STATE OF NEW YORK DEPARTMENT OF PUBLIC SERVICE

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May 20, 2005

Honorable Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals II
445 12th Street, S.W.
Washington, D.C. 20554

Re: Comments of the New York State Department of Public Service in the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92.

Dear Secretary Dortch:

Enclosed for filing please find the Comments of the New York State Department of Public Service in the above-referenced proceeding.

Should you have any questions on these Comments, please call me at (518) 474-2510.

Sincerely,

Dawn Jablonski Ryman
General Counsel

Enc.

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**	
	)	
Developing a Unified Intercarrier	**)**	**CC Docket No. 01-92**
Compensation Regime	**)**	
	)	

COMMENTS OF THE NEW YORK STATE
DEPARTMENT OF PUBLIC SERVICE

Dated: May 20, 2005
Albany, New York

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Developing a Unified Intercarrier Compensation Regime	**)** **)**	**CC Docket No. 01-92**

COMMENTS OF THE NEW YORK STATE DEPARTMENT OF PUBLIC SERVICE

Introduction and Summary

The New York State Department of Public Service (NYSDPS) submits these comments in response to the Federal Communications Commission's (Commission) Further Notice of Proposed Rulemaking (FNPRM), released March 3, 2005, in its proceeding to develop a unified intercarrier compensation regime (CC Docket No. 01-92). In its FNPRM, the Commission stated that it was beginning a process to replace existing diverse intercarrier compensation regimes with a unified regime designed to accommodate the evolving competitive market. To assist it in its endeavors, the Commission requested comment on several specific proposals developed by different industry groups. The Commission also requested general comments on implementation issues associated with any reform measures, alternative reform proposals, and issues related to compensation for Commercial Mobile Radio Service (CMRS) providers.

The NYSDPS recommends that the Commission rely primarily on commercially negotiated agreements, rather than regulatory mandates, for intercarrier compensation arrangements. The NYSDPS also recommends federal universal service funding not be used as a mechanism to shield significant portions of the Incumbent Local Exchange Carriers' (ILECs) revenues from competitive erosion. Finally, we recommend that the Commission reject the

Intercarrier Compensation Forum's proposal that the Commission preempt state regulation of intrastate access charges.

A. NYSDPS POLICY POSITION

The NYSDPS recommends that the Commission recognize that the scale and scope of any intercarrier compensation problem is not uniform among companies or markets. Therefore, the Commission should seek approaches that maximize carriers' and states' flexibility to identify any real intercarrier compensation problems that may exist and tailor solutions to address them. Furthermore, the Commission should recognize that it may not effect a wholesale conversion of intrastate access revenues to federal universal service support.

The subjects of this docket are primarily the charges incumbent local exchange carriers (ILECs) impose on other carriers for their use of the Incumbent LECs' networks to originate and terminate calls (e.g., interstate and intrastate access charges and reciprocal compensation), although similar charges by Competitive LECs and CMRS providers are also implicated. The Commission asserts that the current intercarrier compensation regime "cannot be sustained" and must be reformed, preferably in a "unified" manner.[1] At a minimum, "unified" appears to mean that any intercarrier compensation that is permitted should be indifferent to the endpoints of the call, the nature of the interconnecting carrier(s), and the types of technologies used (i.e., "a call is a call is a call"). However, at least some of the reform plans offered by other parties as well as the Commission's originally proposed "bill and keep" regime would also seek uniformity among LECs (i.e., nationally uniform rates). Although not explicitly stated, the Commission also seems to be inclined to reduce further, or eliminate, some or all intercarrier compensation rates. As a consequence, the FNPRM also raises issues related to the abilities of LECs to recover any

[1] FNPRM ¶¶ 15-17.

revenues lost due to reform and the resulting potential impact on other rates (subscriber line charges, universal service funds, and local rates).[2]

