

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109
)	
Universal Service Reform – Mobility Fund)	WT Docket No. 10-208

**COMMENTS OF
CBEYOND, EARTHLINK, INTEGRA TELECOM, AND TW TELECOM**

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February 9, 2012

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Cbeyond, Inc. (“Cbeyond”), EarthLink, Inc. (“EarthLink”), Integra Telecom, Inc. (“Integra”), and tw telecom inc. (“tw telecom”) (collectively, the “Joint Commenters”), through their undersigned counsel, hereby submit these comments in the above-referenced dockets on various petitions for reconsideration and/or clarification of the *ICC/USF Transformation Order*.¹

¹ See *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (2011) (“*ICC/USF Transformation Order*” or “*Order*”).

I. INTRODUCTION AND SUMMARY.

The Commission should clarify two aspects of the *Order*. *First*, as Windstream and Frontier request, the Commission should make clear that it did not intend to flash cut intrastate originating access rates for intrastate toll VoIP-PSTN traffic to interstate levels. If the Commission did intend such a result, it should reconsider its decision because (1) the Commission does not have the statutory authority to reduce intrastate originating access rates; and (2) applying different originating access rates to intrastate toll VoIP-PSTN traffic for the first 18 months of the transition will only exacerbate the opportunities for arbitrage created by the Commission's treatment of terminating intrastate toll VoIP-PSTN traffic during that period.

Second, the Commission should clarify that it has the statutory authority to permit LECs that originate interstate toll traffic in IP format that is destined for the PSTN (as well as LECs that perform this originating access function for their retail VoIP partners) to assess originating interstate access charges. Contrary to USTelecom's argument, the Commission has authority under Section 201 of the Act to allow all LECs to assess such charges.

The Commission should also reject two requests for reconsideration of the *Order*. *First*, the Commission should reject USTelecom's proposal that LECs entering new markets before July 1, 2013 be required to charge interstate access rates for intrastate toll traffic. The proposal is anti-competitive and inconsistent with the Commission's policy that competitors be able to charge the same access rates as incumbents.

Second, the Commission should reject GCI's proposal that LECs be required to reduce interstate access rates to the level of intrastate access rates during the first two steps of the transition. Competitive LECs have only 18 months to adjust to the significant decreases in their intrastate access revenues as a result of the rate reductions in the *Order* and requiring

simultaneous reductions to some interstate access rates will exacerbate this already difficult transition.

II. DISCUSSION

A. The Commission Should Clarify That LECs Are Permitted To Assess Intrastate Originating Access Charges For Intrastate Toll VoIP-PSTN Traffic.

Windstream and Frontier ask the Commission to clarify that the *Order* does not immediately reduce intrastate originating access rates (to interstate levels) for toll calls that originate on the PSTN and terminate in IP format.² The Joint Commenters support this request. As Windstream and Frontier explain, the *Order* “is clear in its purpose to not reduce (and only cap) existing interstate and intrastate originating access rates for PSTN-originated traffic.”³ In addition, the Commission repeatedly states—including in its discussion of intercarrier compensation for toll VoIP-PSTN traffic—that it will address reductions in originating access charges in the FNPRM proceeding.⁴ Given that some service providers are apparently claiming that the *Order* requires immediate reductions in intrastate originating access rates for intrastate toll VoIP-PSTN traffic,⁵ the Commission should clarify that it never intended such a result.

² See Windstream and Frontier Petition for Reconsideration and/or Clarification, WC Dkt. Nos. 10-90 et al., at 21 (filed Dec. 29, 2011) (“Windstream/Frontier Petition”).

³ *Id.* at 24.

⁴ See *Order* n.1976 (explaining that “originating access charges” are “subject to the phase-down and elimination of those charges pursuant to a transition to be specified in response to the FNPRM”); see also *id.* ¶ 818 (“Although we do not establish the transition for rate reductions [of originating access charges] to bill-and-keep in this Order, we seek comment in the FNPRM on the appropriate transition and recovery mechanism for ultimately phasing down originating access charges”); *id.* ¶ 1298 (“Below, we seek comment on that final transition for *all* originating access charges.”) (emphasis in original).

