Before the
Federal Communications Commission
Washington, D.C. 20554

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 an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

INITIAL COMMENTS
of the
NATIONAL EXCHANGE CARRIER ASSOCIATION, Inc.;
NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION;
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT OF SMALL TELECOMMUNICATIONS COMPANIES; and the
WESTERN TELECOMMUNICATIONS ALLIANCE
ON SECTIONS XVII.L-R (INTERCARRER COMPENSATION ISSUES)

February 24, 2012

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EXECUTIVE SUMMARY

The intercarrier compensation ("ICC") reform issues presented in the instant Further Notice of Proposed Rulemaking ("*FNPRM*") implicate the fundamental mission of universal service as much as any other issues raised heretofore in these proceedings. If rural carriers' ICC revenues are substantially reduced (or driven to zero) by regulatory fiat and without a meaningful alternative for cost recovery, it will become increasingly difficult to provide rural consumers with broadband and voice services that are reasonably comparable in price and quality to those available in urban areas. The Federal Communications Commission ("Commission") must therefore calibrate ICC reform in a manner that ensures sufficiency, predictability, and specificity in support mechanisms, rather than simply squeezing high-cost universal service fund ("USF") support and ICC restructuring into tightly constrained and artificially designed "budgets." Particularly in light of the many changes already made to USF and ICC in the *Order*, the Commission should proceed with caution before enacting additional ICC reforms that would only foist yet greater costs onto the backs of rural rate-payers.

If the Commission moves forward nonetheless with reduction or ultimate elimination of all ICC rates, it must do so in accordance with its stated "no flash cuts" policy and only after it is clear that a robust and fully compensatory recovery mechanism will be available to avoid rural consumer rate shock and sustain universal service. The Commission would also need to address a variety of other technical, practical, and legal complexities, including: (i) the implications of such reforms on equal access obligations; (ii) the treatment of 8YY traffic; and (iii) the fact that certain functionally equivalent services (such as transit and special access transport) would retain positive rates even as the same basic elements, when offered through on a switched service basis, would be sold ultimately for a regulated price of zero.

Reducing and ultimately eliminating regulated switched ICC rates could also introduce substantial uncertainty and arbitrage into the network interconnection process. If tandem switching and transport rate elements move toward a rate of zero, larger carriers would have an increasing incentive to compel small carriers to come to a handful of central locations (such as Chicago or Dallas or New York or Atlanta) to deliver and receive all traffic. The solution to such concerns fortunately resides within the same statutory provisions upon which the Commission has relied to undertake its ICC reforms. Specifically, as a follow-on consequence of bringing all telecommunications traffic within the scope of section 251(b)(5) of the Communications Act of 1934, as amended, the exchange of all such traffic is governed by sections 251 and 252 and related provisions of law and orders. This would include, but not be limited to, voice traffic that is exchanged between carriers via Internet Protocol arrangements.

Although it should be abundantly clear that the Act governs all interconnection, given the substantial gamesmanship over the past decade in the area of ICC, the unrelenting efforts by parties to seek out "the next loophole," and the fundamental shifts in the regulatory landscape under the *Order* that present the risk of foisting significant transport costs on the backs of rural consumers, clarification and reaffirmation to this effect is warranted and would help to minimize future disputes. Such clarification and reaffirmation should note that the governing framework includes, but is not limited to, restricting interconnection to technically feasible points on the incumbent's existing network and confirming that interconnection is subject to the applicable exemptions, suspensions, and modifications that apply under section 251. To minimize the likelihood of future disputes, the Commission should also make several additional clarifications as to precisely how the section 251 and 252 framework applies in a bill-and-keep environment:

(1) Rural local exchange carriers ("RLEC") and other incumbents are entitled to initiate interconnection negotiations and arbitrations with any other carrier pursuant to sections 251 and 252;

(2) State commissions should re-examine all section 251(f)(1) exemptions that may have previously been lifted in light of changed circumstances;

(3) State commissions remain free, and are in fact obligated, to consider fully any request by an RLEC for a suspension of modification of obligations pursuant to section 251(f)(2) to ensure proper definition of "network edges"; and

(4) Consistent with the requirement that interconnection occur on the RLEC network, the "rural transport rule" limits an RLEC's financial responsibility for transport of telecommunications traffic to the relevant exchange boundary.

Even as it moves traffic under sections 251 and 252, however, the Commission should permit carriers to continue to rely upon tariffs in lieu of interconnection agreements. With all of the changes taking effect in the ICC environment and with the administrative burdens that could arise for smaller carriers in addressing dozens or hundreds of individual contracts, the Commission should maintain a flexible approach to implementation details of the transition and permit carriers to employ alternative tariff and non-tariff mechanisms.

The Commission should also decline to adopt phase-outs or accelerated reductions of any access recovery mechanisms, such as Access Recovery Charges or CAF ICC Support, at this time. Here again, the Commission just enacted fundamental shifts in the way that universal service is ensured and is in the process of considering further changes to those mechanisms. The Commission should evaluate the relative success or failure of the changes already made in the broader context of universal service before deciding to pile additional changes atop those.

Finally, the Commission should strengthen its phantom traffic rules. The recently enacted rules, while a good step forward, are incomplete and will become increasingly irrelevant as rates migrate toward bill-and-keep. Including one-way providers of Voice over Internet Protocol services within the scope of the rules and requiring transmittal by all parties of carrier identification information is essential for the long-term efficacy of the phantom traffic rules.

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ON SECTIONS XVII.L-R (INTERCARRER COMPENSATION ISSUES)

The Rural Associations listed above[1] hereby submit their initial comments on questions identified in sections XVII.L-R of the *Report and Order and Further Notice of Proposed*

[1] The National Exchange Carrier Association, Inc. ("NECA") is responsible for preparation of interstate access tariffs and administration of related revenue pools, and collection of certain high-cost loop data. *See generally,* 47 C.F.R. §§ 69.600 *et seq.*; *MTS and WATS Market Structure*, CC Docket No.78-72, Phase I, Third Report and Order, 93 FCC 2d 241 (1983). The National Telecommunications Cooperative Association ("NTCA") is a national trade association

Rulemaking issued by the Federal Communications Commission (the "Commission") in the above-captioned proceeding.[2]

Although the preceding comment cycle on sections XVII.A-K was primarily aimed at proposals for further high-cost Universal Service Fund ("USF") reforms, the questions and proposals presented in the *FNPRM* on intercarrier compensation ("ICC") reform implicate the fundamental mission of universal service as much as those comments filed over the preceding month. Whatever one's perspective on the mechanics of the system, ICC has been an essential component of promoting universal service in high-cost areas by helping to keep end-user rates low and enabling network investment and maintenance.[3] If ICC revenues are substantially reduced (or driven to zero) by regulatory fiat and without a meaningful alternative for cost recovery (beyond merely piling yet more costs atop consumers in high-cost areas), rural rate-of-return regulated local exchange carriers ("RLECs") will not be able to sustain the previous

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representing more than 580 rural rate-of-return ("RoR") regulated telecommunications providers. The Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") is a national trade association representing approximately 460 small incumbent local exchange carriers ("ILECs") serving rural areas of the United States. The Western Telecommunications Alliance ("WTA") is a trade association that represents over 250 small rural telecommunications companies operating in the 24 states west of the Mississippi River.

[2] *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 an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, *Universal Service – Mobility Fund,* WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161 (rel. Nov. 18, 2011) ("*Order*" and/or "*FNPRM*").

[3] *See, e.g., Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1. *Transport Rate Structure and Pricing*, CC Docket No. 91-213, *End User Common Line Charges*, CC Docket No. 95-72, First Report and Order, 12 FCC Rcd 15982 (1997), at ¶ 35.

progress they have made in deploying high-quality advanced networks. In turn, consumers in these high-cost areas could see their broadband and voice services fall behind with respect to availability, quality, and affordability. Likewise, if interconnection obligations are not defined carefully in the context of ICC reform and RLECs face substantially increased transport costs, they will be unable to provide reasonably comparable voice and broadband services at reasonably comparable rates in high-cost rural areas.

Therefore, it is essential that the Commission methodically align ICC reform with high-cost USF reform and the core principles of universal service to avoid massive disruption to rural consumers and carriers.[4] To be clear, however, the undertaking of ICC and USF reform at roughly concurrent times is not the same as coordinating reform. The two processes must be thoughtfully calibrated, with corresponding examination and analyses of the impacts that reform measures (both those already adopted and those still being considered) will have on consumers and carriers of last resort ("COLRs"). Even in its desire to reach an "end state" in which regulated ICC is eliminated, the Commission can ignore neither the costs of operating in rural areas nor the use of rural networks by carriers and other service providers who will make lesser and lesser contributions over time to those networks as ICC rates plummet. The Commission must structure ICC reform in a manner that ensures sufficiency, predictability, and specificity in support mechanisms, rather than simply squeezing USF and ICC support revenues into tightly constrained and artificially designed "budgets."

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4 In this regard, this Commission would be well advised to hearken back to the sensible reform objective it first established in the 1990s, when the more surgical aim was to extract implicit support from ICC charges in cooperation with state commissions. *See, e.g., id*. at ¶¶ 9-10 (indicating the express congressional goal for ICC reform is that the Commission "should" remove implicit support from intercarrier charges "[t]o the extent possible," and that the process for doing so should be coordinated with states to avoid "enormously disruptive effects on both ratepayers as well as the affected LECs").

I. LAW AND GOOD POLICY DEMAND A CAREFUL EVALUATION OF END-USER IMPACTS AND THE COST RECOVERY IMPLICATIONS OF ICC REFORM, TOGETHER WITH A WELL-DEFINED, SUFFICIENT, AND PREDICTABLE TRANSITION, BEFORE MOVING ORIGINATING ACCESS OR REMAINING TRANSPORT AND TERMINATION ELEMENTS TOWARD A BILL-AND-KEEP RATE.

A. As a Matter of Law and Good Policy, the Commission Must Take Specific Account of Both Universal Service Considerations and the True Extent of "Additional Costs" Before Reforming ICC Rates.

In its *FNPRM*, the Commission seeks comment on potential transition paths to bill-and-keep for rate elements that are not reduced immediately in the *Order*. The Rural Associations reiterate that bill-and-keep is an unacceptable result as a matter of law and good economic policy.

