

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

COMMENTS OF THE VOICE ON THE NET COALITION

The Voice on the Net Coalition (VON Coalition)¹ hereby submits these comments in response to the Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, released August 3, 2011 in the above-referenced proceedings.² The VON Coalition commends the Commission for considering three proposals that attempt to address an aged intercarrier compensation system that today does not recognize (or, indeed, encourage) the increasing movement by customers to broadband networks.

¹ The VON Coalition works to advance regulatory policies that enable Americans to take advantage of the promise and potential of IP enabled communications. VON Coalition members are developing and delivering voice and other communications applications that may be used over the Internet. VON Coalition members include AT&T, Broadvox, BT, Google, iBasis, Microsoft, Nextiva, Skype, T-Mobile, Vonage, and Yahoo. Some VON Coalition members may be filing individual comments that are inconsistent with these comments.

² Further Inquiry Into Certain Issues in the Universal Service-Intercarrier Compensation Transformation Proceeding, GN Docket No. 09-51, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, DA 11-1348 (rel. Aug. 3, 2011) (“*Further Inquiry*”).

While the VON Coalition applauds the efforts of various parties to try to forge a consensus on these issues, the VON Coalition cannot endorse any of the proposals identified in the notice – all of which would, for the first time, apply access charges to interconnected VoIP. This result would not only reverse numerous federal court decisions finding that VoIP is an information service and not subject to access charges, but also discourage broadband adoption, slow the transition from legacy TDM networks to all IP, and have an enormous negative economic impact on the tens of millions of VoIP subscribers in the United States. The VON Coalition has no interest in scuttling reform altogether, instead, the Coalition once again urges the Commission to adopt reforms that are consistent with the goals of the national broadband plan, including reforming the compensation system to adopt a bill-and-keep regime for interconnected VoIP traffic.³ Bill-and-keep will accelerate the construction of broadband networks, promote competition, protect consumers, and safeguard investment and technological innovation.

DISCUSSION

The Commission Must Reject Proposals to Assess Access Charges on IP-Enabled Communications

Each of the plans on which the Commission now seeks comment proposes applying access charges to interconnected VoIP.⁴ For example, the America’s Broadband Connectivity (ABC) Plan proposes, beginning January 1, 2012, to rate “toll” traffic that is exchanged between carriers and originates in IP or that terminates in IP at interstate access rates, and non-toll traffic at reciprocal

³ Under a bill-and-keep methodology carriers would not impose any intercarrier compensation charges on other service providers for originating or terminating traffic, but would recover network costs from their own end users, similar to how wireless providers operate today. *See* Comments of the Voice on the Net Coalition, GN Docket No. 09-51, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, DA 11-1348 (filed Apr. 1, 2011). VON asserts that traffic that both originates and terminates in an IP format and/or on broadband networks should not be subject to any form of regulated intercarrier compensation payments.

⁴ None of the plans, however, offers a clear explanation as to how carriers are expected to separately identify IP from TDM traffic, a somewhat ludicrous exercise because most traffic is expected to originate in IP format in the near future. Failure to adequately address this question invites fraud and arbitrage. Thus, if the Commission adopts any of the proposals discussed herein, it must enable providers of IP communications products and services to use their own good faith estimates to identify IP originated or terminated traffic. The Commission must explicitly prohibit terminating carriers from exercising self-help to identify and rate IP traffic. .

compensation rates.⁵ Intrastate access rates would not apply to IP traffic. The ABC Plan has a five-year transition to a uniform default compensation rate of \$0.0007 per minute by July 1, 2017, with reductions in access rates each year between 2012 and 2017.⁶

The ABC Plan does not appear to include any estimates of the revenue impact for the benefitting LECs on applying access charges to IP traffic exchanged between carriers or any cost basis for such treatment. For example, does IP traffic use the same network resources as TDM traffic?⁷ Does this analysis change (and do intercarrier compensation rates still apply) if the communication terminates on a broadband facility?

