

**BEFORE THE  
FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554**

<b>In the Matter of</b>	)	
	)	
<b>High-Cost Universal Service Support</b>	)	<b>WC Docket No. 05-337</b>
	)	
<b>Federal-State Joint Board on Universal Service</b>	)	<b>CC Docket No. 96-45</b>
	)	
<b>Lifeline and Link Up</b>	)	<b>WC Docket No. 03-109</b>
	)	
<b>Universal Service Contribution Methodology</b>	)	<b>WC Docket No. 06-122</b>
	)	
<b>Implementation of the Local Competition Provisions in the Telecommunications Act of 1996</b>	)	<b>CC Docket No. 96-98</b>
	)	
<b>Developing a Unified Intercarrier Compensation Regime</b>	)	<b>CC Docket No. 01-92</b>
	)	
<b>Intercarrier Compensation for ISP-Bound Traffic</b>	)	<b>CC Docket No. 99-68</b>
	)	
<b>IP-Enabled Services</b>	)	<b>WC Docket No. 04-36</b>
	)	
<b>Numbering Resource Optimization</b>	)	<b>CC Docket No. 99-200</b>

**COMMENTS OF COMPTTEL**

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**COMMENTS OF COMPTTEL**

COMPTTEL, through counsel, hereby submits its comments<sup>1</sup> on Appendices A, B and C of the Commission's Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262, released November 5, 2008. Appendix A is the Chairman's draft proposal to comprehensively reform intercarrier compensation and universal service circulated to the other Commissioners on October 15, 2008. Appendix B is a more narrow universal service reform proposal, consisting of a revised telephone numbers/connections based contribution methodology submitted by AT&T and Verizon

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<sup>1</sup> These Comments reflect the position of a majority of COMPTTEL members. Individual members may be filing separate comments where they advocate positions on some issues that are different from those stated herein.

in an *ex parte* filed with the Commission on October 20, 2008.<sup>2</sup> The Chairman circulated Appendix B to the other Commissioners on October 31, 2008. Appendix C is labeled an “Alternative Proposal” and consists of yet a third alternative for universal service reform based on the contents of an *ex parte* filed by OPASTCO and the Western Telecommunications Alliance on October 29, 2008.<sup>3</sup> It was circulated to the other Commissioners on November 5, 2008.

## **I. Introduction and Summary**

None of the Appendices includes a draft of any new or revised rules necessary to implement the proposed changes. Because the three Appendices are fraught with ambiguities, drafting meaningful comments on any of the particulars of the three proposals presents a challenging task. For example, in both Appendix A and Appendix C, the Commission states that IP/PSTN traffic will ultimately be subject to the final uniform reciprocal compensation rates established pursuant to the new “additional costs” pricing methodology, but until the end of the ten year transition period, the “status quo” will be maintained.<sup>4</sup> What is the “status quo”? The Commission has never issued a ruling on how such traffic should be treated for intercarrier compensation purposes. Indeed, there are currently pending three distinct forbearance petitions<sup>5</sup> and one

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<sup>2</sup> See October 20, 2008 Letter from Mary L. Henze, AT&T Services, and Kathleen Grillo, Verizon, to Marlene H. Dortch filed in WC Docket No. 06-122 and CC Docket 96-45.

<sup>3</sup> See Letter from Stuart Polikoff to Marlene Dortch filed in CC Docket No. 01-92, *et al.* on October 29, 2008.

<sup>4</sup> Appendix A at ¶218, n. 564; Appendix C at ¶213, n. 569.

<sup>5</sup> Petition of Feature Group IP For Forbearance From Section 251(g) of the Communications Act and Sections 71.501(b)(1) and 69.5(b) of the Commission’s Rules, WC Docket No. 07-256 (filed Oct. 23, 2007); Petition of Embarq Operating Companies

declaratory ruling petition<sup>6</sup> asking that the Commission clarify whether the ESP exemption applies to IP-PSTN VoIP traffic and whether such traffic is subject to reciprocal compensation or access charges. All four of the Petitions complain about the growing number of disputes among carriers regarding the appropriate compensation to be paid for terminating IP-PSTN VoIP calls. Does the Commission intend to maintain the “status quo” of regulatory uncertainty or does it mean something else? Without knowing what the Commission means or intends, it is difficult to comment on the proposal.

Another serious ambiguity is in the Commission’s classification of “services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks” as “information services.”<sup>7</sup> After making the unqualified statement that “[i]nsofar as a service allows a customer to originate a communication on an IP network and terminate it on a circuit-switched network, or vice versa, *it involves a net protocol conversion*, and we classify it as an ‘information service,’” the Commission then states that “[i]nsofar as that service allows communications with *no net protocol conversion*, it

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For Forbearance From Enforcement of Section 69.5(a) of the Commission’s Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008); and Petition of Frontier Local Operating Companies For Forbearance From Enforcement of Section 69.5(a) of the Commission’s Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-205 (filed Sept. 25, 2008).

<sup>6</sup> Petition of AT&T, Inc. For Interim Declaratory Ruling and Limited Waiver, WC Docket No. 08-152 (filed July 23, 2008).

<sup>7</sup> Appendix A at ¶209; Appendix C at ¶ 204. As discussed *infra*, COMPTTEL disagrees with the Commission’s attempt to classify services as “information” services or “telecommunications” services based on the technology used to transmit the communication.

is not subject to our ‘information service’ classification here.”<sup>8</sup> While COMPTTEL submits that there is no net protocol conversion on IP/PSTN voice traffic, if the Commission adopts its proposal, who will determine whether there has been a net protocol conversion on any particular call?

Aside from the lack of precision in the proposed Orders, a number of the proposals in Appendices A, B and C are not legally sustainable. COMPTTEL submits that the Commission’s proposal to move to a uniform termination rate for all traffic, as drafted, is beyond its jurisdiction to adopt. During the first four years of the transition plan, the Commission is in effect setting intrastate rates, rather than providing a pricing methodology for the states to apply in setting rates. Neither Section 251(b) nor 252(d) gives the Commission that authority.

The Commission’s proposal to classify all services that originate calls on an IP-based network and terminate them on the PSTN and vice versa as information services is not necessary to implement intercarrier compensation reform. Moreover, it is both technologically unsound and legally unsupportable. Packet-switched networks and TDM networks are transmission technologies. The Commission’s classification is based not on the nature of the service provided to the end user, but on the network technologies used to deliver a voice call. The internetworking conversions used to terminate a call that originates on a circuit-switched network and terminates on an IP network , and vice versa, are not net protocol conversions to the end user and are specifically excepted from the definition of information service set forth in the Act.

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<sup>8</sup> Appnedix A at ¶209, n. 529 (emphasis added); Appendix C at ¶ 204, n. 534 (emphasis added).

