

October 20, 2008

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary, Federal Communications Commission  
445 12th Street, S.W.  
Washington, DC 20554

Re: ***Ex Parte Presentation in 01-92, 99-68***

Dear Ms. Dortch:

This *ex parte* letter is submitted on behalf of Earthlink, Inc., Granite Telecommunications, LLC, PAETEC, on behalf of all its operating subsidiaries, RCN Telecom Services, Inc., U.S. Telepacific and its operating entities, and Zayo Group LLC, on behalf of itself and its operating subsidiaries, in the above-referenced proceedings. Although these parties support rationalizing intercarrier compensation to remove arbitrage opportunities and promote competition, such reform must be consistent with the Communications Act of 1934, as amended (“Act”). Even if the Commission’s policy objectives are laudable, the industry cannot afford another decade-plus of uncertainty and litigation arising from overly creative statutory interpretation. Quite simply, the Commission could do more harm than good in its effort to harmonize intercarrier compensation if it fails to base such reform on a solid statutory foundation. As shown herein, the Commission cannot preempt state authority to set intercarrier compensation rates and the overwhelming weight of record evidence shows that the proposed rate of \$0.0007 is below cost and therefore could constitute an unlawful taking.

Any preemption analysis must begin with the text of the statute. In Sections 251 and 252, Congress directed the Commission and states to share jurisdiction over ratemaking for the transport and termination of telecommunications. Section 252(d) authorizes the *state commissions to set the rates* for transport and termination under Section 251(b)(5). This Commission may only set the rates when the state commissions fail to act. As confirmed by the U.S. Supreme Court, the Commission’s role is to establish a *methodology* for state commissions to follow in setting rates consistent with the Act’s pricing standards.<sup>1</sup> Any rule that sets an interim rate, caps recovery of costs or requires the application of a particular rate goes beyond the scope of a rate setting “methodology.” Thus, the Commission cannot adopt the AT&T or Verizon plan because it does not possess the requisite rate setting authority.

Further, Verizon’s reliance on Sections 201 and 251(i) is misplaced. Section 251(i) preserves the Commission’s Section 201 authority to consider whether “charges, practices, classifications, and regulations” are “just and reasonable.” However, this Section 201 authority *does not include within it the authority to set rates in the first instance*. That authority is found in Section 205, and nothing in Section 251(i) or 252 extends the Commission’s rate-setting authority to intrastate telecommunications.

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<sup>1</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999).

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Even if the Commission had the authority to prescribe a unified termination rate, the overwhelming evidence in the record confirms that a rate of \$0.0007 is below cost. The reciprocal compensation rates established by state commissions average over four times \$0.0007. Unlike the \$0.0007 rate that appears in a handful of interconnection agreements, these reciprocal compensation rates were developed through careful consideration of evidence in contested cost proceedings before each state commission. Moreover, numerous individual carriers and their trade associations have submitted evidence showing that a rate of \$0.0007 would not recover a local exchange carrier's costs of termination. The touchstone for just and reasonable rates that prevent arbitrage and promote competition is that such rates must be based on cost. In short, the Commission can achieve its policy objectives, but not by taking the path, or rate, proposed by AT&T or Verizon. Instead, the Commission should publish for comment its final proposals with respect to the kinds of traffic that would be captured within its reform proposals, the methodology that would be applied by the states in setting transport and termination rates, and the legal basis on which the Commission believes it can establish a unified rate. Such a step would be consistent with the Commission's past practice and would ensure that any final decision is based on a transparent and well-supported record.

**I. THE STATUTORY FRAMEWORK EMPOWERS THE STATE COMMISSIONS -- AND NOT THE FEDERAL COMMUNICATIONS COMMISSION -- TO SET RECIPROCAL COMPENSATION RATES FOR "TELECOMMUNICATIONS" TRAFFIC.**

Although parties continue to press various intercarrier compensation rates for the transport and termination of traffic, many of these arguments "place the cart before the horse" by urging this Commission to set rates for different kinds of traffic (or a unified rate for all traffic) without adequate consideration of its authority to do so. As the tortured history of intercarrier compensation for the transport and termination of traffic destined for Internet Service Providers ("ISPs") makes clear,<sup>2</sup> the Commission risks prolonged industry uncertainty if it attempts to achieve policy objectives at the expense of legal sustainability. Thus, it is imperative in this time of general economic turmoil that the touchstone of any Commission decision with respect to intercarrier compensation be a well-grounded analysis of the statutory framework.

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<sup>2</sup> See *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling and Notice of Proposed Rulemaking, 14 FCC Rcd. 3689 (1999), *vacated and remanded*, *Bell Atlantic Tel. Cos. v. FCC*, 206 F.3d 1 (D.C. Cir. 2000) ("ISP Declaratory Ruling"); *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Intercarrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001), *remanded*, *WorldCom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), *cert. den.* 538 U.S. 1012 (2003) ("ISP Remand Order").

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The recent 35-page submission from Verizon purportedly providing the “legal authority” for the Commission to set a unified rate fails to mention the statutory framework for reciprocal compensation until page 26, devotes only a few pages to its flawed statutory “analysis,”<sup>3</sup> and ignores the flaws in its analysis that have already been noted by others.<sup>4</sup> Instead, Verizon first attempts to convince the Commission (with no meaningful evidentiary showing) that jurisdiction is irrelevant in today’s communications world, and that the Commission’s preemption of state regulation over intrastate traffic is therefore justified. Then, following its truncated, policy-driven argument about the statutory framework, Verizon makes a throwaway assertion that forbearance from the statutory framework is justified. As discussed herein, none of these arguments carries any weight. Even if jurisdiction were irrelevant -- which it is not -- the Act is clear that the Commission’s authority with respect to intercarrier compensation for the exchange of “telecommunications” traffic is limited to *establishing a methodology* by which a *state commission* can set rates.<sup>5</sup> Further, as discussed below, nothing in Sections 201 or 251 overrides the statute’s clear vesting of rate-setting authority in the state commissions.<sup>6</sup> Put another way, the Commission has no authority to set intercarrier compensation rates for *local traffic, ISP-bound traffic, or intrastate access traffic*. In short, assuming *arguendo* that jurisdiction is becoming irrelevant or impossible to determine, Congress granted state commissions, not this Commission, authority to set a unified rate for all telecommunications.<sup>7</sup>

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<sup>3</sup> See *Ex Parte* Presentation of Verizon and Verizon Wireless, CC Docket No. 01-92 and WC Dockets Nos. 04-36 and 06-122, dated Sept. 19, 2008 (“Verizon September 19 *Ex Parte*”).

<sup>4</sup> See, e.g., *Ex Parte* Presentation of EarthLink, Inc., CC Dockets Nos. 99-68 and 01-92, dated Aug. 14, 2008, at 10-13.