To the contrary, the ABC Plan includes a lengthy analysis of the consumer benefits of low intercarrier compensation rates, which concludes that setting intercarrier compensation near zero would produce consumer gains of approximately \$9 billion per year.⁸ These gains would derive from not only the reduction in cost of the underlying communications services, but also from the introduction and use of innovative new products and services that will be developed as a result of an intercarrier compensation rate near zero.⁹ This analysis ignores, however, the consumer welfare losses that will result from requiring any intercarrier compensation for IP traffic (even \$0.0007), but most problematically for the five years that access charges would be applied for the first time to interconnected VoIP traffic exchanged between carriers. The \$9 billion in resultant gain claimed by ABC Plan proponents (and just for that five year period) likely will be offset by billions lost from products and services not developed. Billions that will also be unnecessarily spent on communications services that will not be used by consumers and enterprise customers to support other segments of the lagging American economy, and billions lost as

⁵ America's Broadband Connectivity Plan, Attachment 1 at 10-11 (filed July 29, 2011).

⁶ *Id.*

⁷ The Commission has previously determined that the components that make up access in a TDM environment, particularly end office switching, do not apply in an IP environment. Thus applying the same intercarrier compensation rate to VoIP calls that is applied to TDM calls without some cost basis would be arbitrary and capricious. *See AT&T Corp. v. YMax Communications Corp.*, Memorandum Opinion and Order, File No. EB-10-MD-005, rel. April 8, 2011 at paras. 40-45 (disallowing tariff assessing end office switching charges for IP calls).

⁸ *Id.*, at Attachment 4 at 3-4.

⁹ *Id.*

dozens of VoIP service providers cease to exist (or never even form) because of this substantial change to the cost model for IP services. Moreover, the study does not account for the administrative and transaction costs associated with tracking, billing and remitting intercarrier compensation charges for VoIP traffic, all of which will likely have to be recovered from end user customers.¹⁰

Although the VON Coalition recognizes that rural carriers must contend with different economic pressures than other ILECs, the Plan proposed by the National Exchange Carrier Association and other rural carriers is even more problematic.¹¹ The Rural Carrier Plan would require that all IP traffic originating from or terminating to the PSTN would be subject to existing intercarrier compensation obligations, including not only interstate access charges, but also intrastate access charges where applicable.¹² The RLECs argue that setting an intercarrier compensation rate of zero would “send improper pricing signals” to VoIP providers and other service providers “that could lead to uneconomic increases in the usage of the network.”¹³ The problem with this argument is that it assumes that access charges are cost-based and ignores the fact that more consumers will be using broadband networks for both data and voice communications. According to Sprint, currently, access charge rates range from \$0.055 to \$0.359 cents per minute, although the incremental cost of termination is close to zero.¹⁴ At a minimum, there is no basis to perpetuate any notion that the cost of intrastate access is somehow greater than the cost of interstate access, nor is there any basis to spread to interconnected VoIP the potential for arbitrage schemes that rely in part on the difference in intrastate and interstate access rates.

The RLECs also argue that other carriers, rather than the RLECs own end users, should bear the burden of RLEC network costs.¹⁵ However, the RLECs ignore that the High Cost Fund and other, more targeted federal programs will continue to explicitly subsidize end user rates in rural areas. Moreover,

¹⁰ The VON Coalition agrees with the jurisdictional approach reflected in the ABC Plan—that all VoIP traffic is interstate and that the Commission should have sole jurisdiction over VoIP traffic.

¹¹ Comments of the National Exchange Carrier Association, et. al, (filed Apr. 18, 2011) “Rural Carrier Plan”).

¹² *Id.* at 7.

¹³ *Id.* at 24.

¹⁴ Sprint Ex Parte, WC Docket 10-90, at 2 (filed July 29, 2011).