The “default” network interconnection rules proposed by AT&T and Verizon and set forth in Appendices A and C are inconsistent with the rights granted to requesting carriers under Section 251 of the Act and must be rejected.

The Commission’s proposed connections-based contribution methodology for business services should also be rejected or substantially revised. The proposal in Appendix B would disproportionately shift the burden for funding universal service to smaller business customers. These smaller business customers will experience a substantial increase in the monthly USF fees they are assessed while enterprise customers will experience a substantial decrease. The proposal is inconsistent with the requirement in Section 254(d) that carriers contribute on an equitable and nondiscriminatory basis.

The OPASTCO/WTA revenue recovery proposal for rate-of-return carriers set forth in Appendix C must be rejected because there has been no demonstration that the supplemental universal service funds are necessary to ensure that universal service is available at rates that are just reasonable and affordable if access charges are reduced. Indeed the only condition imposed by the Commission to receive this funding is that the carrier is a regulated rate-of-return carrier. Guaranteeing a particular rate of return is not a goal or purpose of the universal service program. OPASTCO/WTA’s proposal to compensate rural rate-of-return incumbent LECs for lines and access minutes lost to competitors (using 2008 as a base year) is inconsistent with Section 254 of the Act and should be rejected on its face.

Finally, the Commission should not eliminate high cost support for competitive ETCs. Support for competitive ETCs promotes competition in high cost areas and

thereby facilitates a fundamental goal of universal service – providing consumers in high cost areas access to the same choices and quality of service that other consumers receive.

## **II. The Commission Does Not Have Authority To Set Reciprocal Compensation Rates For Intrastate Traffic**

The Commission proposes to reform the current intercarrier compensation regimes by moving to a uniform terminating rate for all traffic – local, intrastate toll, interstate, CMRS, ISP-bound<sup>9</sup> and information service – over a ten year period. At the end of the transition period, “all telecommunications traffic will be treated as falling within the reciprocal compensation provisions of section 251(b)(5), and states will set default reciprocal compensation rates pursuant to the new methodology” proposed in the draft orders pursuant to Section 252(d)(2).<sup>10</sup> In order to effectuate this plan, the Commission claims authority under Sections 2(a), 201 and 202 of the Communications Act, 47 U.S.C. §§ 152, 201, 202, to reform intercarrier compensation for interstate access services, including ISP-bound traffic, Section 332 to reform intercarrier compensation for

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<sup>9</sup> The Commission repeatedly asserts that the D.C. Circuit has never questioned its conclusion that ISP-bound traffic is jurisdictionally interstate. See *e.g.*, Appendix A at ¶¶ 180, 182, 234, n. 621; Appendix C at ¶¶ 175, 177, 229, n. 626. That is at best a gross overstatement. In *Bell Atlantic Telephone Companies v. FCC*, 206 F.3d 1 at 9 (D.C. Cir. 2000) (emphasis added), the D.C. Circuit state that “[b]ecause the Commission has not provided a satisfactory explanation why LECs that terminate calls to ISPs are not properly seen as ‘terminat[ing] ... local telecommunications traffic,’ and why such traffic is ‘exchange access’ rather than ‘telephone exchange service,’ we vacate the ruling and remand the case to the Commission.” (Emphasis added.) Similarly, in *WorldCom, Inc. v. FCC*, 288 F.3d 429 at 434 (D.C. Cir. 2002), the D.C. Circuit stated “[h]aving found that § 251(g) does not provide a basis for the Commission’s action, we make no further determinations. For example, as in *Bell Atlantic*, we do not decide whether handling calls to ISPs constitutes ‘telephone exchange service’ or ‘exchange access’ (as those terms are defined in the Act, 47 U.S.C. §§ 153(16), 153(47) or neither, or whether those terms cover the universe to which such calls might belong. Nor do we decide the scope of the ‘telecommunications’ covered by § 251(b)(5). (Emphasis added.)

<sup>10</sup> Appendix A at ¶ 190; Appendix C at ¶ 185.

CMRS services and preempts state regulation of IP/PSTN traffic by declaring it to be an information service.<sup>11</sup> Nowhere does the Commission provide a legal basis for its jurisdiction to reform intercarrier compensation for local or intrastate access services (nor could it) and it specifically disclaims that it is preempting any state regulation of intrastate access charges.<sup>12</sup> Yet, that is exactly what it is doing by actually setting the rates carriers may charge for local and intrastate access traffic during the first four years of the transition plan.

Under the Commission's ten year transition plan, one year from the effective date of the Order, all local exchange carriers are required to reduce their terminating *intrastate* switched access rates by 50% of the difference between their *intrastate* switched access rates and their interstate switched access rates. Two years from the effective date of the Order, all local exchange carriers are required to reduce their terminating *intrastate* switched access rates by the remaining 50% of the difference so that their *intrastate* terminating rates equal their interstate terminating rates.<sup>13</sup> By requiring all carriers to reduce over two years their *intrastate* access rates until they reach the level of their interstate rates, the Commission is in effect establishing the actual rates carriers must charge for *intrastate* traffic in each of the first two years of the transition. The Commission has no statutory authority to set rates for intrastate services or to dictate intrastate rate levels to the states.

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<sup>11</sup> Appendix A at ¶¶ 208, 210, 234; Appendix C at ¶¶ 203, 205, 229.

<sup>12</sup> *Id.* and Appendix A at ¶228; Appendix C at ¶223.

<sup>13</sup> Appendix A at ¶ 193; Appendix C at ¶ 188.

In describing the federal/state allocation of responsibilities under Section 252(d), the Supreme Court stated that Congress’s “approach was deliberate, through a hybrid jurisdictional scheme with the FCC setting a basic default methodology for use in setting rates when carriers fail to agree, but leaving it to state utility commissions to set the actual rates.” *Verizon v. FCC*, 535 U.S. 467, 489 (2002). *See also AT&T Corporation v. Iowa Utilities Board*, 525 US 366, 384 (1999) (Commission has authority to establish a pricing methodology, but states retain authority to set rates pursuant to Section 252(d), which refers exclusively to determinations by state commissions of just and reasonable rates for transport and termination of traffic); *Iowa Utilities Board v. FCC*, 219 F. 3d 744 (2000) (invalidating proxy rates for reciprocal compensation set by the Commission because the Commission does not have jurisdiction to set actual prices for states to use).<sup>14</sup> The Commission’s proposal oversteps its bounds and improperly prevents states from setting the *intrastate* access rates carriers subject to their jurisdiction may charge by directing carriers to lower those rates to interstate access rate levels.

