Before the
PENNSYLVANIA PUBLIC UTILITY COMMISSION

Workshop and Solicitation of Comments on the Missoula Plan	))	Docket No. M-00061972

POST-WORKSHOP COMMENTS OF THE
BROADBAND CABLE ASSOCIATION OF PENNSYLVANIA

The Broadband Cable Association of Pennsylvania ("BCAP") hereby submits its post-workshop comments regarding the "Missoula Plan" that has been submitted to the Federal Communications Commission ("FCC").[1] As we explain in these comments, in its current form the Missoula Plan is fundamentally inconsistent with the objectives the FCC established for intercarrier compensation reform. In particular, the Missoula Plan will hinder, rather than promote, facilities-based competition for telecommunications services and therefore its adoption would not be in the best interests of Pennsylvania consumers.

I. INTRODUCTION AND SUMMARY

Cable operators have invested over $100 billion since 1996, including over $6 billion in Pennsylvania, to provide a full suite of digital video, broadband, and phone services. By the end of this year, telecommunications service provided by cable operators will be available to over 85 million customers nationwide.

The entry of cable operators into the telecommunications market unquestionably is good news for consumers -- in Pennsylvania and across America. Cable's entry into the telecom market has produced tangible savings for consumers. According to a recent

[1] BCAP is the trade association for cable operators in Pennsylvania. BCAP appeared at the workshop held by the Pennsylvania Public Utility Commission ("PUC" or "Commission") in this docket on September 11, 2006, and these written comments are consistent with our oral presentation at that workshop.

J.D. Power report, cable phone customers save an average of $11.19 per month on wireline phone bills.[2]

As cable operators have entered the telecommunications market with state-of-the-art IP networks and innovative service offerings, they have been confronted with a regulatory regime that has not always kept pace with market developments. In no area is this more true than intercarrier compensation. As the FCC recognized last year in its *Intercarrier Compensation FNPRM*, the current intercarrier compensation regime "creates distortions in the marketplace at the expense of healthy competition."[3] This is an understatement, to say the least.

In the *Intercarrier Compensation FNPRM*, the FCC identified three primary objectives in connection with intercarrier compensation reform. The first goal identified by the FCC was economic efficiency. In particular, it said that the development of facilities-based competition was "one of the [FCC]'s most important policies."[4] Second, the FCC emphasized the importance of universal service. The FCC said that it would be "particularly receptive" to proposals that offer increased choices and lower rates for rural consumers.[5] Third, the FCC said that any new regime should strive for competitive and technological neutrality. By this the FCC meant that "similar functions should be subject to similar cost recovery mechanisms."[6]

The cable industry supports these goals completely and is committed to working with this Commission and the FCC to achieve them. In particular, the development of

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[2] Press Release, *J.D. Power and Associates Reports: Cable Companies Dominate Customer Satisfaction Rankings for Local and Long Distance Telephone Service* (July 12, 2006).
[3] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4687, para. 3 (2005) (*Intercarrier Compensation FNPRM*).
[4] *Id.* at 4701, para. 31.
[5] *Id.* at 4702, para. 32.
[6] *Id.* at 4702, para. 33.

facilities-based competition offers substantial, tangible benefits to consumers. Cable operators already are providing these benefits to consumers in urban and rural areas and, with the right policies in place at the federal and state level, operators hope to expand the availability of these competitive services. Despite the recognized importance of pursuing intercarrier compensation reform, BCAP believes that the Missoula Plan does not achieve the objectives identified by the FCC in its *Intercarrier Compensation FNPRM* and would undermine this Commission's efforts to promote facilities-based competition throughout the Commonwealth. Accordingly, this Commission should not support its adoption.

II. ADOPTION OF THE MISSOULA PLAN WOULD NOT SERVE THE INTERESTS OF PENNSYLVANIA CONSUMERS.

BCAP believes the Missoula Plan fails to achieve any of the goals identified by the FCC and is not in the best interests of Pennsylvania consumers. It is primarily intended to preserve (if not increase) Incumbent Local Exchange Carrier ("ILEC") revenues and we believe that it will hinder, rather than promote, facilities-based competition. The fact that all but two of the plan's supporters are ILECs (or affiliated with ILECs) provides strong evidence that the proposal in its current form is anticompetitive or, at a minimum, "anti-competitor."[7] Identified below are five of the most significant concerns raised by the plan.

