BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local	)	
Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing a Unified Intercarrier Compensation	)	
Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

INITIAL COMMENTS OF THE
NEW YORK PUBLIC SERVICE COMMISSION

The Comments of the New York State Public Service Commission (NYPSC) are filed pursuant to the Federal Communications Commission's (FCC) Notice of Proposed Rulemaking (Notice), which proposes major changes to reform the universal service fund (USF) high cost regime and federal intercarrier compensation (ICC). USF high cost funding and ICC provide subsidies for the actual cost of network operations to ensure lower retail rates. In its Notice, the FCC seeks to simultaneously control the costs of these programs and shift support for narrowband telephone services to advanced broadband communications. Specifically, the FCC's long-term solution is to replace the current USF high cost and ICC systems with a new Connect

America Fund (CAF) that will focus on subsidizing broadband in those locations where competitive market forces have failed to encourage broadband deployment (i.e., rural, insular and high cost areas). Ultimately, with ubiquitous broadband deployment, voice service is expected to become an application that is provided over broadband connections.

The FCC proposes to replace the high cost USF with the CAF based system. For ICC, a legacy system based on above-cost per-minute-of-use rates, the FCC proposes to transition away from an ICC-based system, with transitional support provided through the CAF. While the FCC strives to obtain its long-term goal of ubiquitous broadband deployment, it recognizes that a "flash-cut" to the CAF based system is not reasonable, pointing out that many telephone companies continue to operate in an environment where their rates and business plans reflect current high cost and ICC support. To begin the transition to the CAF based system, the FCC proposes a number of interim steps and requests comments from industry participants, state commissions and other interested parties.

In summary, the NYPSC strongly supports reforming the USF high cost and ICC systems, and we share many of the FCC's concerns discussed in the Notice. We agree that the current USF and ICC systems need reform and that charging different rates for what is essentially the same service makes little sense. The subsidies embedded in access charges are no longer sustainable when customers can avoid inflated prices by purchasing services from wireless companies and other providers and use other services altogether (e.g., e-mail and social media) that do not levy these excessive charges. In such a competitive environment, access charges should move towards cost. The USF high cost fund similarly hinders competition by distorting markets through the use of subsidies and, due to its tremendous growth and complexity, has lost credibility. It too needs to be fixed.

In working towards its objective, the FCC should work with states and respect the state's legitimate jurisdiction and interest in managing the transition to reform in a competitive environment. Local residential service is heavily subsidized by access charges that longer-distance, interexchange carriers (IXCs) pay to the local exchange telephone companies (LECs) for originating and terminating intrastate toll calls. The additional revenue received by the LECs from the IXCs has been an important means by which the LECs have been able to make available to all customers affordable basic services, such as, local dial tone and the ability to call 911 in an emergency. New York is ideally positioned to make these difficult decisions regarding its transition to lower access rates.

Universal Service High Cost Fund

The NYPSC has long supported the increased deployment of broadband, provided that it is achieved in a thoughtful and efficient way. Given that excessive subsidies can create a drag on economic activity and a burden on consumers supporting the funding, it is important to New York that the FCC administers the proposal in an efficient and effective manner, with primary attention to costs of the transition and decisions on the amount of support and designated recipients. New York's concern with the program's cost primarily arises because the State is a substantial net contributor to the FCC's USF program. Under the FCC's new proposals, it is not clear that this imbalance resulting in the State's net payer status will change; and, it is possible that the amounts contributed by the State may substantially increase. We, therefore, support all reasonable efforts to contain the costs of the USF and the efficient allocation of monies to maximize benefits.

Avoid Early Adopter State Penalties

New York recognizes the benefits of extending broadband to rural or unserved areas. The NYPSC staff estimates that broadband availability is 90% or better in New York, based upon aggregated data (access lines, homes passed and geographic coverage) for digital subscriber line service, cable modem and wireless offerings. Our pro-competitive policies have contributed to the very broad entrance of cable companies into the broadband and voice telephone markets. In any proposal adopted by the FCC, New York and other similar early-adopter states should not be penalized for their rapid pace of broadband deployment.