The next two years of the Commission’s transition plan are equally infirm. During Stage 2, the Commission directs states to adopt a state-wide interim, uniform reciprocal compensation rate applicable to all carriers. Although the Commission does not specify the methodology that states must follow to establish the interim rate, it does require that the interim rate be *less* than the current interstate access rate, at which both *intrastate* and interstate access rates are capped at the conclusion of Stage 1. Three years

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<sup>14</sup> Inexplicably, the Commission actually cites the Eighth Circuit’s decision, but for the proposition that it does not limit the Commission’s authority to set reciprocal compensation rates for interstate traffic. Appendix A at ¶ 235; Appendix C at ¶ 230. Even if that were the case, during the first four years of the transition, the Commission is setting reciprocal compensation rates for *intrastate* traffic.

from the effective date of the order, all carriers are required to reduce their terminating rates by 50% of the difference between their current terminating rate and the interim, uniform reciprocal compensation rate. Four years from the effective date, all carriers are required to reduce their terminating rates by the remaining 50% of the difference between their current terminating rate and the interim uniform reciprocal compensation rate.<sup>15</sup> Rather than adopt a methodology for the states to use in setting the interim reciprocal compensation rate, as it is authorized to do under the statute and judicial precedent, the Commission has instead told the states to set the interim reciprocal compensation rate for all traffic at a level below the current federal interstate access rate and then reduce that rate in two equal steps until it reaches the interim uniform reciprocal compensation rate.

Again, although the Commission does not have jurisdiction under Section 251(b)(5) or Section 252(d) to set actual prices, that is exactly what it would be doing in years 3 and 4 were it to adopt the transition plan as proposed. By directing states to set the interim uniform reciprocal compensation rate at a level lower than the current interstate access rate, and then to reduce the intrastate access, interstate access and reciprocal compensation rate to that interim rate over two years, the Commission has deprived the states of all authority Congress granted them in Section 252(d)(2) to determine the just and reasonable rates for the transport and termination of intrastate traffic. In *Iowa Utilities Board v. FCC*, 219 F. 3d 744 at 756-57 (2000), the Eighth Circuit vacated the Commission's rules setting proxy prices for reciprocal compensation, which consisted of "upper limits higher than which rates set by the state commission shall not go" because they intruded "on the states' rights to set the actual rates." The

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<sup>15</sup> Appendix A at ¶ 194; Appendix C at ¶189.

Commission's proposal to cap the interim uniform reciprocal compensation rate that states may set at a level lower than the current interstate access rate similarly intrudes improperly on the states' rights to set the actual reciprocal compensation rates.

### **III. The Commission's Proposal To Classify All "IP/PSTN Services" As Information Services Cannot Stand**

As noted earlier, the Commission proposes to "classify as 'information services' those services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely that originate calls on circuit-switched networks and terminate them on IP networks (collectively 'IP/PSTN' services)." The Commission believes that "[s]uch traffic today involves a net protocol conversion between end-users, and thus constitutes an 'enhanced' or 'information' service."<sup>16</sup> Thus, the Commission proposes to classify a service as an information service based not on the nature of the service purchased by the end user, but on the network technology used by the provider that serves the party called. The Commission's classification of IP/PSTN service as an information service is not necessary to implement intercarrier compensation reform and makes no sense. The Commission should reject this ill-considered proposal and rethink its erroneous interpretation of the statutory definition of information services.

As an initial matter, the Commission's classification of IP/PSTN service as an information service is not necessary to implement intercarrier compensation reform. The Commission can establish rules that would apply to the transport and termination of such services independently of the classification. Clearly the Commission can address the compensation issue without addressing the classification issue -- but *cannot* decide the classification issue without creating unnecessary ambiguity with regard to the unbundling

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<sup>16</sup> Appendix A at § 209; Appendix C at § 204.

and interconnection rights of competitors. To avoid unintended consequences, the Commission should not adopt the proposed classification at this time and should continue to monitor developments in the market and technology so that the issue can be addressed at a later date with a fuller appreciation of its overall impact.

Moreover, and more importantly, classifying a telephone voice service as an “information service” based solely on the different transmission technologies used to initiate and terminate a telephone call cannot be reconciled with the statutory definitions of information service and telecommunications service. Nor does the Commission’s attempt to “force-fit” its answer to the classification question in this manner add any clarity to the issue or create any regulatory certainty. Indeed, the discussion in Appendices A and C fosters the opposite result.

The packet switching deployed in IP networks and the circuit-switching deployed in the PSTN are transmission technologies used to route traffic.<sup>17</sup> On its website, Verizon explains the difference between an IP network and a circuit switched network in terms of the different transmission technologies used:

**Packet Switched** A form of data transmission in which data is broken into small packets that are transmitted independently and reassembled at the destination. This is in contrast with circuit-switching, traditionally used for voice telephony, in which the transmission occurs over a dedicated circuit.<sup>18</sup>

Classifying a telephone voice service as an “information service” based solely on the different transmission technologies used to initiate and terminate a telephone call cannot

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<sup>17</sup> See Notice of Proposed Rulemaking in *In the Matter of IP-Enabled Services*, WC Docket No. 04-36 (rel. Mar. 10, 2004) at ¶ 8 (IP is a common protocol used “to transmit data across the network in a manner fundamentally different than the way in which signals transit a circuit-switched service.”)

<sup>18</sup> See Verizon Glossary available at <http://www22.verizon.com/wholesale/glossary/?1=i>.

be reconciled with the statutory definitions of information service and telecommunications service or Commission precedent.

A customer that purchases voice service from a carrier deploying a circuit switched network is purchasing a telecommunications service.<sup>19</sup> And if that customer calls an individual that also purchases telephone service from a carrier deploying a circuit switched network, the end to end communication is a telecommunications service.

Under the Commission's proposed line of reasoning, however, that telecommunications service becomes an information service if the customer of the circuit-switched carrier calls an individual that purchases service from a provider that deploys an IP network regardless of whether there is any net change in the form or content of the information transmitted.<sup>20</sup> This is contrary to the Commission's previous determination that to the extent a packet-switched service does no more than transport information of the user's

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<sup>19</sup> The Communications Act defines "telecommunications service" as the offering of telecommunications for a fee directly to the public. "Telecommunications" is defined as "the transmission between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. §§ 153(46), 153 (43).

<sup>20</sup> How this would occur is an unexplained mystery because as the Commission has previously determined, information services and telecommunications services are mutually exclusive categories. The Commission defines a "basic service" as transmission capacity for the movement of information without net change in form or content. Protocol processing services that result in no net protocol change to the end user are classified as basic services, *i.e.*, telecommunications services. *In the Matter of Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 at ¶¶ 4, 7 (rel. Apr. 21, 2004).

choosing between or among specified points without change in the form or content of the information sent and received, it is a telecommunications service.<sup>21</sup>

The nature of the telephone call or communication does not change, nor does the service the originating caller purchases from his provider. However, simply because the call terminates on an IP network, the Commission has decided arbitrarily that the customer is now using an “information service.” This conclusion is unsupportable.