¹⁵ *Id.*

artificially high usage-based rates will discourage not only broadband adoption, but also use of the existing network, presumably leading to the same result – reduced revenue for the RLECs. The RLECs admit that when networks become entirely IP-based, a per-minute intercarrier compensation regime may no longer be appropriate or desirable, but still suggest that some form of carrier to carrier compensation will be required.¹⁶

The Commission Must Reject Proposals to Reclassify VoIP as a Telecommunications Service

The plan submitted by the State Members of the Federal State Joint Board on Universal Service suffers from the same failings as the Rural Carrier Plan and worse. The State Members argue that interconnected VoIP should be classified as a telecommunications service and that such classification would allow interconnected VoIP to more readily support networks that provide VoIP, including broadband networks.¹⁷ It would also allow the states to resolve intercarrier compensation disputes and apply state jurisdiction to VoIP traffic (presumably including intrastate access charges).¹⁸

The Commission Must Affirm that IP Communications Are Interstate Services

The problem with applying intrastate access to IP communications was discussed above. Moreover, classifying VoIP as telecommunications and subjecting providers to potential state regulation in addition to federal regulation would be a disastrous decision (one that even 20 state legislatures have affirmatively determined would be detrimental to the consumers in their states). The Commission recognized in 2004 that the interconnected VoIP service provided by Vonage should not be subject to the vagaries of state jurisdiction.¹⁹ That decision has helped foster a vigorously competitive, innovative, and consumer friendly IP-communications industry.²⁰ Should the Commission now rule that interconnected

¹⁶ *Id.* at 26.

¹⁷ State Member Comments at 20 (filed May 2, 2011).

¹⁸ *Id.* at 21.

¹⁹ *In Re Vonage Holdings Corp.*, 19 FCC Rcd 22404 (2004).

²⁰ The Commission itself has acknowledged that VoIP (which requires broadband) will be a driver of new jobs in rural communities, leading to more in-sourcing rather than outsourcing of communications-related opportunities. See Fact Sheet of jobs4America, which can be found at <http://www.jobs4america.net/node/755>; Remarks of FCC Chairman Julius Genachowski, which can be found at http://transition.fcc.gov/Daily_Releases/Daily_Business/2011/db0804/DOC-308900A1.pdf (August 4, 2011).

VoIP is not only subject to interstate access charges, but can also be regulated by the state utility commissions, including for assessment of intrastate access charges, it would invariably lead to VoIP providers closing shop, moving to progressive states that have passed laws prohibiting state regulation, or in some cases simply moving offshore to escape jurisdiction. This result would place VoIP providers in the United States at a competitive disadvantage relative to providers outside the United States (and presumably outside the reach of regulators). Consumers in those states where VoIP providers no longer choose to provide service also would be harmed. The VoIP industry has flourished in the current regulatory environment, with consumer interests adequately safeguarded by those minimal consumer protection and public safety obligations already applied to interconnected VoIP. A groundswell of new fees, regulations, and costs, would undermine that success.²¹

The Commission Should Adopt Bill and Keep For All IP to PSTN and PSTN to IP Traffic

The better solution is the adoption today of bill-and-keep for all traffic that is exchanged between carriers and that either originates or terminates in IP format. Bill-and-keep can best facilitate the Commission's goals of ubiquitous broadband adoption and a rapid transition from circuit-switched to IP networks.²² The current intercarrier compensation system was designed for a time when network traffic was defined by now-outdated jurisdictional and technological distinctions such as local and long distance, toll, wireline, wireless, interstate and intrastate, LATAs, circuits, circuit switches, calls, minutes, LECs, and IXCs. The different types of traffic and the Commission's policy of promoting universal service through implicit and explicit subsidies in carrier access charges has created an irrational system and led to

²¹ All of the proposed plans discussed in the Commission's Public Notice also ignore that several federal courts have found that interconnected VoIP is an information service and not subject to access charges. *See Paetec v. CommPartners*, 2010 U.S. Dist LEXIS 51926 at *6 (D.D.C., Feb 18, 2010); *See also Vonage v. Minnesota PUC*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003); *See also, Southwest Bell v. Missouri PSC*, 461 F.Supp. 2d 1055, 1081 (E.D. Mo. 2006).