⁵ See Windstream/Frontier Petition at 26.

Moreover, if the Commission did intend such a result, it should reconsider its decision for several reasons. *First*, the Commission does not have the statutory authority to reduce (or even cap) intrastate originating access rates. Section 251(b)(5) of the Act addresses only the “transport and termination of telecommunications,”⁶ and no other provision of the Act grants the Commission authority over intrastate originating access services.

Second, a flash cut in intrastate originating access rates for toll VoIP-PSTN traffic to interstate levels would only increase opportunities for regulatory arbitrage. The Commission has already subjected intrastate toll VoIP-PSTN traffic to different (i.e., lower) *terminating* access rates than other intrastate toll traffic for the first 18 months of the transition.⁷ As a result, toll service providers that terminate voice traffic on unaffiliated LECs’ networks have a strong incentive to misidentify all of their toll traffic as toll VoIP-PSTN traffic in order to minimize their intercarrier compensation liability. If the Commission were to subject intrastate toll VoIP-PSTN traffic to different (i.e., lower) *originating* access charges than other intrastate toll traffic, toll service providers (e.g., 8YY providers) that receive traffic originated on unaffiliated LECs’ networks would likewise have a strong incentive to misidentify all of the toll traffic they receive as PSTN-VoIP toll traffic in order to minimize their intercarrier compensation liability. Furthermore, as Windstream and Frontier point out, “because the timing for comprehensive reform of originating access rates is uncertain, this arbitrage opportunity could go on indefinitely.”⁸

⁶ 47 U.S.C. § 251(b)(5).

⁷ See *Order* ¶ 945 (holding that the “intercarrier compensation framework for VoIP-PSTN traffic . . . is subject to the reductions in intercarrier compensation rates required as part of th[e] transition” to “the new regulatory regime adopted in this Order,” i.e., the default transition to bill-and-keep for *terminating* traffic).

⁸ See Windstream/Frontier Petition at 28.

Finally, even if the Commission intended to flash cut intrastate originating access rates for toll VoIP-PSTN traffic, the Commission should not permit recovery from the access recovery mechanism for the resulting lost revenues.⁹ Allowing additional subsidies for revenue recovery would be inconsistent with the Commission’s “commitment to keeping within the CAF budget.”¹⁰ In addition, permitting incumbent LECs but not competitive LECs to recover the resulting lost intrastate originating access revenues would only exacerbate an already skewed intercarrier compensation regime. If that were not enough, competitive LECs and their customers would be required to help pay for the additional subsidies to incumbent LECs in the form of universal service contributions—contributions which are at a record high of 17.9 percent.¹¹

B. The Commission Should Clarify That It Has The Authority To Allow All LECs To Assess Interstate Originating Access Charges For Interstate Toll VoIP-PSTN Traffic.

USTelecom argues that the Commission lacks the authority to permit “VoIP providers” to impose interstate originating access charges.¹² USTelecom’s rationale is that Section 251(b)(5)

⁹ See *id.* at 28-29; see also Petition for Reconsideration and Clarification of The United States Telecom Association, WC Dkt. Nos. 10-90 et al., at 39 (filed Dec. 29, 2011) (“USTelecom Petition”).

¹⁰ *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Order on Reconsideration, FCC 11-189, n.22 (2011) (“*ICC/USF Reconsideration Order*”).

¹¹ See *Proposed First Quarter 2012 Universal Service Contribution Factor*, CC Dkt. No. 96-45, Public Notice, DA 11-2020 (rel. Dec. 14, 2011).