Verizon itself has explained that the voice service it provides over its IP-based FiOS fiber network is the same as the voice service provided over its circuit-switched network, and that the choice of technology used is an internal engineering decision:

Verizon denies that it offers a product called “FiOS telephone service.” FiOS is a brand name used to describe the high speed Internet service and video service Verizon offers over its fiber optic network – not POTS service. . . . Verizon’s regulated voice service is the same regardless of the medium over which it is provided, even if the technical requirements for the service to work over that medium happen to be different.

\* \* \*

Verizon[‘s] . . .tariffs . . .allow Verizon to provide local exchange service and intraLATA toll service over any suitable physical facilities and using any suitable equipment. Verizon admits that the physical facilities required for voice service over copper loop facilities differ from the physical facilities required to provide voice service over fiber loop facilities, but Verizon denies that the service itself . . . is different when it is provided over copper loops versus fiber loops.<sup>22</sup>

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<sup>21</sup> *In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 98-188 at ¶ 35 (rel. Aug. 7, 1998).

<sup>22</sup> *In the Matter of the Commission’s Inquiry Into Verizon Maryland’s Provision of Local Exchange Telephone Service Over Fiber Optic Facilities*, Case No. 9173, Verizon Maryland Inc.’s Response to the Request of the Office of People’s Counsel for an Investigation Into Verizon Maryland Inc.’s Provision of Local Exchange Service over Fiber Optic Facilities filed with the Maryland Public Service Commission on August 31, 2007 at ¶¶ 1, 6, 7.

The Act defines information service as a “capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing or making available information, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.”<sup>23</sup> As Verizon so clearly acknowledged, the customer purchasing voice service delivered over its IP-based FiOS network gets the same service as the customer purchasing voice service delivered over its circuit-switched network. The Commission does not explain, nor could it, exactly what information either the customer served by the PSTN or the customer served by the IP network acquires, stores, transforms, processes, retrieves or utilizes during the telephone call.

In an effort to justify its classification of all services that originate calls on an IP network and terminate calls on the PSTN, and vice versa, as information services, the Commission mistakenly claims that all such calls involve a “net protocol conversion between end-users.” The Commission does not specifically define exactly what the net protocol conversion between end users is on a voice call that originates on the PSTN and terminates on an IP network or vice versa, but implies that the protocol conversion occurs when the signal goes through the network gateway “computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated signaling, control and address functions.”<sup>24</sup> The statute makes clear, however, that information service capabilities used for the “management, control or operation of a telecommunications system or the management of a telecommunications service” are

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<sup>23</sup> 47 U.S.C. § 153(20).

<sup>24</sup> Appendix A at ¶209, n. 520; Appendix C at ¶204, n. 535.

excepted from the definition of information service.<sup>25</sup> The Commission has previously determined that protocol processing “involving internetworking (conversions taking place solely within the carrier’s network to facilitate provision of a basic network service, that result in no net conversion to the end user)”<sup>26</sup> are included within the exception.<sup>27</sup>

Although the Commission acknowledges this exception to the definition of information service, it states that it is inapplicable and irrelevant, but does not explain how or why.<sup>28</sup> Nor could it. The protocol conversion that occurs when the circuit-switched voice signal is transformed into IP packets and vice versa is an internetworking conversion that takes place solely within the carriers’ networks to facilitate the provision of voice service and involves no net protocol conversion between the end users.<sup>29</sup> As a result, the statutory exception to the definition of information services applies to the conversion of circuit-switched voice signals into IP packets and IP packets into circuit-switched voice signals and there is no legal or technological basis for the Commission’s

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<sup>25</sup> 47 U.S.C. § 153(20).

<sup>26</sup> The Commission defines a “basic service” as transmission capacity for the movement of information without net change in form or content. Protocol processing services that result in no net protocol change to the end user are classified as basic services, *i.e.*, telecommunications services. *In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 at ¶¶ 4, 7 (rel. Apr. 21, 2004).

<sup>27</sup> *In the Matter of Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Order on Reconsideration, 12 FCC Rcd 2297 (1997) at ¶2.

<sup>28</sup> Appendix A at ¶210, n.521; Appendix C at ¶205, n. 536.

<sup>29</sup> *See In the Matter of Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, WC Docket No. 02-361, Order, FCC 04-97 at ¶¶ 11, 12 (routing a call through a gateway where it is converted to to or from IP format is an “internetworking” conversion which the Commission has found to be a telecommunications service).

classification of IP/PSTN services as information services, based solely on the technology of the network used to originate or terminate the call.

**A. The Commission Cannot Preempt State Regulation of IP/PSTN Services**

In addition to the fact that the Commission's proposal to classify as information services all services that originate calls on IP networks and terminate them on circuit-switched networks, or conversely, that originate calls on circuit-switched networks and terminate them on IP networks is misguided both technically and legally, the Commission's proposal to "preempt any state efforts to impose 'traditional 'telephone company' regulations'" on such traffic is unworkable. Because the Commission's classification is based on a service provided by two different networks, the Commission's classification would require that both the states and the Commission determine whether regulation is preempted, based not on the service provided to the end user, but on a *call by call basis* – *i.e.*, a state would be preempted from regulating a carrier whose customer originates a call on the PSTN that terminates on an IP network, but would not be preempted from regulating the same carrier where its customer originates a call on the PSTN that terminates on the PSTN. Again, this makes no sense.

If the Commission does not mean to preempt on a call by call basis, how does it envision preemption working? Would a state be preempted from imposing certification, tariff and reporting requirements on a carrier that provides local and intrastate access service simply because it is capable of delivering calls for termination to IP networks (whether it does so or not) or because it is capable of terminating calls that originate on IP networks (whether it does so or not)? The fact that the Commission proposes to preempt a service jointly provided by two different networks that may or may not be

jointly owned will create additional regulatory uncertainty that will undoubtedly lead to years of litigation over the meaning and extent of the preemption that the Commission intends to exercise.

As stated earlier, it is not necessary for the Commission to classify all IP/PSTN services as information services in order to implement intercarrier compensation reform. The Commission's proposal is ill-considered and should not be adopted.