²² The VON Coalition asserts that bill-and-keep should apply to all communications traffic that originates or terminates on the PSTN, including all forms of IP traffic, whether facilities-based, fixed, or nomadic. *See NPRM and FNPRM* ¶612.

seemingly endless disputes between originating and terminating local carriers and CLECs that carry IP voice traffic on behalf of VoIP providers and their customers, among others.²³

The identical nature of all IP traffic, and the relative burden such traffic imposes on carriers' networks, demands an intercarrier compensation regime that treats all traffic equally.²⁴ IP products, services, and applications use open and common protocols on digital packet-switched networks on which traffic is not distance-sensitive or identified by application, location, or device. Costs incurred for originating, terminating, or exchanging IP traffic do not depend on distance, time, or the e.164 number that might be associated with the VoIP service. IP-based applications, products, and services enable subscribers to utilize multiple features that access different websites or IP addresses during the same communication session and to perform different types of communications simultaneously. In addition, IP technology enables the routing of calls seamlessly to and from a wide variety of devices, including mobile devices, some of which may be nomadic and some of which may be fixed, but all changeable at the user's discretion. These features do not fit within traditional legacy telephone regulatory treatment nor an intercarrier compensation regime based on the location of the originating and terminating endpoints. Bill-and-keep eliminates the disparate treatment of intercarrier traffic by treating all traffic equally.²⁵ Additionally, a bill-and-keep regime for all traffic eliminates the phantom traffic and traffic pumping issues the Commission is attempting to resolve in this proceeding.²⁶

²³ See generally *Global NAPs, Inc. Petition for Declaratory Ruling*, WC Docket 10-80 (filed Mar. 5, 2010); *PaeTec Communications, Inc. v. Comm Partners, LLC*, 08-CV-0397-JR (D.D.C. Feb. 18, 2010); Order, *Sprint Communications Company L.P. v. Iowa Telecommunications Services, Inc.*, Iowa Utilities Board Docket No. FCU-2010-001 (Feb. 4, 2011).

²⁴ See generally Dale N. Hatfield, Bridger M. Mitchell, & Padmanabahn Spinagesh, *Emerging Network Technologies*, 2 HANDBOOK OF TELECOMMUNICATIONS ECONOMICS: TECHNOLOGY EVOLUTION AND THE INTERNET 29 (2005).

²⁵ See Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime*, OPP Working Paper Series No. 33, ¶ 80 (2000), available at http://www.fcc.gov/Bureaus/OPP/working_papers/oppwp33.pdf (last visited Mar. 17, 2011) ("DeGraba").

²⁶ *NPRM and FNPRM*, FCC 11-13, at ¶¶ 620-34.

If the Commission were to impose an obsolete access charge regime²⁷ on interconnected VoIP providers, the results would be anti-consumer, anti-innovation, and anti-investment for IP-enabled voice services. VoIP providers would, for the first time, be subject to the highest regulated rates for switched traffic. VoIP providers, which must also recover their costs, would be forced to pass through these rate increases to their end users, which one estimate suggests would be about \$180 per year.²⁸ Rates for innovative IP-enabled voice applications would increase, and innovation in and development of new IP-enabled voice applications would be curtailed. IP communications providers would be saddled with inefficient costs that could artificially limit their availability to provide service offerings and burden consumers with above-cost charges. Legacy access charges for VoIP are barriers for entry into the voice market that stifle competition, harming consumers and the public interest. Also, interconnected VoIP providers offering products integrated into websites would be left with a three-pronged “Morton’s Fork” choice: (1) eliminate voice communication from web sites; (2) begin charging customers for access to these applications and web sites (which is often a recipe for web site failure); or (3) develop specific technology to prevent rural Americans (and others living in areas with high access rates) from accessing many of these innovative technologies or communicating with their online counterparts. Each of these outcomes nullifies the continued development of the Internet and other interactive computer services, in contradiction of Congressional mandates.²⁹