<sup>5</sup> 47 U.S.C. § 252(d)(2).

<sup>6</sup> See *id.* at §§ 201 and 251.

<sup>7</sup> To be clear, the Commission has authority to set rates with respect to *interstate* telecommunications. But, as discussed further herein, if the Commission wishes to have a *unified rate* apply to transport and termination of *all* telecommunications -- interstate and intrastate -- the only possible means of doing so under the statute is for the Commission to defer to those rates that each state commission sets for reciprocal compensation consistent with a Commission-established methodology and pursuant to Section 252(d)(2). In short, just as some states require LECs’ intrastate access rates to mirror interstate rates, the FCC could require LECs’ interstate access rates to mirror the reciprocal compensation rates set by the states.

**A. It Is Well-Established that this Commission Has a Limited Role in Setting Rates Pursuant to Section 252.**

Claims by Verizon and others<sup>8</sup> that the Commission has the legal authority to set a unified rate for transport and termination of *all* telecommunications traffic -- interstate and intrastate, local and long distance -- suffer from the same results-oriented analysis of the statutory framework that led the *WorldCom* court to reject the *ISP Remand Order* seven years ago.<sup>9</sup> The plain language of Sections 251 and 252 are the foundation of the Commission's actions and cannot be ignored. As described herein, these sections provide the Commission with authority to achieve its policy objectives without relying upon overly creative interpretations of the Act that are doomed to fail again upon appeal.

Section 251(b)(5) requires each local exchange carrier "to establish reciprocal compensation arrangements for the transport and termination of *telecommunications*."<sup>10</sup> Section 252(d)(2) of the Act,<sup>11</sup> in turn, authorizes the *state commissions* to set rates for transport and termination provided by incumbent local exchange carriers under Section 251(b)(5). The Commission *only* is permitted to set rates where a state commission fails to act under Section 252, and in such cases, the Commission is required to apply the same pricing standards that the state commission would have under the Act.<sup>12</sup>

In drafting Section 251(b)(5), Congress deliberately chose the broad statutory term "telecommunications" and *not* "local traffic" or the much narrower term "telephone exchange service" to define the scope of each local exchange carrier's reciprocal compensation obligations. The Commission's current interpretation of Section 251(b)(5)<sup>13</sup> -- which was not questioned or vacated by *WorldCom* -- excludes from this

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<sup>8</sup> See, e.g., *Ex Parte* Presentation of Qwest Communications International, Inc., CC Dockets Nos. 01-92, 96-45, and 99-68 and WC Dockets Nos. 05-337, 04-36, 06-122, and 05-195, dated Oct. 7, 1998 ("Qwest October 7 *Ex Parte*").

<sup>9</sup> See *ISP Remand Order*, 16 FCC Rcd at 9215-16 (dissenting statement of Commissioner Furchtgott-Roth) ("My colleagues some time ago decided on their general objective -- asserting section 201(b) jurisdiction over ISP-bound traffic and permitting incumbent carriers to ramp down the payments that they make to competitive ones. The delay in producing an order is attributable to the difficulty the Commission has had in putting together a legal analysis to support this result, which is at odds with the agency's own precedent as well as the plain language of the statute.")

<sup>10</sup> 47 U.S.C. § 251(b)(5) (emphasis added).

<sup>11</sup> *Id.* at § 252(d)(2).

<sup>12</sup> *Id.* at § 252(e)(5).

<sup>13</sup> "Unless subject to further limitation, section 251(b)(5) would require reciprocal compensation for transport and termination of all telecommunications traffic, -- i.e., whenever a local exchange carrier exchanges telecommunications traffic with another carrier. ... [W]e interpret

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section only those categories of traffic that qualify under Section 251(g)<sup>14</sup> of the Act.<sup>15</sup> Section 251(g), in turn, covers only compensation arrangements -- such as switched access charges -- that existed and were regulated prior to enactment of the Telecommunications Act of 1996 (“1996 Act”).<sup>16</sup>

It is clear that *all telecommunications* -- interstate and intrastate, local and long distance -- falls within the scope of Section 251 and could be subject to reciprocal compensation rates established thereunder.<sup>17</sup> Therefore, Sections 251 and 252 provide the legal underpinnings by which to achieve the Commission’s long-standing policy objective “that the rates that local carriers impose for the transport and termination of local traffic and for the transport of long distance traffic should converge.”<sup>18</sup> But it is equally clear that Section 252 assigns *to the state commissions* the authority to set such rates.

Indeed, the “past is prologue,” and history shows that any attempt by the Commission to dictate rates under Sections 251 and 252 will not survive appeal. In 1996, the Commission released its landmark *Local Competition Order* implementing many of the key provisions of the 1996 Act. Among other things in that order, the Commission adopted a “forward-looking economic cost-based methodology” for state commissions to apply in pricing transport and termination functions pursuant to Section 252(d)(2).<sup>19</sup> But the Commission also went a step further, establishing “default proxies” for transport and termination rates because of the concern “that it may not be feasible for some state

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subsection (g) as a carve-out provision [to 251(b)(5)].” *ISP Remand Order*, 16 FCC Rcd at 9166-67, ¶¶ 32-34.

<sup>14</sup> 47 U.S.C. § 251(g).

<sup>15</sup> *WorldCom*, 288 F.3d at 432-33. The court’s remand was based not upon any flaw in the Commission’s statutory interpretation with respect to Sections 251(b)(5) and 251(g), but rather upon the fact that ISP-bound traffic did not fit within the scope of Section 251(g).

<sup>16</sup> *See id.* at 433; *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 15 FCC Rcd 385, 407 (1999), at ¶ 47 (Section 251(g) “is merely a continuation of the equal access and nondiscrimination provisions of the Consent Decree”).

<sup>17</sup> Of course, as described in Section I.B., *infra*, some categories of traffic (such as intrastate and interstate access traffic) have to date been kept “outside of” the reciprocal compensation framework pursuant to the savings provisions of Section 251(g). 47 U.S.C. § 251(g).

<sup>18</sup> *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dockets Nos. 96-98 and 95-185, First Report and Order, 11 FCC Rcd 15499, 16012 (1996), at ¶ 1033 (“*Local Competition Order*”).

<sup>19</sup> *Id.* at 16024, ¶ 1056.

