c) (setting forth a non-exhaustive list of eight specific actions that, if proven, would violate the duty to negotiate in good faith under section 251(c)(1)).

²⁴⁵⁵ See, e.g., *Improving Public Safety Communications in the 800 MHz Band*, WT Docket 02-55, ET Docket Nos. 00-258, 95-18, RM-9498, RM-10024, Report and Order, Fifth Report and Order, Fourth Memorandum Opinion and Order, and Order, 19 FCC Rcd 14969, 15076-15077, para. 201 & n.524 (2004) (requiring good faith in rebanding negotiations); *CMRS Interconnection Second NPRM*, 10 FCC Rcd at 10682-83, paras. 31-32. See also, e.g., 2011 (continued...)

Commission should address with respect to the standards and enforcement for good faith negotiations? For example, should enforcement occur at the Commission, state commissions, courts, or other forums?

1349. Would the Commission need to address or provide guidance regarding the contours of a range of reasonableness for IP-to-IP interconnection rates, terms, and conditions themselves to assess whether a party's negotiating positions are reasonable and in good faith? For example, would the Commission need to specify whether direct physical interconnection is required, or whether indirect interconnection could be sufficient in order to judge whether particular negotiations are in good faith? Are there other criteria or guidance regarding the substance of the underlying IP-to-IP interconnection that the Commission would need to specify to make enforcement of a good faith negotiation requirement more administrable?

1350. We observe that certain statutory provisions may give the Commission either broader or narrower leeway to define the scope of entities covered by the requirement, the standards for evaluating whether negotiations are in good faith, and the associated enforcement mechanisms. Thus, in addition to seeking comment on the particular statutory authority we should adopt for good faith negotiation requirements below, commenters should discuss any limitations on the substance and enforcement of the good faith negotiation requirements arising from the particular statutory provision at issue, or what particular approaches to defining and enforcing good faith negotiations are appropriate in the context of the Commission's exercise of particular legal authority. In addition, we seek comment not only on any rules the Commission would need to adopt or revise, but also any forbearance from statutory requirements that would be needed to implement a particular framework for good faith negotiations for IP-to-IP interconnection.²⁴⁵⁶

b. Statutory Authority To Require Good Faith Negotiations

1351. In this section, we note that there are various sections of the Act upon which the right to good faith negotiations for IP-to-IP interconnection could be grounded, and seek comment on the policy implications of selecting particular provisions of the Act. In the subsequent section, we seek comment on the possible legal authority commenters have cited in support of substantive IP-to-IP interconnection obligations, including sections 251(a)(1), 251(c)(2), and other provisions of the Act; section 706 of the 1996 Act; as well as the Commission's ancillary authority under Title I. We thus likewise seek comment on those and other provisions as a basis for the right to good faith negotiations regarding IP-to-IP interconnection, as well as resulting implications for the scope and enforcement of that right.

1352. We seek comment on whether we should utilize section 251(a)(1) as the basis for the requirement that all carriers must negotiate in good faith in response to a request for IP-to-IP interconnection. Section 251(a)(1) requires all telecommunications carriers to interconnect directly or indirectly.²⁴⁵⁷ The requirements of this provision thus extend broadly to all telecommunications carriers, and are technology neutral on their face with respect to the transmission protocol used for purposes of interconnection. We thus seek comment on whether the Commission should rely upon section 251(a)(1) as the primary source of a right to good faith negotiations for IP-to-IP interconnection. Should the Commission create a specific enforcement mechanism and, if so, should the remedy be at the state level
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Pole Attachment Order, 26 FCC Rcd at 5286, para. 100 (revising the Commission's rules to require executive-level negotiations for pole attachments to demonstrate good faith); 47 C.F.R. § 1.721(a)(8) (requiring that complaints include "certification that the complainant has, in good faith, discussed or attempted to discuss the possibility of settlement"); 47 C.F.R. § 76.65 (requiring good faith in retransmission consent negotiations).

²⁴⁵⁶ 47 U.S.C. § 160.

²⁴⁵⁷ 47 U.S.C. § 251(a)(1). See also *infra* paras. 1381-1383.

or with the Commission? We note that section 251(c)(1) of the Act expressly adopts a requirement for incumbent LECs, and requesting carriers seeking interconnection with them, to “negotiate in good faith in accordance with section 252” to implement the requirements of sections 251(b) and (c).²⁴⁵⁸ Although the requirements of section 251(a)(1), standing alone, are not encompassed by that provision, we do not believe that would preclude the Commission from concluding that a separate good faith negotiation requirement is required under section 251(a)(1). What is the appropriate mechanism for enforcing a right to good faith negotiations for IP-to-IP interconnection under 251(a)(1)? Similarly, to the extent that the good faith negotiation requirement adopted for section 251(a)(1) interconnection must be distinct from that imposed by section 251(c)(1), would the Commission need to adopt a different approach to evaluating claimed breaches of good faith from the framework used under section 251(c)(1)?²⁴⁵⁹ If so, what framework for evaluating such claims should the Commission adopt?

1353. We also seek comment on whether the requirement of good faith negotiations for IP-to-IP interconnection should be based on section 251(c)(2). Section 251(c)(2) requires incumbent LECs to provide direct physical interconnection to requesting carriers when the criteria of sections 251(c)(2)(A)-(D) are met.²⁴⁶⁰ As noted above, when section 251(c)(2) applies, it is subject to a statutory requirement of good faith negotiations under section 251(c)(1), with enforcement available through state arbitrations under section 252.²⁴⁶¹ Further, the Commission already has adopted guidance for evaluating claimed breaches of good faith negotiations under section 251(c)(1). Would that guidance remain appropriate for evaluating alleged failure to negotiate IP-to-IP interconnection in good faith under this provision? Under the terms of section 251(c), we believe that the obligations of section 251(c)(2) apply only to incumbent LECs, and thus under the terms of the statute the associated duty to negotiate interconnection in good faith under section 251(c)(1) only would extend to incumbent LECs and requesting carriers seeking interconnection with them. We note, however, that good faith negotiations under the Order are expected of all carriers, not just incumbent LECs. As a result, would the Commission need to rely on additional statutory provisions for the basis of good faith negotiation requirements for IP-to-IP interconnection among other types of carriers?

