BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP Exemption"	)))	WC Docket No. 08-152

COMMENTS OF THE
NEW YORK PUBLIC SERVICE COMMISSION

The current intercarrier compensation regime treats identical uses of the network differently, creating significant inequities and inefficiencies. It should be fixed. AT&T's petition for a declaratory ruling for a – in its words – "piecemeal" solution[1] is not an answer; it will only make matters worse and will fail to resolve underlying issues. AT&T's proposals infringe on regulation reserved to the states and improperly shift the burden of termination costs from carriers to consumers, with no guarantees consumers will benefit from the changes. AT&T's petition for a declaratory ruling should be denied.

AT&T suggests the FCC's enhanced service provider (ESP) exemption from intercarrier compensation is, at least in part, the underlying reason why there are disputes as to the applicable access charge for terminating traffic between internet protocol (IP) telecommunications carriers and the public switched telephone network (PSTN). The company offers what it refers to as interim solutions which could be implemented, while the Commission is addressing overall reform of intercarrier compensation. AT&T requests that the FCC cap all access charges at the interstate rate for the termination of interexchange traffic between IP telecommunications

[1] July 17 transmittal letter of Henry Hultquist, Vice President Federal Regulatory, AT&T.

carriers and local exchange companies. It recommends that reciprocal compensation continue to apply to local traffic. To make up foregone revenue, AT&T requests a waiver to increase its subscriber line charges (SLCs) up to the established cap.

Uniform Rates for Only IP/PSTN Calls Would Not be Technologically or Competitively Neutral

The NYPSC agrees that parts of the current intercarrier compensation regime are broken: some VOIP-based carriers terminating calls do not pay for that functionality. AT&T's proposal, however, would add another dimension to the already fragmented intercarrier compensation regime - - different rates for interstate and intrastate terminating access depending on the type of protocol used to process calls - - all of which are charged for the same function, terminating a call. Differing rates between interstate and intrastate jurisdictions have long been in place, and intrastate access charge rates are set by regulators as a part of comprehensive rate designs. Since this proposal would implement different rates if a call originates or terminates with an IP-connected telecommunications carrier, as opposed to solely riding on PSTN facilities, it would result in two separate and distinct rates for exactly the same function – termination of an intrastate, interexchange call. This is not technologically neutral; it favors one technology over another, resulting in asymmetrical compensation and possibly triggering inefficient investment and deployment decisions. The FCC should reject AT&T's proposal for that reason.

The FCC Lacks Authority to Cap Intrastate Access Charges

Additionally, AT&T's proposal amounts to an illegal preemption of state regulation of intrastate access charges. States are fully capable of evaluating and adjusting the level of intrastate access charges, as the situation requires. Carriers are free to propose reductions in their intrastate access charges as they deem appropriate to their competitive situations. A cap on intrastate access charges at interstate levels amounts to preemption of intrastate ratemaking. This would be ill-advised as a matter of policy, and would also be inconsistent with the Act's reservation of intrastate ratemaking authority to the States, except in limited circumstances. As we pointed out in our comments on the Missoula Plan proposal, the Commission may not preempt state regulation of intrastate access charges, except: 1) where Congress has expressly granted the FCC intrastate jurisdiction; or 2) where the judicially created impossibility exception permits federal preemption of state authority over intrastate communications.[2] Neither of these conditions exists with respect to intrastate access charges. A copy of our earlier comments is attached.

Shifting Costs for Terminating Calls by Increasing SLCs Does Not Benefit Consumers

AT&T's proposal to make up foregone intrastate access charge revenues by increasing subscriber line charges (SLCs) is not a new idea, and was in fact a component of the Missoula Plan of which AT&T was a significant proponent. The problems that existed then that prevented its adoption persist. Telecommunications companies are paying for the portions of the PSTN from which they are benefitting and they are free to build those costs into their rates. AT&T would like to shift the costs to the consumer by increasing its SLCs. Consumers' costs would rise with no expectation of toll rates going down commensurately. The consumers' bills would go up and stay up. AT&T also overlooks the inequities of converting from a usage sensitive

[2] See New York Public Service Commission Comments, CC Docket No. 01-92 (filed October 25, 2006).

charge to a flat rate charge- those hit the hardest are likely to be those of limited means that make few calls.