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commissions conducting or reviewing economic studies to establish transport and termination rates” using the Commission’s methodology in a timely manner.<sup>20</sup>

Upon appeal, the Commission’s methodology was upheld, but its proxy prices were vacated. The United States Supreme Court confirmed the Commission’s authority to establish a methodology for the state commissions to employ in setting such rates.<sup>21</sup> Following remand from the Supreme Court, the United States Court of Appeals for the Eighth Circuit vacated the Commission’s default proxy prices, relying upon the higher court’s determination that the Commission’s role was limited to resolving “general methodological issues,” finding that “[s]etting specific prices goes beyond the [Commission’s] authority to design a pricing methodology,” and concluding that such an approach would “intrude[] on the states’ right to set the actual rates.”<sup>22</sup>

Given that the limits of the Commission’s authority to set transport and termination rates pursuant to Section 251 and 252 were defined nearly a decade ago, the Commission must decline the invitations of Verizon, Qwest, and others to tread back down this dubious legal path now.<sup>23</sup> Rather, as discussed above, under the Act and *Iowa Utilities Board*, the Commission’s proper role in the rate-setting process is to establish the methodology by which the state commissions can, pursuant to Section 252(d), consider the relevant costs and set the applicable rates.

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<sup>20</sup> *Id.* at 16026-16028, ¶¶ 1060-1062.

<sup>21</sup> *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. at 385.

<sup>22</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d 744, 757 (8th Cir. 2000), *aff’d in part and rev’d in part*, *Verizon Comm’s, Inc. v. FCC*, 535 U.S. 467 (2002), and *vacated in part*, *Iowa Utils. Bd. v. FCC*, 301 F.3d 957 (8th Cir. 2002). Although Qwest argues (without citation) that the Supreme Court’s decision in *AT&T Corp. v. Iowa Utils. Bd.* did not address “the roles of the [Commission] and the states in the context of pricing standards” for transport and termination under Section 251(b)(5), this is simply untrue. *See* Qwest October 7 *Ex Parte* at 5. Upon remand, the Court of Appeals clearly found that the Supreme Court’s decision called into question *all* of the Commission’s proxy prices -- including “the rates for transport and termination” -- and thus vacated *all* of the proxy pricing rules. *See Iowa Utils. Bd. v. FCC*, 219 F.3d at 756-57.

<sup>23</sup> This applies with equal force, of course, to arguments that the Commission should adopt bill-and-keep to govern all compensation under Sections 251 and 252. *See* Qwest October 7 *Ex Parte* at 2. Adopting bill-and-keep would translate to the Commission establishing a rate of zero, based (presumably) upon the assumption that the costs borne by a carrier in terminating traffic for another carrier are roughly offset by the benefit of having the other carrier bear costs of termination on its network. *See Local Competition Order*, 11 FCC Rcd at 16054-16056, ¶¶ 1111-13. But the state commissions, and not this Commission, are the authorized parties under Section 252 to review those additional costs and to ascertain whether the exchange of traffic is roughly balanced or whether a price needs to be set for the recovery of those termination costs.

**B. The Commission Cannot Use a Methodology as a “Back Door” Means of Setting Rates, Nor is it Empowered to Set “Interim” Rates for any Traffic Pursuant to Section 252(d).**

The Commission should avoid overreaching in establishing a methodology. In particular, it should not read the Supreme Court’s *Iowa Utilities Board* decision as a narrow prohibition on rate-setting or a sweeping grant of authority with respect to establishment of any possible methodology. If the Commission were to adopt a methodology that -- unlike the open-ended TELRIC standard -- caps rates at a specific level or effectively predetermines a particular rate structure or result, it will run afoul of the same statutory limitations that led to invalidation of the proxy prices established in the *Local Competition Order*.

The Commission should take heed of the wording of the Supreme Court’s *Iowa Utilities Board* decision in considering how far it can go in establishing a methodology. The Court found that the Commission’s TELRIC pricing methodology “no more prevents the States from establishing rates than do the statutory ‘Pricing Standards’ set forth in § 252(d). *It is the States that will apply those standards and implement that methodology, determining the concrete result in particular circumstances.*”<sup>24</sup> If the Commission adopts a “methodology” that caps the rate, sets a range of rates, or otherwise predetermines the outcome, this would not allow the state commissions to “determin[e] the concrete result.” To the contrary, it would limit the state commissions’ ability to set rates based upon their evaluation of costs and put the states in the position of doing little more than ratifying the Commission’s rate-setting activity.

Several Justices believed the Commission exceeded its authority by requiring state commissions to employ a TELRIC methodology. For example, Justice Breyer disputed the Commission’s argument that TELRIC was merely a “pricing standard”: “Most importantly, the FCC’s rules embody not an effort to circumscribe the realm of reasonable, but rather a policy-oriented effort to choose among several different systems, including systems based upon actual costs or price caps . . . they constitute the kind of detailed policy-related ratesetting that the statute in respect to local matters leaves to the States.”<sup>25</sup> Moreover, the Eighth Circuit, in confirming the Commission’s authority to resolve “general methodological issues,”<sup>26</sup> cited to the Commission’s explanation of its TELRIC pricing standard as “a methodology for state commissions to use in completing the ‘critical and complex task of determining the economic costs of an efficient telephone network.’”<sup>27</sup> Thus, as the Eighth Circuit ultimately determined, “it is the state

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<sup>24</sup> *AT&T v. Iowa Utils. Bd.*, 525 U.S. at 384 (emphasis added).

<sup>25</sup> *Id.* at 424-427 (Breyer, J., dissenting) (citations omitted); *see also id.* at 407-411 (Thomas, J., dissenting).

<sup>26</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d at 757.

<sup>27</sup> *Id.* at 756 (quoting Reply Brief of the Federal Petitioners, Cases Nos. 97-826, *et al.* United States Supreme Court, at 7).

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commission's role to exercise its discretion in establishing rates.”<sup>28</sup> Any methodology that limits state commission discretion would be contrary to the principles by which this Commission defended TELRIC nearly a decade ago, and run significant risk of failure on appeal.<sup>29</sup>

Nor can the Commission justify any rate-setting activity regarding Section 251(b)(5) traffic on the basis that the rate it adopts might only be “interim” in nature. As discussed at length in the preceding subsection, the law is unambiguous -- Section 252(d) vests power in *the state commissions* (and not this Commission) to set prices for transport and termination of telecommunications. This limitation applies with equal force to all kinds of rates, regardless of whether the Commission calls its rates “permanent,” “proxy,” “interim,” or something else. Indeed, when the Commission adopted its proxy prices, it did so precisely because it believed an “interim” solution was necessary and appropriate pending the completion of cost cases by the state commissions to set TELRIC-based pricing.<sup>30</sup> The mere fact that the proxy prices were interim did not sway the Eighth Circuit from its decision to vacate those prices: “It is clear from the language of the [*Local Competition Order*], as well as the rules, that the state commissions are to use the proxy prices until the state commissions have established their own rates using the TELRIC method. The use of the proxy prices until such time is not optional.”<sup>31</sup> Thus, regardless of temporary or permanent status, the way in which a rate is characterized by the Commission is irrelevant. At bottom, if the Commission imposes a cap, a proxy, an interim rate, or any other kind of limitation on a state commission's ability to set rates pursuant to Section 252(d), the Commission again runs significant risk of failure on appeal. The path set forth by the statute and the courts is clear -- the Commission should promulgate a methodology and avoid any deviation, however slight or “interim,” into a rate-setting exercise with respect to Section 251(b)(5) traffic.

