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Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF THE PUBLIC UTILITIES COMMISSION OF OHIO

BACKGROUND AND INTRODUCTION

The National Association of Regulatory Utility Commissioners' ("NARUC") Task Force on Intercarrier Compensation filed an intercarrier compensation reform plan ("Missoula Plan" or "Plan") with the Federal Communications Commission ("FCC") on July 24, 2006. The modified deadline for filing comments on the Missoula Plan was October 25, 2006, with the modified deadline for reply comments being February 1, 2007. The Public Utilities Commission of Ohio ("Ohio Commission") filed initial comments with the FCC on October 25, 2006. The Ohio Commission hereby submits its reply comments to the FCC.

DISCUSSION

A. The Missoula Plan presumes that the FCC has preemption authority beyond that which it has been granted by the Act or the courts.

The Missoula Plan, as its supporters describe it, is designed as a "comprehensive reform of the intercarrier compensation system." *Developing a Unified Intercarrier Regime*, CC Docket No. 01-92, Comments of the Supporters of the Missoula Plan (filed

October 25, 2006) at 14 ("*Missoula Plan Supporters' Comments*"). Key to the implementation of the Plan is the FCC's adoption of each of its components. *See id.* at 6. To further this end, the Plan's supporters argue that the FCC has "ample legal authority" to adopt all of the Plan's components. *Id.* at 14. Relying on provisions found in Sections 201, 251, and 252 of the Act, the Plan's supporters posit that such authority extends to interconnection among carriers including interconnection agreements, signaling and intercarrier payment rates, tandem transit service, and intercarrier payment rates. *Id.* at 14-19.

In making their case for the FCC's authority to implement all aspects of the Missoula Plan, the Plan's supporters have essentially condensed and repackaged the arguments set forth in the *Policy and Legal Overview* addendum to the Plan. *See, generally, Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, The Missoula Plan for Intercarrier Compensation Reform, *Policy and Legal Overview,* FCC 05-33 (filed July 24, 2006) ("*Legal Overview*"). A great deal of the Ohio Commission's initial comments was devoted to the state preemption issue and the arguments supporting such that have been made by the Plan's supporters. Specifically, the Ohio Commission argued that the Communications Act of 1996 ("Act") preserves state authority over intrastate access rates and that Section 251(g) does not provide the broad justification for preemption that it is claimed to provide by the Intercarrier Compensation Forum. *Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Comments of the Public Utilities Commission of Ohio (filed October 25, 2006) at 5-12 ("*Ohio Comments*"). Furthermore, the Ohio Commission argued that the FCC lacks the authority to adopt uniform, national rates for reciprocal compensation,

yet does have a responsibility to meaningfully preserve the state role over universal service and comprehensively address the impact intercarrier compensation reform will have on local rates. *Ohio Comments* at 12- 17. The Ohio Commission believes that it has set forth sound legal arguments for its position on the issue of state preemption and wishes to reaffirm in these reply comments its belief that the FCC has a legal obligation to preserve state commission authority over intrastate access rates and reciprocal compensation in any intercarrier compensation reform regime that the FCC chooses to adopt.

The Ohio Commission notes that it is not alone among state commissions in responding to the legal justifications for the preemption of state authority that were offered by the supporters of the Plan. In comments filed with the FCC, several state commissions made arguments for the preservation of state commission authority over intrastate access rates that were substantially similar to those made by the Ohio Commission. *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the Connecticut Department of Public Utility Control (filed October 24, 2006) at 8-9 (arguing that Sections 152(b) and 521(d)(3) of the Act protect and preserve state authority over intrastate access regulation); Comments of the Florida Public Service Commission in Response to the Federal Communication Commission's Public Notice Seeking Comment on the Missoula Intercarrier Compensation Reform Plan (filed October 25, 2006) at 4 ("*Florida Comments*") (arguing that Section 152(b) of the Act does not confer upon the FCC authority over the regulation of intrastate access charges, while Section 252(d)(2) expressly provides to state commissions a role in setting reciprocal compensation rates); Comments of the New

York State Department of Public Service (filed October 25, 2006) at 10-11 ("*New York Comments*") (arguing that Section 251(g) of the Act does not does not permit the FCC to supersede the law of any state); The Comments of the Pennsylvania Public Utility Commission (filed October 25, 2006) at 6 (stating that intrastate access rates are within the purview of state commissions under Sections 252 and 251(b) of the Act). The numerous arguments set forth in the comments of state commissions clearly demonstrate that the Missoula Plan is vulnerable to myriad legal challenges should it be adopted by the FCC in its present form.

