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Public Service Commission

October 25, 2006

VIA ELECTRONIC FILING

The Honorable Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: CC Docket No. 01-92, Developing a Unified Intercarrier Compensation Regime

Dear Ms. Dortch:

Forwarded herewith are comments of the Florida Public Service Commission in the above docket with regard to the Missoula Intercarrier Compensation Reform Plan.

Greg Fogleman at (850) 413-6574 is the primary staff contact on these comments.

Sincerely,

/ s /

Cindy B. Miller
Senior Attorney

CBM:tf
cc: Victoria Goldberg, Pricing Policy Division, Wireline Competition Bureau
Brad Ramsay, NARUC

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

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

COMMENTS OF THE
FLORIDA PUBLIC SERVICE COMMISSION
IN RESPONSE TO THE FEDERAL COMMUNICATIONS COMMISSION'S
PUBLIC NOTICE SEEKING COMMENT ON THE MISSOULA
INTERCARRIER COMPENSATION REFORM PLAN

CHAIRMAN LISA POLAK EDGAR

COMMISSIONER J. TERRY DEASON

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October 25, 2006

Introduction

The Florida Public Service Commission (FPSC) submits these comments in response to the Federal Communications Commission (FCC) Public Notice (Notice) released on July 25, 2006.[1] In this Notice, the FCC seeks comment on the Missoula Plan (the Plan) to reform intercarrier compensation (ICC). The FPSC commends the members of the Plan for their efforts in developing a comprehensive proposal to reform intercarrier compensation.[2] While the FPSC acknowledges that the existing intercarrier compensation regime is in need of reform, we believe that the Plan is contrary to the best interests of consumers because it shifts cost recovery to consumers through increases in SLC and the universal service fund without assurances of offsetting benefits. Further, the Plan is overly broad, addressing several issues beyond the scope of intercarrier compensation.

The FPSC would note, however, its support for action regarding the issue of phantom traffic. The FPSC does not believe that resolution of this issue should be delayed while intercarrier compensation reform is finalized and urges the FCC to address phantom traffic in a separate proceeding.

Intercarrier Compensation Components

The Plan is the result of a lengthy collaboration initially involving many industry stakeholders. While support appears to include a large number of industry representatives, a significant number of parties have already indicated their opposition to the Plan.[3]

Rates

Under the Missoula Plan, ICC rates are reduced by $6 billion over four years.[4] While these reductions will help reduce the costs carriers pay for ICC, there is no guarantee that these reductions will find their way to customers. The FPSC is concerned that the Plan does not

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[1] FCC, Public Notice. *Comment Sought on Missoula Intercarrier Compensation Reform Plan*. CC Docket No. 01-92. DA 06-1510. Released July 25, 2006.

[2] The Missoula Plan is supported by AT&T, BellSouth, Cingular Wireless, Commonwealth Telephone Company, Consolidated Communications, Epic Touch, Global Crossing, Iowa Telecom, Level 3 Communications, Madison River Communications, and the Rural Alliance (representing about one-fourth of the small rural LECs).

[3] Opponents of the Missoula Plan include: Verizon, MCI, Cavalier Telephone, COMPTEL, Core Communications, GCI, McLeodUSA, NuVox Communications, Pac-West Telecom, RCN Corporation, XO Communications, Xspedius Communications, Comcast, Charter Communications, Cox Communications, NCTA, Time Warner Cable, Time Warner Telecom, CTIA – The Wireless Association, and NASUCA.

[4] For Tracks 1 and 2, the Plan seeks to reduce and unify all terminating intercarrier charges and to reduce originating charges (terminating charges are reduced more quickly than other charges to reduce arbitrage). Carriers in Tracks 1 and 2 also have the option of eliminating originating charges altogether. These reforms are achieved differently, and to different degrees, for each track. In Track 3, intrastate access charges will be reduced to a company's interstate levels and structured for both originating and terminating traffic.

appear to require any pass through of reductions in ICC rates to end-users, and residential wireline customers may end up paying more.

Furthermore, the Plan does not result in unified rates. The greatest disparity in ICC rates exists within and between rates charged by rural carriers (which are called Track 3 carriers under the Plan). While the Plan reduces each Track 3 carrier's intrastate access rates to interstate levels, a vexing disparity remains in intercarrier rates among the three tracks and among Track 3 carriers.[5] Unlike Tracks 1 and 2, the Plan does not establish a single national target rate for Track 3 carriers. In fact, the Missoula Plan allows some interstate Track 3 rates to rise. As a result, incentives to misreport traffic will continue to exist.