As a threshold matter, the Communications Act of 1934, as amended (the "Act"), makes clear that the purpose of ICC reform is neither budget management nor the reduction of long-distance rates. Certainly, both are important elements of the policy debate, but Congress could not have been more clear in the Telecommunications of 1996 (the "1996 Act") that the core purpose of ICC reform is to extract implicit subsidies and replace them with explicit support sufficient to achieve the objectives of universal service.[5] Congress also made clear in undertaking ICC reform that the "additional costs" of transport and termination must be addressed apart from the USF (or some other explicit mechanism) support needed to maintain universal service. Specifically, the Commission (in cooperation with state commissions) is required to isolate those "additional costs" arising as a result of another carrier's use of transport

[5] 47 U.S.C. § 254(e).

and termination functions, and then enable recovery thereof.[6] The Commission cannot ignore transport and termination in the drive to reform ICC.

Bill-and-keep purports to shift the responsibility for recovery of costs associated with the use of another carrier's network from the carrier making such use to: (1) the customers of the host network; "plus [2] universal service support where necessary."[7] Yet ICC reform cannot be sustained as a matter of law or policy unless it is ensured that local service rates in rural areas *will* indeed stay reasonably comparable to rates in urban areas and that "additional costs" *are* in fact being recovered through some combination of remaining ICC rates, end-user rates (provided those remain reasonably comparable) and/or explicit support (including, but not limited to, a "Recovery Mechanism" or "CAF ICC Support"). In contrast, even if it were good policy (which it is not) that all costs of providing services to other carriers should be recovered only through a combination of explicit support and/or end user rates, the Commission's presumption that such "additional costs" can be recovered, in part or in whole, from end users is accompanied by no indication, let alone evidence, that it has evaluated the likelihood that end user rates will then in fact remain affordable or "reasonably comparable" thereafter.

Indeed, it is worth noting that access rate reductions are not the *only* negative impact imposed in connection with these reforms. Unfortunately, the *Order* has cut a broad swath across present and potential RLEC cost recovery options. For example, consumers can expect to see anywhere from $0.50 per month in Access Recovery Charges ("ARCs") in the first year of reform, going up to a maximum of $3.00 by the sixth year of reform.[8] Moreover, the

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6 *Id*. § 252(d)(2).

7 *Order and FNPRM* at ¶ 746.

8 *Id*. at ¶¶ 908-909.

Commission has adopted "rate floors" that will require a number of carriers in the first year of reform to increase their rates to $10 for local service in order to avoid a reduction in High-Cost Loop Support ("HCLS") – and by the third year of reform will apparently penalize *any* carrier whose rate might happen to be even a penny below the national average local rate.[9] This dynamic will almost certainly drive carriers to increase local rates to avoid becoming trapped below the rate floor in any coming year and thus lead to an "unvirtuous" cycle where local rate increases may have no end in sight. Finally, of course, several of the previously adopted USF changes will cause most RLECs to suffer shortfalls in support that – particularly given the inability to look to ICC for incremental cost recovery – will necessarily fall back on local consumers.[10]

In theory, a carrier might be able to recoup some "additional costs" associated with originating access or tandem switching and transport from end users – but when that recovery from end users is bundled with rate increases arising out of earlier ICC reform and rate increases occasioned by diminished USF, the pressures on end-user rates will strain, if not snap, any notion that rural rates are "reasonably comparable." Until the Commission affirmatively finds that the additional costs of switching traffic *will* be recovered under a bill-and-keep regime and that any recovery of these costs (in whole or in part) from end users *will not* frustrate universal service (especially when piled atop the changes already made in the *Order*), it should not subject these charges to any transition under such a regime.

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[9] *Id*. at ¶ 239.

[10] *See id*. at ¶ 290 (indicating that more than half of carriers will suffer losses in USF support as a result of the reforms adopted in the *Order*).

This being said, the Rural Associations do not assert that per-minute access charges must be carved into the canon of cost recovery.[11] Rather, the Rural Associations submit that bill-and-keep, which wipes away a critical source of cost recovery, violates the basic tenets of that structure and the statute. The ability of rural COLRs to build and maintain networks must not be compromised, since doing so would rattle the foundations of universal service policies set forth in the Act and built upon successfully by these carriers. The Act's oft-manifested commitment to reasonable rates must not be trampled in pursuit of seemingly simple, yet highly hazardous, policies.

If the Commission nonetheless moves forward with its zero-rate mandate, it must do so in accordance with its stated "no flash cuts" policy.[12] This necessitates both a reasonable transition path and an explicit, robust, and fully compensatory Recovery Mechanism. To achieve a more reasonable transition, the changes proposed in the *FNPRM* for originating access, tandem switching, and transport should not occur pursuant to the schedule already in effect for other rate elements. Such a compressed transition schedule would cause additional customer confusion and harm to smaller carriers who depend upon ICC for cost recovery.

In addition, a broad and rapid series of ICC rate reductions and the need for alternative cost recovery would increase substantially the "budget" the Commission has held as paramount

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11 *See, e.g.,* footnote 51, *infra* (describing other potential rate structures for intercarrier cost recovery).

12 *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 an Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, *Federal-State Joint Board on Universal Service,* CC Docket No. 96-45, *Lifeline and Link-Up*, WC Docket No. 03-109, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb. 9, 2011) ("*February 2011 NPRM*"), at ¶ 12.

in USF reform. Although the Rural Associations do not concur in all respects with the ICC reforms or the structure of the Recovery Mechanism in the *Order*,[13] the Commission at least made facially clear in adopting such a mechanism that it held some concern for consumers served by rural COLRs that depend upon ICC to fulfill the mission of universal service. The Commission sought to ensure through the Recovery Mechanism that the "transition to a reformed intercarrier compensation and universal service system does not undermine continued network investment – and thus harm consumers."[14] A similar concept is warranted here if the Commission decides to plow forward with reduction of remaining switched access service rate elements, although the specific approach should be more consistent with the Recovery Mechanism proposed by the Rural Associations in the RLEC Plan rather than that version adopted in the *Order*.[15] The proposed RLEC Plan Recovery Mechanism is robust and fully compensatory in that it would enable the continued availability of quality affordable voice and broadband services for consumers in RLEC service areas without unacceptable rate increases or service disruptions. The precipitous loss of ICC revenues without an adequate funding transition – or the arbitrary phase-down of a Recovery Mechanism over time without reference to costs (or "additional costs") incurred – may force some RLECs to pursue substantial end-user rate

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[13] A Recovery Mechanism cannot be considered robust or fully compensatory if, for any given carrier, it precludes the recovery of reasonable costs by that carrier. A Recovery Mechanism that ticks downward toward zero and hinders the ability of an individual carrier to make reasonable and prudent new investments in equipment – even IP-enabled soft-switching equipment – may be "predictable," but it is by no means necessarily "sufficient." *See Ex Parte* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Oct. 20, 2011), at 3.

[14] *Order and FNPRM* at ¶858.

[15] *See* Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et al.* (filed Apr. 18, 2011), at 13-20.

increases, default on existing loans, and potentially reduce or discontinue COLR services in portions of their territories.

Finally, it should be clear that a Recovery Mechanism cannot be considered sufficient unless it is *incremental* to existing support. If such alternative cost recovery is simply wedged into existing levels of USF under the guise of "budget management," this would not satisfy the objectives of providing recovery of "additional costs" or fulfilling universal service. This is instead, in practice and effect, a "write-off" of ICC revenues. None of these results would be consistent with the FCC's goals for broadband availability throughout the nation or the universal service goals or ICC pricing provisions of the Act.

B. The FCC Should Not Compel any Migration to Bill-and-Keep for Additional Switched Service Rate Elements Until it Has Had Time to Evaluate the Reforms Already Made and Addresses Several Significant Complexities Related to Additional Reforms.

1. The Commission Has No Authority to Regulate or Mandate Rate Reductions With Respect to Originating Intrastate Access.

Sections 201(b) and 251(b)(5) of the Act ostensibly supply the jurisdictional foundation for the Commission's ICC reforms in the *Order* and those further proposed in the *FNPRM*.[16] Section 251(b)(5), however, deals only with transport and termination of telecommunications traffic,[17] and even if it could arguably be read to justify a federal bill-and-keep pricing mandate for transport and termination of intrastate traffic,[18] nothing on the face of that statute empowers

16 *Order and FNPRM* at ¶ 760 (citing 47 U.S.C. §§ 251(b)(5) and 201(b)).

17 *See Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996), at ¶ 1042 (1996) ("Section 251(b)(5) . . . does not address charges payable to a carrier that originates traffic.")

18 As the Commission is aware, the Rural Associations are parties or intervenors in appeals of the *Order* relating, *inter alia*, to the imposition of a bill-and-keep pricing mandate and the ultimate lack of an ability to recover in full the "additional costs" of providing switched services.

the Commission to regulate (or establish the "methodology" for) *originating* intrastate access pricing. Similarly, section 201(b) may permit the Commission to regulate the rates, terms, and conditions of originating interstate access, but here again it does not enable the Commission to reach over the fence and interfere with State prerogatives with respect to intrastate rate-setting.[19] Thus, even if for the sake of argument, section 251(b)(5) provided the Commission preemptive authority with respect to transport and termination of intrastate traffic, there is no jurisdictional foundation for unilateral reform of originating intrastate access charges.

2. *If the Commission Nonetheless Proceeds With Reform of Originating Access, Any Changes Must be: (a) Timed Appropriately; (b) Paired With Reasonable and Sufficient Alternative Cost Recovery; and (c) Address Complications with Respect to Equal Access and Treatment of 8YY Traffic.*

The Rural Associations would have preferred that the Commission implement ICC reform in a comprehensive manner, in coordination with the States, that addresses originating and terminating access simultaneously and at a reasonable pace.[20] However, given the changes for certain terminating switched service rate elements that were adopted in the *Order*, any originating access reform should now occur on a separate path.[21] For the reasons described

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Challenges to the Order have been consolidated in the United States Court of Appeals for the Tenth Circuit, Docket No. 11-9900. Several parties challenged the bill-and-keep transition, including, but not limited to: Core Communications; Choctaw Telephone Company; National Association of State Utility Consumer Advocates (NASUCA); Pennsylvania Public Utility Commission; and Vermont Public Service Board.