**B. Classifying All IP/PSTN Services As Information Services Cannot Be Reconciled With The Technology-Neutral Focus of the Act**

As the Commission acknowledged, carriers are converting from circuit-switched to IP-based networks.<sup>30</sup> Indeed, the Commission noted that most experts agree that “IP technologies will be used to deliver the predominant share of voice and data traffic within a few years.”<sup>31</sup> Fortunately, Sections 251 and 252 of the Communications Act are technology neutral – they do not distinguish between services provided over IP-based networks and those provided over circuit-switched networks. Contrary to the Act, the Commission proposes to create regulatory distinctions based solely on the technology used to transmit voice communications. Aside from the legal and technological infirmities with its new classification, if the Commission classifies all IP/PSTN traffic as “information services,” it will jeopardize competitors’ rights to obtain interconnection and unbundled network elements under Section 251 of the Act and their rights to state commission arbitration of interconnection disputes under Section 252 of the Act.

Section 251(c)(2) of the Act imposes on incumbent local exchange carriers the duty to provide for the facilities and equipment of any requesting telecommunications

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<sup>30</sup> Appendix A at ¶ 2; Appendix C at ¶ 2.

<sup>31</sup> Appendix A at ¶ 260; Appendix C at ¶ 255.

carrier, interconnection with the ILEC's network for the transmission and routing of *telephone exchange service and exchange access*. Section 251(c)(3) imposes on ILECs the duty to provide to any requesting telecommunications carrier *for the provision of a telecommunications service* nondiscriminatory access to unbundled network elements. If the Commission classifies as information services those services that originate calls on IP networks and terminate them on circuit-switched networks and vice versa, the “predominant share” of voice traffic could conceivably be classified as an information service in a few years if the experts cited by the Commission are correct. Because an information service is not a telephone exchange service, an exchange access service or a telecommunications service, the effect of the Commission's classification will be to eliminate the Congressionally granted rights of competitive carriers to interconnection and access to unbundled network elements.

Just last year, the Wireline Competition Bureau correctly concluded that ensuring the protections of Section 251 interconnection rights is a critical component for the growth of facilities-based competition as well as broadband deployment.<sup>32</sup> The Bureau further held that the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers.<sup>33</sup> If all, or a “predominant share” of voice traffic is classified as an information service, the Commission will eliminate the interconnection rights that

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<sup>32</sup> *In the Matter of Time Warner Cable Request For Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, To Provide Wholesale Telecommunications Services to VoIP Providers*, WC Docket No. 06-55, Memorandum Opinion and Order, DA 07-709 (Chief, Wireline Competition Bureau, rel. Mar. 1, 2007).

<sup>33</sup> *Id.* at ¶ 14.

are the critical component for the growth of facilities-based competition and broadband deployment. Similarly, competitors will not be able to access unbundled network elements to provision voice service to their customers.

While the Wireline Competition Bureau has determined that the statutory classification of a third party's VoIP service as an information service or a telecommunications service is irrelevant to the issue of whether a wholesale provider of telecommunications may seek interconnection under Section 251,<sup>34</sup> at least one incumbent LEC has refused to provide interconnection to a telecommunications carrier seeking to connect an affiliate's VoIP customers to the PSTN on the grounds that VoIP is not a telecommunications service.<sup>35</sup> The Commission has yet to issue a ruling on this issue and does not address the Section 251 implications of its classification of all IP/PSTN traffic as information services in either Appendix A or Appendix C.

If the Commission does not reconsider its classification of all IP/PSTN traffic as information services, it must at the very least explain what, if any, provisions of the Act support its determination that the technology used to transmit a voice call determines whether the call is an information service or a telecommunications service. Moreover, it must clarify how its classification will impact the rights of requesting carriers to interconnect with the incumbent LECs' networks and to purchase unbundled network elements for the provision of IP/PSTN service.

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<sup>34</sup> *Id.* at ¶ 15.

<sup>35</sup> *In the Matter of Petition for Declaratory Ruling Whether Voice Over Internet Protocol Services Are Entitled To The Interconnection Rights of Telecommunications Carriers*, WC Docket No. 08-56 (filed April 6, 2008).

#### IV. The Proposed Default Interconnection Rules Should Be Rejected

In addition to not having to classify IP/PSTN traffic as an information service in order to implement intercarrier compensation reform, the Commission does not need to adopt network architecture rules to implement such reform. Nonetheless, the Commission proposes “default” rules regarding the network “edge” that will “define functions governed by” the uniform terminating reciprocal compensation rate applicable to all carriers and all traffic<sup>36</sup> at the end of the 10 year transition period.<sup>37</sup> Aspects of this proposal are fundamentally inconsistent with the interconnection rights granted by Congress in Section 251(c)(2) of the Act, and the Commission’s rules implementing that section, which provide CLECs the right to choose the points at which they will interconnect with the incumbent LEC.<sup>38</sup> The Commission may not eliminate any interconnection obligations applicable to the incumbent LEC or any rights granted to competitive LECs by Congress. Moreover, adoption of this proposal is not necessary to accomplishing intercarrier compensation reform.

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<sup>36</sup> The “default” rules in Appendix A at ¶ 275 were set forth in an *ex parte* submitted by AT&T and Verizon on October 14, 2008, the day before the draft Order was put on circulation. See Letter from Hank Hultquist, AT&T Services, Inc., and Donna Epps, Verizon, to Marlene Dortch, filed in CC Docket No. 01-92 on October 14, 2008. An additional rule was added to the draft Order circulated on November 5, 2008. See Appendix C at ¶ 270. That rule, the rural transport rule, was submitted in an *ex parte* filed by Stuart Polikoff on behalf of OPASTCO and the Western Telecommunications Alliance (“WTA”) filed on October 29, 2008. See Letter from Stuart Polikoff to Marlene Dortch filed in CC Docket No. 01-92, *et al.* on October 29, 2008.

<sup>37</sup> Appendix A at n. 726; Appendix C at n. 731.

<sup>38</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 and Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, 11 FCC Rcd 15499 at ¶ 209; *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3d Cir. 2001)(“the CLEC cannot be required to interconnect at points where it has not requested to do so”).

Section 251(c)(2) provides CLECs the ability to design their own networks, based on their own business and technology plans, and to negotiate arrangements with ILECs pursuant to the substantive and procedural protections of Sections 251 and 252.

“[S]ection 251(c)(2) gives competing carriers the right to deliver traffic terminating on an incumbent LEC’s network at any technically feasible point in the network, rather than obligating such carriers to transport traffic to less convenient or efficient interconnection points.”<sup>39</sup> The Commission’s proposal denies CLECs their statutory right by requiring CLECs to interconnect at the called party service provider’s network edge, which is defined as the location of its end office, MSC, point of presence, or trunking media gateway associated with the called party’s telephone number unless that location subtends a tandem in which case the tandem is the network edge.<sup>40</sup> Therefore, CLECs would not only have the point of interconnection determined by the ILEC network structure, they would also have to interconnect directly or indirectly at every location associated with the telephone numbers of an incumbent LEC’s customers. In contrast, the Commission has repeatedly confirmed that the right to interconnect at any technically feasible point includes the right to request a single point of interconnection in a LATA.<sup>41</sup>

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<sup>39</sup> 47 U.S.C. 251(c)(2)(B); *Local Competition Order*, 11 FCC Rcd 15499 at ¶ 209.