The Commission began this proceeding in 2001 to examine the merits of replacing the current structure of intercarrier compensation with a "unified regime," particularly one based on "bill and keep." Now, in the FNPRM, the Commission finds that "developments compel [it] to move to a new, unified intercarrier compensation regime" (¶ 17) and seeks comment on a number of plans proffered by various parties and groups as well as on general issues related to intercarrier compensation reform. In the FNPRM, the Commission establishes a number of goals and constraints to be met in reforming the current system:

- Promote economic efficiency
- Promote facilities-based competition
- Preserve universal service (listed as a "consideration")
- Be competitively and technologically neutral
- Provide regulatory certainty
- Limit non-cost-based regulatory distinctions
- Encourage commercial agreements (as opposed to regulatory solutions)
- Comply with statutory requirements and limitations (including preemption)

In addition, a number of other potential constraints are raised or implied:

- The Commission's established preference for recovery of non-traffic-sensitive costs through "fixed" (e.g., monthly) charges
- The "additional cost" standard (now TELRIC) for reciprocal compensation for local traffic (252(d)(2))

[2] FNPRM ¶¶ 98-114.

- The need to ensure that calls are completed
- The requirements for (toll) rate integration (254(g))
- The requirement for service and rate comparability (254(b))
- The exemption for Enhanced Service Providers

As the Commission is well aware, various interested parties have expended considerable time and resources over the past several years in their attempts to develop proposals that would satisfy the Commission's goals and the parties' respective interests. The Commission is also aware that, to date, all of these efforts, while considerable, have failed to achieve a consensus solution. This failure, in and of itself, suggests that no simple solution exists to the complex problem articulated in the FNPRM. Moreover, the lack of a consensus solution bespeaks a lack of agreement on the nature and scope of the problem. For example, the Commission suggests that the core of the problem lies in the Incumbent LECs' inability to sustain intercarrier compensation charges that differ depending on the jurisdiction of a call or the type of interconnecting carrier. The extent to which such rate differentials challenge an Incumbent LEC's revenue stability, however, will depend heavily on the magnitude of its rate differentials and the extent to which it is able to respond to competitive pressures. Certainly, a carrier that faces limited competition and whose intercarrier compensation rates are fairly uniform will perceive a much more manageable problem than one facing intense competition with widely disparate access and reciprocal compensation charges. If those carriers perceive they have vastly different problems, it is at least questionable whether they would need or want the same solution.

Congress and the Commission have indicated a preference for relying on commercial agreements, rather than on regulatory mandates, to establish appropriate intercarrier relationships. We concur. Such arrangements allow parties in a competitive environment to develop solutions tailored to their particular needs. Such procedures necessarily imply that solutions, including rates and rate structures, may vary from company to company and even within a single company's service territory. Even where regulatory assistance is required, such as in arbitrating those agreements, there need be no expectation of nationally uniform outcomes. As experience with unbundled network element (UNE) rates reveals, even where a nationally uniform cost standard is imposed, there should be no expectation that nationally uniform rates will result. Nor should such an outcome be seen as a natural and desirable result in a competitive marketplace. The Commission should not seek to impose, even as a default, nationally uniform intercarrier compensation rates. Instead, the Commission should seek an approach that allows carriers (and, where necessary, states) the flexibility to identify and solve their own intercarrier compensation problems.

The Commission and many parties clearly expect intercarrier compensation reform to reduce the ILECs' current revenue streams. Consequently, debate rages over whether and how such revenue losses should be recouped. While such revenue losses need not be a foregone conclusion, if they do occur, federal universal service support should not be regarded as the sole, or even primary, source of replacement revenues. It is especially important that federal universal service funding not be used as a mechanism to shield significant portions of the ILECs' revenues from competitive erosion. Section 254 of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996 Act) provides that federal universal service funding is to be used only to support those services designated for support and then only toward achieving the goals of affordable and reasonably comparable rates. Absent a determination that an individual eligible telecommunications carrier requires additional federal universal service funding support to achieve affordable and reasonably comparable rates, it would be inappropriate to provide such funding simply to replace lost revenue streams. This is particularly true with respect to intrastate access revenues, which the Commission may not, and should not, simply convert into federal universal service funding. To the extent that a carrier's intercarrier compensation revenues would be reduced by regulatory action, it should be provided an opportunity to attempt to recover lost revenues through other rates, including subscriber line charges, basic local rates, or any other appropriate rate design, but it should not be guaranteed revenue recovery by in effect charging its competitors' customers higher universal service surcharges.

