BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20544

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96045
	)	
LifeLine and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier Compensation	)	
Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36

INITIAL COMMENTS OF THE
NEW YORK PUBLIC SERVICE COMMISSION

These Initial Comments of the New York Public Service Commission are filed pursuant to a notice of the Federal Communications Commission (Commission) proposing major changes in the federal intercarrier compensation and universal service regimes.[1] No one can credibly challenge the Commission's conclusion that competition

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[1] *Universal Service Contribution Methodology; High-Cost Universal Service Support; IP-Enabled Services; Lifeline and Link Up; Developing aUnified Intercarrier Compensation Regime; Numbering Resource Optimization; Intercarrier Compensation for ISP-Bound Traffic; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Federal-State Joint Board on Universal Service*, WC Docket Nos. 06–122, 05–337, 04–36, 03–109; CC Docket Nos. 01–92, 99–200, 99–68, 96–98, 96–45,

has "challenged the outdated regulatory assumptions underlying our universal service and intercarrier compensation regimes forcing us to reassess our existing approaches."[2] We share many of the Commission's concerns. We agree that the current intercarrier compensation system needs reform and that charging different rates for what is essentially the same service makes little sense, but the Commission should respect state's legitimate jurisdiction and interest in not being unduly burdened by shifting above cost access charge recovery to universal service funding. The subsidies embedded in access charges are no longer sustainable when customers can avoid the inflated price by purchasing service from cable companies, VOIP providers, wireless companies and a host of other providers that don't levy the excessive charge. In such a competitive environment, access charges should move to cost. The Universal Service Fund similarly hinders competition by distorting the market. It too needs to be fixed.

Intercarrier Compensation

The Need For Access Charge Reductions

Reform of access charge pricing is clearly long overdue.[3] We share the Commission's concerns. Our pro-competitive policies predate – by years – the 1996 Act. We pioneered collocation and eased the way for interconnection[4] long ago. More

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Further Notice of Proposed Rulemaking, 73 Fed. Reg. 66821 (Nov. 12, 2008) (Further Notice of Proposed Rulemaking).

[2] Further Notice of Proposed Rulemaking at A-3

[3] Further Notice of Proposed Rulemaking, at A-84, et seq.

[4] *Examination of Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Case 05-C-0616, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (April 11, 2006) at 22 and sources cited therein.

recently, recognizing that facilities-based competitive alternatives were widely available, we allowed end user rates to rise to market levels.[5] Intrastate access charges are already lower than most. Left alone, we could lead the way to efficient pricing and fully competitive markets.

We recognize, however, the Commission's authority over interstate rates as well as the Universal Service Fund. Given this situation, and our agreement with the Commission that a single, unified rate for all access is appropriate (subject to our reservations about cost studies discussed below), the Commission's approach is a reasonable one, so long as states that have already moved to rationalize rates are not harmed.

Several states have kept local service rates far below cost and below competitive levels. While this is their prerogative, it is not fair to have the difference made up by other states. The Commission seems appropriately sensitive to this problem, but would require only that "state retail local service rates are at the maximum levels permitted under applicable law;" it would not require a benchmark, deferring that issue to the joint board.[6]

"At the maximum levels permitted under applicable law" is too vague a phrase to provide adequate protection. Especially given the vagaries inherent in the typical "just and reasonable" standard, the maximum rate could easily be far below competitive levels. Before receiving support from other states, the Commission should

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[5] *Examination of Issues Related to the Transition to Intermodal Competition in the Provision of Telecommunications Services*, Case 05-C-0616, Statement of Policy on Further Steps Toward Competition in the Intermodal Telecommunications Market and Order Allowing Rate Filings (April 11, 2006) at 54.

[6] Further Notice of Proposed Rulemaking at A-141.

require that a state show that its local service rates are equivalent to competitive rates. With this protection, the Commission's approach strikes a fair balance. Without that assurance, the approach in the Notice represents an unfair burden on New York and an unjustified intrusion into state jurisdictional regulation.