Cost Containment and Efficient USF Allocations

Given the importance of broadband to economic development and quality of life at the state and federal level, the NYPSC supports reasonable efforts to expand its availability and adoption as a long-term voice, data and video technology. We urge priority be given to expanding adoption and a measured pace of deployment that allows companies to adapt to the new broadband world in a way that takes into account specific circumstances, financial resources and available and evolving equipment and technology. Haste and a rush to one specific technology may not take into account the fast paced evolution of telecommunications technology and the possibility of innovation, efficiencies and enhancements that are likely to develop in support of the FCC's policies and may result in a wasteful investment of public monies, particularly for deployment of broadband technology in high cost areas. As the FCC suggests, it is important to utilize innovation and initiative to extend broadband to high cost areas near-term, while technologies evolve. This should include satellite services (suggested in the NPRM) as well as the potential development of wireless backhaul infrastructure, last-mile wireless broadband and digital microwave Ethernet bridges to decrease deployment costs in difficult to serve areas.

Phase I CAF: Non-recurring Broadband Support in Unserved Areas

For the first phase of the CAF, the FCC proposes to establish a new pool of funding to make available non-recurring support for broadband in unserved areas and test the use of reverse auctions as a means of disbursing CAF support. For the size of the fund, New York recommends that the FCC choose the alternative for a CAF budget that results in a smaller amount of funding, and allow program savings to reduce the overall size of the CAF and contribution obligations on consumers. New York further suggests that the FCC give priority to and concentrate on distribution of funding for extension of broadband to public computing centers. Shared facilities offer several advantages. First, it allows more efficient use of funded services and equipment. Second, it makes more sense to provide increased broadband and computer access in centralized locations, where staff is on hand as a resource for training and trained professionals are available to maintain the equipment and services. Focusing support on broadband adoption and use strategies would respond to the needs of unserved or underserved populations during the initial stages of broadband deployment. Support for less expensive adoption policies over full deployment would allow development of a wider acceptance of the technology and evolution of technological improvements that may result in greater demand and decreased costs. This strategy is especially useful in areas where deployment is exceptionally expensive: it meets the basic objective of more broadband access while allowing time for innovations that may provide a more cost effective means to serve those areas in the future.

Top Priority - Cost Containment

Substantial universal service fund payments cause additional economic drag and impose burdens on consumers. For that reason, the FCC should give top priority to cost containment. The FCC has acknowledged that the level of high cost funding has spiraled out of control and that some portion of the funding is unrelated to its core universal service purpose. These acknowledgments underscore the need to put in place reforms on the use of funds in a responsible and accountable manner. For example, it is important to target USF support to locations that need the support and provide funds to one reliable local service provider with offerings priced in an affordable range. Cost containment could be achieved at least in part through the economies of scope and scale from a single company given the ability to serve all customers in a specified area. These measures hold the potential for targeting subsidies to locations where additional revenues are needed, without providing unnecessary support levels.

The NYPSC supports other cost containment proposals in the NPRM. These types of reforms are necessary to decrease the overall high levels of the USF. We encourage adoption of the proposal to eliminate the identical support rule because this revision will better peg funding levels to actual costs. The use of a competitive bidding mechanism for awarding USF high cost support may result in cost reduction: the risk of excessive administrative costs in conducting competitive bidding is outweighed by the need to make every effort to reduce subsidies to the lowest rate that will support continued universal service. An auction mechanism could eliminate the disparities in the existing program, which treats large carriers far less generously than small carriers and allows competitive eligible telecommunications carriers to receive support unrelated to their costs or the provision of universal service. With adoption of these and other reforms, consumers would no longer fund duplicative networks and the competitive bidding process could drive support levels closer to actual costs. We also urge flexibility in designing the competitive bidding programs to allow bidders to construct their bids to maximize revenues from end users and, thereby, take full advantage of external funding.

Intercarrier Compensation Reform

The FCC proposes two options for working with states in an effort to reform ICC. The first relies on maintaining the existing FCC and state roles in ICC regulation: the FCC would modify interstate access and reciprocal compensation rates; states would modify intrastate access rates under their own authority; and the FCC would implement a backstop mechanism. After a specified period of time, the FCC would take action if the states fail to act. Under option two, the FCC, under §§251 and 252 of the 1996 Telecommunications Act (Telecom Act), would establish a unified transitional reciprocal compensation methodology that would apply to all intercarrier rates, including charges for intrastate calls. Under this option, the FCC would determine the schedule for any glide path for ICC reform and eliminate per-minute charges. The FCC asserts that it could establish a unified pricing methodology and, then, defer to the states decisions on the glide path for implementation of the framework it establishes.

Existing Jurisdictional Framework Preferred

Reforming access charges is clearly long overdue. The NYPSC has already instituted a proceeding to address intrastate access charge reform.[1] For this reason, the NYPSC believes the FCC should leave intrastate access charge reform to the states, in the first instance. There are also compelling policy and legal reasons for the FCC to reject option two.