**C. Nothing in Sections 201 or 251 Overrides the Clear Congressional Intent to Vest State Commissions with Rate-Setting Authority Pursuant to Section 252.**

Scrambling to find any possible jurisdictional hook for the Commission to establish intercarrier compensation rates for different kinds of traffic and/or a unified rate

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<sup>28</sup> *Id.* at 757 (citation omitted).

<sup>29</sup> *See also Federal Power Comm'n v. Hope Natural Gas Co.*, 302 U.S. 591, 602 (1944) (contrasting the “method employed” with the “result reached” in setting “just and reasonable” rates).

<sup>30</sup> *Local Competition Order*, 11 FCC Rcd at 15883, ¶ 767. (“A proxy approach might provide a faster, administratively simpler, and less costly approach to establishing prices *on an interim basis* than a detailed forward-looking cost study.”) (emphasis added)

<sup>31</sup> *Iowa Utils. Bd. v. FCC*, 219 F.3d at 757.

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for all telecommunications, various parties look to Sections 201 and 251 for support. As discussed below, however, none of the cited provisions provides any basis to override the clear Congressional delegation of pricing authority to state commissions in Section 252(d)(2).

For example, AT&T has asserted that Section 251(i) permits the Commission to apply something other than a reciprocal compensation regime to ISP-bound traffic. Specifically, AT&T claimed that Section 251(i), which provides that nothing in Section 251 “shall be construed to limit or otherwise affect the Commission’s authority under Section 201,”<sup>32</sup> authorizes the Commission “to continue setting rates it deems ‘just and reasonable’ under its traditional Section 201 authority for jurisdictionally interstate traffic . . . .”<sup>33</sup> The Commission has previously rejected this very argument, however, and thus, there is no reason to revisit this conclusion. In fact, the Commission has in the past expressly dismissed Section 251(i) as a basis for establishing *rates* for the exchange of ISP-bound traffic: “The Commission relies upon section 251(i) solely for its continued authority to regulate Internet-bound traffic (which *otherwise* is exempted from section 251(b)(5) pursuant to section 251(g)) under its general regulatory jurisdiction over interstate communications set forth in section 201.”<sup>34</sup>

Verizon likewise relies upon the interplay of Sections 201 and 251(i) to argue that the Commission can establish a unified rate for *all* telecommunications. Specifically, Verizon argues that it would be inconsistent with Section 201 if state commissions could (pursuant to Sections 251 and 252) “set rates different from the single, default rate the Commission established for all other traffic.”<sup>35</sup> Verizon therefore concludes that Sections 201 and 251(i) read together must permit the Commission to set a unified intercarrier compensation rate. But this is a baseless and confused argument. First, it confuses the Commission’s regulatory authority under Section 201 with its rate-setting authority under Section 205. The Commission’s authority to set rates does *not* arise under Section 201. Section 201 merely provides for the Commission to ensure that “charges, practices, classifications, and regulations” are “just and reasonable.”<sup>36</sup> Rather, the Commission’s authority to prescribe rates arises under Section 205<sup>37</sup> -- and nothing in Section 251(i)

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<sup>32</sup> 47 U.S.C. § 251(i).

<sup>33</sup> *Ex Parte* Presentation of AT&T Services, Inc., CC Dockets Nos. 01-92, 96-98, and 99-68, dated May 9, 2008, at 1 (quoting 47 U.S.C. § 201).

<sup>34</sup> Brief of the Federal Communications Commission, Case No. 01-1218, *et al.*, United States Court of Appeals for the District of Columbia Circuit (filed Nov. 15, 2001), at 45 (underlined emphasis added; italicized emphasis in original).

<sup>35</sup> Verizon September 19 *Ex Parte* at 28.

<sup>36</sup> 47 U.S.C. § 201(b).

<sup>37</sup> *Id.* at § 205. (“[T]he Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge . . . .”)

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indicates that the Commission's authority under *Section 205* is somehow preserved in the face of Sections 251(b)(5) and 252(d)(2). Thus, consistent with the Commission's statement in its *WorldCom* brief, Section 251(i) merely preserves the Commission's *regulatory authority* over interstate services pursuant to Section 201. Notably, there is no corresponding provision in Section 252 (which contains the pricing standards for transport and termination) that preserves the Commission's *rate-setting authority* over interstate services under Section 205.

Moreover, even if the Commission were to prescribe "a single, default rate" pursuant to Section 205 (or Section 201, as Verizon incorrectly argues), that rate could apply only to interstate traffic. By contrast, Section 252(d)(2) provides the exclusive statutory mechanism by which a single rate could be set for *all* "telecommunications." Thus, if the Commission wanted to set a unified rate for *all interstate* traffic nationwide, it has jurisdiction to do so.<sup>38</sup> But only *the state commissions* pursuant to Section 252(d)(2) can set a "single, default" rate for *all other traffic*, such as local and intrastate long distance calls. Given this statutory framework, it would be far better for the Commission to focus its efforts on developing a rate-setting methodology for state commissions to employ under Section 252(d)(2) than to adopt an overly creative interpretation intended to sidestep that framework.<sup>39</sup>

**D. There Is No Factual or Legal Basis to Justify Overriding Section 2(b) and Preempt the State Commissions' Jurisdiction over Intrastate Services.**

Perhaps recognizing that the statutory framework does not permit the Commission to set a unified rate for intrastate and interstate intercarrier compensation, Verizon and Qwest also have argued that jurisdiction is no longer relevant or possible to establish given technological advances and changes in traditional service and call routing options.<sup>40</sup> They argue that this alleged blurring of jurisdiction empowers the Commission to preempt the state commissions and exercise jurisdiction over intercarrier compensation

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<sup>38</sup> See also Qwest October 7 *Ex Parte* at 7 ("There is no dispute over the Commission's section 201 authority to establish *interstate* access charges.") (emphasis added). Although Qwest is technically incorrect in citing to Section 201 for the Commission's rate-setting authority, the point is that no one contests the Commission's authority to set interstate rates.

<sup>39</sup> Indeed, if Verizon's concerns about a "single, default rate" are paramount, this could be achieved -- at least on a state-by-state basis -- consistent with the statutory framework. In short, the Commission could choose not to set interstate access rates pursuant to Section 205, and could instead let each state commission set "a single, default rate" pursuant to Section 252(d)(2) for *all* "telecommunications" -- interstate and intrastate, local and long distance -- exchanged with a local exchange carrier in that state. The Commission could, of course, prescribe the methodology for each state commission to use in setting such a unified rate to apply in that state.