The NYPSC agrees with AT&T, and many other parties, that comprehensive intercarrier compensation reform is necessary but urges that quick fixes not be the focus. Mechanisms that continue need to be fair, equitable, and competitively neutral. Most importantly, the system must be technology neutral and flexible enough to accommodate future technological innovations. For the reasons outlined above, NYPSC respectfully requests the FCC to deny AT&T's request for declaratory ruling and limited waivers.

Respectfully submitted,
s/Peter McGowan

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Attachment

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

On July 25, 2006, the Commission issued a Public Notice in the above-entitled proceeding inviting comments on the Missoula Plan for Intercarrier Compensation Reform (Plan). The New York State Department of Public Service (NYDPS) submits these comments in response to the Public Notice.

INTRODUCTION AND SUMMARY

In broad terms, the Plan proposes to significantly reduce interstate and intrastate access charges by approximately $6 billion annually and reciprocal compensation payments by an indeterminate amount.[1] It allows incumbent local exchange carriers (ILECs) to recover the foregone access charge revenues through increased monthly subscriber line charges (SLCs),[2] as well as through a new "Restructure Mechanism.[3] The Plan would also expand several existing components of the Universal Service Fund (USF), and would shift some existing state USF costs to the federal program through an

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[1] Plan at 100.

[2] *Id.* at 19.

[3] *Id.* at 63.

"Early Adopter" fund.[4] The Plan also contains various complex components detailing how and where carriers will exchange and transit traffic,[5] the extent of each carrier's financial obligations for such interconnections,[6] and the transmission of call data to assist in proper billing of intercarrier charges.[7]

The NYDPS does not support the Plan. In previously filed comments in this proceeding, the NYDPS recommended that the Commission rely primarily on commercially negotiated agreements, rather than regulatory mandates, for intercarrier compensation arrangements. We also recommended that 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 recommended that the Commission reject the Intercarrier Compensation Forum's proposal that the Commission preempt state regulation of intrastate access charges.[8] The Plan runs contrary to all three of these recommendations.

There are additional reasons why the NYDPS cannot support the Plan. First, while the Plan would allow significant subscriber line charge (SLC) increases, corresponding usage (e.g., toll) rate decreases are not guaranteed. Hence, the Plan's

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4 *Id.* at 76.

5 *Id.* at 49.

6 *Id.* at 30.

7 *Id.* at 56.

8 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the New York State Department of Public Service, filed May 20, 2005.

purported consumer benefit may be significantly overstated. Second, the Plan would convert billions of dollars of intrastate revenues into interstate revenues, inevitably leading to consumers in some states subsidizing services used by customers in other states. Third, the Commission lacks legal authority to preempt State regulation of intrastate access rates. For these reasons, the NYDPS recommends that the Commission reject the Plan.

DISCUSSION

Markets, Not Mandates, Should Drive Intercarrier Compensation Reform.

While the NYDPS commends the parties' multi-year efforts at establishing a consensus plan for intercarrier compensation reform, we note that the complex and controversial Plan does not represent any sort of consensus, not even within the industry. The Plan's proponents are essentially AT&T and its affiliates, along with a minority of the nation's small rural ILECs.[9] As we observed in our earlier comments, this lack of consensus, despite prodigious effort, suggests that attempting to impose a national regulatory solution to the various intercarrier compensation problems faced by a myriad of parties with disparate interests may be futile. Instead, service providers should identify and solve cooperatively their own problems through commercial arrangements. Where voluntary negotiations fail, the Commission or state utility commissions may be called upon to resolve disputes within their respective jurisdictions. In this manner, solutions may be tailored to fit provider-specific situations.

[9] Most ILECs of all sizes, most competitive local exchange carriers (CLECs), most wireless carriers, most cable companies, most state regulators, and most consumer advocates have not endorsed the Missoula Plan.

Uniform Rates Ignore Providers' Costs and Competitive Pressures.

Both the NYDPS and the Commission have long supported moving intercarrier compensation rates toward cost. In order to achieve rate uniformity, the Plan would ignore cost differences between carriers, as well as differences between separate service areas of a single carrier. [10] As a result, many providers would be required to significantly reduce intercarrier compensation rates, perhaps even below cost, and could only hope to recover lost revenues through higher end user charges and the Plan's "restructure mechanism" revenues.[11] Those providers should not be forced to accept such a bargain in order to achieve artificial rate uniformity among service providers. Indeed, in a truly competitive marketplace, rate uniformity is an unlikely outcome. Rather than impose uniform national rates on carriers facing competition, the Commission should focus on affording carriers flexibility in order to allow them to respond to their own particular competitive pressures.