As noted above, the comments of the Plan's supporters largely restate the legal justifications found in the *Policy and Legal Overview* of the Plan. Among these is the "impossibility" exception[1] rationale for state preemption. *See Legal Overview* at 4-7; *Missoula Plan Supporters' Comments* at 19. As presented by the Plan's supporters, the "impossibility" exception allows the FCC to regulate those matters that were traditionally left under the authority of the states when doing so is necessary to protect a valid regulatory objective. *See Legal Overview* at 4-5. As noted in the comments of the Florida PSC, the impossibility exception can be used as a basis for preemption only when compliance with both the federal and state law or regulation is physically impossible. *Florida Comments* at 4. Preemption cannot be justified by a mere showing that some of the state regulation could frustrate federal regulatory goals. Rather, to justify preemption, it must be shown with some specificity that unless preempted, the state regulation would negate federal policy. *Id.* In other words, it is not enough to show that preemption of a

[1] The Missoula Plan supporters derive the "impossibility" exception from *Louisiana Public Service Commission v. FCC*, 475 U.S. 335, fn 4 (1986).

state law or regulation will merely further a federal policy objective. *New York Comments* at 11. In fact, where a state law or regulation can feasibly coexist with a federal law or regulation, there is no impossibility. *See id.* As the New York State Department of Public Service notes in its comments, with regard to separate interstate and intrastate access charges, state regulation has coexisted with federal regulation for decades. *Id.* The Ohio Commission agrees with the Florida Public Service Commission's conclusion that the test for impossibility has not been met in this case and, as a consequence, believes that the "impossibility" exception is being improperly applied by the Missoula Plan supporters and encourages the FCC to find this justification to be without merit.

Many sound legal arguments against state preemption have been made in the comments that have been filed in this docket. In light of these arguments, the FCC is encouraged to proceed cautiously in implementing intercarrier compensation reform and to act in a manner that preserves the right of each state to regulate intrastate access rates.

B. The Missoula Plan was not developed with the consensus of all stakeholders.

Over 100 interested stakeholders filed initial comments on the Missoula Plan, representing a broad diversity of interests. It is apparent from a survey of these comments that there is really no industry consensus supporting the Plan as alluded to by the Missoula Plan supporters. *See Missoula Plan Supporters' Comments* at 5. To the contrary, the comments represent a broad spectrum of opinions on the Plan from a vast array of stakeholders. The comments received from the industry itself are far from being uniform and can be roughly categorized in one of five ways. The first category includes

those carriers who fare well under the Plan and make up the largest group of its supporters. *See, e.g., Missoula Plan Supporters' Comments.* Small and/or rural CLECs who are opposed to being included as a Track 1 carrier under the Plan comprise the second category. *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of Eschelon Telecom, Inc. (filed October 25, 2006); Comments of General Communications, Inc. (filed October 25, 2006); Comments of Mahaska Communications Group on the Missoula Plan (filed October 25, 2006). Category three includes Track 2 carriers who would prefer to be included in Track 3. *See, e.g., Developing a Unified Intercarrier Compensation Regime,* CC Docket No. 01-92, Comments of CenturyTel, Inc. (filed October 25, 2006); Comments of Frontier Communications on Missoula Plan (filed October 25, 2006). The fourth categorization includes Track 3 ILECs who do not believe that they will be adequately compensated under the Plan. *See, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of Untied Utilities, Inc. (filed October 25, 2006); Comments of the Tri-County Telephone Association (filed October 25, 2006). Finally, the fifth category is made up of IP-based providers, who oppose the Plan in its entirety. *See, e.g.*, Comments of Ionary Consulting (filed October 25, 2006); Comments of The National Cable & Telecommunications Association (filed October 25, 2006) ("*NCTA Comments*"). These categorizations do not account for the diversity of comments filed by state commissions, consumer advocates and other interested persons. It should come as no surprise, then, that a consensus has not been achieved with the Missoula Plan. As such, the Ohio Commission strongly urges the FCC to proceed with due diligence and

caution in adopting the Plan as a whole or in part.[2]