<sup>40</sup> See Verizon September 19 *Ex Parte* at 5-12; Qwest October 7 *Ex Parte* at 6-8.

for all telecommunications traffic. Even assuming arguendo that jurisdiction is becoming irrelevant or impossible to determine, Congress granted state commissions, not this Commission, authority to set a unified rate for all telecommunications.

But the “evidence” presented by Verizon and Qwest to support this theory consists mostly of policy argument and bald assertion. For example, Verizon contends that “trends in favor of wireless and IP-based services” and “[t]he advent of location-independent services” make it harder for carriers “to make accurate assessments of the jurisdiction of the traffic they exchange.”<sup>41</sup> But even if such trends are emerging, Verizon provides no quantitative basis to determine how difficult it is to make such a jurisdictional assessment or how many minutes of traffic (or what percentages of traffic) are affected by these trends. Qwest is even more indefinite in its assertion that “state access charges will necessarily be applied to a nontrivial quantity of interstate traffic.”<sup>42</sup>

The lack of specificity in these statements is telling, and such bald assertions concerning alleged trends provide no basis to override the strict jurisdictional limitations of Section 2(b) of the Act.<sup>43</sup> The United States Supreme Court has confirmed that this Commission only may preempt state commissions with respect to regulation of intrastate matters if it is “*not* possible to separate the intrastate and interstate components of the asserted [Commission] regulation.”<sup>44</sup> Certainly, if the Commission is going to preempt state jurisdiction over a significant aspect of intrastate telecommunications pursuant to this standard, it needs more of a quantitative basis to conclude that the interstate and intrastate components are inseparable than generalized observations that some unquantified “nontrivial” portion of what appear to be intrastate calls *might* actually be interstate calls. Likewise, the fact that IP-based services may be gaining market share does not lead to the necessary conclusion that the jurisdiction of all traffic is imperceptible. To support its point, Verizon cites a study indicating that VoIP providers are expected to serve 31 percent of all U.S. households by 2011.<sup>45</sup> But just because it may be difficult to establish the jurisdiction of *some traffic* does not mean that the Commission can or should assume jurisdiction and preempt the state commissions’ rate-setting authority with respect to *all traffic*. Such preemption would be markedly different from -- and vastly overreaching when compared to -- the Commission’s action in the *Vonage* preemption matter to which Verizon cites. In that matter, the Commission determined that there was “no practical way to sever [a specific service] into interstate

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<sup>41</sup> Verizon September 19 *Ex Parte* at 8-10.

<sup>42</sup> Qwest October 7 *Ex Parte* at 8.

<sup>43</sup> 47 U.S.C. § 152(b).

<sup>44</sup> *Louisiana Pub. Serv. Comm’n. v. FCC*, 476 U.S. 355, 375 n. 4 (1986) (citations omitted).

<sup>45</sup> *See* Verizon September 19 *Ex Parte* at 6 (citation omitted).

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and intrastate communications” because the service enabled a nomadic presence.<sup>46</sup> By contrast, here Verizon and Qwest beg that the Commission preempt state commission jurisdiction over intercarrier compensation for *every call* -- even those for which jurisdiction easily could be determined -- because it is difficult to tell the jurisdiction of *some unspecified percentage of calls* and because the services that enable such calls *might* be used by less than one-third of the U.S. population three years from now.

Carriers remain capable of establishing the jurisdiction of the vast majority of access traffic, even if that task might be made more difficult by the emergence of new services and technologies over time. Indeed, the arguments of Verizon and Qwest are belied by the fact that each and every month both of them continue to issue invoices to a plethora of carriers that bill hundreds of millions of minutes of intrastate access traffic. Apparently, neither party has too much difficulty identifying the jurisdictional nature of all of those minutes of traffic terminated today. Thus, there is no evidentiary or legal basis for the Commission to override Section 2(b) of the Act and preempt the state commissions’ rate-setting authority with respect to intrastate access charges. Instead, as described above, the Commission should at most establish a methodology in accordance with Section 252(d)(2) pursuant to which the state commissions would set rates for intrastate access charges and other “telecommunications.”

**E. Verizon’s Last-Resort Claim that the Commission Could Forbear from Enforcing Section 251(b)(5) Is Without Merit.**

Perhaps recognizing the shortcomings of its arguments about preemption and the statutory framework, Verizon makes one last effort to salvage its request for the Commission to establish a unified rate by invoking forbearance pursuant to Section 10.<sup>47</sup> Specifically, Verizon claims that the Commission could forbear from enforcing Section 251(b)(5) “insofar as it would require carriers to enter into reciprocal compensation arrangements that are subject to state commission authority.”<sup>48</sup>

Verizon’s throwaway argument regarding forbearance fails in several respects. First, it is well-settled that forbearance *only* is applicable to excuse the enforcement of existing regulatory obligations, and that it cannot result in the expansion of existing obligations or creation of new obligations<sup>49</sup> -- such as an entirely new intercarrier

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<sup>46</sup> *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minn. Pub. Utils. Comm’n*, 19 FCC Rcd 22404, 22423 (2004), at ¶ 31.

<sup>47</sup> Verizon September 19 *Ex Parte* at 29.

<sup>48</sup> *Id.*

<sup>49</sup> *See, e.g., Fones4All Corp. Petition for Expedited Forbearance Under 47 U.S.C. § 160(c) and Section 1.53 From Application of Rule 51.319(d) to Competitive Local Exchange Carriers Using Unbundled Local Switching to Provide Single Line Residential Service to End Users Eligible for State or Federal Lifeline Service*, WC Docket No. 05-261, 21 FCC Rcd 11125,

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compensation structure that would apply to all telecommunications traffic. Second, Verizon concedes that its forbearance position relies wholly upon the same inseparability argument that underpins its preemption analysis -- in other words, even if the Commission were to forbear from enforcing Section 251(b)(5) to justify implementing a unified rate applicable to all telecommunications traffic, that would not resolve the issue. The Commission would need to forbear from Section 252(d)(2) as well, because that provision vests in *the state commissions* the right to set rates for “telecommunications” other than those categories of traffic that were subject to different arrangements prior to the 1996 Act (*i.e.*, switched access traffic). If it did so, the Commission would be in the position of setting a rate for *all* telecommunications traffic notwithstanding this clear Congressional mandate to the contrary. Finally, as even Verizon appears to admit, the Commission would still have to determine that all telecommunications traffic could not be separated into interstate and intrastate components, because only then could it preempt the state commissions and exercise its authority under Section 205 of the Act to prescribe a single rate for all such inseparable traffic. Yet this inseparability argument falls short as described in the preceding subsection. Thus, the Commission is precluded on both procedural and substantive grounds from using forbearance from enforcement of Section 251(b)(5) as the basis to establish a unified intercarrier compensation rate.