Universal Service Funding Should not be Used as a Mechanism to Shield Ilecs from Competition.

The Plan calls for establishment of a USF-like Restructure Mechanism to defray a portion of local carriers' annual revenues losses resulting from mandated intercarrier

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[10] Appropriately, the Plan implicitly recognizes carrier and market-based cost differentials by allowing carriers to deaverage their SLCs. Wholesale rates paid by other carriers should likewise reflect cost differentials.

[11] The Missoula Plan sponsors suggest that the plan's rules are merely defaults that carriers can ignore in negotiating individual interconnection agreements. In reality, however, these default rates must be assumed to be caps, above which at least one party to such negotiations likely will never go.

compensation rate decreases.[12] The effect of this proposal would be to move $1.5 billion in access revenues, which are presently at risk due to intermodal competition, into a safer government-mandated subsidy mechanism funded, in large part, by customers of the ILECs' competitors. Like the Interstate Access Support (IAS) and Interstate Common Line Support (ICLS) previously added to USF by the Commission, the Restructure Mechanism would merely recover lost intercarrier compensation revenues without regard to providers' costs. As was the case with IAS and ICLS, the Restructure Mechanism appears to be another means of protecting the incumbents' revenues from erosion. This is inappropriate in a competitive market, except perhaps on a brief transitional basis.

The Plan's Consumer Benefits may be Illusory.

The Missoula Plan would allow SLC caps to rise over time to $10 and above for most customers. In addition, consumers will be expected to pay higher USF charges to cover increases to the existing USF mechanisms, as well as to fund the Plan's Restructure Mechanism and Early Adopter fund. In return for bearing these added costs, consumers should expect lower toll rates. Consumers who place few toll calls tend to experience higher bills when such rate restructuring is undertaken, and these consumers are frequently the least able to afford the increase. Under the Plan, however, it is possible that even consumers who place significant numbers of long distance calls will not benefit from this proposal. Whether they do, and whether consumers as a whole benefit, depends

[12] Plan at 63. It is not clear to what extent this subsidy would be available to specific ILECs or their competitors. It would appear that in some cases it would not be provided on a competitively neutral basis.

on the extent to which intercarrier compensation rate reductions enjoyed by carriers are flowed through to their customers. In the past, when toll markets were dominated by two or three highly competitive independent carriers, regulators might reasonably have assumed that access charge reductions would flow through fairly quickly to customers as per minute toll rate reductions. Now that many providers offer flat rate packages of all-distance calling, there is little if any pressure to flow access reductions through to customers of those plans. For example, if an ILEC raises its SLC to offset its access revenue reductions, it might not simultaneously reduce the usage portion of its package price to reflect its access cost savings as a toll carrier. Thus, it is unlikely that the Plan's rate restructuring exercise will ultimately benefit consumers.

<u>The Commission Should not Attempt to Override State Oversight of Intrastate Access Charges.</u>

In addition to moving toward greater intercarrier compensation rate uniformity, the Plan's rate proposal would substantially reduce intrastate access charges. Of the Plan's proposed $6 billion access charge reductions, approximately $4.3 billion, or (72%), is intrastate.[13] Most, if not all, of this intrastate reduction would be transferred to interstate rates via SLC and USF surcharge increases. In addition, the Plan proposes that at least an additional $200 million of previous intrastate access reductions should be federalized through an Early Adopter fund.[14] These actions amount to Commission preemption of intrastate ratemaking and federalization of revenues which are currently

[13] Plan at Exhibit 2, p. 12, fig. 2.

[14] Plan at 76.

intrastate.[15] This would be ill-advised as a matter of policy, and would also be inconsistent with the Act's reservation of intrastate ratemaking authority to the States, except in limited circumstances.[16]

States are fully capable of undertaking the proposed intrastate access reductions, if such reductions are indeed warranted. Each provider whose rates are regulated at the state level may propose reducing its intrastate access rate in that state to whatever level it deems appropriate given its competitive situation. Likewise, a provider may seek to offset any revenue losses with intrastate rate or intrastate USF increases, which the state may approve after taking into consideration factors such as local market conditions and the provider's financial situation. Customers would simply trade lower intrastate toll rates for higher local rates or state USF payments. This would not result in intrastate revenue decreases, as is being proposed under the Plan. Hence, the Commission need not create a federal mechanism to compensate providers for intrastate access rate reduction. Indeed, it would be inappropriate to ask consumers in one state to pay into a federal Restructure Mechanism in order to offset intrastate access reductions in other states. There is no national problem which requires a national solution.