<sup>40</sup> Appendix A at ¶ 275; Appendix C at ¶ 270.

<sup>41</sup> *Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act*, Memorandum Opinion and Order, CC Docket Nos. 00-218, 00-249, and 00-251, DA 02-1731, ¶52 (2002)(“*Virginia Arbitration Order*”); *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Docket No. 01-92, FCC 01-132, ¶112 (2001)(“*NPRM*”); *Application by SBC Communications Inc. et al to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶ 78 (2000)(“*SBC 271 Order*”). Competing ILECs may also designate multiple points of interconnection within a LATA. *See SBC 271 Order* at ¶ 78, n. 174.

The existing negotiated agreements between ILECs and CLECs are, in some cases, the result of interconnection arrangements such as reciprocal collocations that accrue to the benefit of both carriers and that would be difficult to abandon without the needless deployment of scarce capital resources. Citing an *ex parte* letter from Verizon, the Commission asserts that because the edge rule is a “default” rule, it does not alter any obligations of incumbent LECs to interconnect at any technically feasible point, nor does the rule alter carriers’ ability to request interconnection.<sup>42</sup> This is not the case. The proposal states that “*for every call,*” the calling party service provider is responsible for the transmission and routing of the call to the network edge of the called party. If a competitor and an ILEC disagree about where interconnection will take place, the “default” rules will apply and thereby allow ILECs to dictate the points of interconnection. Moreover, many ILECs have required competitors to interconnect at end offices once traffic to those offices reaches a certain level. Under the Commission’s proposal, traffic to those end offices will have to be redirected to the tandems they subtend.

Inexplicably, the “default” rules also provide that a service provider that utilizes a tandem as its edge may require calling party service providers to groom their traffic onto segregated trunk groups. If the same rate applies whether the traffic is local, intrastate access or interstate access, the rationale for grooming traffic onto segregated trunk groups disappears. Finally, if the application of the rate is constrained by the interconnections arrangements described in the proposal, it may be interpreted to mean that ILECs are free

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<sup>42</sup> Appendix A, ¶ 275 n. 726; Appendix C, ¶ 270, n. 731.

to charge any rate they want for arrangements that fall outside the proposal.<sup>43</sup> At the very least, the “default” rules will disrupt current contracts and make future negotiations difficult.

The Commission has offered no justification as to why “default” rules are even necessary to implement intercarrier compensation reform when there are well established, interconnection arrangements already in place.<sup>44</sup> Such a justification is especially warranted because the “default” rules are tied to the incumbent LECs’ legacy architecture and will not even go into effect until 10 years after the effective date of the Order. As the Commission observed, carriers are converting from circuit switched networks to IP-based networks.<sup>45</sup> As a result, the rules may not even be relevant in 10 years. The Commission should reject the AT&T/Verizon “default” rules and allow carriers to continue to negotiate, and if necessary, arbitrate interconnection arrangements.

## **V. The Commission Must Re-think Its Universal Service Proposals**

The Commission has issued three different proposals for reforming the universal service (“USF”) contribution and distribution methodologies in Appendices A, B and C. COMPTEL limits its comments to pointing out the inequities certain aspects of the proposals will impose on both carriers and customers as well as their inconsistency with Section 254 of the Act. The connections-based proposal set forth in Appendix B will

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<sup>43</sup> Only when an ILEC denies interconnection at its edge is it responsible for providing transport at no charge from a location where it does permit interconnection. Appendix A, ¶ 275; Appendix C, ¶ 270.

<sup>44</sup> As tw telecom inc., *et al*, stated in a recent *ex parte*, “the existing arrangements have stood the test of time and are the result of several generations of state arbitrations.” See Letter from Thomas Jones, on behalf of tw telecom inc., *et al*, to Marlene Dortch, filed in WC Docket Nos. 05-337, *et al*. on October 24, 2008 at 3.

<sup>45</sup> Appendix A at ¶ 2; Appendix C at ¶ 2.

improperly make smaller business customers bear the brunt of the financial impact of the Commission's proposed change in contribution methodologies. The revenue recovery proposal for rate-of-return incumbent LECs set forth in Appendix C is inconsistent with Section 254 of the Act. Finally, the Commission's proposal to eliminate universal service support for competitive ETCs set forth in Appendix C violates the Commission's principal that USF mechanisms should be competitively neutral. It also will discourage carriers other than the incumbent LEC from providing service in high cost areas, thereby depriving customers of a choice of carriers and services.

**A. The Connections-Based Contribution Proposal Would Have A Grossly Disproportionate Impact on Smaller Business Customers**

In the Narrow Universal Service Reform Proposal set forth in Appendix B, the Commission proposes that residential customers contribute to the USF based on "Assessable Numbers" and that business services contribute based on "Assessable Connections" and possibly also on "Assessable Numbers." The draft Order is ambiguous with respect to whether business customers will be assessed on both numbers and connections. The definition of "Assessable Numbers" is not limited to numbers assigned to residential end users. The definition reads that an assessable number is an NANP telephone number or functional equivalent in a public or private network that is in use by an end user.<sup>46</sup> End user is defined as any purchaser of interstate services that is not itself a direct contributor to the universal service fund.<sup>47</sup> These definitions would appear to include both business and residential customers. Elsewhere, the draft Order states that providers of business services, including non-numbers based services, should be assessed

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<sup>46</sup> Appendix B at ¶ 63.

<sup>47</sup> *Id.* at ¶ 65.

based on their connections to the public switched network and that a connections-based contribution mechanism is the better option for business services.<sup>48</sup> To the extent the Commission adopts a connections-based contribution mechanism for business services, it should make clear that business services will not also be assessed based on working telephone numbers for those same connections. Carriers, and ultimately their customers, should not be subjected to two USF fees, based on two different methodologies, for the same service.

The Appendix B proposal was submitted as an *ex parte* by AT&T and Verizon on October 20, 2008. Under the AT&T/Verizon proposal, Assessable Connections up to 64 kbps will be assessed \$5.00 per month and Assessable Connections over 64 kbps will be assessed \$35.00 per month.<sup>49</sup> If the Commission were to adopt this proposal, it would shift a substantial portion of the universal service burden from large enterprise customers to smaller business customers with fewer lines, putting a significant financial strain on these smaller businesses at a time when they are already experiencing the impact of a poor economic climate.