B. NYSDPS LEGAL ANALYSIS

The NYSDPS submits that the Intercarrier Compensation Forum's (ICF) proposal that the Commission set ubiquitous access charge rates ("bill and keep"), including those for intrastate access, is in violation of the Telecommunications Act of 1934, as amended by the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56.

1. Section 251(b)(5) Applies Only to the Exchange of Local Traffic

In its first argument, the ICF notes that the Commission has been given broad rulemaking authority under §201(b) of the Act which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this chapter."[3] The ICF argues that the Supreme Court, in Iowa Utilities Board, recognized that §201(b) authority extends not just to jurisdictionally interstate matters, but "encompass[es] matters that, before 1996, fell within the exclusive jurisdiction of the states."[4] The ICF then couples the Commission's rulemaking authority with what they refer to as the "expansive" language of §251(b)(5) allegedly to demonstrate that the Commission can, and should, preempt the states for

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[3] 47 USC §201(b).

[4] ICF Ex Parte Brief at 28-29 (citing AT&T Corp. v. Iowa Utilities Bd., 525 U.S.366, 377-86 (1999)).

all matters of intercarrier compensation, including those matters that involve intrastate access charges for intrastate interexchange calls.

The Commission's authority to preempt the States under §201 falls only to those matters to which the 1996 Act applies,[5] and jurisdiction over intrastate access charges was not changed under the 1996 Act. Consequently, "[i]nsofar as Congress has remained silent, however, §152(b) continues to function."[6]

The ICF's argument that §251(b)(5) applies to intrastate access charges because Congress neglected to include language limiting the term "telecommunications" in that provision, is incorrect. As the Commission correctly identified, the reach of §251(b)(5) encompasses only compensation arrangements as they apply to Local Exchange Carriers carrying local traffic.[7]

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[5] AT&T Corp. v. Iowa Utilities Bd., 525 U.S.366, 380-81 (1999).

[6] Id. at 381n.8.

[7] *See* First Report and Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 11 FCC Rcd 15499, 16008-58 ¶¶ 1027-1118 (1996) (Local Competition Order) (adopting reciprocal compensation rules and creating a compensation scheme for the exchange of competitive local traffic). In addition, the ICF is incorrect that, in the ISP Remand Order, the Commission reversed its own prior position as stated in the Local Competition Order. Instead, the Commission again determined that for ISP traffic, §251(b)(5)'s reciprocal compensation provisions excluded traffic that is subject to parallel intrastate access regulations. The Commission made its determination noting that "[b]efore Congress enacted the 1996 Act, LECs provided access services to IXCs and to information service providers in order to connect calls that travel to points - both interstate and intrastate - beyond the local exchange. In turn, both the Commission and the states had in place access regimes applicable to this traffic, which they have continued to modify over time. It makes sense that Congress did not intend to disrupt these pre-existing relationships. Accordingly, Congress excluded all such access traffic from the purview of section 251(b)(5)." ISP Remand Order at 9168, ¶37 (*see also* ¶37 n.66 stating that "we again conclude that it is reasonable to interpret section 251(b)(5) to exclude traffic subject to parallel intrastate access regulations, because "it would be incongruous to conclude that Congress was concerned about the effects of potential disruption to the interstate access charge system, but had no such concerns about the effects on analogous intrastate mechanisms" citing its Local Competition Order, 11 FCC Rcd at 15869.)