Preemption

The Missoula Plan improperly preempts the authority of the states over intrastate ICC rates. The courts have required that the preemption of state authority be narrowly tailored. Although the Plan is described as having "optional elements," the basis of the plan is complete FCC preemption of authority over ICC rates, both interstate and intrastate. There is no basis in law for such an abrogation of power.

The Plan not only conflicts with preemption policy, it also treads on state law. Both the Federal law and Florida law provide the FPSC authority over intrastate rates and access charges. Sections 252(c), 252(d)(1), and 252(d)(2) of the Federal Telecommunications Act place state Commissions in the role of prescribing rates for such traffic. The FCC is only authorized to set the methodology for the rate setting. In Section 364.163(3), Florida Statutes, the FPSC has continuing regulatory oversight of intrastate access. In Sec. 364.164, Florida Statutes, the Florida law sets out a structure to move intrastate access charges to the interstate level, under certain circumstances, and thus eliminates some disparities. The Florida Legislature's framework should not be thwarted, with an increase from $6.50 to $10.00 to the customers' Subscriber Line Charge cap.

While we appreciate that a balkanized framework is less than perfect, it is the law of the land. In *Louisiana PSC v. FCC*, 476 U.S. 355 1890 (1986), the U.S. Supreme Court stated that

[5] The average Track 2 target rate of $0.01 per minute of use (MOU) is twenty (20) times higher than the Track 1 target rate of $0.0005 per MOU. The Track 3 average rate of $0.018 per MOU is thirty-six (36) times higher than Track 1 and is made up of a different target rate for each rural company. The individual company rates range from $0.003 per MOU to $0.089 per MOU.

the FCC may not take preemptive action merely because it thinks it will best effectuate federal policy.

The 1996 Federal Telecommunications Act (the Act) retained the overall split of authority between state and federal entities over telecommunications service. Section 152(b) provides that the FCC does not have authority over regulation for, or in connection with, intrastate communications service. The seminal case of *Louisiana Public Service Commission v. FCC*,[6] reinforced this dual regulatory paradigm. The Court said that "an agency literally has no power to act, let alone preempt the validly enacted legislation of a sovereign State, unless and until Congress confers power upon it." Here, Congress has not conferred the power to preempt state intrastate access charges or otherwise affect ratemaking. Moreover, despite the assertions of the Plan proponents, the proposal does not fit within the "impossibility exception" in favor of preemption, nor does it warrant the triggering of the Telecommunications Act "forbearance provision." Such a basis for preemption is available only when compliance with both federal and state law is in effect physically impossible.

The Plan proponents acknowledge that the FCC will need to "adopt assertive and new legal strategies" to implement the mandatory provisions for Tracks 1 and 2. In Section 252(c), state commissions must establish any rates for interconnection, services, or network elements in resolving arbitrations. In Section 252(d)(2), the state commissions are expressly provided a role on reciprocal compensation.

The Plan's premises underlying the claim of impossibility are weak. The proponents have postured that the current broken intercarrier compensation framework has led to the unraveling of the industry. In *People of the State of California v FCC*,[7] the Court emphasized that the impossibility exemption is a limited one. The FCC may not justify a preemption order merely by showing that <u>some</u> of the preempted state regulation would frustrate FCC regulatory goals if not preempted. Rather, the FCC must justify the <u>entire</u> preemption order by demonstrating that it is narrowly tailored to preempt <u>only</u> the state regulations that would thwart valid FCC regulatory goals. "The FCC has the burden . . . of showing <u>with some specificity</u> that [state regulation] . . . would negate the federal policy . . . ." This test has not been met.

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[6] 476 U.S. 355 (1986).
[7] 905 F. 2d 1217, 1243 (9th Circuit, 1990).

Cost Recovery to Offset Access Charge Decreases

The cornerstone of the Plan is the replacement of revenues lost from reducing ICC by increasing the federal universal service fund and the subscriber line charge (SLC) cap. Specifically, for Track 1 carriers the SLC would be increased from a cap of $6.50 for residential lines today, to a cap of $10.00 for all lines in year four, with adjustments for inflation in subsequent years.[8] These SLC increases make up $4.7 billion of the $6.9 billion revenue increase under the Plan.