Section 254(g) of the Communications Act requires telecommunications carriers to contribute to the universal service fund on an equitable and nondiscriminatory basis. As COMPTTEL explained in its *ex parte* submitted on October 22, 2008, the AT&T/Verizon proposal would disproportionately impact smaller business customers. The Commission acknowledged that carriers are permitted to pass through their

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<sup>48</sup> *Id.* at ¶¶ 78, 79.

<sup>49</sup> Appendix B at ¶ 81.

contribution assessments to end users and typically do so.<sup>50</sup> Under the connections-based proposal, large enterprise customers would experience a substantial reduction in the universal service fees they are assessed by their carriers, while business customers with fewer lines would be subject to a substantial increase in the universal service fees they are assessed.<sup>51</sup>

The following examples demonstrate the extent of the significant and disproportionate increase in USF charges smaller businesses will face under the AT&T/Verizon plan proposed by the Commission in Appendix B:

- a customer that pays \$155.00 per month for a DS1 will see its current monthly USF fee of \$17.67 (at 11.4%) double to \$35.00, even before adding on any assessable number charges and any increase in the subscriber line charge;
- a customer that pays \$69.95 per month for a 1.5 Mbps SDSL line would see its current monthly universal service charge of \$7.97 more than quadruple to \$35.00, resulting in an increase to the monthly price of its service to \$104.95 before taxes and other surcharges;
- a customer that has eight 64 kbps voice lines would pay connection charges of \$40.00 per month, whereas a much larger business customer that has an OC-48 would pay a connection charge of only \$35.00 per month.

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<sup>50</sup> Appendix B at ¶ 64.

<sup>51</sup> See October 22, 2008 Letter from Mary C. Albert to Marlene Dortch filed in WC Docket No. 06-122 and CC Docket No. 06-45.

The inequity of the connections-based approach proposed by AT&T/Verizon and the Commission is evidenced not only by the staggering increases in USF fees that smaller businesses would pay, but also by the extraordinary reductions in USF fees large enterprise customers would experience. For example, Verizon is offering high speed Internet service for businesses with plans starting at \$42.99 per month.<sup>52</sup> A business customer purchasing this service, who today pays a universal service fee of \$4.90 (at 11.4%) will be assessed a universal service fee of \$35 – i.e., 80% of the cost of the service – under the plan proposed in Appendix B. In contrast, a business customer purchasing a DS3 for \$2,310 per month<sup>53</sup> that currently pays \$263.34 in USF fees (at 11.4%) will see its fees reduced to \$35 per month or less than 2% of the price of the service.

Neither the Commission, in Appendix B, nor AT&T/Verizon in their *ex parte*, justify the dramatically disproportionate impact the connections-based contribution methodology would have on smaller business customers. AT&T, however, did submit a revised proposal intended to address these very concerns.<sup>54</sup> Without commenting on the merits of AT&T's revised proposal, the fact that AT&T submitted it underscores the lack

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<sup>52</sup> <http://smallbiz.verizonmarketing.com/>

<sup>53</sup> The Verizon Telephone Companies, Tariff F.C.C. No. 1, Page 7-252; [http://www22.verizon.com/tariffs/viewdocact.asp?system\\_id=4491338&lib=TMPI\\_PCD\\_P\\_LIB&doc=126647&checkout=false&fileExt=.PDF&Frameset=Created](http://www22.verizon.com/tariffs/viewdocact.asp?system_id=4491338&lib=TMPI_PCD_P_LIB&doc=126647&checkout=false&fileExt=.PDF&Frameset=Created)

<sup>54</sup> Letter from Mary L. Henze, AT&T Services Inc., to Marlene Dortch, FCC, CC Docket No. 96-45, Oct. 29, 2008. Under the revised proposal the assessment on Assessable Connections would be based on three speed tiers as follows: Tier 1: dedicated connections up to and including 25 mbps @ \$2.00 per connection per month; Tier 2: dedicated connections over 25 mbps up to and including 100 mbps @ \$15.00 per connection per month; and Tier 3: dedicated connections over 100 mbps @ \$250.00 per connection per month.

of analysis performed by the Commission on the financial impact of the connections-based proposal in the draft Order. Given the fragile state of the economy, requiring smaller businesses to bear a disproportionate share of the impact of changes made in the USF contribution methodology would be contrary to public interest.

**B. The OPASTCO/WTA Proposal For Full Revenue Recovery For Rate-of-Return Carriers Should Be Rejected**

OPASTCO/WTA submitted a proposal, set forth in Appendix C, which provides supplemental ICLS for rate-of-return carriers.<sup>55</sup> The OPASTCO/WTA proposal consists of two components. First, rate-of-return incumbent LECs will be compensated from the USF fund for all of the lost revenues that would result from mandated reductions in intercarrier compensation rates that are not otherwise recoverable through increases in subscriber line charges (“SLCs”). The only precondition for receiving such compensation is that the ILEC is under rate-of-return regulation in the interstate jurisdiction. Second, rural rate-of-return incumbent LECs that have committed to the five-year broadband build-out requirements will be compensated from the universal service fund for revenue losses attributable to losses in access lines and interstate and *intrastate* minutes of use, using 2008 as a base year.<sup>56</sup> The fund to reimburse the rural rate-of-return carriers for their lost lines and access minute revenues will be capped at \$100 million in year one, \$200 million in year two, \$300 million in year three, \$400

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<sup>55</sup> See Letter from Stuart Polikoff to Marlene Dortch filed in CC Docket No. 01-92, *et al.* on October 29, 2008. While the Commission proposes to freeze non-rural rate of return carrier USF support at December 2008 levels, at the suggestion of OPASTCO/WTA, it proposes to continue in place all high cost support USF mechanisms for rural rate of return carriers until the end of 2010. Appendix C at ¶ 18.

<sup>56</sup> Appendix C at ¶¶ 320-321.

million in year four and \$500 million in year five, at which point the Commission will determine if modifications are needed.<sup>57</sup>

The first component of the plan is untenable because there has been no demonstration that USF compensation is necessary for rate-of-return carriers to meet their authorized rates-of-return. The second component is inconsistent with the statute and should be rejected on its face.

The Commission proposes to adopt the OPASTCO/WTA revenue recovery plan without any explanation as to why the reimbursement proposed is necessary “to ensure universal service is available at rates that are just, reasonable, and affordable.”<sup>58</sup> The Commission merely states that “supplemental ICLS properly addresses the needs of rural rate-of-return carriers, and their right to an opportunity to recover their authorized rate of return.”<sup>59</sup> Guaranteeing a particular rate-of-return is not a goal or purpose of the universal service program. In order to ensure that they obtain their authorized rates of return, the appropriate procedure for rate-of-return carriers to follow is to initiate a rate case with the appropriate commission and demonstrate that they are not earning sufficient returns. The Commission should not consider using the already bloated universal service fund to reimburse rate-of-return carriers for lost access revenues – let alone lines or minutes or use lost to competitors -- without first requiring a demonstration that a carrier would have to increase its rates to unreasonable and unaffordable levels in order to meet its authorized rate-of-return. The Commission should condition the use of universal

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<sup>57</sup> *Id.*

<sup>58</sup> 47 U.S.C § 254(i).