Applying access charges to interconnected VoIP service providers also will impede broadband adoption in stark contrast to the goals set forth in the Act, and repeatedly emphasized by the Commission over the last 15 years, including most recently in the National Broadband Plan.³⁰ The availability of VoIP and IP-enabled products provides consumers with applications, content, and services needed to spur broadband deployment as a result of consumer demand. Under a bill-and-keep regime, removal of non-

²⁷ Letter from CenturyLink, Frontier, Qwest, and Windstream to Chairman Genachowski, GN Docket No. 09-51; WC Docket Nos. 07-135, 05-337, 04-36; CC Docket Nos. 99-68, 01-92, Jan. 18, 2011.

²⁸ Sprint ex parte at p. 3.

²⁹ 47 U.S.C. § 230(b)(1) (2006).

³⁰ National Broadband Plan at 142.

economic costs provides customers with the opportunity to make rational economic choices because any decision to adopt broadband would be based solely on the efficiencies of the networks and operations as well as the quality of service provided.³¹ The superior efficiency and quality of service that broadband provides would be highlighted under a bill-and-keep system, increasing demand for broadband.

The Commission Must Not Impose Piecemeal “Solutions” That Permit the Imposition of Access Charges on IP Originated and Terminated Traffic

The Commission should adopt bill-and-keep for all IP originated and terminated traffic today and reject interim solutions that increase rates and harm consumers – even for a limited period of time. The VON Coalition is concerned that comprehensive reform efforts will be delayed and ultimately may fail if the Commission adopts interim decisions that negatively affect VoIP consumers and the VoIP industry. The appropriate compensation rate for VoIP traffic is inextricably intertwined with the comprehensive intercarrier compensation reform issues under consideration by the Commission. The Commission must be wary of carving out IP-enabled services for rate-raising treatment among the many compensation issues currently pending. While such a piecemeal approach to addressing intercarrier compensation may temporarily provide a new revenue source for some terminating carriers, it would negatively affect many other segments of the industry and drive consumers away from VoIP products, applications, and services that have been significant drivers of broadband adoption. Such a result only would serve to exacerbate problems created by the un-economic compensation structure, rather than resolving those problems.

The VON Coalition believes that acting on an *ad hoc* basis and imposing uneconomic access charge type rates on VoIP traffic will stall any hope of a consensus solution to comprehensive intercarrier compensation reform. Instead, the VON Coalition urges the Commission to enable the exchange of VoIP traffic on a bill-and-keep basis and focus attention on completing action on its omnibus intercarrier compensation reform proceeding. Such an approach avoids imposing costly but temporary “band-aid” requirements on VoIP providers, protects VoIP consumers from arbitrary price increases, and ensures that

³¹ See DeGraba at ¶ 80.

new investment in IP- enabled networks, applications, and services is not unnecessarily deterred. Until the Commission establishes a comprehensive compensation scheme that reflects a unified rate, self-help measures will likely increase, along with the very real risk of creating new problems while exacerbating others.

It makes little sense to require VoIP providers and carriers to make costly investments to enable last-generation equipment to make jurisdictional distinctions – that the Commission is rightly considering eliminating -- between categories of traffic, as would be required if the Commission were to allow imposition of access charges for VoIP traffic. A piecemeal, rate-raising approach might temporarily appease some, but it would negatively affect both consumers and the most innovative segment of the communications industry. Once the Commission has adopted a unified rate structure, the originating and terminating endpoints of a call will be irrelevant, obviating the need for interim rules addressing the issue.

CONCLUSION

The Commission should immediately implement a bill-and-keep system for the exchange of IP-PSTN traffic.

Respectfully submitted,

VOICE ON THE NET COALITION

/s/

Glenn S. Richards
Executive Director
2300 N Street NW
Washington D.C. 20037
(202) 663-8215
glenn.ricards@pillsburylaw.com

August 24, 2011