Carriers that cannot recover the full amount of ICC revenue reductions from the SLC increases are eligible to receive support from the new Restructure Mechanism Fund. The basis of the Restructure Mechanism is not clear. The supporters of the Plan do not agree on its legal foundation. If the basis to establish such a fund is from the sections of the Act regarding interconnection, then there is no authority to assess other carriers to pay for lost revenue.[9] Alternatively, if the basis is the universal service section of the Act, then it is likely that equal support would be provided to competitive eligible telecommunications carriers (ETCs), not just to incumbent ETCs. If the FCC were to make Restructure Mechanism support portable to competitive ETCs, it would have the effect of increasing the cost estimates of the Plan.[10]

In addition, another new fund is included to allow states that have elected to establish an intrastate universal service mechanism to defray the cost of compensating carriers for access rate reductions made before the Plan's adoption. The fund is called the "Early Adopter Fund." The FPSC questions why such support is only available if an explicit intrastate universal service program was established. We note that the 2003 Florida Legislature passed the Tele-competition Innovation and Infrastructure Enhancement Act of 2003 to address access charge reform, without the use of a universal service program. Specifically, the 2003 Act permits Incumbent Local Exchange Carriers (ILECs) to petition the FPSC to reduce their intrastate switched network access charges to parity with interstate switched network access charges in a revenue neutral manner, with offsetting increases to basic local service rates.[11]

In August 2003, BellSouth, Embarq, and Verizon each filed such petitions with the FPSC. The FPSC approved those petitions in December 2003. The rate rebalancing petitions

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[8] The residential and single line business SLC cap for Tracks 2 and 3 carriers increases from $6.50 to $8.75 over three years.
[9] Sections 201 and 251.
[10] Section 254.
[11] Florida Statutes 364.164.

were to be phased in over a period of not less than two years and not greater than four years. The initial rate changes occurred in November 2005 after the Florida Supreme Court affirmed the FPSC's decision. There are two remaining access charge reductions for BellSouth and Verizon and three for Embarq under their respective petitions. The estimated total amount of the reductions is $343.5 million. Thus, Florida has begun to address intercarrier compensation reform. We believe it is properly the role of states to resolve intercarrier compensation rate disparities that are within their jurisdiction. The "Early Adopter Fund," as proposed, would have the effect of only rewarding those states that have addressed ICC reform through an intrastate universal service mechanism.

If the FCC chooses to move forward with this Plan, the FPSC urges the FCC to consider broadening eligibility for Early Adopter funding to include more than those states that elected to establish explicit universal service funds. We believe that to do otherwise would unreasonably penalize those states who chose to eliminate access charge disparities through other means.[12] For example, where a state has performed rate rebalancing, it would be reasonable to distribute Early Adopter support to carriers as a credit to end-users.

The Missoula Plan shifts nearly two-thirds of revenues currently recovered from carriers directly to consumers (end-users) through higher SLCs and USF contributions. Since access charge volumes generally have been decreasing, the plan would have the effect of sheltering some ILEC revenue streams from competition by shifting revenue recovery from ICC to fixed line item charges on consumers' bills. The FPSC does not believe that in a competitive market this is appropriate or in the best interest of consumers.

<u>Non-Intercarrier Compensation Components</u>

Rebasing the Rural High-Cost Cap

High-Cost Loop Support (HCLS) is provided to rural ETCs based on their embedded costs.[13] In December 1993, the FCC, at the recommendation of the Joint Board, imposed a cap on HCLS payments.[14] The cap was indexed to the rate of growth in the national total of working exchange loops. The FCC modified the HCLS mechanism to provide additional support to rural

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[12] We note the great uncertainty that exists as to the ultimate amount of any Early Adopter Fund. Consistent with out comments in prior proceedings, we would have serious misgivings in funding an Early Adopter Fund through massive increases in federal universal service funds.

[13] This support is also available to competitive ETCs that serve within a rural ETC's study area. Nonrural carriers receive High-Cost Model Support instead of High-Cost Loop Support.

[14] FCC. *Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 80-286, Report and Order, (1993).

carriers on May 23, 2001.[15] Specifically, the FCC rebased the HCLS fund for rural carriers,[16] revised the corporate operations expense limitation formula, and modified the indexed cap. The Missoula Plan would again recalculate the cap of the high-cost embedded loop mechanism, thus providing increased funding to rural carriers.

