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June 15, 2020

Lynn M. Retz, Executive Director
Kansas Corporation Commission
1500 SW Arrowhead Rd.
Topeka, KS 66604

RE: Initial Comments of the Rural Local Exchange Carriers
Docket No. 20-GIMT-387-GIT

Dear Ms. Retz:

Attached for filing please find the Initial Comments of the Rural Local Exchange Carriers. If you have any questions, please let me know.

Sincerely,

Colleen R. Jamison
JAMISON LAW, LLC

Att:

cc: Tom Gleason
Mark Doty
Mark Caplinger

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BEFORE THE STATE CORPORATION COMMISSION
OF THE STATE OF KANSAS

In the Matter of a General Investigation into Interconnection, Porting, Evolving Technology, and the Impacts on Consumer Choices in Kansas.	))))	Docket No. 20-GIMT-387-GIT

INITIAL COMMENTS OF THE RURAL LOCAL EXCHANGE CARRIERS

COME NOW the Rural Local Exchange Carriers ("RLECs")[1] and for their comments, state as follows:

I. INTRODUCTION

1. This proceeding was precipitated by proposals to shift responsibility for certain costs of providing Voice over Internet protocol ("VoIP") service from the VoIP service provider to Kansas incumbent rural local exchange carriers ("RLECs"). VoIP service, as defined by K.S.A. 66-2017, is a service that "permits a user to receive a call that originates on the public switched telephone network (PSTN) and to terminate a call to the PSTN." In the present context the service offered to Kansas customers by VoIP providers for a fee includes the ability to receive a call originated by a customer of an RLEC.

2. As the cost-causer and as the entity offering the service to consumers the VoIP provider, not the RLEC, is responsible for paying the costs necessary to provide network

[1] The Rural Local Exchange Carriers are comprised of the following Kansas rural local exchange carriers ("LECs"): Blue Valley Tele-Communications, Inc.; Columbus Communications Services, L.L.C.; Craw-Kan Telephone Cooperative, Inc.; Cunningham Telephone Co., Inc.; Golden Belt Telephone Association, Inc.; Gorham Telephone Co., Inc.; H&B Communications, Inc.; Haviland Telephone Co., Inc.; Home Telephone Co., Inc.; JBN Telephone Company, Inc.; KanOkla Telephone Association; LaHarpe Telephone Co., Inc.; Madison Telephone, LLC; Moundridge Telephone Co., Inc.; Mutual Telephone Company; Rural Telephone Service Co., Inc. d/b/a Nex-Tech; Peoples Telecommunications, LLC; Pioneer Telephone Association, Inc.; Rainbow Telecommunications Association, Inc.; S&A Telephone Company, Inc.; S&T Telephone Cooperative Association, Inc.; South Central Telephone Association, Inc.; Southern Kansas Telephone Co., Inc.; Totah Telephone. Company, Inc.; Tri-County Telephone Association, Inc.; Twin Valley Telephone, Inc.; United Telephone Association, Inc.; Wamego Telecommunications Company, Inc.; Wheat State Telephone Company, Inc. d/b/a Wheat State Technologies; Wilson Telephone Co., Inc.; and, Zenda Telephone Co., Inc.

arrangements and all elements of the service, not merely number porting, for which the VoIP customers pay to the provider of the service.

3. VOIP service is an information service. *See Charter Advances Servs. (MN), LLC v. Lange,* 903 F.3d 715 (8th Cir. 2018). VoIP providers have not assumed the common carrier obligations of a telecommunications carrier that would entitle them to the interconnection and negotiation rights afforded by statute to telecommunications carriers. Because a VOIP provider is not a regulated telecommunications carrier, it is not afforded any interconnection rights as a common carrier under the Federal Communications Act ("Federal Act" or "FTA"). While LECs are required to provide VoIP providers with number portability,[2] the Federal Communications Commission ("FCC") has not imposed Title II common carrier regulations on VoIP Services. The Eighth Circuit has ruled that VoIP is an information service that does not have Section 251/252 rights under the FTA.

4. To the extent RLECs are required to provide local number portability to and interconnect with VoIP providers, the Commission may impose such a requirement only in a manner that is consistent with FCC rules. The LECs' rural subscribers that never use a VoIP provider's information service should not be required to subsidize that information service. Congress and the FCC have prohibited such implicit subsidies.[3] To the extent that the

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[2] *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; Numbering Resource Optimization,* Report and Order, Declaratory Ruling, Order on Remand, and Notice of Proposed Rulemaking, 22 FCC Rcd. 19531 (2007) ("VoIP LNP Order").