[7] Other than Global Crossing and Level 3 Communications, every company that supports the plan is an incumbent LEC or affiliated with an ILEC. This includes AT&T Corp. Neither Global Crossing nor Level 3 compete with ILECs for residential customers; however, both companies stand to benefit greatly by the deregulation of transit service under the Missoula Plan. Even Verizon, the largest ILEC in Pennsylvania opposes the plan. Given these dynamics, the Missoula Plan cannot be categorized as an industry consensus plan to fairly address intercarrier compensation reform.

A. The Missoula Plan Is Not Competitively or Technologically Neutral Because It Retains Artificial Distinctions Among Services and Providers.

As the FCC explained in the *Intercarrier Compensation FNPRM*, "existing compensation regimes are based on jurisdictional and regulatory distinctions that are not tied to economic or technical differences between services. . . . These artificial distinctions distort the telecommunications markets at the expense of healthy competition."[8] In any new regime, the FCC made clear that "[s]imilar types of functions should be subject to similar cost recovery mechanisms. . . . To the extent a proposed regime would preserve distinctions between types of carriers and types of traffic, such distinctions should be based on legitimate economic or technical differences, not artificial regulatory distinctions."[9]

Judged against this standard, the Missoula Plan is a failure – it maintains distinctions between local and long distance calls; it maintains distinctions between incumbents and competitors;[10] and it maintains distinctions between Local Exchange Carriers ("LECs"), wireless carriers, and VoIP providers.[11] None of these distinctions are based on "legitimate economic or technical differences" as the FCC required. To the contrary, these distinctions simply preserve the legacy regulatory regime that ILECs have used so effectively to hinder the development of facilities-based competition. The fact that the two largest Interexchange carriers ("IXCs") are now owned by the two largest ILECs illustrates how unnecessary these artificial distinctions are.

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[8] *Intercarrier Compensation FNPRM* at 4694, para. 15.
[9] *Id.* at para. 33.
[10] For example, only incumbents are considered Track 2 or Track 3 providers. All competitive providers are considered Track 1 providers, even when they serve the same geographic area as a Track 2 or Track 3 incumbent.
[11] For example, wireless providers have different local calling areas than other providers under the plan.

Maintaining all these irrational distinctions will have a significant effect on the development of facilities-based competition. Cable operators generally offer retail services that do not distinguish between local and long distance calls, or between interstate and intrastate. Requiring such distinctions as part of the intercarrier compensation regime creates a need for complicated and unnecessary billing and administrative activities, and therefore imposes costs on cable operators that they would not otherwise incur. BCAP respectfully submits that needlessly increasing the costs of current and potential competitors based on a proposed "reform" plan that does not even achieve the objectives articulated by the FCC represents inappropriate public policy that is contrary to the pro-competition goals of the Nation and this Commonwealth.

Moreover, as a number of parties explained at the workshop, it is highly unlikely that this complex new set of rules will resolve pending disputes among providers and prevent future litigation. Indeed, BCAP is concerned that it is far more likely to have the opposite effect. This Commission has witnessed over the last ten years how the endless litigation over the myriad of issues emanating from the Telecommunications Act of 1996 and Chapter 30 of the Public Utility Code has stymied competitive entry. This is precisely what the FCC and the PUC should avoid in order to promote facilities-based competition.

B. The Missoula Plan Will Harm Competitors and Consumers by Deregulating Transit Services.

In its *Intercarrier Compensation FNPRM*, the FCC recognized that "indirect interconnection via a transit service provider is an efficient way to interconnect when carriers do not exchange significant amounts of traffic."[12] It also acknowledged that

[12] *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4740, para. 126.