We also note that reducing access charges will create a significant shortfall in intrastate revenues for some of the smaller, independent companies in New York. The majority of New York's rural local exchange companies are quickly losing customers to cable and wireless competitors, and competition from cable and wireless providers will constrain these companies from recouping a portion of the revenue shortfall. Because access reform should be accompanied by appropriate regulatory pricing flexibility, we do not agree that additional shortfalls must necessarily be recouped via other funding mechanisms. Competitive markets are characterized by the presence of winners and losers; underwriting the cost of the incumbent provider may distort market signals and reward an inefficient provider. In such a situation, it may be unreasonable to compensate the incumbent for revenue losses that result from reductions in access charges. While we agree that access charges should be reduced, states are in a better position to discern if funding a resulting deficiency is actually necessary, and to craft and fund a recovery mechanism consistent with the state's past practices and future expectations of their local market and that does not require the creation of a new federal fund or undermine facilities-based competition.

It also bears mention that the Commission's proposal is not the only way to achieve more accurate pricing. A similar approach, adopted on a state by state basis, would accomplish much of what the Commission is attempting to do on a national basis.

States could initiate proceedings to establish a unitary[7] rate per carrier, rather than the Commission's proposal of setting a "one size fits all" uniform rate for all carriers. The Commission claims that a uniform rate for terminating access and reciprocal compensation recognizes that the incremental cost of packet switching and fiber capacity is minimal, simplifies the regulatory process, and forces less efficient carriers to become more efficient. This approach may be appropriate in states whose demographics are relatively uniform. In a state such as New York, however, with areas of high density short loops and low density long loops, costs differentials should be considered.

Cost proceedings tend to be contentious and time consuming, and many states are constrained by lack of resources. Given that it is clear that access charges should be substantially reduced over a transition period, we question whether the small benefit to be gained from litigating existing TELRIC based cost studies is worth the substantial time and effort such an undertaking would entail. States should decide if it is in their best interest to examine costs related to call termination or, in the alternative, to allow carriers to opt-in to a state established default rate. A carrier choosing the opt-in approach would file such a request with the state commission, thus preserving the state's fundamental responsibility of ensuring adequate service and just and reasonable rates - - consistent with the 1996 Act and state law. In the event a state does not act to either require cost studies or establish a state default rate, carriers should be able to adopt a unitary national default rate vetted by the FCC.

Under this approach, reduced intrastate and interstate access revenues can be offset by some of the same mechanisms advocated by the FCC in its order, such as

[7] A carrier would establish over time one rate for all of its terminating traffic (local, intra-state access, interstate access).

limited increases on subscriber line charges (SLCs). As discussed above, using the USF as a revenue replacement mechanism is acceptable only if there are stringent requirements on carriers to raise local service rates to levels that reflect a competitive marketplace. Those states that wish to do so can establish an alternate mechanism to replace the shortfall, if necessary.

Either of these approaches should satisfy our mutual interest in seeing rates priced as they should be, without unreasonable subsidy of one state by another. Without the protection against subsidies, however, the Commission's plan would unreasonably burden New York, and we would object to its imposition.

<u>Cost Study Methodology</u>

The suggestion in the draft notice to move from TELRIC[8] is theoretically sound but impractical. In the event that the Commission does order state-specific cost studies, the 47 U.S.C. § 252(d)(2) cost methodology should be similar to that used in existing TELRIC and TSLRIC studies. We have evaluated the additional cost method proposed in the notice and draft orders and determined it to be impractical.

The industry experts who collaboratively developed the incremental cost study manual for toll and carrier access services in the New York Public Service Commission's access charge proceeding realized that the additional cost method represents the "theoretical ideal of the proper way to measure the total service long run incremental cost", but also found that " it would be impractical in most cases to attempt to estimate changes in cost that would result from changes in the entire structure of a

[8] Further Notice of Proposed Rulemaking at C-110.