[19] 47 U.S.C. § 201(b); *see also Louisiana Pub. Serv. Comm'n. v. FCC*, 476 U.S. 355, 375 n. 4 (1986) (citations omitted) (holding that the Commission may only preempt state commissions with respect to regulation of intrastate matters if it is not possible to separate the intrastate and interstate components of the regulation).

[20] *See* Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et al*. (filed Apr. 18, 2011), at 12-27.

below, the Commission should resist the seemingly easy yet damaging approach of compressing originating access into the structures that will govern terminating access. Moreover, disposition (and potential elimination) of originating access must contemplate related impacts on equal access and 8YY traffic. Above all, the Commission must ensure that any diminished ability of carriers to obtain cost recovery from originating access is matched by sufficient alternative recovery mechanisms.

As background, the Rural Associations initially proposed synchronized reform of terminating and originating access as part of the RLEC Plan. The simultaneous reduction of those rate elements would have been coordinated with the States and included both reasonable "pause points" and a robust and fully compensatory alternative recovery mechanism. This more measured approach would have yielded the benefits of transitioning the industry away from per-minute cost recovery and toward a future in which other approaches to cost recovery will most likely be more appropriate. The "end state" of bill-and-keep identified by the Commission, however, provides a free ride to other service providers that profit substantially from their access to and use of the "last mile" network. This places greater upward pressure on the two remaining sources of RLEC cost recovery: end-user rates and high-cost USF support.

With changes to terminating and originating access bifurcated in the *Order*, the Commission should now defer any reductions to originating access rates until the impacts of the changes already adopted in the *Order* – that is, terminating end office switched access reforms, the adequacy of the Recovery Mechanism, and all other changes to high-cost support – can be

[21] The Rural Associations acknowledge that their current viewpoint differs from their initial proposal in the RLEC Plan. This is due to the adoption of a bill-and-keep approach for all switched services and the elimination of RoR-based interstate cost recovery for such services, which now compel an evaluation of the impacts of the reforms already adopted before proceeding any further.

evaluated. If the Commission ultimately decides to continue down the path of bill-and-keep for originating access, then it must be placed on a separate and reasonable transition path.[22] It is also essential, for the reasons explained in section I.A, *supra*, that any such reforms be paired with a robust and compensatory incremental Recovery Mechanism.

The Commission should treat originating access charges no differently if the retail interexchange carrier ("IXC") happens to be an affiliate of the local exchange carrier ("LEC").[23] In the first instance, the LEC incurs costs in providing origination services on behalf of an underlying facilities-based long distance provider (which often may not be affiliated with an RLEC), and should recover those costs for use of its network. Since the Commission's Part 64 rules prohibit cross-subsidization, those cost burdens cannot be shared across regulated and non-regulated lines of business. Originating access fees enable LECs to recover the costs of providing end users with access to long distance service without increasing local service rates in high-cost areas. Any elimination or reduction of that cost recovery opportunity must be matched with an equivalent opportunity to recover costs in a manner that does not threaten the provision of affordable and "reasonably comparable" universal service to rural consumers.[24]

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22 *Cf. Order and FNPRM* at n. 2348.

23 *See id*. at ¶¶ 1300-1301.

24 The Act recognizes the challenges of high-cost areas, and balances local and long-distance rates in its universal service directives. Section 254(g) of the Act requires that rates charged by IXCs in rural areas cannot be higher than the rates charged in urban areas. The Commission has explained the "geographic averaging rule" as "benefit[ing] rural areas by providing a nationwide telecommunications network whose rates do not reflect the 'disproportionate burden that may be associated with common line recovery costs' in rural areas." *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers, Federal-State Joint Board on Universal Service, Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation, Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket Nos. 96-45, 98-77, 98-166, 00-256, Second Report and

The Commission must also consider the equal access implications of transitioning to bill-and-keep for originating access charges. Equal access obligations are a corollary to access fees paid by IXCs to LECs. Stated differently, equal access is a component of the access service provided by LECs to IXCs, in return for which the IXCs tender payment to LECs. Retaining equal access obligations in a bill-and-keep environment would appear to be a patently inequitable and improper result as it would require one party (the LEC) to provide a service (equal access) solely for the benefit of the IXC without any payment therefor. The elimination of such payments in a bill-and-keep environment should result in the corresponding elimination of obligations to render that service.

Finally, the Commission must consider the complex question of how access charges relate and apply to 8YY traffic. Notwithstanding the Commission's transition to bill-and-keep for terminating access and its questions surrounding how to extend the bill-and-keep pricing regime to originating access, access charges should nonetheless be retained for 8YY calls.[25] The Commission rationalizes its trend toward bill-and-keep by explaining that the calling party should pay for all cost elements incurred by the originating carrier, including those that derive to the benefit of the IXC that carries the call. In the universe of 8YY traffic, however, the calling party never shoulders a financial obligation for the call – accordingly, the imposition of *new* obligations on the calling party is unwarranted.

Order and Further Notice of Proposed Rulemaking Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001), at ¶ 179, *citing Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket No. 99-61, Report and Order, 11 FCC Rcd 9464 at ¶¶ 3, 5, 9 (1996). Reform of access must similarly recognize these imperatives in a comprehensive manner that meets the needs of local and long-distance service users without unduly shifting costs from one to the other.

[25] *See Order and FNPRM* at ¶ 1303.

The 8YY market is not affected by the calling party's evaluation of an IXC's rates because the owner of the 8YY number pays all charges associated with the call. Thus, calling parties have no incentive to adapt their behavior by selecting an IXC based on 8YY rates because the charges associated with such calls are never imposed on them. Instead, IXCs bill the owner of the 8YY number for both origination and termination. The theories underlying reciprocal compensation that defaults to bill-and-keep are inconsistent with the architecture of 8YY service. Therefore access charges should continue to apply to 8YY traffic, even in a bill-and-keep environment.

3. The FCC Should Not Migrate Tandem Switching and Transport Rate Elements to Bill-and-Keep Until it: (a) Evaluates the Reforms Already Made; (b) Pairs any Reductions With Reasonable and Sufficient Alternative Cost Recovery; and (c) Coordinates Such Further Reform with Interconnection Rights and Obligations.

As with potential changes to originating access, the Commission should examine the impacts of those changes already adopted in the *Order* – that is, terminating end office switched access reductions, the adequacy of the Recovery Mechanism, and all other changes to high-cost support – before undertaking reductions to other switched service rate elements such as tandem switching and transport. As described in section I.A, failure to take a measured and thoughtful approach to further reform would introduce the substantial risk of limiting cost recovery and ultimately undermine universal service by foisting significant costs on rural end users.

If the Commission mandates reductions to tandem switching and transport rate elements notwithstanding these concerns, then it should do so only on a separate transition path that is not compressed within the time frame of any reforms already adopted in the *Order*. This is necessary to avoid "flash cuts" and to ensure an adequate Recovery Mechanism is available. A sufficient Recovery Mechanism that recognizes the continuing value of transport and tandem switching and is composed of incremental support (in lieu of simply being wedged within arbitrary budget limits already set) is essential to avoid rate shock for rural consumers and to fulfill the statutory mandates of universal service. It it is not clear how the Commission would or could provide for such additional cost recovery within the time frames and budget limitations prescribed in the *Order* for ICC reforms already adopted.

Finally, it is essential that the Commission carefully coordinate reform of transport and tandem switching rate elements with further consideration of interconnection rights and obligations. As discussed at greater length in section II.A of these comments, if transport rates in particular are driven to zero and carriers can theoretically obtain "free" transport across each other's networks with no consequence, the Commission risks upsetting existing interconnection arrangements and inviting several new forms of arbitrage. The Commission would be better served by taking a holistic approach that tethers reform of transport and tandem switching rates to careful review of interconnection rights and obligations. As just one example of many, carriers often have a choice of special access or switched access tariffs for purposes of procuring dedicated transport and achieving interconnection. Yet there is no indication that the Commission intends at any time in the near future to reduce rates for special access circuits to zero. Since the Commission's intent in reform is to eliminate arbitrary distinctions in rate structures for functionally equivalent services,[26] it should not reduce transport rates as applied in a *switched access* tariff while leaving untouched rates for a functionally equivalent service in a *special access* tariff. More comprehensive review of such issues is required before the Commission migrates transport and tandem switching rate elements to bill-and-keep.

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26 *See, e.g., February 2011 NPRM* at ¶ 495 (noting that ICC reform is necessary because "rates vary based on the type of provider and where the call originated, even though the function of originating or terminating a call does not change").

C. The Commission Should Cap Current Transit Service Rates and Ensure Regulation of Prices for Such Services Consistent with Functionally Equivalent Transport and Tandem Switching Services.

The same concern raised immediately above with respect to the functional equivalency of different services also arises in the context of transit service. The Commission found in the *Order* that transit service is the functional equivalent of tandem switching and transport, and that this functional equivalency will converge toward a single virtually identical service as all access and non-access traffic is unified under section 251(b)(5).[27] In light of this conclusive legal finding and given the Commission's long-standing view that ICC reform is necessary precisely to avoid artificial distinctions and distortions in pricing between equivalent services,[28] transit service rates should be regulated in a similar manner as other switched services. This will minimize regulatory arbitrage opportunities and the increasing likelihood of discriminatory pricing if transit were the only switched service for which a positive rate could still be charged.

From the earliest days of its efforts to reform ICC mechanisms, the Commission has sought to reduce and minimize regulatory arbitrage.[29] Its goal has been to establish more economically rational rate structures to send more accurate price signals to consumers, carriers

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27 *Order and FNPRM* at ¶ 1311.

28 *See, e.g., February 2011 NPRM* at ¶ 495 (highlighting "fundamental problems with the current system," including : (1) "the system is based on outdated concepts and a per-minute rate structure . . . that no longer matches industry realities"; (2) "rates vary based on the type of provider and where the call originated, even though the function of originating or terminating a call does not change"; (3) "because most intercarrier compensation rates are set above incremental cost, they create incentives to retain old voice technologies and engage in regulatory arbitrage for profit").