The Commission's conclusion also is supported by the plain language of §252(d)(2). Section 252 (d)(2) includes the pricing standards applicable to unbundled network elements under §251. More specifically, §252(d)(2)(A) states that for the purpose of compliance with §251(b)(5), a state commission shall not consider a commercial reciprocal compensation agreement as just and reasonable:

> unless 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.[8]

Because calls neither originate, nor terminate, on an interexchange carrier's facilities, the pricing of such traffic is not governed by §252(d), and, therefore, §251(b)(5) is not applicable.[9]

2. The Scope of §251(b)(5) is Not Defined by §251(g)

Likewise, the ICF is incorrect in asserting that §251(g) demonstrates that intrastate access charges are subject to §251(b)(5) because Congress preserved certain pre-1996 Act rules applicable to interstate access traffic by court order, consent decree or Commission regulation, order or policy until superceded by Commission regulation.[10]

Not only does the plain language of §251(b)(5) and §252(d)(2) refute the ICF's argument,

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[8] 47 U.S.C. §252(d)(2)(A)(i) (emphasis supplied).

[9] Local Competition Order at ¶¶ 1033-1034 (stating that "section 251(b)(5) reciprocal compensation obligations should apply only to traffic that originates and terminates within a local area," and the "provisions of section 251(b)(5) for transport and termination of traffic do not apply to the transport or termination of interstate or intrastate interexchange traffic.")

[10] The ICF argues that such a provision would have been unnecessary had Congress not meant for §251 to apply to interexchange traffic, even when wholly intrastate.

but had Congress intended to preserve the status quo for intrastate access until the Commission issued new regulations, as it did with interstate access, it would have directed such a result in §251(g).

3. Section 254 Does Not Grant the Commission Preemption Authority

Finally, the ICF attempts to find further support for preemption in the Universal Service provisions of §254. According to the ICF, the Commission can preempt intrastate access charges on the grounds that such are "inconsistent" with the Commission's duty to "rationalize universal service support." The ICF's argument, however, ignores judicial precedent that has determined that §254 contemplates both a Federal and a State Universal Service system, and does not provide the Commission authority to preempt the states.[11]

In Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 423-24 (5th Cir. 1999), the Fifth Circuit held that the universal service provisions of §254, as applied to intrastate access charges, were not sufficiently unambiguous or straightforward enough to override the reservation of state authority under §152(b).[12] Additionally, precisely because of the limitations on the Commission's authority after the 1996 Act, the Fifth Circuit "held that the Commission may not consider intrastate revenues in assessing a carrier's contribution to the federal universal service-support mechanism."[13] Likewise, in the recent decision of Qwest Communications International,

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[11] See Qwest Corp. v. FCC, 258 F.3d 1191, 1203 (10th Cir 2001) (stating that the court "recognize[s] that the FCC may not be able to implement universal service by itself, since it lacks jurisdiction over intrastate service."); see also Texas Office of Public Utility Counsel v. FCC, 183 F.3d 393, 423-24 (5th Cir. 1999) (TOPUC I) (holding that §254 does not give the FCC preemption authority).

[12] TOPUC I, 183 F.3d at 424.

[13] Qwest Corp. v. FCC, 258 F.3d at 1203 (citing TOPUC I, 183 F.3d at 447-48).

Inc. v. FCC, 398 F.3d 1222 (10th Cir 2005), the Tenth Circuit again rejected the appellant's argument that the general provisions of §254 require the Commission to order States to terminate implicit subsides in favor of explicit universal service programs and held that §254 does not provide "a backdoor to federal manipulation of state support mechanisms."[14]

Accordingly, as two Federal circuits have decided, the Commission should reject the ICF's argument that §254 provides any authority on which to preempt the States with regard to intrastate access charges.

CONCLUSION

For all the foregoing reasons, the NYSDPS urges the Commission to approach any reform of the current intercarrier compensation regime with great care. Additionally, the NYSDPS urges the Commission not preempt the state authority over intrastate access charges for the reasons stated herein.

Respectfully submitted,

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[14] Qwest Communications International, Inc. v. FCC, 398 F.3d 1222, 1232-33 (10th Cir 2005).