LEC's network"[9] Similarly, the New York Public Service Commission order setting unbundled network element (UNE) rates confirmed the infeasibility of estimating such a purely theoretical cost.[10] LEC networks are too large and complex to support the required modeling. The additional cost method requires that the network be costed out twice: once with the service in question, and once without it. So to determine the cost of switching and transport, for example, one would assume the ILECs no longer need to provide those functions. The network would be modeled both ways, and the difference would represent "additional costs." The questions seem endless, and the answers would be largely subjective and surely controversial. The difficulties in modeling what the network might otherwise look like (if we could redesign everything efficiently from scratch) is precisely why the TELRIC proceedings fixed certain parameters such as the number and location of central offices. This practical infeasibility may be the primary impetus for the Commission's statement "that there appear to be no cost studies or analyses in the record that attempt to estimate the termination costs using Faulhaber's definition of incremental cost."[11]

Jurisdiction Over Intrastate Access Charges

The Chairman's Draft Proposal and the Alternative Proposal purport to incorporate all "telecommunications," including interexchange traffic that has historically been subject to access charges, within the realm of intercarrier reciprocal compensation

[9] *Incremental Cost Study Manual*, Case 28425, (August 1989) at p. 6.

[10] *Joint Complaint Concerning Wholesale Provision of Local Exchange Service*, Case 95-C-0657, Opinion No. 97-2 (issued April 1, 1997).

[11] Notice, Appendix C, Paragraph 248.

governed by Section 251(b)(5). The proposals assert that the statutory term "telecommunications" is broad, and that the scope of traffic governed by §251(b) (5) is not limited to local traffic, as the Commission has historically held, but now also includes exchange access traffic.[12] The proposals further assert that Section 201(b)[13] authorizes the Commission to adopt pricing rules for all traffic within the scope of §251(b) (5), including intrastate access charges.[14]

In essence, then, the Commission proposes to override traditional state authority over intrastate access rates on the asserted basis that the statutory term "telecommunications" is broad enough to bring access charges within the scope of §251(b)(5) reciprocal compensation.

1. The text of 251(b) (5)

Section 251(b) provides that

> **(b) Obligations of all local exchange carriers**
>
> Each local exchange carrier has the following duties:
>
> . . .
>
> "**(5) Reciprocal compensation**
> The duty to establish reciprocal compensation arrangements for the transport and termination of telecommunications.

Reciprocal compensation applies to competitors of the local exchange companies, not to interexchange carriers.[15] Even the Commission itself distinguishes

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[12] Chairman's Draft Proposal at ¶220; Alternative Proposal at ¶215.

[13] 47 U.S.C. §201(b).

[14] Chairman's Draft Proposal at ¶224; Alternative Proposal at ¶219.

[15] 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 . . .

access charges from reciprocal compensation: "There are two major forms of intercarrier compensation - access charges and reciprocal compensation."[16] To supplant the Commission's longstanding legal distinction, the proposals merely state that §251(b) (5) encompasses all telecommunications traffic. Declaring that the scope of §251(b) (5) is broad did not prevent the Commission, in 1996, from establishing a legal distinction between reciprocal compensation and access charges. Because the proposals do not adequately distinguish Commission precedent, they fail to provide a reasoned explanation for abandoning the longstanding legal distinction between reciprocal compensation and access charges.[17]

As the Commission has previously stated, reciprocal compensation arrangements are those in which mutual compensation is received for a mutual exchange of traffic.[18] In contrast to the exchange of non-toll traffic, there was no need for Congress to "establish" access charges, because they were already in existence. Had the section been intended to apply to access charges it would have provided for both the establishment and the continuation of access charges. It doesn't, and the only reasonable reading of the words is that the section applies to reciprocal compensation as it is

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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).

[16] http://www.fcc.gov/wcb/ppd/IntercarrierCompensation (visited November 16, 2008) Access charges are distinguishable from reciprocal compensation. *Global NAPS, Inc. v. Verizon New England*, 444 F.3d 59, 63 (1st Cir. 2006); *First Report and Order*, 11 FCC Rcd at 16013 ¶1033.