29 *See Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213 and 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, FCC 96-488, (rel. December 24, 1996), at ¶ 9.

and potential competitors.[30] By the time of the Internet Service Provider-bound traffic controversy, the Commission had concluded that the most important of the pressing issues regarding its ICC rules was "the opportunities for regulatory arbitrage created by the existing patchwork of intercarrier compensation rules."[31] The Commission noted that any discrepancy in regulatory treatment between similar types of traffic or similar categories of parties is likely to create opportunities for regulatory arbitrage.[32]

If transit service rates are afforded special treatment while all other regulated switched service prices are driven toward zero, then the reduction of tandem switching and transport rates will create substantial regulatory arbitrage opportunities. After a more than 15-year effort to reduce what it characterized as the "pressing" problem of regulatory arbitrage in its ICC mechanisms, it makes no sense for the Commission now to allow – indeed, to affirmatively foster – the creation of a new regulatory arbitrage opportunity with respect to the functionally equivalent and rapidly converging tandem switching/transport and transit services. The reasonable and rational approach is for the Commission to regulate transit service rates in a manner similar to regulation of tandem switching and transport rates.

A failure by the Commission to regulate transit rates in a similar manner will put certain carriers in the position of charging unreasonably discriminatory higher rates for transit services

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30 *See id*. at ¶ 55.

31 *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132, (rel. April 27, 2001) ("*April 2001 NPRM*"), at ¶ 11; *see also Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket Nos. 96-98 and 99-98, Order on Remand and Report and Order, FCC 01-131, (rel. April 27, 2001), at ¶ 2 ("the existing intercarrier compensation mechanism for the delivery of this traffic . . . has created opportunities for regulatory arbitrage and distorted the economic incentives related to competitive entry into the local exchange and exchange access markets").

32 *April 2001 NPRM* at ¶ 12.

than for functionally equivalent tandem switching and transport services. As the Commission is well aware, the three-step test for whether rates are unreasonably discriminatory pursuant to section 202(a) of the Act is: (1) whether the services are like services; (2) if they are, whether there is a price difference between them; and (3) if there is, whether that difference is reasonable.[33] Here, the functionally equivalent and rapidly converging transit services and tandem switching/transport services are clearly "like services." If transit rates remain constant or increase while tandem switching and transport rates are required by the Commission to be reduced, there would be a growing price differential and the only remaining question will be whether it is reasonable. Without reviewing the cost data for principal providers of both transit services and tandem switching/transport services (*e.g.,* Verizon and AT&T), the Rural Associations cannot address the "reasonable price difference" issue. It is difficult, if not impossible, however, to understand how or why the costs of functionally equivalent and converging services provided over the same or similar facilities would differ so significantly.

The Rural Associations emphasize that their position is that transit rates should be regulated in the same manner as tandem switching/transport rates, and *not* that transit and other switched service rate elements should be transitioned to bill-and-keep. As indicated above, the Rural Associations oppose the reduction at this time of originating access and transport and tandem switching rates, particularly if the Commission does not provide additional Recovery Mechanism support *over and above* existing USF/CAF budget levels to offset the resulting losses. Instead, any ICC reforms that affect transit *and* other transport and tandem switching rate elements should be undertaken in accordance with sections 251 and 252 of the Act, pursuant to

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[33] *MCI Telecommunications Corp. v. Federal Communications Commission*, 842 F.2d 1296, 1303 (DC Cir. 1988); *MCI Telecommunications Corp. v. Federal Communications Commission*, 917 F.2d 30, 39 (DC Cir. 1990); *Competitive Telecommunications Association v. Federal Communications Commission*, 998 F.2d 1058, 1061 (DC Cir. 1993).

which prices are set by *state commissions* in accordance with a reasonable methodology established by this Commission. In this regard, the Commission should take a transitional step (as it did with respect to several ICC rate elements in the *Order*) by capping transit rates, and then turning over to state commissions the actual determination of proper rates. If, however, the Commission insists upon migrating tandem switching and transport rates to bill-and-keep – again, a step that the Rural Associations oppose – the Commission should transition transit rates as well to minimize regulatory arbitrage and discriminatory pricing issues.

II. THE COMPLEXITIES OF IMPLEMENTING INTERCONNECTION IN A BILL-AND-KEEP WORLD DEMONSTRATE THE MANY DANGERS OF PREMATURELY MANDATING BILL-AND-KEEP.

A. The Indication that All ICC Rate Elements Will Move to Bill-and-Keep Makes Well-Defined Interconnection Rights and Obligations Consistent With the Statutory Framework all the More Critical as a Component of Universal Service and Minimizing Further Intercarrier Disputes.

As discussed in section I, *supra*, the Commission should ensure that the consequences of an ICC bill-and-keep "end state" will not undermine the ability of rural consumers to obtain reasonably comparable services at affordable rates. Fortunately, as explained further herein, the Commission's decision in the *Order* to bring all telecommunications traffic under section 251(b)(5) provides a relatively straightforward answer to concerns about interconnection and financial network responsibilities.

As a backdrop, to date, the ICC system has encouraged carriers to seek physical interconnection closer to high-cost areas or other areas with which they exchanged significant amounts of traffic, because failure to do so would render them financially responsible for all traffic on the "other side" of the relevant point of interconnection. For example, an IXC that handed off long distance traffic at a serving tandem for termination to called customers was typically responsible for: (1) tandem switching; (2) common transport; and (3) end office switching. Alternatively, the IXC might seek to obtain direct end office trunking from a switched access tariff to reach an RLEC's end office, if a business case could be made for direct interconnection. The greater the amount of traffic exchanged, the greater incentive for the IXC to come closer to the relevant area to minimize transport and tandem switching costs.

If tandem switching and transport rate elements all move toward a rate of zero, however, the IXC or other carrier has an increasing incentive to compel RLECs and other small carriers to come to a handful of central locations (such as Chicago or Dallas or New York or Atlanta) to deliver and receive all traffic. Stated differently, since the consequence of cost is irrelevant to the interconnection calculus in a bill-and-keep environment, if the proper legal framework is not clearly (re)stated in a further order, large carriers could attempt to dictate distant points of interconnection that foist transport costs onto smaller carriers' networks. The impacts of these perverse incentives would be compounded by the fact that an IXC may maintain the only long-haul transport route in and out of a rural serving area.

Without clear guidance from the Commission that existing law governs such circumstances and precludes such gamesmanship, new efforts at arbitrage such as these – even though baseless – could consume substantial time and resources in disputes, threaten the viability of smaller carriers, and contradict the core mission of universal service by transferring significant transport costs onto the backs of rural consumers. Fortunately, as a follow-on consequence of bringing all telecommunications traffic within the scope of section 251(b)(5) under the *Order*, the exchange of all such traffic is by definition governed by sections 251 and 252 and related provisions of law and orders. Thus, all that the Commission needs to do in a further order is to provide a clear and unmistakable reaffirmation to this effect. Such reaffirmation should note that the governing framework includes, but is not limited to, restricting interconnection to technically feasible points on the ILEC's existing network and confirming that interconnection is subject to the applicable exemptions, suspensions, and modifications that apply under section 251. Absent clarification and reaffirmation that this statutory framework bounds interconnection rights and obligations for the exchange of all traffic going forward (since all traffic has now come within section 251(b)(5)), disputes are almost certain to fester and the Commission runs the rather ironic and truly unfortunate risk of having ICC reform undermine universal service.

Congress recognized such concerns in enacting the 1996 Act, carefully linking the determination of interconnection points and financial responsibilities for interconnection and transport and termination to a determination of "additional costs."[34] A carrier's choice of interconnection point(s) under the 1996 Act comes with consequences. At least until such time as a bill-and-keep regime is further implemented, that carrier can choose to interconnect closer to or further from another carrier, but in doing so, it will incur more or less in ICC obligations (and payment of those "additional costs") as a result. Congress was also careful in the 1996 Act to exempt, modify, or suspend certain interconnection obligations as they otherwise might have applied to RLECs, recognizing that even as the basic framework was intended to strike a balance between interconnecting carriers and incumbents, smaller rural carriers faced special challenges that warranted unique treatment.[35] Accordingly, section 251(f)(1) of the Act exempts RLECs

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[34] 47 U.S.C. § 252(d)(2).

[35] *See, e.g.,* Sen. Rep. 104-23 at 22 ("The Committee intends that the FCC or a State shall, consistent with the protection of consumers and allowing for competition, use this authority to provide a level playing field, particularly when a company or carrier to which this subsection applies faces competition from a telecommunications carrier that is a large global or nationwide entity that has financial or technological resources that are significantly greater than the resources that are significantly greater than the resources of the company or the carrier."); 142 Cong. Rec. S 709 (Feb. 1, 1996) (Comments of Senator Daschle of South Dakota) ("The bill before us also recognizes the important role that must be played by Public Utilities Commissions [PUC's] in rural States. PUC's are the best entities to judge whether a given market within their

from interconnection and other obligations under section 251(c) until a bona fide request for such interconnection has been received and the state commission can confirm that such request "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 . . . ."[36] Similarly, section 251(f)(2) of the Act permits an RLEC or any other smaller incumbent to seek suspension or modification of obligations under subsections (b) and (c) of section 251 where it can be shown that such request is necessary to avoid, among other things, "a significant adverse impact on users of telecommunications services generally; [or] a requirement that is unduly economically burdensome."[37] Finally, section 251(g) provides for continuation of the existing access regime in apparent recognition of the disruptive effect of upsetting existing arrangements without more specific consideration.[38]

The unmistakable purpose of each of these provisions was to avoid having new interconnection and ICC landscapes alter cost recovery without a thoughtful approach to reform that was carefully coordinated with state commissions. Thus, even as the Commission has moved toward bill-and-keep for ICC purposes, under the statute it must continue to coordinate with the states in ensuring that interconnection obligations do not result in a complete reversal of fortune that not only exempts IXCs and other providers from paying access but also transfers their transport costs to small rural carriers and rural consumers. In fact, having brought all

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State can support competition. That's not a judgment we should make from Washington. Nor is it something we can or should leave to the unbridled, unsupervised judgment of the private sector. Those who have taken the risks and made the investments to extend cable or phone services to smaller rural communities should not be places at risk of being overwhelmed by larger, better-financed companies.").

36 47 U.S.C. § 251(f)(1).