The FPSC fails to see any connection between rebasing HCLS again with reforms to ICC. Rebasing of the cap on the High Cost Loop Fund is not relevant to ICC reform. Moreover, the estimated $0.3 billion increase in the High Cost Loop Fund due to rebasing is understated since it does not include payments made to competitive ETCs.

Rewriting Interconnection Rules

Under current law, a CLEC is entitled to interconnect with an ILEC at a single technically feasible point of interconnection (POI) on the ILEC's network. The POI is the CLEC's choice in each local access and transport area (LATA).[17] The Plan changes settled interconnection rules and may impose additional costs on competitors for interconnection. The FPSC is concerned that this may have a detrimental effect on competition. The Plan changes the rules by permitting incumbent carriers, rather than CLECs, to designate the POIs (or Edge as referred to in the Plan) at which they will accept traffic for termination. Moving to multiple POIs may impose substantial network regrooming costs on competitors. If the competitor does not have the facilities available to reach the incumbents' Edges, the Plan may require competitors to pay tariffed special access rates for interconnection facilities. It is unclear if this aspect of the Plan conflicts with the CLECs' rights to cost-based interconnection under Sections 251 and 252 of the Act. In short, the Plan would likely increase competitors' costs by requiring them to establish more facilities to more locations, at a greater cost, with no apparent net benefit.

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[15] FCC. *Federal-State Joint Board on Universal Service, Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, CC Docket Nos. 96-45, 00-256, Fourteenth Report Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256 (2001).

[16] For rural carriers, the national average annual loop cost is now frozen at $240.00 and the cap is indexed to the rate of growth in working loops of rural carriers plus the rate of inflation as measured by the Gross Domestic Product – Chained Price Index. This replaces indexing the cap based on the national growth rate of exchange loops.

[17] *Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, FCC 00-238, ¶78 (rel. Jun. 30, 2000).

Phantom Traffic

Phantom traffic refers to calls that lack sufficient signaling information to enable intermediate and terminating providers to bill properly for ICC. Phantom traffic obstructs the creation of accurate billing records, conceals the identity of parties responsible for payment, and hampers the appropriate rating of calls. To address these problems, the Plan requires the delivery of accurate telephone number signaling information to both intermediate and terminating providers to ensure that traffic can be properly identified and classified for purposes of the intercarrier compensation provisions of the Plan.[18] It also offers a uniform framework for the generation and exchange of call-detail records. Finally, the Plan sets forth a proposed enforcement framework with serious consequences for providers that fail to comply with the phantom traffic rules.

The FPSC notes that two other proposals to resolve phantom traffic issues have been submitted in this docket.[19] Moreover, there appears to be significant support for resolving this issue in a timely manner. The FPSC urges the FCC to move forward to resolve this issue quickly, on a stand-alone basis.

<u>Conclusion</u>

The FPSC recognizes that the existing intercarrier compensation regime is in need of reform; however, we believe that the Missoula Plan is not in the best interest of consumers because it shifts cost recovery to consumers through increases in SLC and the universal service fund without assurances of offsetting benefits. The increases in the SLC caps do not appear in the public interest given the Plan does not require the reductions in ICC be flowed through to benefit consumers. Furthermore, the Plan places even more upward pressure on the Universal Service Fund at a time when that program's assessable base has been declining. The FPSC also questions the legal analysis offered by the sponsors of the Plan.

The Telecommunications Act continues to authorize state authority over intrastate telephone service and Federal authority over interstate service. Thus, states should look to minimize or eliminate discrepancies that exist in ICC rates charged within their states, either through changes in end-user rates or state USF mechanisms. The Plan is overly broad,

[18] The Plan enumerates certain exceptions of this requirement necessary for technological reasons.

[19] Ex Parte Comments of USTelecom before the FCC in CC Docket No. 01-92 on March 16, 2006. ExParte Comments of CenturyTel, Consolidated Communications, Fairpoint Communications, Iowa Telecommunications Services, TDS Telecommunications, and Valor Telecommunications before the FCC in CC Docket No. 01-92 on March 31, 2006.

addressing several issues beyond the scope of intercarrier compensation. The FPSC would note, however, its support for action regarding the issue of phantom traffic. The FPSC does not believe that resolution of this issue should be delayed while intercarrier compensation reform is finalized. We would urge the FCC to address this issue in a separate proceeding.

Respectfully submitted,

/ s /

Cindy B. Miller
Senior Attorney

DATED: October 25, 2006