Furthermore, the proposed Early Adopter fund highlights a weakness in the Plan's effort to federalize intercarrier compensation. Because the Plan contemplates prospective intrastate rate reductions being offset by interstate rate increases, consumers in states that

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[15] *See Texas Office of Pub. Util. Counsel v. FCC*, 183 F.3d 393, 447 (5^{th} Cir. 1999) (holding that the Commission cannot assess intrastate revenues for USF purposes).

[16] *See* pp. 9-13, *infra*.

have already taken steps to lower intrastate access charges (Early Adopters) would enjoy less benefit from future (presumably smaller) rate reductions, but would nevertheless be penalized by being required to subsidize larger reductions in the remaining states. To mitigate this unfairness, the Plan would create a federal Early Adopter fund. As initially proposed, this fund would be applied solely to reimburse the "explicit state funds" that some states have already created to offset prior intrastate access charge reductions. The Plan's proponents, however, also recognize that the Early Adopter fund would not provide any relief to states which are rebalancing rates without using an explicit state fund.[17]

Efforts to create an all-inclusive Early Adopter fund, however, will likely founder. First, it will be difficult to determine whether or how to compensate states that have not utilized an explicit state fund. Those states may either have raised other intrastate rates, or may have declined to provide for recovery of the forgone revenues. In those cases, it would be very difficult to determine how much intrastate access revenues have been reduced. Any attempt to quantify prior reductions raises questions such as which charge reductions would be taken into account, what point in time to begin counting access charge reductions, and whether end user toll reductions should be taken into account.

In any event, a federal fund simply could not afford to defray any significant portion of prior intrastate access reductions. New York alone has ordered intrastate access and toll reductions in excess of $500 million since the 1980s. This suggests that the national figure could exceed $5 billion. The Plan's $200 million Early Adopter fund

[17] Plan at 76 n.27.

would fall far short of what could be needed. Thus, the creation of a fair and adequate Early Adopter fund would be unworkable. This illustrates the futility of attempting to redistribute monies between states, especially when such redistribution may unfairly penalize states for having made logical and valid policy choices concerning intrastate access charges.

The Commission Lacks Legal Authority to Cap Intrastate Access Charges.

The Plan's proponents offer a legal analysis which asserts that the Commission may impose mandatory caps on intrastate access rates when states do not do so voluntarily. As a legal matter, the Commission may not preempt state regulation of intrastate access charges, except: 1) where Congress has expressly granted the Commission intrastate jurisdiction;[18] or 2) where the judicially-created "impossibility exception" permits federal preemption of state authority over intrastate communications.[19] Neither of these conditions exists with respect to intrastate access charges.

The Plan proponents argue that Section 251 (b) (5) of the 1996 Act[20] grants the Commission authority over intrastate access charges because it makes no distinctions

[18] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 (1999) (*Iowa Utils. Bd.*).

[19] *Louisiana PSC v. FCC*, 476 U.S. 355, 375 n.4 (1986) (*Louisiana PSC*).

[20] 47 U.S.C. § 251 (b) (5).

with respect to types of traffic or service definitions.[21] This provision, however, expressly applies only to "reciprocal compensation arrangements."[22] The United States Court of Appeals for the First Circuit recently relied upon the Commission's view that access charges and reciprocal compensation are not the same.[23]

The Plan proponents further argue that § 251 (g) of the 1996 Act carves out Commission jurisdiction over intrastate access charges, but that this provision also entitles the Commission to supersede that carve-out at any time simply by enacting access regulations.[24] This argument only works if the Commission has intrastate access rate jurisdiction in the first instance, but since it does not, § 251 (g) does not apply. In effect, § 251 (g) expressly permits the Commission only to supersede any pre-1996 Act

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[21] Plan Attachment A, "Legal Analysis of Track 1 and 2 Carriers Concerning Measures to Ensure State Compliance with Rate Provisions for Tracks 1 and 2" (Legal Analysis), at 2.

[22] 47 U.S.C. § 251 (b) (5).