"without the continued availability of transit service, carriers that are indirectly interconnected may have no efficient means by which to route traffic between their respective networks."[13] Even in markets where the FCC has reduced regulation of the incumbent due to the presence of facilities-based competition, it has acknowledged the importance of retaining interconnection obligations on the ILEC in order to facilitate transit arrangements among other providers.[14]

From BCAP's perspective, continued regulation of transit services is absolutely critical to the development of facilities-based competition in Pennsylvania. As a result of the dominant position that Verizon and other ILECs possess in every part of the state, most of the traffic that a new entrant exchanges will be with an ILEC, and a much smaller volume of traffic will be exchanged with other providers in that service area. Consequently, because this small volume of traffic does not warrant the cost of establishing direct connections, a new entrant generally must rely on ILEC transit service to exchange traffic with these other carriers. Unfortunately, ILECs presently face little, if any, competition in the market for transit services. As a result of this limited competition, cable operators and other competitive entrants frequently find themselves at the mercy of their main competitors for this crucial input.

The Missoula Plan would remove transit service as an interconnection agreement term, replacing it with commercial agreements. For the limited three-year period in which transit rates are regulated, those rates far exceed the costs of providing the

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[13] *Id.* at 4740, para. 125.

[14] *See Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, WC Docket No. 04-23, Memorandum Opinion and Order, 20 FCC Rcd 19415, 19457, para. 86, n.25. (2005).

service.[15] After three years, even those caps disappear and LECs can charge whatever rate they want for this critical service. This deregulation of transit services is completely unjustified given the dearth of competition that ILECs face for these services. The lack of any meaningful constraint on transit rates – either through regulation or competition – will result in cost increases for cable operators and other facilities-based competitors, which then reduces the benefits that consumers will derive from competitive entry. Therefore, the proper approach to transit is to require it to be included in interconnection agreements at cost-based rates determined by state commissions.

C. The Interconnection Rules Included In The Missoula Plan May Create More Problems Than They Solve.

The FCC recognized in the FNPRM that some of the most contentious issues between telecommunications providers involve the physical interconnection of networks and the financial responsibility for transport between networks.[16] The FCC found, therefore, that any proposal should have "clear rules regarding how and where carriers interconnect and the allocation of responsibilities for any facilities needed to connect two networks."[17]

The Missoula Plan proposes an interconnection regime based on the "edge" concept, in which every provider must identify at least one point on its network where it will accept traffic from any other provider. The originating provider generally is responsible for arranging to deliver its traffic to the edge established by the terminating carrier, and is financially responsible for the cost of those arrangements. Although the

[15] Level 3, which supports the plan, acknowledged during the workshop that these rates were too high.
[16] *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4727-28, para. 91.
[17] *Id.* at 4702-03, para. 34.

edge concept is not necessarily objectionable, BCAP has a number of concerns with the manner in which it would be implemented under the Missoula Plan.

First, the rural transport rules are highly discriminatory. While the plan generally places financial responsibility for delivering traffic on the originating provider, that is not the case when a Track 1 carrier (e.g., any cable operator) exchanges traffic with a Track 3 carrier (e.g., any rural LEC). In this scenario, the plan proposes to place almost the entire cost of the interconnection arrangement on the Track 1 carrier. In situations where the Track 1 carrier serves the same geographic area as the Track 3 carrier, this result is totally unjustified and anticompetitive.

The discriminatory nature of the rural transport rules is compounded by the "incentive regulation" component of the Missoula Plan. One likely option for a competitor that is responsible for transport to and from a rural LEC's end office is to purchase special access service from the rural LEC. But under the incentive regulation plan, rate-of-return LECs would no longer be limited to cost-based rates for special access services. Instead, the prices of those services would be allowed to rise as much as ten percent per year.[18]

Second, the plan only applies these interconnection rules to "non-access" traffic, while access traffic continues to be subject to interconnection requirements that are contained in LEC tariffs. As a result, even as termination rates for access and non-access traffic are unified, terminating carriers may still be able to require different types of traffic to be delivered on separate trunks to separate locations. This has the effect of

[18] This problem is indicative of the "no risk, all reward" nature of the incentive regulation portion of the Missoula Plan. While the plan would enable rate-of-return LECs to earn as much as possible, a LEC would still have the right to ask the FCC for rate increases if its rate of return fell below 10.25 percent. Needless to say, cable operators and other facilities-based competitors must operate with no such guarantee.

preventing carriers from delivering traffic in the most efficient manner possible and it imposes significant costs on competitors.