[3] The FCC has adopted rules to "fulfill[] Congress's mandate to remove implicit subsidies to allow for a more efficient marketplace in which consumers receive the correct pricing signals, competition is no longer distorted, and consumers pay only for the services they use." *Updating the Intercarrier Comp.l Regime to Eliminate Access Arbitrage,* No. DA 10-1093, WL 5558878, at *2 ¶5 (Oct. 25, 2019). "In passing the Telecommunications Act of 1996, 'Congress sought to establish a pro-competitive, deregulatory national policy framework for the United States' telecommunications industry in which implicit subsidies for rural areas were replaced by explicit ones in the form of universal service support." *Id.* N. 16 (internal quotation marks omitted) (*citing Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage,* Report and Order and Modification of Section 215 Authorizations, FCC 19-94, 2019 WL 4785554 at 3, para. 5 (Sept. 27, 2019), and 47 U.S.C. §§201(b), 254(e).

Commission has the authority to regulate VoIP services, such authority is highly restricted under K.S.A. 66-2017. That statue specifying the Commission's limited authority over VoIP providers expressly precludes modification of the Commission's regulation of rural telephone companies. The mere presence of a provider offering a VoIP service in an RLEC service area does not authorize the Commission to impose new burdens and costs on the RLEC, or to require an RLEC to transport local traffic beyond the RLEC's service area boundaries. VoIP carriers should be required to exchange traffic with RLECs, if at all, pursuant to commercial agreements that are not governed by the Section 251/252 interconnection requirements of the federal act; such sections are applicable only to telecommunications carriers subject to common carrier obligations.

II. BACKGROUND

A. Rural carrier operations in Kansas

5. As the Commission is aware, rural carriers face unique challenges in serving their communities. One of the central challenges for rural areas is that high costs and low population densities make the provision of affordable, reliable voice service much more difficult. Costs for rural carriers to serve their local communities are much higher, in contrast to large carriers or service providers that operate in urban cities and other metropolitan areas.

6. Kansas RLECs have stepped up to the challenge and invested hundreds of millions of dollars in their networks to bring the benefits of reliable and affordable universal service and enhanced universal service (see K.S.A. 66-1,187(p-q)) services to their customers, in satisfaction of Kansas statutory public policy (see K.S.A. 66-2001). As a result of their prudent investment and focus on meeting the needs of their rural communities, RLECs have committed millions of dollars to provide state-mandated services for the benefit of their subscribers and the public generally. RLECs serve as carriers of last resort pursuant to K.S.A. 66-2009 and are

entitled to recover the costs of providing such service in their respective Commission-defined rural service areas.

7. When the FCC adopted bill-and-keep[4] for non-access traffic, the agency acknowledged that rural carriers had unique issues regarding traffic transported outside of their service areas. Specifically, the FCC was concerned that rural carriers would be subject to onerous and burdensome transport costs if they were required to transport traffic to wireless carriers if those carriers did not have a point of interconnection that was within the RLECs' service areas:

> We find it appropriate, however, to establish an interim default rule allocating responsibility for transport costs applicable to non-access traffic exchanged between CMRS [commercial mobile radio service] providers and rural, rate-of-return regulated LECs to provide a gradual transition for such carrier. . . .
>
> Specifically, for such traffic, the rural, rate-of-return LEC will be responsible for transport to the CMRS provider's chosen interconnection point when it is located within the LEC's service area. When the CMRS provider's chosen interconnection point is located outside the LEC's service area, we provide that the LEC's transport and provisioning obligation stops at its meet point and the CMRS provider is responsible for the remaining transport to its interconnection point. Although we do not prejudge our consideration of what allocation rule should ultimately apply to the exchange of all telecommunications traffic, including traffic that is considered access traffic today, under a bill-and-keep methodology, we believe that this rule is warranted for the interim period to help minimize disputes and provide greater certainty until rules are adopted to complete the transition to a bill-and-keep methodology for all intercarrier compensation.[5]

8. The FCC's concerns that rural carriers would be saddled with additional costs to transport calls to interconnection points outside their service areas are equally applicable to traffic exchanged between rural carriers and VoIP providers. As further discussed below, VoIP

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[4] A pricing scheme for the two-way interconnection of two networks under which the reciprocal call termination charge is zero - that is, each network agrees to terminate calls from the other network at no charge. In other words, each carrier bills its own customers for the origination of traffic and does not pay the other carrier for terminating this traffic.

[5] *Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, ¶¶ 998-999 (2011) ("*USF/ICC Transformation Order*"), *aff'd, In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014), *cert. denied*, 135 S. Ct. 2050, and 135 S. Ct. 2072 (2015).

providers often do not have facilities located in the RLECs' respective service areas and must exchange traffic with RLECs indirectly through other carriers, or by sending traffic through the "Internet cloud." In either case, the cost of transporting VoIP traffic should not be imposed on RLECs if the VoIP provider does not have a point of presence ("POP") in the LEC's service footprint.