The Ohio Commission realizes that designing a solution for reforming intercarrier compensation that satisfies such a diverse group of stakeholders is, undoubtedly, a difficult undertaking. However, achieving this goal becomes much more unlikely when the solution is primarily designed by a small group of stakeholders. The telecommunications industry has a wide range of stakeholders, including new entrants and end users, whose interests must be represented and considered. It is only by doing so, that the process will be efficient and equitable for all. Perhaps the difficulty in reaching consensus on the Plan suggests that the ultimate goal of intercarrier compensation reform has been replaced by the goal of preserving the revenues of a limited set of interests.

C. The Missoula Plan is a "moving target."

While the Missoula Plan is touted as a "comprehensive solution to intercarrier compensation reform,"[3] it may more accurately be described as a "work in progress." An example of this is found in the comments of the Early Adopted State Commissions, which notes that details of the "Early Adopter" fund proposed in the Plan have not yet been fully developed. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the Early Adopter State Commissions (filed October 25, 2006) at 3. These commenters went on to state that discussions are continuing and considerable policy and financial work is being done. *Id.* To further illustrate this point,

[2] The Ohio Commission has filed comments in this docket in support of implementing the phantom traffic provisions of the Plan separate and apart from the Plan itself.
[3] Missoula Plan Supporters' Comments at 5.

one only needs to look at the four-plus pages of clarifications and revisions to the Plan that were filed as an attachment to the comments of the Plan's supporters. *See, generally, Missoula Plan Supporters' Comments,* Attachment A. While some of these changes may be benign, others appear to have a significant impact on the Plan and its implementation. These include new definitions for Tracks 1, 2, and 3; a change in the proposed reindexing of the high cost loop fund; and, a change in the nature of the Restructure Mechanism. *Id.* at 1-4.

As a further example, the Plan's supporters indicate that a procedure will be developed and filed with the FCC to ensure proper matching of jurisdictional revenues and costs. *Id.* at 4. This filing was to be made by December 11, 2006. *Id.* It is interesting that the supporters of the Plan chose the original reply comment due date as their filing date for this procedure. Had the FCC not extended the reply comment due date, there would have been no possibility of any stakeholder review of this procedure. Nonetheless, even with the two extensions granted by the FCC and a revised due date of February 1, 2007, the Plan's supporters have managed to circumvent any stakeholder review by simply not filing this procedure prior to the revised reply comment due date. Yet, they continue to solicit stakeholder support for the Plan's approval.

It is more difficult for stakeholders to comment on a proposal that is a moving target, especially given that the Missoula Plan is needlessly convoluted. Essentially, the supporters are saying "trust us," yet a further review of their comments reveals that even they are unsure of the Plan's details. The heading of Attachment B, filed with the supporters' comments, unambiguously states "[t]he restructure mechanism is not USF." *Missoula Plan Supporters' Comments*, Attachment B at 1. However, Attachment C, also

filed with supporters' comments, states, "[t]he Restructure Mechanism is just another aspect of federal universal service, like the high cost support mechanism." *Missoula Plan Supporters' Comments*, Attachment C at 2. Clearly, a great deal of uncertainty remains with the Plan.

D. The distribution of benefits and burdens under the Plan is inequitable.

In its bare essence, the supporters of the Plan propose to reform intercarrier compensation through a scheme in which large carriers reduce their access charges by $6 billion, while end users are charged at least an additional $6.5 billion to offset the carriers' lost revenue. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Billy Jack Gregg Notice of Ex Parte Presentation (filed December 19, 2006)[4]. The plan is then marketed as being economically beneficial, albeit minimally, for wireline and wireless end users. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missoula Plan for Intercarrier Compensation Reform, *Exhibit 2: Economic Benefits from Missoula Plan Reform of Intercarrier Compensation*, Richard N. Clark and Thomas J. Makarewicz, FCC 05-33 (filed July 24, 2006) at 1 & 5. In their initial comments, Cavalier Telephone, LLC, McleodUSA Telecommunications Services, Inc., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., and RCN Corporation point out that the Plan's supporters base their economic analysis of consumer benefits on a wide range of overly optimistic and unsupported assumptions that, in part, rely on data from 2001, which for an industry