Third, by allowing ILECs to designate their preferred point of interconnection, and impose transport charges if competitors choose to interconnect at a different point on the ILEC network, the "edge" concept changes the ground rules for interconnection in an anticompetitive manner. Under section 251(c)(2), a CLEC may choose to interconnect at any technically feasible point on an ILEC's network and need only establish a single point of interconnection ("POI") in each LATA.[19] As the United States Court of Appeals for the Third Circuit explained, "the CLEC cannot be required to interconnect at points where it has not requested to do so."[20] While the Missoula Plan acknowledges that a Competitive Local Exchange Carrier ("CLEC") has the right under section 251(c)(2) to choose where it wants to interconnect with an ILEC, the plan subverts this pro-competitive statutory scheme by authorizing ILECs to impose additional charges when a CLEC actually exercises that right. Allowing an ILEC to charge extra when a CLEC chooses a single POI is no different than permitting the ILEC to require multiple POIs in that both strategies have the effect of imposing unnecessary costs on competitors.[21]

Finally, as a number of parties discussed at the workshop, there is significant potential for these new interconnection rules to interfere with existing negotiated arrangements. By giving carriers the ability to demand different interconnection arrangements than they have agreed to in the past, the plan creates the potential for a new round of disputes between providers. This problem is particularly acute in areas served

[19] *See* 47 U.S.C. § 251(c)(2).
[20] *MCI Telecommunications Corp. v. Bell Atlantic-Pennsylvania*, 271 F.3d 491, 518 (3d Cir. 2001).
[21] *Id.* at 517 (requiring "additional connections at an unnecessary cost to the CLEC[] would be inconsistent with the policy behind the Act.").

by Track 3 companies because of the unreasonably favorable treatment of those companies under the proposed interconnection rules.

D. The Proposed Restructure Mechanism Unfairly Shelters ILECs From Competitive Forces and Imposes Significant Burdens on Pennsylvania Consumers.

The Missoula Plan proposes to offset some access charge reductions for incumbent LECs with money from a so-called "Restructure Mechanism." BCAP believes that the proposed Restructure Mechanism is deeply flawed. Despite the name, the Restructure Mechanism is exactly like a universal service fund, except that it is not open to competitive providers. This is a clear violation of federal law and completely at odds with the goal of competitive neutrality.[22]

The discriminatory nature of the proposal discourages competition. Under the plan, competitors must match the access charge reductions of incumbents (and in some cases charge even less), but without the benefit of the offsetting funds from the Restructure Mechanism. Obviously this makes the business case less attractive for any company considering competing against an incumbent that has access to this additional regulatory revenue stream.

Moreover, the entire premise that ILECs must be compensated dollar-for-dollar for any access charge reductions (either from the Restructure Mechanism or through increased Subscriber Line Charges) is flawed from the start.[23] In the five years since the

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[22] *See Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, 12 FCC Rcd 8776, 8801-04, paras. 45-52 (1997) (establishing competitive neutrality as a principle to govern the distribution of universal service support).

[23] Section 3017(a) of the Public Utility Code states that "[t]he commission may not require a local exchange telecommunications company to reduce access rates except on a revenue-neutral basis." 66 Pa. C.S. § 3017(a). Under the Code, "the commission" is the PUC, not the FCC. *Id.* at § 102. Because the Missoula plan would be enacted by the FCC, Section 3017(a) would not prevent the adoption by the FCC of intercarrier compensation reform that was not designed to be revenue neutral for LECs *or* that included in the revenue neutrality equation potential additional revenue sources. In addition, nothing in the Public

last major access charge reform efforts (the Global plan in Pennsylvania and the CALLS plan at the FCC), ILECs have developed numerous alternative revenue streams (such as long distance service, DSL service, and video services) to recover the costs of their networks. In a marketplace where companies compete by providing packages of multiple services, providing the incumbent with access to a revenue stream (i.e., the Restructure Mechanism) that is not available to competitors unfairly tips the scales and unquestionably discourages competitive entry.