[23] *Global NAPS v. Verizon New England, Inc.*, 444 F.3d 59, 63 (1st Cir. 2006) (*citing Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 16012-13 ¶ 1033 (rel. Aug. 8, 1996) ("As a legal matter, transport and termination of local traffic are different services than access service for long distance telecommunications. The [Act] preserves the legal distinctions between charges for transport and termination of local traffic and interstate and intrastate charges for terminating long distance traffic").

[24] Legal Analysis at 3.

"regulation, order or policy of the Commission."[25] It contains no express grant of authority to supersede the law of any State.[26]

Proponents further argue that the impossibility exception permits the Commission to preempt state intrastate access regulations, on the grounds that preemption is necessary to further the federal regulatory objective of access charge uniformity.[27] The Supreme Court in *Louisiana PSC* held that the Commission cannot preempt state law merely to further a policy objective.[28] Rather, the test for impossibility is whether federal and state regulation can feasibly coexist.[29] In the same manner, decades of actual practice of separate interstate and intrastate access charges reveal that state and federal regulation can coexist.

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[25] 47 U.S.C. § 251 (g).

[26] In addition, as the Commission correctly recognized, § 251 (g) preserves only the Commission's authority over interstate access, and supports an interpretation of § 251 (b) (5) as excluding intrastate access traffic. *Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, 16 FCC Rcd 9151, 9168 ¶ 37 n.66 (rel. Apr. 27, 2001).

[27] Legal Analysis at 5.

[28] "[A]n agency literally has no power to act, let alone pre-empt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it . . . we simply cannot accept an argument that the FCC may nevertheless take action which it thinks will best effectuate a federal policy." *Louisiana PSC,* 476 U.S. at 374; *see also Iowa Utils. Bd.,* 525 U.S. at 381 (disagreeing with FCC preemption on the basis of policy because § 152(b) "prevent[s] the Commission from taking intrastate action solely because it further[s] an interstate goal").

[29] *Louisiana PSC*, 476 U.S. at 379 (where separation of regulation covering depreciation of the same pieces of equipment was possible, state regulation was upheld).

While the Plan concerns access charges, the Legal Analysis seems to argue that the Commission may preempt state regulation of intrastate transit charges as well. [30] In any event, the Legal Analysis incorrectly asserts that the Commission may utilize its "ancillary authority under section 201" of the Act to regulate intrastate transit traffic in order to effectuate § 251 (a) interconnection.[31] As the Supreme Court held in *Iowa Utilities Bd.*, however, "the Commission could not, for example, regulate any aspect of intrastate communication *not* governed by the 1996 Act on the theory that it had an ancillary effect on matters within the Commission's primary jurisdiction." *Iowa Utilities Bd.*, 525 U.S. at 381 n.8. Consequently, a service's (e.g., transit) ancillary effect on interconnection pursuant to § 251(a) supplies no basis for preemption of state regulation of the intrastate aspects of that service. Section 201 only gives the Commission jurisdiction over matters to which the Act expressly applies,[32] the scope of which excludes intrastate transit traffic.

Finally, the judicial "presumption against preemption" further bars Commission authority over intrastate rates. When federal courts determine whether federal law preempts states in a field traditionally dominated by state regulation, a presumption

[30] Legal Analysis at 4 n.3.

[31] Title I, not Section 201, of the Act is recognized as being the source of the Commission's ancillary authority. *United States v. Southwestern Cable Co.*, 392 U.S. 157, 178 (1968).

[32] *Iowa Utils. Bd.*, 525 U.S. at 380.

against preemption applies.[33] In a traditional state regulatory field, there is a presumption that state and federal regulation can coexist.[34] Thus, state law is presumed to be preserved unless it is the "clear and manifest purpose of Congress" to displace state law.[35] Because of the States' historical authority over intrastate rates and charges, which the Commission has acknowledged, [36] the presumption applies to intrastate access charges. The statutory language relied upon in the Legal Analysis does not clearly demonstrate preemptive intent, and therefore does not overcome the presumption.

CONCLUSION

For all of the foregoing reasons, the Commission should reject the Missoula Plan for intercarrier compensation reform.

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[33] *Engine Mfrs. Ass'n v. S. Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 260 (2004).

[34] *Hillsborough County v Automated Medical Labs.*, 471 U.S. 707, 716 (1985).

[35] *Engine Mfrs. Ass'n*, 541 U.S. at 260.

[36] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4723 ¶ 82 (rel. Mar. 3, 2005); *Texas Office of Pub. Util. Counsel*, 183 F.3d at 447.