[1] Case 09-M-0527, Universal Service Fund, Notice Establishing Universal Service Proceeding (issued August 3, 2009) and Order Adopting Terms of Phase I Joint Proposal (issued July 16, 2010) p. 28.

First, as to policy reasons, option two may leave the scheduling of the glide path and transition to the FCC. If the FCC were to reduce access charges too quickly, a significant shortfall in revenues for the LECs in New York could result. The majority of New York's LECs are quickly losing customers to cable and wireless competitors and competition from cable and wireless providers will constrain LECs from recouping a portion of the revenue shortfall. While we agree that access charges should be reduced, states are in a better position to discern the extent to which funding a resulting deficiency is actually necessary and assigning responsibility for recovery of the deficiency. Any decisions in this regard could have a major impact on the viability of New York’s LECs going forward as well as local rates and extent of the burden imposed upon customers.

Second, for purposes of setting rates for other New York intrastate regulated services, the NYPSC is in a much better position than the FCC to decide upon the methods to offset any reductions to intrastate access charges on a company-by-company basis. Carrier access reduction plans will likely need to differ from company-to-company based on, among other things, existing local service rates, current access charge revenues and forward-looking commitments to local investment. Since the factors affecting local revenue requirements vary widely among the 40 LECs operating in New York, the state is the jurisdictional entity best positioned to take primary responsibility for deciding upon rate designs that are specific to each company or established on an average basis.

Concerning legal authority, the FCC, under option two, proposes to incorporate all “telecommunications,” including intrastate access traffic, under “intercarrier reciprocal compensation” governed by §251(b)(5). The FCC proposes to assert that the scope of traffic governed by §251(b)(5) is not limited to local traffic, as it has historically held, but now also includes exchange access traffic (i.e., toll). In essence, the FCC proposes to override traditional state authority over intrastate access rates on the asserted basis that the statutory term "telecommunications" is broad enough to bring traffic historically subject to intrastate access charges within the scope of §251(b)(5) reciprocal compensation. This interpretation would have the FCC exceed its statutory authority.

Since the advent of local competition, reciprocal compensation has applied to competitors of the LECs, not to IXCs.[2] The FCC itself has distinguished access charges from reciprocal compensation: "There are two major forms of intercarrier compensation - access charges and reciprocal compensation."[3] Federal courts also recognize this distinction.[4]

To reverse the FCC's longstanding legal distinction, the Notice merely states that §251(b)(5) encompasses all telecommunications traffic. It also declares now that the broad scope of §251(b)(5) did not prevent the FCC, in 1996, from establishing a legal distinction between reciprocal compensation and access charges. Because the FCC does not adequately

---

[2] The Supreme Court explained the process: ". . . the Act imposed various obligations on incumbent local-exchange carriers (LECs), including a duty to share their networks with competitors. See 47 U.S.C. §251(c). When a new entrant seeks access to a market, the incumbent LEC must 'provide . . . interconnection with' the incumbent's existing network, §251(c)(2), and the carriers must then establish 'reciprocal compensation arrangements' for transporting and terminating the calls placed by each others' customers, §251(b)(5)." Verizon Md. Inc. v. Public Serv. Comm'n. of Md., 535 U.S. 635, 638 (2002). And the FCC itself originally concluded that reciprocal compensation applies "only to traffic that originates and terminates within a local area." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15,499, 16,013, P 1034 (1996) (First Report and Order).

[3] First Report and Order, 11 FCC Rcd at 16013 ¶1033.

[4] Access charges are distinguishable from reciprocal compensation (Global NAPS, Inc. v. Verizon New England, 444 F.3d 59, 63 (1st Cir. 2006)).

distinguish its own precedent, it fails to provide a reasoned explanation for abandoning the longstanding distinction between reciprocal compensation and access charges.[5]

Besides being contrary to FCC precedent, the proposed interpretation is inconsistent with the rational implementation of the statutory provisions. As the FCC has previously stated, reciprocal compensation arrangements are those in which mutual compensation is received for a mutual exchange of traffic.[6] In contrast to the exchange of non-toll traffic, where Congress needed to establish a new regime in the 1996 Telecom Act, there was no need for Congress to establish access charges, because they were already in existence. Had §251(b) been intended to apply to access charges, it would have provided for both the establishment and the continuation of such charges. It does not, and the only reasonable reading of the 1996 Telecom Act is that the section applies to reciprocal compensation as it was then understood, not to access charges. The other provisions of the section – related to the new local competition provided for in the Act[7] – support this construction.