**II. THE VAST MAJORITY OF CARRIERS OPPOSE THE PROPOSED DEFAULT TERMINATING RATE OF \$0.0007 AND HAVE DEMONSTRATED THAT THIS RATE IS UNLAWFUL BECAUSE IT DOES NOT RECOVER THEIR COSTS.**

Even if the Commission had authority to prescribe rates for the transport and termination of all telecommunications, which it does not, it should not impose a rate of \$0.0007 for interstate or intrastate terminating traffic as proposed by AT&T, Verizon and a few others.<sup>50</sup> Nor can the Commission design a pricing “methodology” that is so restrictive that state commissions cannot achieve any result other than a \$0.0007 rate. That rate does not permit carriers to recover their costs unless, like Verizon and AT&T, they are extremely large with long distance, wireless and other affiliates that will receive a windfall from the reduced rates. This rate is simply too low – it is far below the costs of perhaps all carriers with the exception of AT&T and Verizon. Moreover, it would have an especially harsh effect on CLECs and competitive tandem providers because unlike the RBOCs, under the AT&T and Verizon Plans, competitive carriers are not guaranteed to recover any reductions in terminating revenues from universal service and increased SLC charges to consumers.

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11129 (2006), at ¶ 7; *U.S. Telecom Ass'n v. FCC*, 359 F.3d 554, 579 (D.C. Cir. 2004) (stating that forbearance “obviously comes into play only for requirements that exist”).

<sup>50</sup> See, e.g., Verizon Proposal for Intercarrier Compensation Reform, attached to Letter from Susan Guyer, Senior Vice President, Verizon, to Kevin Martin, Chairman FCC, CC Docket No. 01-92 (filed Sept. 12, 2008) (“Verizon Plan”).

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The vast majority of carriers oppose the imposition of a default \$0.0007 rate for all terminating traffic as proposed by AT&T and Verizon. For example, the National Exchange Carrier Association (“NECA”) which represents over 1,400 local telephone companies, has analyzed its data and found that the “proposed \$0.0007 / minute rate *doesn’t even cover pool member’s costs of billing, let alone network costs,*” or the costs of investing in advanced networks.<sup>51</sup>

Likewise, the National Telecommunications Cooperative Association (“NTCA”), which represents approximately 585 rural rate-of-return (“RoR”) regulated telecommunications providers “urges the Commission to reject the proposed unified \$0.0007 terminating access rate because it will significantly harm rural consumers, unlawfully preempt the states, and *result in an unlawful taking of RoR carrier property*” in violation of the 5<sup>th</sup> Amendment of the U.S. Constitution.<sup>52</sup> In short, NTCA views the proposed \$0.0007 rate as so low that it not only will preclude carriers from recovering their costs and earning a reasonable return on investments made to provide service, it will “result in a confiscatory taking.”<sup>53</sup> The Independent Telephone and Telecommunications Alliance (“ITAA”), which represents midsized LECs, also opposes the proposed default rate in rural areas where it argues it “would harm both end users and the carriers that serve them while *generating tremendous savings for larger players such as AT&T and Verizon.*” ITAA underscores that the proposed rate “*would not cover the cost of providing terminating access services in most rural areas.*”<sup>54</sup>

In addition to NECA, NTCA and ITAA, CenturyTel, Windstream, Embarq, Chicasaw Telephone Company, Eastex Telephone Cooperative, Great Plains, XO Communications, NuVox, PAETEC, and a host of others have presented convincing empirical and other evidence that demonstrates the proposed \$0.0007 terminating rate would not cover carriers’ costs, and in many cases would not even cover the carriers’ cost

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<sup>51</sup> *Ex Parte* Presentation of NECA, CC Docket No. 01-92 and WC Dockets Nos 06-122 and 08-152, at 1, dated Sept. 11, 2008 (emphasis added). (“Mandatory below-cost rates are likely to result in network abuse, new forms of uneconomic arbitrage, and unnecessary legal challenges.”)

<sup>52</sup> *Ex Parte* Presentation of NTCA, CC Docket No. 01-92 and WC Docket No. 04-36, dated Sept. 18, 2008, at 1, 4-5, n. 10 and 17 (“NTCA Sept. 18 *Ex Parte*”); U.S. Const. Amend. V. *See, e.g.; Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307 (1989) (It is clear that “the Constitution protects utilities from being limited to charge for their property serving the public which is so ‘unjust’ as to be confiscatory.”).

<sup>53</sup> NTCA Sept. 18 *Ex Parte*, at 1-2, 4-5; *see Ex Parte* Interim Universal Service & Intercarrier Compensation Reform Proposal of NTCA, dated July 11, 2008, at 19-20.

<sup>54</sup> ITAA members include CenturyTel, Consolidated, Embarq, FairPoint, Iowa Telecom, TDS Telecom, Frontier, Windstream and others. *Ex Parte* Presentation of ITAA CC Docket No. 01-92, dated Sept. 19, 2008, at 1 (emphasis added); *Ex Parte* Presentation of ITAA, WC Docket No. 04-36 *et al.*, dated Aug. 21, 2008, at 4.

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of billing, let alone network costs or the costs of building and maintaining advanced innovative networks and services.<sup>55</sup>

For example, NuVox's Comments and the study of independent consultant QSI Consulting, Inc.'s ("QSI Study") reveals that the average of state commission approved cost-based traffic termination rates "across approximately 40 jurisdictions equals \$0.0029 per minute," or more than four times the \$0.0007 per minute rate proposed by AT&T and Verizon.<sup>56</sup> Further, the QSI Study found that the "weighted average of those rates (using relative access lines as the weighting mechanism), equals \$0.0027 per minute," again nearly 4 times the proposed default rate.<sup>57</sup>

QSI Studies submitted on behalf of PAETEC, NuVox, and XO Communications Services, Inc. establish that each CLEC's costs for terminating traffic exceed \$0.0007. With respect to PAETEC, QSI's Study shows that even with its "notable, traffic termination economies beyond those enjoyed by a majority of CLECs" a "rate equal to \$0.0007 would fall far short of properly compensating PAETEC for the capital it has deployed and the expenses it incurs in transporting and switching voice-related services."<sup>58</sup> With respect to NuVox, QSI's study shows that even with its advanced, IP-based softswitch technology, NuVox's costs "are many times higher than \$0.0007 per minute, using a [Total Service Long Run Incremental Cost ("TSLRIC")] compliant methodology."<sup>59</sup> QSI's cost study for XO Communications Services, Inc. also "shows that \$0.0007 is very far below XO's actual costs of termination."<sup>60</sup> In sum, NuVox concludes that "the imposition of the \$0.0007 terminating access rate in combination with the exclusion of competitive LECs from the Recovery Mechanism would be confiscatory

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<sup>55</sup> See, e.g., *Ex Parte* Comments of CenturyTel, CC Docket No. 01-92, dated Sept. 19, 2008 at 4 ("Using an unrealistic national rate, such as \$0.0007, is below costs, fails to protect rural consumers, and displaces costs on other consumers."); *Ex Parte* Comments of Windstream, CC Docket No. 01-92, dated Sept. 24, 2008, at 2 (maintaining the \$0.0007 rate constitutes a windfall for payers of access charges); Reply Comments of Embarq, CC Docket No. 01-92, dated Sept. 6, 2008, at 6 ("Embarq Reply Comments"); *Ex Parte* Comments of NECA, WC Docket No. 08-152, dated Sept. 11, 2008; NTCA Sept. 18 *Ex Parte*, at 1-2, 4-5.