Not only are there significant problems in the manner in which the Restructure Mechanism distributes money, there are significant issues with the collection of this money. As demonstrated by the Office of Consumer Advocate ("OCA"), consumers in Pennsylvania, regardless of where they live or from whom they take service, will be expected to contribute almost $100 million annually to this new funding mechanism,[24] an amount that far exceeds the additional amount that Pennsylvania carriers are expected to draw from this new mechanism. Obviously the financial burden that the plan imposes on Pennsylvania consumers should be a major consideration for this Commission.

E. The Missoula Plan Will Discourage Investment Because It Does Not Clearly Address the Rights and Obligations of IP-Based Communications Providers.

IP-based networks represent the future of telecommunications. The FCC recognized this trend two years ago, in its *IP-Enabled Services NPRM.* As it said in that order, the "increasing deployment of broadband facilities therefore has prompted the

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Utility Code requires the PUC to support the Missoula Plan solely because it proposes "revenue neutrality" for ILECs or prevents the Commission from opposing the Missoula Plan at the FCC on the basis that it should not be revenue neutral.

[24] According to the OCA, Pennsylvania consumers will pay 4.2 percent of the estimate $2.25 billion in additional funding that the plan calls for, or roughly $95 million. Moreover, as the OCA explained, the materials submitted in support of the plan likely understate the amount of funding that will be needed, so the total amount imposed on Pennsylvania consumers may well be higher.

development of services and applications that provide broader functionality and greater consumer choice at prices competitive to those of analogous services provided over the public switched telephone network ("PSTN")."[25]

Since that time, the cable industry has proved the FCC right. Cable operators have introduced IP-based phone service in Pennsylvania and throughout the country. Additional Pennsylvania cable operators are poised to introduce IP-enabled voice services in the services territories of the rural ILECs. These new services are bringing new jobs to communities and new choices, and big savings, to consumers.

Cable operators are not the only ones taking advantage of the benefits of IP technology. ILECs also are transitioning to IP technology at a rapid pace. Verizon has been using packet switching technology to serve local business and consumer lines since 2004.[26] Similarly, Embarq recently migrated its one-millionth customer from a circuit-switched network to a packet-switched network.[27]

Given the obvious transition of the entire telecommunications industry to IP-based networks and services, any comprehensive intercarrier reform effort obviously must consider what rules to apply to the exchange of traffic between IP-based providers. Remarkably, nowhere in the hundreds of pages of documentation filed with the Missoula Plan is there a proposal to address this critical issue.

The failure of the Missoula Plan to address the transition of LEC networks from circuit switching to packet switching, and the increasing significance of IP-to-IP traffic exchange, is a fundamental flaw in the plan. For cable operators and other companies

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[25] *IP-Enabled Services*, WC Docket No. 04-36, Notice of Proposed Rulemaking, 19 FCC Rcd 4863, 4865, para. 3 (2004).
[26] Press Release, *Verizon Begins Deploying Packet Switches to Provide Local Phone Service* (June 22, 2004).
[27] Press Release, *Embarq Reaches Packet Network Milestone* (August 22, 2006).

that are using IP-based networks today, the Missoula Plan does not provide the "regulatory certainty" that its proponents claim because it is not even clear whether calls they send to, or receive from, other IP-based networks are covered by the plan. As LECs increasingly transition to IP networks, this uncertainty will affect an increasingly large share of traffic.

Moreover, the Missoula Plan is unclear even with respect to types of IP traffic that it purports to address. For example, while the obligation of VoIP providers to pay compensation when they originate traffic is featured prominently, nowhere in the plan is there any discussion of the compensation that applies when a call originates with a LEC (or wireless carrier) and terminates with an IP-based provider. If cable operators and other IP-based providers are expected to pay compensation when they originate calls, they certainly should be permitted to collect compensation when they terminate calls. The supporters of the plan stated during the Commission workshop that VoIP providers were entitled to terminating compensation under the plan, and BCAP would welcome an on-the-record clarification of that point. This clarification will not, however, resolve the uncertainty regarding IP-to-IP traffic treatment, as noted earlier.

III. CONCLUSION

For all the reasons explained herein, BCAP urges the Commission not to support adoption of the Missoula Plan by the FCC.

Respectfully submitted,

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