For instance, §252(d)(2)(A) makes clear that §251(b)(5) applies only to local traffic.[8] The only permissible reading of this section is that it applies only to traffic that

---

[5] New York Cross Harbor R.R. v. Surface Transp. Bd., 374 F.3d 1177, 1181 (D.C. Cir. 2004).

[6] See Pacific Bell v. Cook Telecom, Inc., 197 F.3d 1236, 1245 (9th Cir. 1999) (quoting Commission statement defining reciprocal compensation).

[7] Pub.L. 104-104; 110 Stat. 56 (1996).

[8] Section 252(d)(2)(A) provides:

> (d) Pricing Standards . . .
> (2) Charges for transport and termination of traffic
> (A) In general
> For the purposes of compliance by an incumbent local exchange
> carrier with section 251(b)(5) of this title, a State commission shall

originates on the facilities of one carrier and terminates on the facilities of a second carrier within the same local calling area. Any other reading would either contradict one or more of the provisions or lead to unreasonable results. Accordingly, §251(b)(5) cannot apply to traffic exchanged between LECs and IXCs (i.e., toll), because the provision applies by its terms only to traffic exchanged between LECs. Section 252(d)(2)(A) cannot apply to traffic that an IXC delivers for termination where such traffic is not originated on the network of the IXC. Moreover, it cannot apply to traffic that an ILEC delivers to an IXC, because ILECs do not compensate IXCs for transport and termination of such traffic. Consequently, this provision, which is the mandatory pricing regime for ILEC-exchanged traffic under §251(b)(5), undermines the FCC's interpretation. [9]

Further authority that §251(b)(5) applies exclusively to local traffic and not toll can be found in §251(b)(3) which states that LECs have "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service . . . ." Telephone toll service is defined as ". . . telephone service between stations in different exchange areas for which there is a separate charge not included in contracts with subscribers for exchange service"

> not consider the terms and conditions for reciprocal compensation to be just and reasonable unless—
> (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of **calls that originate on the network facilities of the other carrier**; . . . .
> (Emphasis added).

[9] Moreover, under §251(b)(5), LECs are required to "establish reciprocal compensation arrangements for the **transport** and termination of telecommunications (emphasis added)." Since LECs would only provide for the termination of exchange access (i.e., toll) and not the transport which would be handled by the IXCs, there would be no provision for reciprocal compensation for toll traffic under §251(b)(5).

(§153(48)). In contrast to §251(b)(3), LECs are not specifically required to establish reciprocal compensation arrangements with providers of telephone toll service under §251(b)(5). That is because Congress did not intend for telephone toll service providers (IXCs) to be subject to the pricing policies under §251(b)(5).

The FCC also incorrectly concludes that §251(g), which provides for the continuation of interconnection requirements pending FCC action, suggests that §251(b)(5) provides for FCC jurisdiction over access charges. That section cannot create FCC authority that does not otherwise exist.[10] Section 251(g) merely provides for the continued enforcement of certain pre-Act regulatory interconnection restrictions and obligations. It clearly is not an independent grant of authority to establish pricing standards over intrastate traffic. Thus, it does not override the §152(b) bar against FCC assertion of jurisdiction over intrastate traffic.[11]

Incentive Mechanisms

For states using a fund to reform intrastate access charges, the FCC properly proposes several incentive mechanisms during this transition, including use of a limited

---

[10] Section 251(g) provides:

> (g) Continued enforcement of exchange access and interconnection requirements
> On and after February 8, 1996, each local exchange carrier, to the extent that it provides wireline services, shall provide exchange access, information access, and exchange services for such access to interexchange carriers and information service providers in accordance with the same equal access and nondiscriminatory interconnection restrictions and obligations (including receipt of compensation) that apply to such carrier on the date immediately preceding February 8, 1996, under any court order, consent decree, or regulation, order, or policy of the Commission, until such [restrictions and obligations] are explicitly superseded by regulations prescribed by the Commission after February 8, 1996.

[11] Worldcom v. Federal Commun. Comm'n., 288 F.3d 429 (D.C. Cir. 2010).

subscriber line charge (SLC) and CAF dollars to match a state USF, to ease any revenue losses that LECs will inevitably experience as access charges decline. Opportunities to offset lost revenues from intrastate access charge reform would help resolve these issues.