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

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

understood, not access charges. The other provisions of the section – related to the new local competition provided for in the 1996 Act – support this construction.

While the Commission proposes that access charges be deemed reciprocal compensation for the purposes of §251(b) (5), it fails to explain how it would make IXC-LEC access compensation arrangements "reciprocal".[19] The Commission has recognized that when an interexchange carrier ("IXC") interconnects with and exchanges traffic with a LEC, traffic flows in both directions, but compensation flows in only one direction – from the IXC to the LEC.[20] Compensation flowing in one direction is not reciprocal.

Lastly, the proposals purport to eliminate intrastate originating access charges at the conclusion of the transition period.[21] The Commission, however, lacks authority to prohibit states from setting such charges. For legal bases, the proposals assert that because §251(b) (5) does not address charges payable to a carrier that originates traffic, that provision prohibits such charges. As *AT&T Corp. v. Iowa Utilities Bd.* made clear, however, the Commission's authority to preempt states on intrastate matters extends only to those matters to which the 1996 Act expressly applies.[22] Where the 1996 Act does not address intrastate matters, the state jurisdictional reservation

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[19] In fact, the Commission proposals continue to refer to IXC-LEC compensation arrangements as "access charges" during the transition period. Chairman's Draft Proposal at A-87 ¶193; Alternative Proposal at C-85 ¶188.

[20] *First Report and Order*, 11 FCC Rcd 15499, 16013 ¶1034 (rel. Aug. 8, 1996).

[21] Chairman's Draft Proposal at A-103 ¶229; Alternative Proposal at C-101 ¶224.

[22] *AT&T Corp. v. Iowa Utilities Bd.*, 525 U.S. 366, 381 n.8 (1999).

provision[23] of the Act continues to function.[24] Because §251(b) does not address and at best is silent with respect to originating access charges, the States retain their authority to establish such charges for intrastate communications.

2. Section 251(g)

The Commission concludes that section 251(g) – which provides for the continuation of interconnection requirements pending Commission action -- suggests that 251(b) (5) provides for Commission jurisdiction over access charges. It doesn't.

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.

From this text the Commission concludes

> There would be no need for Congress to have preserved these compensation rules against the effect of section 251 if the scope of section 251(b) (5) was not broad enough for the Commission to bring with its scope the traffic covered by 251(g), i.e., access traffic . . . [W]e find that section 251(g) confirms that section 251(b) (5) applies to the transport and termination of all telecommunications traffic with LECs . . . [25]

[23] "[N]othing in [the Act] shall be construed to apply of to give the Commission jurisdiction with respect to … charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communication service by wire or radio of any carrier." 47 U.S.C. §152(b).

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

[25] Further Notice of Proposed Rulemaking, p. A-98.

The better reading of the phrase "including receipt of compensation" is that it modifies the phrase immediately preceding it, that is, interconnection obligations. In other words, LECs are still required to interconnect and to pay compensation. And, even if "compensation" could be construed to apply to access from interexchange carriers, the point of the provision is that such access was to continue together with whatever concomitant charges applied, not that the charges might change pursuant to 251(b)(5).

3. Section 252(d)(2)(A)(i)

47 U.S.C. 252 (d) 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 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; . . . .

The Commission concedes the section does not address the circumstance when carriers' traffic originates or terminates on a third carriers network, but concludes that this means there is a gap in the pricing rule of 252(d)(2) and that it has authority to fill that gap.[26]

That is an unreasonable construction. 252(b) (5) sets the rule and 252(d) (2) explains how it is to be priced. The only fair conclusion is that if Congress did not

[26] Further Notice of Proposed Rulemaking at A-100.

explain how something was to be priced in 252(d)(2), it must not have required it in 252(b)(5).

