

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. Subsequently, Missoula Plan Supporters and several State commissions filed a modification to the Plan, referred to as the Federal Benchmark Mechanism ("FBM"). *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, The Missoula Plan Amendment to Incorporate a Federal Benchmark Mechanism, (filed January 30, 2007) ("FBM Proposal"). The FCC established a comment cycle on this revision with initial comments due March 19, 2007 and reply comments are due April 3, 2007. The Public Utilities Commission of Ohio ("Ohio Commission") hereby submits its responses, comments and recommendations concerning the Plan modifications filed January 30, 2007.

As it stands, the docket in this case is voluminous, and Ohio has certainly contributed to that volume. While not wishing to needlessly belabor issues already thoroughly discussed, certain points bear repeating because the modification proposed

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does not address the basic difficulties with the Plan, and in fact exacerbates some of them. The concerns addressed in these comments include preemption, the complexity and cost of the Plan, the failure to address the core problems of intercarrier compensation, and a reliance on projections.

DISCUSSION

A. The FCC lacks preemption authority over intrastate access charges and reciprocal compensation.

The Plan supporters assert and imply that the FCC has legal authority to broadly preempt State commissions regarding intrastate access charges and rate setting for reciprocal compensation of local traffic. *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*”). But the FCC, according to the Communications Act of 1996 (“Act”), lacks this preemption authority. The Ohio Commission has previously made clear that the Act preserves state authority over intrastate access rates and that Section 251(g) does not provide the broad preemption authority suggested 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 argues that the FCC lacks the authority to adopt uniform, national rates for reciprocal compensation. Nevertheless, the FCC must still 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 has set forth sound legal arguments for its preemption position and reaffirms them in these comments. 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.

It is important to reiterate that the Ohio Commission is not alone in opposing the legal justifications for preemption. Many state commissions argued to preserve state authority. *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 (filed October 25, 2006) at 4 (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 (arguing that Section 251(g) of the Act 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). As demonstrated by the plethora of arguments, the Missoula Plan is vulnerable to legal challenges, should it be adopted by the FCC.

The Ohio Commission and NASUCA have each proposed alternative approaches to the Plan that do not depend upon state preemption. The approaches proposed employ a concept of state/federalism wherein the FCC can exercise its national leadership, and states can implement locally a phased and measured path to a reformed system of intercarrier compensation. The Ohio commission continues to believe that such a

combined approach will attract a broader range of stakeholders and can achieve the FCC's stated goals for intercarrier compensation, consistent with the FCC's stated criteria.

B. The Plan lacks industry-wide consensus and resources continue to be expended on evaluating and modifying a proposal that does not solve the core problems of intercarrier compensation.

It is important to note that, as the Ohio commission stated in its reply comments to the Plan, there is not an industry-wide consensus on the Plan. *See Ohio Reply Comments* at 5-7. In continuing to develop and distribute details of the Plan piecemeal, the supporters of the Plan are attempting to create additional benefits to stakeholders in an effort to gain support for what, unfortunately, remains a fundamentally flawed plan. In this most recent offering the Plan supporters propose to provide "...a more fair and balanced approach to addressing a critical problem the original Missoula plan failed to address." FBM Proposal at 1. In fairness, the newest proposal does attempt to provide a more balanced allocation of benefits to early adopter states, however, this comes at the expense of making the Plan more complex and, as discussed below, more costly.

As Ohio has commented previously, the Plan does not even begin to address the goals and criteria laid out by the FCC, either in its initial NPRM or in other documents and statements. *Ohio Comments* at 11-12. This revision does not change that.

C. The Plan is already needlessly complex and the proposed modification adds more cost and complexity to the plan.

The Plan contains a series of mechanisms to redistribute revenues. The FBM is simply another such mechanism. The supporters now project that the early adopter fund under its new guise will rise from at least \$200M (the initial projection by the supporters)

to \$800M. Given the concerns stated elsewhere in this docket regarding the existing projections of costs and benefits of the Plan¹, the only thing that can be said with certainty is that the FBM will increase the costs associated with the Plan. This offering increases the total cost of the plan, without getting any nearer to solving the core intercarrier compensation problem.

An additional difficulty and complexity is added by the FBM's use of local rates as a "proxy" for determining whether States have taken action with regard to intercarrier compensation, and what action has been taken. It is difficult to see why a proxy is being used when the answer to the question of "What states have taken what actions?" is so easily determined.

In the criteria identified by the FCC in its NPRM, the FCC stated that ICC reform must not lead to a large increase in the Universal Service Fund ("USF"). As Ohio commented previously, (*Ohio Reply Comments* at 8-9) while nothing in the Plan increases the USF *per se*, establishing parallel mechanisms (i.e. the restructure mechanism, and the early adopter fund, now called the FBM) seems to avoid "increasing the USF" in name only.²

Supporters may state that the (now) roughly \$2.5 Billion projected additional funding is not a significant increase to the roughly \$7 Billion USF, but a 35% increase in the total funding certainly seems significant.

The USF was created as a specific subsidy designed to promote an important

¹ 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. and Comments Of The National Association Of State Utility Consumer Advocates at 33 - 37

² It is worth noting that the attachment to the FBM proposal titled "Projected Per Unit USF Assessment Charge Per Month" acknowledges this fact.

public policy. An intense effort is underway to resolve the issues associated with that fund, and possibly to make changes in or expand the policy. The proposal at hand will simply complicate an already complicated scenario.

Enough is already said in this docket that questions the reliability of the Supporters' projections of costs and benefits. See *Developing a Unified Inter-carrier 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 and Comments Of The National Association Of State Utility Consumer Advocates at 33-37. As those projections are viewed with skepticism by knowledgeable commenters, one wonders how much credibility to attach to these new cost projections.

Finally, one must ask, when the USF was created was there an expectation that it would become a \$7 Billion mechanism? Is there any basis for expecting the RM and FBM to avoid a similar growth problem?

CONCLUSION

The proposed modification to the Plan does nothing to change the essential nature of a flawed plan, except to further increase its cost and complexity. The Plan's supporters merely restate the legal justifications found in the *Policy and Legal Overview* of the Plan. In opposition, many sound legal arguments against state preemption have been made and filed in this docket. The FCC must proceed cautiously in implementing intercarrier compensation reform and preserve the right of each state to regulate intrastate access rates.

The FCC clearly outlined in its NPRM on this issue and in later statements the

core issues and needs of intercarrier compensation reform. The Plan, with the proposed revision, modifies the Early Adopter Mechanism to allocate more funds (from end-user charges) to "early adopter" states, to assist in funding the mechanisms those States (Ohio included) developed to ameliorate the effects on end user rates of rebalancing intercarrier compensation. These mechanisms, in fact, do little more than push money around in a circle (from end users, to companies, to government, to end users) with some redistribution along the way. The goals and needs identified by the FCC remain unaddressed.

Ohio, therefore, once again, renews its call for a plan that actually addresses the goals of, and criteria for, intercarrier compensation reform, which the FCC has so clearly already delineated.

Respectfully submitted,

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