37 *Id*. § 251(f)(2).

38 *Id*. § 251(g).

telecommunications traffic under section 251(b)(5) pursuant to the *Order*, the Commission has acknowledged that it must squarely enlist the state commissions to assist with implementing the interconnection arrangements for such traffic pursuant to section 251 and 252.[39]

Part of the state role includes approving negotiated interconnection agreements, arbitrating such agreements, enforcing section 251(f)(1) exemptions, or even extending, renewing, or revising section 251(f)(2) suspensions or modifications to RLEC interconnection obligations. This is necessary to ensure that universal service is maintained and the public interest is served even as the interconnection and ICC landscape shifts dramatically. But to this end, and to ensure that interconnection gamesmanship cannot become a new form of arbitrage used by IXCs and other carriers to shift unreasonable and unmanageable transport costs to rural consumers, the Commission should take <u>four specific additional steps</u> in a further order arising out of the *FNPRM* that clarify precisely how the section 251 and 252 framework applies in this new bill-and-keep environment.

<u>First</u>, the Commission should ensure that RLECs and other incumbent carriers are entitled to initiate interconnection negotiations and arbitrations with any carrier – IXC, mobile wireless provider, competitive LEC, etc. – to whom they send or from whom they receive section 251(b)(5) traffic.[40] Although RLECs and other incumbent carriers should be able to continue to use tariffs as a default for the exchange of such traffic as suggested in subsection II.B immediately below, the Commission should also enable RLECs to initiate interconnection negotiations in light of the decision to bring all traffic within section 251(b)(5). Such a measure

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39 *Order and FNPRM* at ¶ 776.

40 This would in effect be a modified extension of the Commission's decision in *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, FCC 05-42 (rel. Feb. 24, 2005), at ¶ 16.

could also facilitate resolution of disputes over interconnection points via potential section 252 arbitration.

Second, the Commission should make clear, pursuant to its authority to interpret the Act and in the wake of any and all ICC and interconnection-related reforms, that state commissions should re-examine all section 251(c) RLEC exemptions that may have previously been lifted. Such re-examination is appropriate because any prior state commission action to lift an RLEC's exemption under section 251(f)(1) was taken under a very different set of economic circumstances than those now presented by the *Order and FNPRM*. Specifically, at the time any such exemption was lifted, RLECs were still entitled to receive interstate and intrastate switched access revenues and were rate-of-return regulated for purposes of interstate switched access revenues. Now, RLECs are on "incentive-based" regulation with respect to switched access, and they face a very different economic challenge in interconnecting with carriers who might ultimately have no obligation whatsoever to pay *any* ICC charges or bear any financial responsibility for use of the RLEC network. Since the economics of network interconnection and ICC mechanisms have changed substantially as a result of the *Order* and appear poised to shift even further pursuant to the *FNPRM*, the Commission should look to the Congressional intent of section 251(f)(1) and call upon the state commissions to confirm whether any request for interconnection (including amendments to existing agreements) after the effective date of the *Order* "is not unduly economically burdensome, is technically feasible, and is consistent with section 254 . . . ."

Third, the Commission should clarify, notwithstanding its cautionary note in the *Order* regarding a state commission's invocation of section 251(f)(2) to address concerns about ICC reforms,[41] that state commissions remain free – and are in fact obligated – to consider fully any request by a RLEC for a suspension or modification pursuant to that subsection that would affect any *interconnection* obligations. Such clarification would be consistent with the finding elsewhere in the *Order* that state commissions retain their essential roles and "responsibility" in defining network edges for purposes of interconnection.[42]

Finally, and most importantly, pending consideration of any further reforms and a more careful evaluation of the consequences of different interconnection regimes on the broader objectives of universal service, the Commission must clarify that the "rural transport rule" adopted in the *Order* applies to an RLEC's exchange of *all* section 251(b)(5) traffic with any carrier.[43] Such a rule is consistent with current law and is in fact dictated by the interplay of sections 251(a) through (c) and (f) of the Act as noted above.[44] In the *Order*, the Commission noted that moving to a bill-and-keep regime "raises issues regarding the default point at which financial responsibility for the exchange of traffic shifts from the originating carrier to the

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[41] *Order and FNPRM* at ¶ 824. For purposes of clarification, the Rural Associations disagree with the premise that the Commission could possibly *a priori* determine that any and all requests by RLECs pursuant to section 251(f)(2) for suspension or modification of ICC obligations are "highly unlikely" to have any merit. This suggests that state commissions are all but foreclosed from finding such suspensions or modifications to be necessary to avoid economic burden and to serve the public interest, convenience, and necessity from the perspective of their ratepayers. There is a clear difference between a rule promulgating standards by which states interpret such requests (which would appear to be within the Commission's purview) and a "shot across the bow" warning that tells states, without any meaningful interpretive guidance, how they must reject any such request.

[42] *Id*. at ¶ 776.

[43] *See id*. at ¶ 999.

[44] It is also compelled by the long-standing determination that interconnection must occur at a point within the incumbent network. *See Iowa Utilities Bd. v. FCC* 120 F. 3d 753, 813 (8th Cir. 1997).

terminating carrier."[45] Although this specific finding was made with respect to intraMTA wireless traffic, it applies with even greater force in the broader context of carrier interconnection. Indeed, in the context of intraMTA traffic, the wireless carrier presumably has *some* presence within the MTA in question and thus the extent of transport at issue would have at least been limited by the MTA boundaries.[46] By contrast, in a broader context, the interconnecting carrier might have only one point of presence nationwide. Or, in the wake of the transition to bill-and-keep, an interconnecting carrier might attempt to opportunistically demand that RLECs and other smaller carriers come to an arbitrarily chosen point among a limited set of points of presence that it maintains across the country.

Although the statute clearly precludes such behavior, given the substantial gamesmanship over the past decade in the area of ICC, the unrelenting efforts by parties to seek out "the next loophole," and the fundamental shifts in the regulatory landscape under the *Order*, clarification and reaffirmation is warranted and would help to minimize future disputes. Specifically, the Commission should confirm via a "rural transport rule" that an RLEC's financial responsibility for transport of any and all telecommunications traffic is limited to the relevant exchange boundary of the RLEC.[47] At such time as the Commission might finally determine how to avoid

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45 *Order and FNPRM* at ¶ 998.

46 Of course, as noted in several *ex parte* filings, many MTAs are quite large in scope, extending across several states. *See, e.g., Ex Parte* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Feb. 9, 2012), at slide 23.

47 The Commission will note that the rural transport rule adopted in the *Order* with respect to intraMTA traffic provided for transport to a single interconnection point within the RLEC's serving area. *Order and FNPRM* at ¶ 999. In the broader interconnection context, however, it is important to recall that local rates are constructed around the ability of a consumer to place a call within a given exchange – and the RLEC's costs of transporting a call within that exchange. If an RLEC is obligated to take a call for which *someone else* (*i.e.*, a presubscribed or underlying facilities-based IXC) is being paid to a location beyond the exchange boundary, and if the RLEC

the impetus for interconnection gamesmanship and is otherwise able to assess and resolve on a granular basis how a bill-and-keep environment can be reconciled with interconnection obligations in a manner that does not imperil universal service, this rural transport rule could perhaps then be revisited and modified or lifted (provided that such further reforms are consistent with sections 251 and 252). But pending careful assessment of universal service impacts and further reforms, a clear and unequivocal confirmation that the rural transport rule applies to the exchange of all section 251(b)(5) traffic between any carrier and an RLEC provides the best means by which the Commission can minimize the likelihood of intercarrier disputes moving forward in a bill-and-keep world and ensure that transport costs are not transferred onto the backs of rural consumers in a way that violates sections 251, 252, and 254 of the Act.

B. Even in Facilitating the Use of Interconnection Agreements, the Commission Should Proceed with Caution Before Forbearing From the Act's Tariffing Requirements or Otherwise Precluding the Continued Use of Tariffs.

The *FNPRM* seeks input on the role of tariffs and interconnection agreements during the transition to a bill-and-keep environment. The Commission initially observes in this regard that it would be in the public interest to continue to rely on tariffs for establishing terms and conditions for interconnection arrangements, while also providing carriers with the ability to negotiate individualized agreements. But even as it observes that carriers may continue to rely on tariffs, the Commission points out in the *FNPRM* that carriers are likely to rely primarily on negotiated agreements rather than tariffs as they transition from the existing access charge regime to the

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can no longer recover those costs via the imposition of access charges on the IXC, this means that those costs must fall back to consumers whose current local service rates do ***not*** reflect such transport. It is impossible to see how universal service can be served where long-haul transport costs to reach rural areas would need to be added into *local* service rates.

section 251(b)(5) and bill-and-keep framework adopted in the *Order.*[48] The *FNPRM* accordingly seeks comment on whether the Commission should forbear from tariffing requirements in section 203 of the Act and Part 61 of the Commission's rules to enable carriers to negotiate such alternative arrangements.[49]

The Rural Associations agree that carriers should have the flexibility to continue offering service under tariff or to enter into negotiated agreements, when individual circumstances permit doing so, and when parties to such arrangements have roughly equal bargaining power. Indeed, as noted in the preceding subsection, the fact that all traffic has now been brought under section 251(b)(5) would appear to contemplate the use of section 252 arrangements for the exchange of such traffic with any and all other interconnecting carriers.[50] The Commission should proceed with caution, however, before attempting to forbear from the tariffing requirements set forth in section 203 of the Act or its Part 61 rules. The marketplace is likely to change in unexpected ways over the next few years in response to the Commission's ICC and USF reforms. These changes should be allowed to unfold before the Commission makes decisions to forbear from enforcing such fundamental provisions of the Act as section 203 and related rules.

Use of individually-negotiated agreements may give rise to substantial concerns about unreasonable discrimination and departures from the basic common carrier obligations that have so far kept interconnected public telecommunications networks functioning. The Commission would also need to consider to what extent it should retain existing rules governing

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48 *Order and FNPRM* at ¶ 1323.

49 *Id*. at ¶ 1322.

50 *See* 47 U.S.C. § 252(a)(1) (providing for negotiation of agreements to interconnect and exchange traffic pursuant to section 251).

interconnection contracts, such as public filing requirements, the ability for providers to "opt in" to existing agreements, etc. There is substantial concern as well with respect to relative bargaining power, and how that might be used to undermine other important public policy goals and statutory objectives such as the need to ensure reasonably comparable rates and services across the country.