<sup>59</sup> Appendix C at ¶ 321.

service funds to reimburse rate-of -return carriers for lost access revenues only to the extent necessary to keep rates at a reasonable and affordable level. In doing so, the Commission must also ensure that to the extent it provides for revenue recovery for these carriers, the calculation for the reimbursement takes into account the money they will be saving from the reduction in the intercarrier compensation rates they will be paying to other carriers.

The Commission's proposal to reimburse rural rate-of -return carriers for lines and minutes of use lost to competitors, using 2008 as base year, is contrary to the express language of Section 254 and is bad public policy. "A carrier that receives [universal service] support shall use that support only for the provision, maintenance, and upgrading of facilities and services for which the support is intended."<sup>60</sup> Providing universal service reimbursement for lines and minutes lost to competitors is not funding for the provision of a supported service. Indeed, it is quite the opposite – it is providing funds because a carrier is no longer providing service to a customer. The Commission cites to Section 4(i) of the Communications Act<sup>61</sup> to support the proposition that it may use universal service funding to ensure that "maintaining affordable rates does not unduly threaten the financial viability of rate-regulated incumbent LECs."<sup>62</sup> But section 4(i) specifically states that the Commission may not perform any act, adopt a rule, regulation or order that is inconsistent with the Act, including Section 254. Section 254 requires universal service funding to be used solely for a supported service. Therefore, the

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<sup>60</sup> 47 U.S.C. 254(e).

<sup>61</sup> 47 U.S.C. 154(i).

<sup>62</sup> Appendix C at ¶ 313. The Commission notes that section 4(i) provided the authority for USF prior to the enactment of section 254.

Commission may not provide universal service funding to reimburse a carrier because its previous customers choose another carrier's services. Additionally, *intrastate* access service has not been designated as a supported service for rural insular and high cost areas under the federal universal service program.<sup>63</sup> Therefore it is not permissible for the Commission to use the federal universal service fund to reimburse carriers for loss of intrastate minutes of use or revenue.

Aside from being inconsistent with the language of section 254, compensation to a carrier for lines and minutes of use lost to competitors is bad public policy and inconsistent with the goals of universal service. Quality service and the availability of services comparable to the service provided in urban areas are critical objectives of universal service funding.<sup>64</sup> If a carrier receives funding regardless of whether it is actually providing service to a customer, the carrier will have no incentive to attempt to retain the customer because it will be paid in any event. In fact, a carrier's incentive may even be to lose the customer and thereby save the cost of providing service. Consequently, the carrier will have no incentive to offer high quality service, improve its service, or enhance its service offerings to meet its customers' needs.

C. **The Commission Should Not Eliminate USF Support for CETCs**

The Commission also proposes in Appendix C to eliminate the existing high-cost support for competitive ETCs over a five year period. COMPTTEL urges the Commission to reject this proposal. Eliminating support for competitive ETCs would be contrary to

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<sup>63</sup> 47 CFR §54.101.

<sup>64</sup> 47 U.S.C. §§254(b)(1) and (3).

Congress' call for the preservation and advancement of universal service in a manner conducive to opening all telecommunications markets to competition.<sup>65</sup>

In the *First Report and Order*, the Commission adopted the principle that federal support mechanisms should be competitively neutral, “neither unfairly advantaging nor disadvantaging *particular service providers* or technologies.”<sup>66</sup> Accordingly, the Commission determined that federal universal service support should be made available, or “portable,” to all ETCs that provide supported services, regardless of technologies used.<sup>67</sup> The Commission must adhere to its own precedent or explain why it is reversing course.<sup>68</sup> Rather than do so, the Commission simply asserts that “to manage the high-cost support effectively, we must control its growth.” The Commission does not explain how creating a supplemental funding mechanism to reimburse rate-of-return LECs for lost access revenues, lost lines and lost minutes controls the growth of the fund. Nor does it explain why the growth of the fund can only be controlled by eliminating support for competitive ETCs altogether, while merely freezing price-cap incumbent ETC support at 2008 levels and allowing all universal service mechanisms for rate-of- return incumbent

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<sup>65</sup> Appendix C at ¶5.

<sup>66</sup> *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Order, 17 FCC Rcd 22642, ¶ 2 (2002). *See also*, *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801, ¶¶ 46-48 (1997)(“First Report and Order”)(emphasis added).

<sup>67</sup> *Id.*

<sup>68</sup> *Columbia Broad Sys., Inc. v. FCC*, 454 F.2d at 1026 (“[W]hen an agency decides to reverse its course, it must provide an opinion or analysis indicating that the standard is being changed and not ignored, and assuring that it is faithful and not indifferent to the rule of law.”)

LECs to continue to operate as they do today through the end of 2010.<sup>69</sup> Although Section 254 of the Act requires support to be sufficient,<sup>70</sup> the Commission has offered no analysis that demonstrates that competitive ETCs will be able to continue providing service in high cost areas without universal service funding.

As the Commission has concluded, the principle of competitive neutrality is not secondary to the advancement of universal service.<sup>71</sup> A principle goal of universal service is to provide consumers in high cost areas access to the same choices and quality of service that other consumers receive. Support for competitive ETCs promotes competition in high cost markets, thereby providing these consumers a choice in both providers and services. Refusing universal service support to competitive ETCs who anticipate providing or currently provide valuable high quality service to high-cost areas will create a system where only one carrier can survive, stifling choices and innovation. The Commission should retain a policy that encourages – not discourages-- competitive entry into high cost markets.

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<sup>69</sup> “For incumbent ETCs other than rural rate-of-return incumbent LECs, we freeze each incumbent LEC ETC’s individual, annual high-cost support at the amount of support, on a lump sum basis, that the ETC received in December 2008 annualized, net any prior or past period adjustments, on a study area or service area basis. For rural rate-of-return incumbent LECs, all high-cost universal service support mechanisms utilized by rate-of-return incumbent LECs continue to operate as they do today through 2010.” Appendix C at ¶ 16.

<sup>70</sup> 47 U.S.C 254(b)(5).

<sup>71</sup> *First Report and Order* at ¶50.

**Conclusion**

COMPTEL respectfully requests that the Commission reconsider its proposed changes to intercarrier compensation and the universal service contribution and distribution methodologies consistent with the foregoing.

Respectfully submitted,

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