1354. Alternatively, we seek comment on whether the obligation to negotiate in good faith for IP-to-IP interconnection arrangements should be grounded in section 201, particularly in conjunction with other provisions of the Act and the Clayton Act.²⁴⁶² The Commission previously interpreted section 2(a), 201 and 202 collectively “as requiring common carriers to negotiate the provision of their services in good faith” and thus requiring LECs to negotiate interconnection in good faith with CMRS providers.²⁴⁶³ It found it appropriate to extend the requirement of good faith negotiations not only to interconnection for the exchange of interstate services, but for intrastate services as well, reasoning that “departures from our good faith requirement [in the context of intrastate services] could severely affect interstate communications by preventing cellular carriers from obtaining interconnection agreements and consequently excluding them from the nationwide public telephone network.”²⁴⁶⁴ The Commission

²⁴⁵⁸ 47 U.S.C. § 251(c)(1).

²⁴⁵⁹ See 47 C.F.R. § 51.301(c).

²⁴⁶⁰ 47 U.S.C. § 251(c)(2)(A)-(D). See also *infra* paras. 1384-1393.

²⁴⁶¹ 47 U.S.C. §§ 251(c)(1); 252.

²⁴⁶² See *infra* para. 1393.

²⁴⁶³ *The Need to Promote Competition and Efficient Use of Spectrum for Radio Common Carrier Services*, Declaratory Ruling, 2 FCC Rcd 2910, 2912-13, para. 21 (1987) (*CMRS Interconnection Declaratory Ruling*).

²⁴⁶⁴ *Id.*

further concluded that its “authority to mandate good faith negotiations is also derived from Sections 309(a) and 314 of the Act and Section 11 of the Clayton Act, which require the Commission to remedy anticompetitive conduct,” given that delays in the negotiating process could place a carrier at a competitive disadvantage.²⁴⁶⁵ We seek comment on whether we should adopt these provisions as the legal basis for a requirement of good faith negotiations among carriers regarding IP-to-IP interconnection. Would the considerations cited by the Commission in the context of LEC-CMRS interconnection likewise justify a right to good faith negotiations in this context? If so, what standards and processes should apply in evaluating and enforcing good faith negotiations under this provision? We note that interconnection with LECs for access traffic historically—and as preserved by 251(g)—was addressed through exchange access and related interconnection regulations, including through the purchase of tariffed access services. How should any right to good faith negotiation of IP-to-IP interconnection for the exchange of access traffic be reconciled with those historical regulatory frameworks? Does the Commission’s action in the accompanying Order to supersede the preexisting access charge regime and adopt a transition to a new regulatory framework affect this evaluation?

1355. In addition, we seek comment on the relative merits of section 706 of the 1996 Act as the statutory basis for carriers’ duty to negotiate IP-to-IP interconnection in good faith. As discussed below, some commenters suggest that section 706 would provide the Commission authority to regulate IP-to-IP interconnection.²⁴⁶⁶ Would the statutory mandate in section 706 justify a requirement that carriers negotiate in good faith regarding IP-to-IP interconnection? If so, what standards and enforcement processes would be appropriate? If the Commission were to rely on section 706 of the 1996 Act to impose a good faith negotiation requirement, would it also need to adopt associated complaint procedures, or could the existing informal and formal complaint processes, which derive from section 208, nonetheless be interpreted to extend more broadly than alleged violations of Title II duties? Could the Commission, relying on section 706, extend the obligation to negotiate in good faith beyond carriers to include all providers of telecommunications? If so, should the Commission do so?

1356. We also seek comment on whether section 256 provides a basis for the good faith negotiation requirement for IP-to-IP interconnection. Although section 256(a)(2) says that the purpose of the section is “to ensure the ability of users and information providers to seamlessly and transparently transmit and receive information between and across telecommunications networks,”²⁴⁶⁷ section 256(c) provides that “[n]othing in this section shall be construed as expanding or limiting any authority that the Commission may have under law in effect before February 8, 1996.”²⁴⁶⁸ Particularly in light of section 256(c), is it reasonable to interpret section 256 as a basis for the good faith negotiation requirement? If so, what are the appropriate details and enforcement mechanism? Even if it is not a direct source of authority in that regard, should it inform the Commission’s interpretation and application of other statutory provisions to require carriers to negotiate IP-to-IP interconnection in good faith?

1357. Alternatively, should the Commission rely upon ancillary authority as a basis for requiring that carriers negotiate in good faith in response to requests for IP-to-IP interconnection? Because it is “communications by wire or radio,” the Commission clearly has subject matter jurisdiction

²⁴⁶⁵ *Id.* at 2913, para. 22.

²⁴⁶⁶ *See infra* para. 1394.

²⁴⁶⁷ 47 U.S.C. § 256(a)(2).

²⁴⁶⁸ 47 U.S.C. § 256(c); *see also Comcast*, 600 F.3d at 659 (acknowledging section 256’s objective, while adding that section 256 does not “expand[] . . . any authority that the Commission’ otherwise has under law”) (quoting 47 U.S.C. § 256(c)).