¹² See USTelecom Petition at 39. Presumably, USTelecom’s reference to “VoIP providers” in this context is to LECs that originate interstate toll traffic in IP format that is destined for the PSTN (as well as any LEC that performs this originating access function for an affiliated or unaffiliated retail VoIP partner). See *Order* ¶ 970 (permitting “a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner,

of the Act alone “cannot lawfully authorize the imposition of originating access charges, whether on a transitional or permanent basis.”¹³ But while the Commission brought all telecommunications traffic within the Section 251(b)(5) framework in the *Order*,¹⁴ the Commission did not abandon its authority to regulate interstate communications under other provisions of the Act, including Section 201.¹⁵ To the extent that it has not already done so, the Commission need only clarify that Section 201 of the Act provides it with ample authority to permit LECs that originate interstate toll traffic in IP format that is destined for the PSTN (as well as any LEC that performs this originating access function for an affiliated or unaffiliated retail VoIP partner) to assess originating interstate access charges.

This interpretation accords with the text of Section 201 and Commission precedent. Section 201(b) grants the Commission jurisdiction to ensure that all carrier “charges, practices, classifications, and regulations for and in connection with [interstate] communication service, [are] just and reasonable.”¹⁶ The Commission has relied on this provision, as well as Section 202(a), as the basis for regulating interstate originating access charges for decades.¹⁷ It may do

regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional TDM architecture”).

¹³ USTelecom Petition at 39.

¹⁴ *See Order* ¶ 764.

¹⁵ *See id.* ¶ 771 (relying on the Commission’s Section 201 authority to establish bill-and-keep as a default compensation mechanism for interstate traffic subject to Section 251(b)(5); *see also* 47 U.S.C. §251(i) (“Nothing in this section shall be construed to limit or otherwise affect the Commission’s authority under section 201.”)).

¹⁶ 47 U.S.C. § 201(b).

¹⁷ *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing Usage of the Public Switched Network by Information Service and Internet Access Providers*, Notice of Proposed Rulemaking, Third Report and Order,

so again now by concluding that it is just and reasonable for a LEC that originates interstate toll traffic in IP format that is destined for the PSTN to charge interstate originating access charges in accordance with the rules adopted in the *Order*.

Moreover, the Commission has held that it may simultaneously exercise its authority under Section 251(b)(5) and Section 201(b) of the Act to establish a regulatory regime governing traffic exchanged between carriers. In the context of ISP-bound traffic, the Commission explained that “addressing ISP-bound traffic through the section 251 framework does not diminish the Commission’s independent jurisdiction or authority to regulate traffic under other provisions of the Act.”¹⁸ The Commission retained “authority under section 201 to regulate ISP-bound traffic, despite acknowledging that such traffic is section 251(b)(5) traffic.”¹⁹ The Commission’s authority to rely on Section 201(b) is especially clear here because Section 251(b)(5) says nothing about traffic origination. It follows that the Commission remains free to exercise its authority under Section 201 to regulate interstate originating access charges associated with VoIP. Therefore, the Commission can allow all LECs to assess interstate originating access charges—for both interstate toll VoIP-PSTN traffic and interstate toll TDM-based traffic—under this provision.

and Notice of Inquiry, 11 FCC Rcd. 21354, ¶ 9 (1996) (“[A]ccess charges for interstate long-distance traffic are governed by sections 201 and 202 of the Act.”).

¹⁸ *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service; Lifeline and Link Up; Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing a Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475, ¶ 21 (2008), *aff’d*, 592 F.3d 139 (D.C. Cir. 2010).

¹⁹ *Id.*

C. The Commission Should Not Require LECs Entering New Markets Prior To July 1, 2013 To Charge Interstate Access Rates For Intrastate Toll Traffic.

USTelecom argues that a carrier entering a geographic market for the first time prior to July 1, 2013 should be required to charge interstate access rates for intrastate toll traffic.²⁰ The Commission should reject this proposal for several reasons. *First*, requiring new entrants to charge lower access rates than their competitors would place new entrants at a competitive disadvantage, thereby diminishing their incentive to enter new markets prior to July 1, 2013. There is no reason why the Commission should encourage potential new entrants to delay market entry until after July 1, 2013 in this manner.