<sup>56</sup> *Ex Parte* Comments of NuVox, CC Docket No. 01-92 and WC Docket No. 04-36, dated Oct. 2, 2008, at 1-2 ("NuVox *Ex Parte*") and attached Declaration of Michael Starkey at 2.

<sup>57</sup> NuVox *Ex Parte*, Declaration of Michael Starkey at 5.

<sup>58</sup> *Ex Parte* Comments of PAETEC, CC Docket No. 01-92 and WC Docket No. 04-36, dated Oct. 17, 2008 ("PAETEC *Ex Parte*") and attached Declaration of Michael Starkey at 2 and 7.

<sup>59</sup> NuVox *Ex Parte* at 6; Declaration of Michael Starkey at 5-7.

<sup>60</sup> *Ex Parte* Comments of XO Communications Services, Inc., CC Docket No. 01-92, dated Oct. 6, 2008, at 1.

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with respect to NuVox and its investors.”<sup>61</sup> Likewise, the rate would also be confiscatory for all similarly situated CLECs.

Embarq similarly maintains that a terminating access rate of \$0.0007 is far below any of Embarq’s access rates and the rate for Tier 2 carriers in the Missoula Plan, and it “would be woefully insufficient to compensate Embarq for building and maintaining backbone networks that provide voice and broadband services to rural America.”<sup>62</sup> Great Plains Communications, Inc. (“Great Plains”) calls for the Commission to reject AT&T’s one size fits all plan as it will “imperil” rural LECs. Great Plains states that the proposed \$0.0007 rate is less than its billing costs and its TELRIC costs are *30 times higher*.<sup>63</sup> Great Plains together with Chickasaw Telephone Company, Eastex Telephone Cooperative, Consolidated Companies of Lincoln, Nebraska, and the Texas Statewide Telephone Cooperatives, Inc. introduced evidence that in their states rural carrier’s reciprocal compensation rates range between \$0.020 and \$0.025 per minute, several times higher than the proposed default rate. They underscored that the \$0.0007 rate does not recover even their costs of billing.<sup>64</sup>

Taken together the cost data filed by numerous companies individually, and the QSI survey of state-set TELRIC rates showing that the average of all state rates for functions comparable to transport and termination was approximately \$0.003, provides persuasive empirical evidence demonstrating that the \$0.0007 rate is confiscatory. Verizon and AT&T’s proposed \$0.0007 rate is substantially, by at least an order of magnitude, below the rates set by states that comply with the applicable Section 252(d) standard for prices for transport and termination.<sup>65</sup> This is startling because as set forth below, Verizon previously maintained in this docket that the TELRIC methodology used to develop these rates is confiscatory and violates the Takings Clause when applied to ILEC access charges.<sup>66</sup>

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<sup>61</sup> NuVox *Ex Parte* at 7.

<sup>62</sup> Embarq Reply Comments at 6.

<sup>63</sup> *Ex Parte* Comments of Great Plains Communications, CC Docket No. 99-68, dated Sept. 17, 2008, at 6, 8 (emphasis added).

<sup>64</sup> *Ex Parte* Comments of Great Plains Communications, Chickasaw Telephone Company, Eastex Telephone Cooperative, Consolidated Companies of Lincoln, Nebraska, and the Texas Statewide Telephone Cooperatives, Inc., CC Docket No. 96-45 et al., dated Oct. 8, 2008, at 3-4 (“Great Plains Group Comments”).

<sup>65</sup> Comments of Cavalier Telephone, LLC, McLeod USA Telecommunications Services, Inc., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., and RCN Corporation, CC Docket No. 01-92, dated Oct. 25, 2006, at 60 and Attachment 1.

<sup>66</sup> Comments of Verizon, CC Docket No. 01-92, dated Aug. 21, 2001, at 13-15 (“Verizon Initial Comments”) (*quoting* in part, *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989)).

Verizon characterizes its proposed \$0.0007 rate as a “negotiated,” “voluntary,” “market” based rate that is “just and reasonable.”<sup>67</sup> However, in most instances where it was adopted, the \$0.0007 rate was imposed upon the vast majority of carriers through the Commission’s *ISP Remand Order*.<sup>68</sup> Great Plains and the other rural LECs show that “virtually no rural ILECs have adopted the \$0.0007 rate.”<sup>69</sup> Only a handful of carriers (largely the RBOCs) have agreed to the rate, and even in these rare instances application of the rate has been limited to “terminating local traffic,” not all traffic. Indeed, the Commission considered a similar question in evaluating what proxy prices to adopt in its *Local Competition Order*, and specifically *rejected* the use of rates in pre-existing agreements for similar reasons: “[S]uch agreements may reflect the divergent bargaining power of the parties to the agreement, various public policy initiatives . . . , or non-monetary *quid pro quos* often found in voluntarily negotiated business arrangements that may be difficult to quantify.”<sup>70</sup> Given that the \$0.0007 rate was agreed to in connection with resolution of disputes over ISP-bound traffic and interconnection obligations, these concerns apply with equal, if not greater, force to the agreements in place today than those in place prior to the 1996 Act. Finally, AT&T and Verizon can champion a below-cost rate because they can recover any revenue shortfalls from increases in originating access charges, SLCs and other “Recovery Mechanisms,” and their gigantic long distance affiliates will reap a windfall from the reduced terminating rates. The Commission would be far better served (and would conform to the statutory framework) by letting the state commissions consider and establish the appropriate rate for transport and termination based upon a thorough examination of cost evidence.

### **III. THE PROPOSED DEFAULT RATE IS UNLAWFUL AND CONFISCATORY IN VIOLATION OF THE TAKINGS CLAUSE AND SECTIONS 252(D), 251(B) AND 201 OF THE ACT.**

The \$0.007 rate is not cost-based in violation of Section 252(d)(2), is not “just and reasonable,” and violates the Takings Clause of the U.S. Constitution because it does not enable carriers to cover their costs. The rate is not competitively neutral as it favors large integrated carriers, and is opposed by the majority of carriers in the industry. We

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<sup>67</sup> Verizon September 19 *Ex Parte* at 4-5, 31.