[4] In the presentation, the increase in end user rates is estimated at $6.9 billion as follows: $4.7 Billion increase in Subscriber Line Charges, $1.5 Billion increase in Restructure Mechanism finding, $0.3 Billion increase in the High Cost Fund, $0.2 Billion increase in the Low Income Fund, and $0.02 Billion of the Early Adopter Fund.

changing and evolving as rapidly as the telecommunications industry, is analogous to returning to the days of the horse and buggy. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of Cavalier Telephone, Inc., McLeodUSA Telecommunications Services, Inc., Norlight Telecommunications, Inc., Pac-West Telecomm, Inc., RCN Corporation (filed October 25, 2006) at 56-58. The Ohio Commission agrees with the assessment that the likely outcome of implementing the Missoula Plan is that it will cost more for end users than the supporters claim.

The final phase of the Plan's implementation results in a perpetual stream of revenue for the ILECs, founded again, not on a cost basis but on inappropriately inflated industry revenue data to start with, inflated further through unsupported, automatic annual cost of living increases. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missoula Plan for Intercarrier Compensation Reform, *Executive Summary*, FCC 05-33 (filed July 24, 2006) at 12; The Missoula Plan for Intercarrier Compensation Reform, FCC 05-33 (filed July 24, 2006) at 82. From the perspective of the Ohio Commission, this scheme appears suspiciously like the defensive measures that an incumbent would take to insulate itself from the competitive threats of new and "disruptive" technologies in the communications marketplace. It is against the backdrop of potentially large-scale, tangible benefits for the incumbents, that the Plan's supporters speak of the benefits to end users and the multiplier effects on the economy, which, at best, are speculative and trivial, and, at worst, constitute creative marketing.

E. The FCC has set forth specific goals and criteria for accomplishing intercarrier compensation reform.

The Ohio Commission believes that the FCC has clearly stated appropriate goals to be achieved in reforming intercarrier compensation. *See* Remarks of Chairman Kevin J. Martin to the NARUC Summer Meeting, Austin, TX, July 26, 2005 available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-260312A1.pdf. Satisfying these goals requires that intercarrier compensation reform first achieve a single unitary rate for all types of telecommunications traffic. Second, reform must not impose large increases in end-user charges. Finally, reform must not result in a large increase in the federal universal service fund ("USF"). The National Association of State Utility Consumer Advocates ("NASUCA") makes clear in its comments that intercarrier compensation reform should begin with, and be continually tested against, these stated goals. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the National Association of State Utility Consumer Advocates on the Missoula Plan, FCC 05-33 (filed October 25, 2006) at 1 ("*NASUCA Comments*"). As NASUCA and others have noted in their initial comments, the Missoula Plan fails to meet these objectives. *See NASUCA Comments* at 1; *see also, e.g., Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the Virginia State Corporation Commission Staff (filed October 25, 2006) at 21; Comments of the Wyoming Public Service Commission (filed October 25, 2006) at 2; Comments of Time Warner Telecom Inc., Cbeyond, Inc., Xspedius Communications, LLC (filed October 25, 2006) at 4-9; *NCTA Comments* at 2-3. The Ohio Commission supports NASUCA's contention that intercarrier compensation reform should be measured against the FCC's

stated goals and encourages the FCC, as it evaluates the Missoula Plan, to remain mindful of the requirements it has already established for intercarrier compensation reform.

Unlike the Missoula Plan which is complex and opaque, appropriate intercarrier compensation reform entails a simple transparent design, which satisfies the objectives set forth in the FCC's original notice of proposed rulemaking. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, FCC 01-132 (rel. April 27, 2001) 16 FCC Rcd. at 9612 at ¶¶ 31-36 ("*NPRM*"). The FCC has outlined criteria to be used in determining whether any proposed intercarrier compensation reform satisfies the FCC's stated goals. According to the FCC, the efficient use of, and investment in, telecommunications networks, and the development of efficient facilities-based competition in the marketplace should be encouraged in any new approach to intercarrier compensation reform. *See NPRM* ¶ 2. Furthermore, the preservation of universal service should be a priority of any reform regime that is adopted. *See Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, FCC 05-33 (rel. March 3, 2005) at ¶ 32 ("*FNPRM*"). Any new rules that may be adopted must accommodate continuous changes in the marketplace without distorting, or in any way limiting the opportunities available to carriers using different or novel technologies. *See FNPRM* at ¶ 33. Finally, regulatory certainty should be achieved, where possible, such that both the need for regulatory intervention and opportunities for arbitrage are both limited. *See Id.* By setting forth the goals and criteria that it has, the FCC has provided a clear roadmap for intercarrier compensation reform.