The Universal Service Fund

The Size of the Fund

The overall size of the fund must be reduced and the high cost funding mechanisms that continue need to be fair, equitable, competitively neutral, and targeted to focus the effect of any subsidy on a precisely defined problem. The Commission has taken positive steps in adopting a permanent cap on the USF. The Commission's new contribution methodology for funding the USF, however, may exacerbate the already heavy burden that New Yorkers have carried to ensure universal service across the nation. New York may become an even greater net payer state under the business connections proposal advanced by the Commission. For 2006, New York was a net payer state of over $210 million; residents of New York were the second highest net donors to the USF (Florida has the dubious title of being first).[27] We are concerned that the new contribution proposal will exacerbate an already significant problem. The Commission has provided no analysis of the impact of its new contribution methodology on the states, or individual market segments. Without that factual information, and in light of the demographic makeup of the state, we can only surmise that our already steep contributions may be dwarfed by required contributions in the future. We urge the Commission to complete a detailed analysis of its proposal, and release that information

[27] *Universal Service Monitoring Report*, Federal-State Joint Board on Universal Service, CC Docket No. 98-202, (December 2007), Table 1.12.

to the states, before it adopts such a far reaching proposal which could have tremendous impact on the state and its consumers and businesses.

Deployment of Broadband

We also recognize the benefits of extending broadband to rural or unserved areas as contemplated under the Commission's proposal. We encourage such deployment aggressively. Nearly 75% of our ILECs already have broadband available to 90% or more of their customers. Our pricing policies have contributed to the very broad entrance of cable companies into the broadband and voice telephone market. In any proposal adopted by the Commission, New York and other similar states should not be penalized for their rapid pace of deployment.

We also note that the Commission's goal of 100% broadband deployment within five years to be eligible for continuing high cost subsidies may not make economic sense; some areas may be too costly to serve with traditional, wired service. The Commission has tried to address this cost issue by allowing rural companies to substitute satellite broadband under some circumstances. That is helpful, but it is unclear whether this is sufficient to ensure the broadband deployment policy is economically rational. In addition, the Commission's goal does not take into consideration the evolution of technology, like third generation wireless, that could provide more efficient and cost effective alternatives to providing ubiquitous broadband.

Classification of IP/PSTN Services as an Information Service

The Notice proposes to classify calls that originate on IP networks and terminate on circuit-switched networks, or vice-versa, as "information services" instead of "telecommunications services."[28] Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[29] A "telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." An "information service" consists of "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, 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."[30] The Commission cannot employ this classification as a basis for preemption of state regulation of intrastate aspects of non-nomadic, or "fixed", IP/PSTN services.

The Import of Classification as an Information Service

Section 152(b) precludes the Commission from preemption of lawful state regulation governing intrastate communications. Thus, communications occurring

[28] Chairman's Draft Proposal at A-93 ¶209; Alternative Proposal at C-91 ¶204.

[29] 47 U.S.C. § 153(43).

[30] 47 U.S.C. § 153(20).

between points within the same state may be regulated only by that state.[31] Section 152(b) does not distinguish between telecommunications and information services.[32] The Commission's ancillary jurisdiction under Title I of the Communications Act of 1934 Act, by which the Commission regulates information services, does not override §152(b).[33] Consequently, intrastate aspects of 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.[34]

The Commission may not preempt state regulation as being inconsistent with its policy of "generally unregulated treatment of information services."[35] The Commission's desire to "take action which it thinks will best effectuate a federal policy" does not override the §2(b) statutory bar against Commission regulation of intrastate communication.[36] The Commission simply cannot act where Congress has not granted it jurisdiction.[37] The proposals do not point to any statutory authority granting the

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

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

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

[34] *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).

[35] Chairman's Draft Proposal at A-94 ¶211; Alternative Proposal at C-93 ¶206.

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

[37] *Id.*

Commission authority to preempt state regulation of intrastate aspects of IP/PSTN services.