<sup>68</sup> See, e.g., NuVox *Ex Parte* at 6 (“Verizon’s ability to negotiate ‘voluntarily’ for the \$0.0007 rate has much to do with the Commission’s *ISP Remand Order*, Verizon’s ability to extract concessions from carriers from which it withholds significant amounts of intercarrier compensation through the use of self-help, and the desire of many carriers to avoid litigation simply by agreeing to whatever Verizon proposes. Thus, Verizon’s categorical characterization of such agreements as being voluntary ignores the reality that the result is often unavoidable and is sometimes forced.”).

<sup>69</sup> Great Plains Group Comments at 3.

<sup>70</sup> *Local Competition Order*, 11 FCC Rcd at 15892, ¶ 785.

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join the chorus of opponents to the \$0.007 unified terminating rate proposed by Verizon, AT&T and others.<sup>71</sup>

Even Verizon acknowledged in this very docket, at least before the phenomenal growth of its long distance affiliates, that one of the guiding principles in establishing a unified intercarrier compensation regime should be that:

*All carriers should have a reasonable opportunity to recover their actual costs. Carriers made investments with the perfectly reasonable expectation that regulators would allow them an opportunity to recover their costs. The Supreme Court has found that it raises “serious constitutional questions” if a regulator changes the rules in a way that deprives the carrier of that opportunity. As the Court explained, when a ratemaker undertakes a fundamental shift in rate methodologies, the new methodology must be evaluated to determine whether it continues to provide constitutionally adequate compensation for previous investments, measured under the old methodology.*<sup>72</sup>

In fact, Verizon opposed the imposition of the TELRIC methodology as the basis of the access charge regime because in its view that methodology would not “generate revenues sufficient to recover the costs of the carrier’s actual network,” and because it would not “send the correct price signals to the market.”<sup>73</sup> Verizon underscored that “under the Constitutional test set forth in *Duquesne Light Co. v. Barasch*, a new regulatory regime is unlawful if the new rates are not within the ‘range of reasonableness’ based upon the prior regime.”

As demonstrated by a host of carriers in this docket, Verizon’s proposed \$0.0007 rate cannot pass the Supreme Court’s test, is not “just and reasonable,” violates Sections 201 and 252(d)(2), and violates the Takings Clause of the U.S. Constitution because it does not permit *all carriers*, especially competitive providers and small and mid-sized rural carriers, to recover their costs.<sup>74</sup> In fact, in many cases, the \$0.0007 rate does not even cover the costs of billing let alone the deployment of advanced networks.

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<sup>71</sup> Not only does the \$0.0007 rate violate the governing standard in Section 252(d)(2) of the Act as shown above, it also is not “just and reasonable” and violates Section 201 if the Commission somehow misconstrued this provision as the applicable standard for establishing a rate setting methodology. 47 U.S.C. §201.

<sup>72</sup> Verizon Initial Comments at 13-15 (emphasis added) (*quoting in part, Duquesne Light Co. v. Barasch*, 488 U.S. 299, 315 (1989)).

<sup>73</sup> Verizon Initial Comments at 19-20.

<sup>74</sup> *Id.* at 20 (*quoting in part, Duquesne Light Co.*, 488 U.S. at 312).

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In sum, the proposed \$0.007 rate is confiscatory and unreasonable in violation of the Takings Clause and Sections 251(b)(5), 201, and 252(d)(2) of the Act because it prevents the vast majority of carriers from recovering their costs, let alone earning a return. Of course, Qwest's proposed rate of zero (i.e. bill-and-keep) is even more confiscatory and unreasonable and clearly unlawful.<sup>75</sup>

#### IV. CONCLUSION

The Commission should take heed of the lessons of the past -- particularly, the overturning of its proxy pricing rules from the 1996 *Local Competition Order* and the rejection of its attempt to craft a policy-based resolution of intercarrier compensation disputes through creative statutory interpretation in the *ISP Remand Order*. In light of this history, the path toward comprehensive intercarrier compensation reform is relatively clear. The Commission has the authority to establish a methodology for state commissions to follow in setting transport and termination rates pursuant to Section 252(d), and it has "reasonable interpretative leeway" to develop that methodology.<sup>76</sup> It does not, however, have the authority to set rates with respect to Section 251(b)(5) traffic -- whether through mandate of a specific rate, adoption of a rate cap or interim rates, or some other "methodology" that effectively predetermines the results of each state's rate-setting activities. Rather, the Commission should focus its efforts on developing clear and well-thought instructions to state commissions on what traffic falls within Section 251(b)(5) and the methodology that the states must use in setting the transport and termination rates for that traffic.

To ensure that there is an adequate record to support such findings and any methodology, the Commission should issue a Notice of Proposed Rulemaking setting forth its final comprehensive intercarrier compensation reform proposals. Each time the Commission has considered a significant change in methodology or approach to intercarrier compensation in the past, it has published and sought comment on the proposed changes.<sup>77</sup> By contrast, stakeholders here have been "shooting at moving

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<sup>75</sup> Qwest October 7 *Ex Parte* at 2.

<sup>76</sup> *See Verizon v. FCC*, 535 U.S. 467, 501 (2002).

<sup>77</sup> *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, 16 FCC Rcd 9610, 9645-9646 (2001), at ¶¶ 99-101 ("We . . . ask that parties comment on whether, if the Commission declines to adopt bill and keep, the Commission's use of the TELRIC cost standard is the most appropriate methodology for establishing 'additional costs' under section 252(d)(2)."); *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4716-4719 (2005), at ¶¶ 64-73 (considering continuing use of TELRIC as proposed by the Cost-Based Intercarrier Compensation Coalition and other proposals that would "require some departure from the Commission's implementation of the section 252(d) 'additional cost' standard"); *Comment Sought on Missoula Intercarrier Compensation Reform Plan*, CC Docket No. 01-92, Public Notice, DA

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targets” for the past several months, with every rumor and new *ex parte* presentation generating a flurry of responsive comments and further proposals. A draft order is also reportedly circulating among the Commissioners that would guide the state commissions in setting rates -- but, to our knowledge, not a single stakeholder has seen the specific proposals now being considered by the Commission. The Commission should not adopt significant changes to the existing methodology for determining transport and termination rates pursuant to Section 252(d) without taking appropriate procedural steps to support such action. It is also unclear how the current proposals will ensure that arbitrage does not result from adopting an intercarrier compensation regime that results in rate(s) that are either *above or below* cost.

The commenters hereto therefore request that the Commission publish for comment its final proposals with respect to the kinds of traffic that would be captured within its reform proposals, the methodology that would be applied by the states in setting transport and termination rates, and the legal basis on which the Commission believes it can establish a unified rate. Such a step would be consistent with the Commission’s past practice and would ensure that any final decision is based on a transparent and well-supported record.

Respectfully submitted,

/s/ electronically signed

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06-1510 (July 25, 2006); *Petition of AT&T for Interim Declaratory Ruling and Limited Waivers*, WC Docket 08-152, Public Notice, DA 08-1725 (July 24, 2008).