Second, USTelecom's proposal is inconsistent with the Commission's access charge policies for competitive LECs. Those policies have been designed, appropriately, to ensure that competitors are able to charge the same access rates as incumbents.²¹ As the Commission has recognized, competitors "should not be 'deprived of revenue streams available to the incumbent[s]'" with which they compete.²²

While the Commission departed from this policy in the ISP-bound traffic context, there is no basis for applying the policy underlying intercarrier compensation for ISP-bound traffic to intercarrier compensation for all telecommunications traffic.²³ Specifically, the FCC found that allowing LECs to charge intercarrier compensation for the delivery of ISP-bound traffic created

²⁰ See USTelecom Petition at 37.

²¹ See generally *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 (2001) (adopting the CLEC benchmarking rule).

²² *Id.* ¶ 54.

²³ See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 81 (2001) (subsequent history omitted).

significant incentives for arbitrage that, in turn, harmed consumer welfare.²⁴ The Commission required existing competitors to transition their intercarrier compensation rates for the delivery of ISP-bound traffic to \$0.0007,²⁵ but it precluded new entrants from charging intercarrier compensation altogether in order to eliminate the incentive for “inefficient entry [by] LECs intent on serving ISPs exclusively and not offering viable local telephone competition.”²⁶ By contrast, here, there are no such arbitrage concerns where a new entrant legitimately seeks to offer local telephone and other services to residential and/or business customers in a particular geographic market. There is therefore no reason to treat new entrants differently from existing competitors for purposes of the transition adopted in the *Order*.

D. The Commission Should Not Require LECs To Reduce Interstate Access Rates To The Level Of Intrastate Access Rates During The First Two Steps Of The Transition.

GCI requests that the Commission revise the first two steps of the transition to bill-and-keep such that interstate access rates are reduced to intrastate levels where a carrier’s interstate access rates are higher than its intrastate access rates.²⁷ The Commission should reject this request. Under the *Order*, competitive LECs have only 18 months to adjust to the substantial decreases in their intrastate access charge revenues in many states.²⁸ Mandating simultaneous reductions in some interstate access rates will only make this already difficult transition even

²⁴ See *id.* ¶¶ 21, 68-71.

²⁵ See *id.* ¶¶ 8, 78.

²⁶ *Id.* ¶ 21.

²⁷ See General Communication, Inc. Petition for Reconsideration, WC Dkt. Nos. 10-90 et al., at 19-20 & App. C (filed Dec. 23, 2011).

²⁸ See *Order* ¶ 801, Figure 9 (requiring that intrastate terminating access rates be reduced to interstate levels by July 1, 2013).

worse. Furthermore, adopting rules requiring reductions in some interstate access rates only a few months before those reductions would take effect (i.e., on July 1, 2012) would conflict with the Commission’s goals of “minimiz[ing] market disruption”²⁹ and “moderat[ing] potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes.”³⁰ It is important to emphasize that the effects of GCI’s proposal would not be limited to Alaska. For example, in Massachusetts, some intrastate access rates are lower than the interstate access rates for the same functionality. Thus, adopting GCI’s proposal would harm LECs that operate in Massachusetts.

Rather than adopting GCI’s proposal, the Commission should allow the transition as adopted in the *Order* to take its course. Under that transition, starting on July 1, 2014, all price cap LECs and competitive LECs that benchmark their rates to price cap LECs will reduce interstate terminating end office switching charges—including those that currently exceed intrastate access charges—in lock-step until those charges reach \$.0007 on July 1, 2016.³¹ Those charges are then eliminated entirely on July 1, 2017.³² This schedule for rate reductions is more than sufficiently aggressive to meet the Commission’s objectives of eliminating terminating end office switching charges.

III. CONCLUSION.

For the foregoing reasons, the Commission should take the actions recommended herein by the Joint Commenters.

²⁹ *ICC/USF Reconsideration Order* ¶ 7.

³⁰ *Order* ¶ 801.

³¹ *See id.*, Figure 9.

³² *See id.*

Respectfully submitted,

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February 9, 2012

CERTIFICATE OF SERVICE

I, Matthew Jones, do hereby certify that on this day, February 9, 2012, I caused to be served a true and correct copy of the foregoing Comments of Cbeyond, EarthLink, Integra Telecom, and tw telecom via First-Class U.S. Mail, postage prepaid, to the following:

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