Conversely, because the 1996 Act expressly preserves States' authority to preserve and advance intrastate universal service on a competitively neutral basis,[38] in a manner consistent with the Commission's rules to preserve and advance universal service in general,[39] we support the position that the Commission has taken in *Vonage Holdings Corp. v. Nebraska Pub. Utilities Comm'n.*[40] In its amicus brief in that case, the Commission stated that requiring VOIP providers to contribute to state universal service funds does not frustrate federal policy.[41] We agree and note that providing for competitively neutral contributions from VOIP providers advances both federal and state policy goals.

Whether These Calls Constitute an Information Service

The Commission action is improper, even aside from the issue of the scope of regulation of information services, because these calls are "telecommunications services," not "information services." Telecommunications is defined in the statute as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in form or content of the information as sent and received."[42] A "telecommunications service" is "the offering of telecommunications for a fee directly to the

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[38] 47 U.S.C. §253(b).

[39] 47 U.S.C. §254(f).

[40] No. 08-1764 (8th Cir. filed April 1, 2008).

[41] Brief for Amici Curiae United States and Federal Communications Commission Supporting Appellants' Request for Reversal at 15.

[42] 47 U.S.C. § 153(43).

public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." Because there is no change in the "form or content" these calls are "telecommunications services."

The content of the call does not change. The intent of telecommunications is to transmit as accurately and precisely as possible, the spoken words and communications of the calling party to the called party. Through a century of technology, we have greatly improved our ability to replicate the communications of the calling party to the called party. This improvement resulted from multiple advancements in technology including different transmission protocols.

The form of the call also does not change. Since 1980, there have been protocol conversions in telecommunications as a routine matter of business; these conversions increased operational efficiency, speed, and fidelity. In the early days of telecommunications, the end to end telecommunications protocol was a simple analog signal. It was not until the 1980s that digital protocol was introduced on a broad scale. Even then, it was limited to digital switching with a remaining need for the signal to be converted to an analog format at either end through the use of "analog to digital" and "digital to analog" circuit equipment. Some telecommunications go through multiple protocol conversions during transmission (e.g. analog to digital, digital to packet, packet to digital, digital to wireless or analog), all transparent to the end users. Protocol conversions in telecommunications have been routine business for decades, and changes in protocol conversions cannot be the type of change that was meant in order to transform a telephone call into an enhanced or information service.

The Commission now proposes to "... classify as "information services" those services that originate on IP networks and terminate them on circuit-switched networks, or conversely that originate on circuit-switched networks and terminate them on IP networks (collectively "IP/PSTN services). Such traffic today involves a net protocol conversion between end-users and thus constitutes an "enhanced "or "information service."

The PSTN has used multiple protocols for decades to effect call transmission and will continue to do so for the foreseeable future. The introduction of packet call transmission and switching are merely the next steps in increasing efficiency and fidelity of the telecommunications network, but as before, the goal is to replicate the caller's voice communication to the called party. Adding a new protocol or substituting it for one of the existing multiple protocols does no more than that. To conclude that a "net" protocol conversion somehow constitutes a departure from traditional voice telecommunications is misplaced. For some time now businesses have been equipped with digital phone systems that initiate a call in a digital format, which may terminate in an analog format - - a "net" protocol conversion. The same would apply to a PSTN call which may terminate to a wireless customer, or a POTS customer served on fiber who calls a POTS customer served by a copper loop - - both scenarios involving a "net" protocol change.

The Commission's attempt to reclassify IP/PSTN calls cannot be taken lightly. To categorize IP/PSTN calls as "information services" could effectively limit the the Commission's and the states' regulatory authority over the telecommunications market, to the extent that carriers could engineer forbearance over their networks by implementing IP networks "providing information services". The competitive gains which have been achieved, along with benefits to consumers, would be placed at risk. This may be less of an issue if in fact the Commission intends to require incumbents to provide packet network interconnection. But since the Commission has ruled that incumbents do not have to make new fiber build outs available to competitors, it may similarly deny competitors access to packet networks. Interconnection has sparked significant growth in competition in New York. To now make policy that would stifle it, would be detrimental to our competitive telecommunications market. Reform can be achieved without this pronouncement.

Respectfully submitted,

Peter McGowan

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