Moreover, for RLECs in particular, the administrative difficulties associated with establishing contractual relationships to govern interconnection rates, terms and conditions during the transition justify continued reliance on tariff arrangements as generally the most reasonable and efficient solution for these carriers. Tariffs are also needed in instances where it would be infeasible for small companies to negotiate with numerous service providers who individually terminate comparatively small amounts of traffic in a particular carrier's territory, but who collectively impose terminating traffic loads that are significant to a small company's network. In today's environment, with significantly more service providers, small companies often find themselves without the resources or leverage to negotiate fair interconnection agreements with larger carriers, who typically refuse to consider reasonable modifications to standard agreements. A system basing all ICC on dozens or even hundreds of negotiated agreements would place enormous strains on RLECs and leave them vulnerable to unfair and unreasonable terms and conditions. Such a system would also greatly hamstring regulators' ability to ensure that it telecommunications markets are functioning in accordance with essential provisions of the Act, including sections 201, 202, and 254.

Many carriers also continue to need the ability to participate in common revenue pooling arrangements similar to those administered by NECA. Revenue pooling provides substantial administrative savings and risk-sharing benefits, and can be adapted for use under tariffs, certain types of common contracts, or some combination of the two mechanisms. Regardless of whether ICC rates, terms and conditions are set by tariff, contract, or some combination of the two, RLECs should continue to have the option of participating in voluntary tariff and revenue pooling arrangements.

In sum, the Commission should maintain a flexible approach to implementation details of the transition that can, to the extent possible, accommodate both tariffs and negotiated agreements. This should include, for example, permitting carriers to employ alternative tariff and non-tariff pricing mechanisms that reflect underlying network economics.[51] Forbearance from tariff and/or interconnection rules may be initially appropriate only in circumstances where carriers negotiate with other carriers of comparable size and market power, and where the administrative burdens for smaller carriers of establishing such contracts do not overwhelm the benefits of tailored arrangements. In cases where these conditions do not exist, such as with small RLECs, continued regulatory oversight will be required. Put another way, the Commission

[51] For example, the Rural Associations and others have suggested the Commission permit carriers to develop flat-rate interconnection pricing models, using so-called "port and link" rate structures, a methodology already widely used for packet-based services. *See, e.g.,* Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et al*. (filed Apr. 18, 2011), at 46 and n. 74. Unfortunately, in its rush to impose a "quick fix" for per-minute access charges, the Commission included language in the *Order* which might be read to foreclose such options. *See Order and FNPRM* at ¶ 786. The Commission may wish to consider reopening discussion of flat-rate pricing structures as a possible end state for intercarrier pricing arrangements, inasmuch as such mechanisms may permit both carriers and customers to provide high-quality bundled services to customers on mutually-agreeable terms. Indeed, the Commission is presumably aware that interconnection within Internet Protocol ("IP")-based/Internet structures (which the Commission seems to view as a model) commonly includes comparable flat-rated charges and is not "cost free" for most interconnecting entities, except in cases where traffic scope and balances are roughly equivalent. *See, e.g.,* "Peering" (available at: http://en.wikipedia.org/wiki/Peering) ("in order for a network to reach any specific other network on the Internet, must either: [1] Sell *transit* (or Internet access) service to that network (making them a 'customer'), [2] Peer directly with that network, or with a network who sells transit service to that network, or [3] Pay another network for transit service, where that other network must in turn also sell, peer, or pay for access.")

can establish conditions that will facilitate the use of negotiated interconnection agreements pursuant to sections 251 and 252 of the Act as described in the preceding subsection of these Comments. In doing so, however, the Commission should not require RLECs to depart from the practice of using tariffs where they deem it necessary.

III. IT IS PREMATURE FOR THE COMMISSION TO CONSIDER PHASE-OUTS OR ACCELERATED REDUCTIONS OF ARCS AND CAF ICC SUPPORT FOR RLECs.

The *FNPRM* seeks comment on proposals to modify the rules in the *Order* regarding the ICC recovery mechanism for RLECs and its two individual components – end-user ARCs and CAF ICC support (also referred to as the "Recovery Mechanism").[52] In particular, the *FNPRM* asks whether ARCs and/or CAF ICC support should be subject to a defined phase-out and ultimately be eliminated. It also asks whether carriers' "Rate-of-Return Eligible Recovery" should decline at a faster rate than five percent annually after five years, which would result in the accelerated reduction of both the ARCs and CAF ICC support.

All of these proposed changes are highly premature and have the potential to be very harmful to rural consumers in RLEC service areas. Therefore, none of these proposals should be adopted at this time. The Commission has not even had an opportunity to evaluate the impact of the Recovery Mechanism adopted in the *Order* on RLECs' ability to recover their costs of providing access services and to earn a reasonable return over the long term. Without this ability, RLECs will not be able to make needed investments in their networks – including investments in IP-based facilities – and provide rural consumers with affordable and "reasonably comparable" voice and broadband services, consistent with the goals of this proceeding and the mandates of section 254 of the Act.

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[52] *Order and FNPRM* at ¶¶ 1326-1329.

Under the rules adopted in the *Order*, Rate-of-Return Eligible Recovery is already subject to a five percent reduction each year that, over time, will drive both the ARC and CAF ICC support for RoR carriers toward $0.00, regardless of switching-related costs that might actually be incurred during that period. For example, even if a carrier attempts to move to a softswitch during this phase-down and makes every effort to minimize its operating expenses, the procurement of that softswitch – a result *specifically desired* by the Commission[53] – will almost certainly yield costs that are unrecoverable through the Recovery Mechanism or otherwise. Although a five percent annual reduction in eligible recovery is perhaps certain and predictable, it is also arbitrary in that it has no tether whatsoever to an individual carrier's cost recovery needs. The Rural Associations recognize that the five percent annual reduction is based on *aggregated* data on recent annual declines in RoR carriers' interstate switched access revenue requirements and intrastate access revenues.[54] Still, this does not provide an adequate foundation for assuming that *individual* RLECs will achieve the necessary productivity gains to enable them to recover their costs. To the contrary, there is and will continue to be tremendous variance among individual RLECs' revenue requirement trends, which in turn will cause some to experience significant shortfalls as their eligible recovery amount declines year after year.

As NECA, OPASTCO, and WTA explained in their Petition for Reconsideration and Clarification ("PFR") with respect to the *Order*,[55] the current cost allocation rules require RLECs to allocate costs between the interstate and intrastate jurisdictions. Portions of those costs are

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53 *See, e.g., February 2011 NPRM* at ¶ 495 ("because most intercarrier compensation rates are set above incremental cost, they create incentives to retain old voice technologies and engage in regulatory arbitrage for profit").

54 *Order and FNPRM* at ¶¶ 892–894.

55 Petition for Reconsideration and Clarification of NECA, OPASTCO, and WTA, WC Docket No. 10-90, *et al*. (filed Dec. 29, 2011) ("*NECA, et al. PFR*"), at 29-31.

then assigned to specific access rate elements for recovery from a combination of charges assessed upon end users and IXCs, along with high-cost support mechanisms. The *Order's* Recovery Mechanism permits a RoR carrier to recover a fixed amount each year to account for the revenue losses resulting from mandated ICC rate reductions, and that Rate-of-Return Eligible Recovery amount is reduced by five percent annually without regard to the carrier's actual cost recovery needs in any particular year. However, since existing cost allocation rules remain in effect, RLECs are mathematically required to allocate expenses and investments to the equivalent of a regulatory black hole, with no opportunity for recovery upon the point at which required allocations exceed Eligible Recovery.

This is why NECA, OPASTCO, and WTA in their PFR urged the Commission to provide a reasonable method for RLECs to recover costs allocated to switched access elements under current rules. This may be accomplished either by: (1) reconsidering the decision to cap and then reduce annually carriers' eligible recovery amounts, or (2) permitting RLECs to establish a new rate element applicable to IXCs (which may be flat-rated) designed to recover costs assigned to existing switched rate elements in excess of those recovered via ARCs and CAF ICC support. Otherwise, neither switched access costs nor the "additional costs" of transport and termination will be recoverable. In the event, however, the Commission decides not to reconsider the RoR Recovery Mechanism as proposed, at the very least it should certainly take the time to observe the effects of the Recovery Mechanism for several years before deciding to accelerate the decline of that mechanism. Such data-driven prudence is essential to determine whether RLECs retain a reasonable opportunity to recover their costs of providing access services.

In addition, the *Order* states that one of the main goals of ICC reform is to "provide more certainty and predictability regarding revenues to enable carriers to invest in modern, IP networks."[56] There is no question that revenue certainty and predictability are key to encouraging any carrier to invest in IP and broadband-capable networks. However, revenue certainty and predictability, by themselves, are not enough to ensure that rural consumers in RLEC areas gain access to affordable and "reasonably comparable" advanced services, as required by the Act. The remaining essential driver is that those revenue streams must also be *sufficient*. Obviously, all the revenue certainty and predictability in the world will not result in needed capital investment if those revenues are insufficient to do so and there is no reasonable expectation of cost recovery.[57]

As it stands, the USF and ICC reforms adopted in the *Order*, coupled with the proposals in the *FNPRM*, portend the worst of all possible scenarios regarding the certainty, predictability, and sufficiency of RLEC revenues. To begin with, many major issues regarding reform of the high-cost USF program for RoR carriers were left unaddressed in the *Order* and are the subject of the *FNPRM*. These include: (1) the development of a RoR carrier CAF mechanism, (2) the specific methodology for calculating limits on reimbursable capital and operating costs, (3) the

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56 *Order and FNPRM* at ¶ 9.