F. The Ohio Commission proposes an alternative approach to reform intercarrier compensation reform by focusing on applying the FCC's goals and criteria.

The Ohio Commission appreciates the effort the Plan's supporters have invested in developing the Missoula Plan. Nonetheless, for the reasons stated above, the Ohio Commission believes that the supporters of the Plan lost sight of the FCC's stated goals at some point during this process. Accordingly, the Ohio Commission proposes an alternative approach to intercarrier compensation reform that integrates the goals and criteria of the FCC as listed above.

1. Compensation should not differ between local and toll.

The proposition that compensation for using a given network component should not differ between local and toll traffic is based on the fact that the costs to transport and terminate a minute of traffic using a given network component are the same regardless of where that traffic originates. This is a widely held belief of many carriers. Under such an approach, each carrier would be compensated for terminating, *i.e.*, accepting, call traffic at the same cost-based rate regardless of whether it is terminating or transit traffic. The natural consequence of drawing no distinction between local and toll services would be the reduction in arbitrage opportunities available to carriers.

2. Compensation should be cost based.

Under the approach being offered by the Ohio Commission, the originating carrier would compensate each transit carrier and terminating carrier for transit and terminating service. Compensation would be strictly based upon the costs of the carrier, to the extent possible, and include a reasonable profit component. The economic signals to various systems, methodologies, and technologies will be distorted if compensation is not cost

based. Those carriers and technologies that can minimize costs and achieve an acceptable profit at a given price will be more efficient and will likely succeed due to lower costs that attract more traffic.

3. Rules and rates should be applicable, and applied, consistently regardless of technology.

In an era when technologies are in constant transition, and where business models come and go based on those technologies, it becomes imperative that the application of rules regarding how service providers interact and compensate each other must "rise above" technology differentiation

4. Universal service should be funded, based on total revenue, by all carriers who use Local "PSTN resources."

Carriers using PSTN resources such as the number pool and PSTN infrastructure, which includes loops, switches, and trunks should fund universal service.

5. Carriers who provide PSTN resources should receive universal service support based on costs.

Carriers who provide PSTN resources should receive universal service support based on costs, but only to the extent that their available revenues from all regulated sources do not recover their regulated costs by an acceptable margin.

6. Reform should truly follow a planned, phased-in approach.

The preceding paragraphs have set forth the Ohio Commission's proposed approach to intercarrier compensation reform. Like the Ohio Commission, NASUCA has also offered an alternative approach to the Missoula Plan. While not in agreement with all aspects of the NASUCA plan, the Ohio Commission finds aspects of it accommodating to the framework outlined above such as NASUCA's proposal that the

FCC would set intercarrier compensation target rate goals for each year of a five-year plan; the encouragement of negotiated agreements; and the oversight and monitoring of a phased-in-process. *NASUCA Comments* at 77.

CONCLUSION

The Ohio Commission thanks the NARUC for facilitating the development of the Plan and the FCC for the opportunity to provide comment on it. In the opinion of the Ohio Commission, the real benefit achieved through the Missoula Plan is the renewed interest it has generated in reforming intercarrier compensation. In these reply comments, the Ohio Commission reaffirms its opposition to the adoption of the Missoula Plan, yet encourages the FCC to continue leading a systematic approach to reforming intercarrier compensation. To aid in this endeavor, the Ohio Commission is offering an alternative approach to intercarrier compensation reform that it believes reflects the goals and objectives previously set forth by the FCC. The Ohio Commission believes that such an alternative approach should provide the underlying basis for any reform plan that the FCC chooses to adopt and should be given strong consideration by the FCC as it addresses this important issue.

Respectfully submitted,

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