Apply Existing ICC Rates to Interconnected VoIP

The FCC proposes to establish intercarrier compensation rules governing interconnected voice over internet protocol (VoIP) traffic and, if it is subject to intercarrier compensation rules, the applicable rate for such traffic. The FCC's objective is to promote the efficient use of resources, provide predictability regarding future revenues, and reduce billing disputes and litigation. It proposes four options: immediate adoption of bill-and-keep for VoIP; immediate obligation to pay VoIP-specific rates; payment of intercarrier compensation as part of a future glide path; and, immediate obligation to pay existing intercarrier compensation rates. We strongly urge the FCC to act in this regard; and, the NYPSC proposes that the FCC should adopt its fourth option and determine that all interconnected VoIP is subject to the same ICC rules – including intrastate access – as other similar traffic that originates and terminates calls. In this way, carriers will be subject to the same ICC rules to establish a level playing field as New York and other states pursue efforts to reduce access charges and eliminate subsidies. It is no longer necessary to treat VoIP as a nascent technology, given the proliferation of providers in the marketplace. Creating a special rate category for VoIP simply promotes another confusing distinction and opportunity for arbitrage. VoIP traffic should be subject to the legacy regime, especially because the revenues VoIP traffic produces in termination fees may facilitate access reform by offsetting revenue losses of LECs financially stressed during the transition to a new ICC system.

In New York, interconnected VoIP is the subject of many complaints by terminating carriers who routinely do not get paid for their termination function, because VoIP carriers claim that their service is an information service or falls under the FCC enhanced service provider exemption and therefore is not subject to ICC pricing rules. Traffic terminated by a LEC over a circuit-switched network is ultimately delivered in voice or time division multiplex format. In this regard, VoIP-originated traffic is technically indistinguishable from Plain Old Telephone Service (POTS) traffic; and, both VoIP-originated and POTS traffic is terminated in an identical manner over these legacy facilities. The process and costs for terminating VoIP-originated and POTS traffic over these legacy networks are identical and should be subject to ICC pricing rules, including intrastate access charges. The FCC's failure to classify interconnected VoIP has only exacerbated this issue.

If the FCC opts to sweep all interconnected VoIP into its proposed all-inclusive reciprocal compensation regime, it will likely fail for the reasons discussed above. Instead, VoIP traffic should be treated the same as POTS traffic for ICC purposes and VoIP toll traffic would not fall under §251(b)(5).

State Role Relating to Interconnected VoIP

In the event that the FCC decides that interconnected VoIP is an information service, then it also must recognize the state's role in overseeing this service. Section 2(b) (47 USC §152(b)) precludes the FCC from preemption of lawful state regulation governing intrastate communications. Thus, communications occurring between points within the same state may be regulated only by that state.[12] Section 2(b) does not distinguish between telecommunications

[12] Nat'l Ass'n of Regulatory Util. Comm'rs v. FCC, 746 F.2d 1492, 1498 (D.C. Cir. 1984).

and information services.[13] The FCC's ancillary jurisdiction under Title I of the Act, by which the FCC regulates information services, does not override §2(b).[14] Consequently, intrastate aspects of telecommunications or information services remain subject to state regulation. And because call endpoints of fixed IP/PSTN services can be identified, intrastate communications, as well as other intrastate aspects of those services, can be identified, and may therefore be regulated by the states.[15]

---

[13] People of the State of California v. FCC, 905 F.2d 1217, 1239-40 (9th Cir. 1990).

[14] AT&T, 525 U.S. at 381 n.8.

[15] See Minnesota Pub. Utilities Comm'n v. FCC, 483 F.3d 570, 581-83 (recognizing the difference between fixed and nomadic Voice over Internet Protocol (VoIP) services); see also Universal Service Contribution Methodology, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd 7518, 7546 ¶56 (recognizing that VoIP providers capable of identifying intrastate and interstate calls would be subject to state regulation).

The FCC's desire to take action to effectuate a uniform federal policy does not override the §2(b) statutory bar against FCC regulation of intrastate communication.[16] The FCC simply cannot act where Congress has not granted it jurisdiction.[17] The Notice does not point to any statutory authority granting the FCC authority to regulate intrastate aspects of IP/PSTN services. Accordingly, the FCC should determine that interconnected VoIP traffic is a telecommunications service subject to the same ICC, including intrastate access, as other telephone providers in New York.

Respectfully submitted,

Peter McGowan

Peter McGowan
General Counsel
Public Service Commission
State of New York
Three Empire State Plaza
Albany, NY 12223-1350

[16] Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 374 (1986).

[17] Id.