57 This is why, in previous *ex partes*, the Rural Associations stated that an "incentive-based" approach to Rate-of-Return Eligible Recovery would not prompt RLECs to make timely investments in IP-capable softswitches. *See, e.g., Ex Parte* Letter from Michael R. Romano, NTCA, to Marlene H. Dortch, FCC, WC Docket No. 10-90, *et al.* (filed Oct. 20, 2011), at 3. Instead, carriers will be encouraged to minimize their costs in an effort to achieve full cost recovery and earn a positive rate of return. Unfortunately, under the new ICC recovery mechanism that was adopted, carriers will have an increasingly difficult time achieving full cost recovery with each passing year as the combined revenues from ICC rates, ARCs, and CAF ICC support continually decline. Ironically, by moving to such an "incentive-based" system for RLECs, the Commission has perpetuated and extended the very same system that *discouraged* price cap investment in modern networks in rural America.

possible represcription of the authorized interstate rate of return, and (4) to what extent an RLEC's support levels may be adjusted in areas where there is less than a 100 percent overlap by an unsubsidized competitor. In addition, regarding ICC reform, how originating, tandem switching, and transport access charges will be transitioned to bill-and-keep has been left unresolved in the *Order* and is only now being contemplated. All of these open issues make RLECs' future regulated revenue streams highly *unpredictable* and *uncertain* at this time, other than the fact that the resolution of these issues will almost certainly result in far *less* cost recovery from high-cost support and ICC for these carriers than they receive today.

Likewise, the "reforms" to the high-cost USF program that were adopted in the *Order* for RoR carriers consisted entirely of cuts and caps to the existing support mechanisms, coupled with significant public interest obligations and reporting requirements. Here again, these "reforms" will result in a reduction in regulated revenue for RoR carriers,[58] and will almost certainly result in *insufficient* support for many carriers to provide "reasonably comparable" services and rates, or even meet the *Order's* broadband performance obligations.[59] Furthermore, if many of the proposals in the *FNPRM* are adopted, RLECs will experience even greater

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[58] The *Order* establishes an annual budget target for high-cost support for RoR carrier service areas at $2 billion through 2017, which is approximately equal to support levels for these carriers in FY2011. However, because that amount must now also accommodate recovery for ICC reform under which all rates will eventually transition to $0.00, the fixed $2 billion budget target will result in increasingly lower combined revenues from high-cost support and ICC.

[59] As the Rural Associations have previously noted, existing high-cost support levels have enabled most RLECs to deploy at least basic levels of broadband service to a substantial majority of the consumers living in their territories. However, for the majority of RLECs, significant additional investment is necessary to meet the public interest obligation to provide broadband service at speeds of at least 4 Mbps downstream and 1 Mbps upstream upon reasonable request. Comments of NECA, NTCA, OPASTCO, and WTA, WC Docket No. 10-90, *et al*. (filed May 23, 2011), at 47. Therefore, if today's support levels were insufficient for most RLECs to provide broadband service that meets the Order's speed benchmark and other performance metrics, then certainly cutting that support will make it nearly impossible.

reductions in support, leaving even more carriers with insufficient revenues to provide their customers with quality, affordable basic and advanced services.

Therefore, simply considering at this time phase-outs or an accelerated reduction of the ARCs and CAF ICC support for RoR carriers compounds the utter lack of revenue certainty and predictability that they presently face. This is already causing carriers to retreat in their investments in network infrastructure.[60] Adoption of a phase-out or an accelerated reduction of the ARC and/or CAF ICC support, it would only exacerbate the difficulty most RoR carriers will face going forward in making critical network upgrades to achieve the universal service mandates of the Act and the Commission's public interest obligations.

Therefore, and as expeditiously as possible, the Commission should confirm that it will neither phase-out nor reduce either component of RoR carriers' ICC recovery mechanism for the foreseeable future. At the very least, the Commission should take the time to observe the functioning of the Recovery Mechanism adopted in the *Order* for several years, after all of the other outstanding issues regarding high-cost support and ICC rate reform have been addressed. This will enable the Commission to undertake a data-driven assessment of whether, in fact, RLECs continue to have a reasonable opportunity to recover their costs of providing access

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60 For example, Rural Telephone Service Company, an RLEC in western Kansas, has stated that "[b]ecause of the uncertainty presented by the Commission's decision in the USF/ICC Order and FNPRM, RTSC has already decided to cut its capital budget by $6 million for 2012, and will likely move towards a zero dollar capital budget in 2013 and beyond." Comments of Rural Telephone Service Company, Inc., WC Docket No. 10-90, *et al*. (filed Jan. 18, 2012), at 5. Similarly, TCA, a national consulting firm, has stated that "[i]t is utterly unreasonable for the FCC to expect RoR LECs to continue to invest in broadband infrastructure in the face of significant caps and cuts to their current support mechanisms – and with no certainty of how any investments may be recovered in the future." Comments of TCA, WC Docket No. 10-90, *et al*. (filed Jan. 18, 2012), at 3.

services and, moreover, are able to make the necessary investments in IP and broadband-capable networks.

IV. IP-BASED INTERCONNECTION BETWEEN CARRIER NETWORKS SHOULD BE GOVERNED BY THE SAME STATUTORY AND REGULATORY REGIME AS ALL OTHER NETWORK INTERCONNECTION.

The Rural Associations are well aware that networks are evolving over time to IP-based technologies.[61] Incumbents (including many RLECs) have been replacing circuit switches with softswitches, and the evolution will continue as more and more large, mid-sized and small carriers deploy softswitches in more and more of their service areas. Accordingly, the Rural Associations support the Commission's effort to develop a more complete record on IP-to-IP interconnection issues before issuing and implementing comprehensive general rules. This will allow regulators and carriers to focus upon the more critical and intractable issues that arise in practice and craft more targeted and effective solutions to such issues. Detailed rules enacted at too early a stage are more likely to lead to unforeseen twists and consequences that may delay IP evolution or divert it down less than optimal paths.

While a more complete record is being compiled, the Rural Associations suggest that the Commission limit regulation of IP-to-IP interconnection to a few relatively simple and clear rules and policies, including: (a) reliance primarily upon the existing and well-tested interconnection procedures of sections 251 and 252 of the Act; (b) monitoring of interconnection negotiations and the rules governing them, particularly to make certain that carriers with substantial bargaining power (e.g., large carriers negotiating with small carriers) are not misusing

[61] Given that fiber rings, fiber trunks, fiber loops and digital subscriber line ("DSL") loops constitute the basic structure of both circuit-switched and IP networks, it is far more accurate to speak of the "continuing evolution" to an all-IP network rather than the "migration" to it. As softswitches replace circuit switches, the existing public switched telecommunications network ("PSTN") becomes more and more of an IP network. And as fiber facilities replace copper facilities, the network will become a higher and higher speed network.

or abusing it; and (c) clarification that any "additional costs" of IP-to-IP interconnection must be borne by those seeking to obtain such interconnection where it cannot be accommodated today.

A. The Commission Should Clarify that Sections 251 and 252 of the Act Govern All Interconnection Arrangements, Including IP-to-IP Interconnection for the Purposes of Exchanging Traffic Between Carriers.

Sections 251 and 252 of the Act were enacted as part of the 1996 Act to establish a framework for the negotiation and arbitration of interconnection agreements between telecommunications carriers. Whereas the section 251/252 process does not depend upon the network technology underlying the interconnection (whether time-division multiplexing ("TDM"), IP or otherwise), it is expressly limited by its very clear statutory language to circumstances where the requesting entity is a *telecommunications carrier* that is proposing to use the requested IP-to-IP or other form of interconnection to deliver a *telecommunications service* to its end users. This is not an exclusionary rule to keep out information service providers, but rather a reasonable policy to create a level competitive playing field and to minimize opportunities for regulatory arbitrage. As indicated above, the Commission has recognized that disparities in the regulation of similar types of traffic or similar categories of parties are likely to create opportunities for regulatory arbitrage.[62] For an entity to be permitted to enjoy the privileges and benefits of the section 251/252 process to compete with a telecommunications carrier, it should be willing to accept the same Title II common carrier responsibilities and obligations that apply to the telecommunications carrier from which it is requesting interconnection.[63]

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62 *April 2001 NPRM* at ¶ 12.

63 For example, the number portability required by section 251(b)(2) is defined in section 3(30) of the Act as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or

Moreover, in confirming that IP-based interconnection is subject to sections 251 and 252, the Commission should make clear that IP-based interconnection is but one of many means of achieving interconnection, and that all of the applicable limitations of interconnection under section 251 apply with equal force to IP-to-IP interconnection. Specifically, the Commission should ensure that a requesting carrier's rights under section 251 are limited to those situations in which both parties (*i.e.*, the requesting carrier *and* the carrier receiving the request) have already deployed IP trunking capabilities. To provide for direct IP-to-IP interconnection, an RLEC would need to deploy IP-enabled switching equipment along with other facilities to exchange and transport in IP, as well as perhaps network equipment to convert traffic to TDM for switching and termination to individual customers. Some RLECs may have such facilities and equipment in place, while others do not. It is well established that a requesting carrier cannot force an ILEC to upgrade its facilities or deploy new functionalities to accommodate its interconnection request. The U.S. Court of Appeals for the Eighth Circuit declared long ago that section 251(c)(2) requires access "only to an incumbent LEC's existing network – not to a yet unbuilt superior one."[64] The ILEC need not upgrade its network to "cater to every desire of

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convenience when switching from one telecommunications carrier to another." Likewise, section 251(b)(3) requires all local exchange carriers to provide dialing parity "to competing providers of telephone exchange service and telephone toll service" and to permit all such competing providers "to have nondiscriminatory access to telephone numbers, operator services, directory assistance, and directory listing." Section 251(b)(4) requires all LECs to afford access to their poles, ducts, conduits, and rights-of-way "to competing providers of telecommunications services." Finally, section 251(b)(5) establishes the duty to establish reciprocal compensation arrangements, which section 51.701(e) of the Commission's Rules defines as arrangements "between two carriers . . . in which each of the two carriers receives compensation from the other carrier for the transport and termination on each carrier's network facilities of telecommunications traffic that originates on the network facilities of the other carrier."

64 *Iowa Utilities Bd. v. FCC* 120 F. 3d 753, 813 (8th Cir. 1997).

every requesting carrier."[65] This is equally true for section 251(a), which sets forth an even lower threshold for interconnection with carriers that are not subject to section 251(c).

Beyond the clear constraints of this statutory framework, there is substantial Commission precedent for requiring the party that benefits primarily from a network upgrade or service addition to pay for it. For example, a television station requesting must-carry status on a cable television system must pay the full cost of any network upgrades (for example, an improved receiving antenna or additional microwave hops) needed to obtain an adequate signal at the cable headend, and/or of any additional copyright royalties resulting from carriage of the signal.[66] Likewise, spectrum auction winners must bear the costs of relocating the microwave facilities that previously occupied their frequency blocks.[67] As another example, in the case of microwave facility relocations, those initially required to pay the costs of upgrades/relocations may be reimbursed in part subsequently by additional entities that benefit from them in the future.[68] Thus, the Commission should clarify that, even as IP-based interconnection for the exchange of traffic should be governed by sections 251 and 252, _*all*_ rights and obligations under those sections apply with equal force to such arrangements, rather than modifying those rights and obligations in some manner that would violate the Act and foist upgrade costs on smaller carriers.

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65 *Id*.

66 47 C.F. R. § 76.55(c).

67 *Id*. §§ 101.69, 101.73, and 101.75; 47 C.F. R. §§27.1160, 27.1164.

68 *Id*. §§ 27.1160, 27.1164.

B. The Commission Should Actively Monitor the Status of IP Interconnection Following Any Order Pursuant to the *FNPRM* to Ensure that the Migration is Occurring as Contemplated and Without the Abuse of Market Power.

In an evolving IP world, RLECs and other small wireline and wireless carriers will need to establish IP-to-IP interconnection arrangements for access to regional, national and international networks, as well as for access by other telecommunications carriers to their networks. Whereas the larger Tier 1 Internet backbone providers have negotiated settlement-free (*i.e.*, bill-and-keep) peering arrangements with each other, they generally do not offer similar arrangements to smaller carriers.

To date, larger carriers have shown minimal interest in negotiating IP interconnection agreements with RLECs or other smaller carriers. Essentially, the perceived attitude is "you need us much more than we need you." and critical matters such as interconnection points, middle mile capacity and middle mile prices are often provided on take-it-or-leave-it terms. As the Commission continues to consider IP-to-IP interconnection issues and responses, the Rural Associations ask that it monitor the establishment of such arrangements between carriers of significantly disparate sizes. The Rural Associations fear that "negotiations" for such arrangements will consist primarily of "take it or leave it" proposals from the larger carriers and result in smaller carriers receiving less favorable terms and higher prices than larger carriers. The Commission should therefore stand ready to initiate a proceeding to study effective and equitable rules or procedures to re-balance bargaining power disparities between large and small carriers so that the customers of all carriers can enjoy the benefits of a nationwide all-IP network.

The Rural Associations also note that bargaining power imbalances exist with respect to the negotiation of IP-to-IP interconnection agreements for access to local networks as well as those for access to regional, national and international networks. In those still relatively few instances where RLECs have negotiated section 251/252 interconnection agreements with local competitors, they have frequently done so with much larger and financially more powerful carriers such as Sprint Nextel, Time Warner and Cox Communications. In an increasingly IP world, major international powers such as Google, Apple, and Skype, as well as large carriers and multiple-system cable operators, may be seeking IP-to-IP interconnection agreements (subject again, presumably, to their deciding to become certified as telecommunications carriers to obtain such interconnection pursuant to the Act). Therefore, the Commission will need to monitor and adjust bargaining power disparities on the basis of actual size and financial differences, and not merely and reflexively impose additional obligations and restrictions upon ILECs.

V. THE COMMISSION'S PHANTOM TRAFFIC RULES WILL BECOME INCREASINGLY INADEQUATE UNLESS CALL SIGNALING RULES ARE EXTENDED TO ONE-WAY VOIP PROVIDERS AND SUFFICIENT DATA IS REQUIRED.

The *Order* established a framework for applying ICC obligations to voice over Internet Protocol ("VoIP") service providers and extended the Commission's call signaling rules to providers of interconnected VoIP services.[69] The *FNPRM* now requests further comment on whether call signaling rules should be extended to providers of "one-way" VoIP services as well.[70] In particular, the Commission asks commenters to address whether application of call signaling rules to one-way VoIP providers would require that these providers be able to obtain and use numbering resources, whether rules should specify at what point in the call path such

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69 *Order and FNPRM* at ¶¶ 717-718, 960. The Commission's rules define "interconnected" VoIP providers as those entities offering services that permit customers to make and receive calls to and from the PSTN. 47 C.F.R. § 9.3.

70 *Id*. at ¶¶ 1399-1402.

signaling should originate (*i.e.* at the gateway or at some other point), and whether one-way VoIP service providers should be permitted to use numbers other than an actual North American Numbering Plan ("NANP") telephone number associated with an originating caller.[71]

At the outset, the Rural Associations note that actions taken in the *Order* to address "phantom" traffic, while helpful, are incomplete. Requiring transmission of calling party number ("CPN") data in call signaling helps identify the originating caller, and is typically used to jurisdictionalize calls as well. But the *Order* declined to adopt suggestions that providers be required to transmit information relevant to determining the *originating carriers'* identity, such as the carrier identification code ("CIC") or the operating company umber ("OCN").[72] In their PFR, NECA, OPASTCO and WTA accordingly asked the Commission either to reconsider this decision, or require as an alternative that the last carrier delivering unidentified traffic to a terminating provider's network assume financial responsibility for such traffic.[73]

Since the Commission has taken the long-overdue step of explicitly extending ICC obligations to VoIP providers, there is an obvious need to require all providers of such services, including "one-way" VoIP, to transmit call signaling information in signaling data. Before granting VoIP providers direct access to numbering resources, however, the Commission should resolve a number of significant concerns identified by commenters in other proceedings regarding unequal regulatory treatment currently afforded such providers. As the Commission is well aware, providers of VoIP services routinely claim exemption from traditional common carrier requirements on the basis their services are "enhanced," notwithstanding the fact such

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71 *Id*. at ¶ 1401.

72 *Id*. at ¶¶ 727-728.

73 NECA, *et al*. PFR at 39.

services are largely indistinguishable from, and compete directly with, "like" services offered by common carriers.[74]

As the Commission establishes a true level playing field and minimizes arbitrage opportunities between providers of comparable services, issues associated with access to telephone numbering resources will need to be resolved as well. In situations where the originating VoIP customer does not have a NANP telephone number, the Rural Associations understand it may be necessary to use the first network switch in the call path as the point of origination. The Commission should make clear, however, that the point at which a "call" begins is at the originating caller's location. The Commission can likely resolve issues associated with identifying originating switch locations simply by requiring providers to populate the jurisdictional information parameter ("JIP") field in call signaling data.[75]

VI. CONCLUSION

Based on the record in this proceeding, the Commission should proceed with caution before enacting additional ICC reforms that would foist yet greater costs onto the backs of rural rate-payers. If the Commission moves forward nonetheless with ultimate elimination of all ICC rates, it must do so in accordance with the Chairman's stated "no flash cuts" policy, only after it

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74 These issues were addressed most recently in comments submitted in response to a request by the Commission to refresh the record on petitions for waiver of the Commission's numbering resources rules. *Wireline Competition Bureau Seeks to Refresh Record on Petitions for Waiver of Commission's Rules Regarding Access to Numbering Resources*, CC Docket No. 99-200, Public Notice (rel. Dec. 27, 2011); *see also* Comments of NTCA, CC Docket No. 99-200 (filed Jan. 25, 2012) (identifying industry-wide regulatory, jurisdictional, technical (*e.g.*, interconnection and traffic routing), and economic (*e.g.*, intercarrier compensation) issues arising out of the requested relief).

75 *See, e.g.,* Comments of NECA, NTCA, OPASTCO, WTA, the Eastern Rural Telecom Association, the Rural Alliance, and the Rural Broadband Alliance, WC Docket No. 10-90, *et al*. (filed Apr. 1, 2011), at 27-28; NECA Petition for Interim Order, CC Docket No. 01-92 (filed Jan. 22, 2008). Possibly methods might be developed in the future to utilize data in the "ENUM" database to determine origination points of calls, to the extent it remains necessary to do so after the transition is complete.

is clear that a robust and fully compensatory recovery mechanism will be available to avoid rural consumer rate shock and sustain universal service, and only after addressing a variety of other technical, practical, and legal complexities such as: (i) the implications of such reforms on equal access obligations; (ii) the treatment of 8YY traffic; and (iii) the fact that certain functionally equivalent services (such as transit and special access transport) would retain positive rates even as the same basic elements when offered on a switched service basis would be regulated and sold ultimately for a mandated price of zero.

Moreover, as a follow-on consequence of bringing all telecommunications traffic within the scope of section 251(b)(5) of the Act, it should be abundantly clear that the exchange of all such traffic is governed by sections 251 and 252 and related provisions of law and orders. But in light of the substantial gamesmanship over the past decade in the area of ICC, the unrelenting efforts by parties to seek out "the next loophole," and the fundamental shifts in the regulatory landscape under the *Order* that present the risk of foisting significant transport costs onto rural consumers, clarification and reaffirmation to this effect is warranted and would help to minimize future disputes. Such clarification and reaffirmation should note that the governing framework includes, but is not limited to, restricting interconnection to technically feasible points on the incumbent's existing network and confirming that interconnection is subject to the applicable exemptions, suspensions, and modifications that apply under section 251. The Commission should also provide a series of more specific clarifications, such as how the rural transport rule will apply going forward, to minimize the likelihood of future disputes and ensure that universal service concerns are cared for as the interconnection and ICC landscape otherwise shifts. Finally, the Commission should clarify that, even as it moves traffic under sections 251 and 252, carriers are entitled to continue to rely upon tariffs and voluntary pooling arrangements in lieu of interconnection agreements.

The Commission should also decline to adopt phase-outs or accelerated reductions of any access recovery mechanisms, such as Access Recovery Charges or CAF ICC Support, at this time. Here again, the Commission has just enacted fundamental shifts in the way that universal service is ensured and is in the process of considering further changes to those mechanisms. The Commission should evaluate the relative success or failure of the changes already made in the broader context of universal service before deciding to pile additional changes atop those.

Finally, to ensure that its phantom traffic rules remain relevant in the long-term, the Commission should take further action to strengthen those rules by including one-way providers of Voice over Internet Protocol services within the scope of the rules and requiring transmittal by all parties of carrier identification information.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Comments was served this 24th day of February, 2012 by electronic filing and e-mail to the persons listed below.

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