B. Exchange of Traffic by Rural Carriers with VoIP Providers

9. One of the most problematic issues for RLECs with regard to the routing of VoIP traffic is the cost of transporting traffic to VoIP providers that do not have a POP within the RLEC's service area. In rural areas, VoIP providers typically do not have "last-mile" facilities in order to connect to the PSTN to reach calling and called parties. Rather, VoIP providers typically use the facilities of other entities to transport traffic to and from the public switched telephone network ("PSTN").[6]

10. Cognizant of the burdensome impact that out-of-area transport costs would have on RLECs, the FCC has implemented a "Rural Transport Rule" for RLECs. Specifically, for local and extended area service ("EAS") calls made by an RLEC's customer to a non-rural carrier's customer, the RLEC is responsible for transport to a non-rural carrier's POP only when the POP is located within the RLEC's service area. When the non-rural carrier's POP is located outside the RLEC's service area, the RLEC's transport and provisioning obligation stops at its meet point, and the non-rural carrier is responsible for the remaining transport to its POP.[7]

11. In the case of the exchange of traffic between RLECs and VoIP providers, identical concerns addressed by the FCC for the out-of-area transport of wireless traffic exist. If

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[6] *Connect American Fund*, Declaratory Ruling, 30 FCC Rcd. 1587, 1588 ¶ 2 (2015), *remanded*, *AT&T Corp. v. FCC*, 841 F.3d 1047, 1048 (D.C. Cir. 2016).

[7] *See USF/ICC Transformation Order*, 26 FCC Rcd. 17663, ¶¶ 998-999.

an RLEC's customer places a local telephone call to a VoIP customer, the call must be transported to the VoIP network so that the VoIP provider can meet its service obligation to complete the call to the VoIP provider's customer. If the VoIP carrier's POP is located outside of the RLEC's service area, transport over third-party facilities is needed to transmit the call to the VoIP POP. The Commission should not force RLECs, rather than the VoIP provider, to pay the third-party transiting carrier for transporting traffic to the VoIP POP outside the LECs' service areas when such transport is necessary to satisfy a statutorily defined element (K.S.A. 66-2017(d)(4)(C)) of the VoIP service offered to consumers for a fee.

C. Potential to burden rural customers with additional costs

12. VoIP provider proposals to Kansas RLECs have included proposals to port numbers and to exchange all traffic on a bill-and-keep[8] basis – including traffic that is subject to tariffed access charges – even where the VoIP provider did not have a POP in RLEC exchanges. Under such a proposal, because the VoIP provider did not have an in-area POP, RLECs exchanging traffic with the VoIP provider could be required to pay transport costs in order to route local calls outside of their exchanges, only to have those local calls transported again, back into the same exchange for termination to a VoIP provider's customer.

13. A VoIP provider could establish direct connections for the exchange of local traffic to avoid having RLECs pay unnecessary transport costs for local traffic RLEC. Completion of local calls between a VoIP provider and an RLEC using existing jointly provisioned access service trunks connecting the RLEC with AT&T, even though those facilities were only permitted to be used for long distance traffic, would enable the VoIP provider

[8] See footnote 4, *infra*.

unlawfully to avoid paying the applicable access tariff rates by commingling local and long distance traffic.

14. As discussed below, the FCC has implemented the "VoIP Symmetry Rule" to clarify that interexchange VoIP calls continue to be subject to access charges and state and federal access tariffs. Not only does the use of jointly provisioned AT&T trunks for transport of VoIP local traffic likely violate federal law, it is also in contravention of approved tariffs and the filed rate doctrine, and therefore unenforceable.

III. DISCUSSION

A. Federal Telecommunications Act interconnection framework

1. Duties under Section 251 of the Federal Act

15. Section 251 of the Federal Telecommunications Act of 1996[9] ("FTA") sets forth the interconnection requirements and other LEC obligations designed to foster local competition with other telecommunications carriers subject to FTA Title II common carrier regulations. The nature and scope of these obligations vary depending on the type of service provider involved. Section 251(a) sets forth general duties applicable to all telecommunications carriers, including the duty "to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers."[10] Section 251(b) sets forth additional duties for LECs pertaining to resale of services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation (i.e., arrangements for exchange of traffic terminating on another common carrier's network).[11] Section 251(c) sets forth the most detailed obligations, which apply to

[9] 47 U.S.C. § 251.

[10] 47 U.S.C. § 251(a)(1).

[11] 47 U.S.C. § 251(b).

incumbent LECs ("ILECs").[12] These section 251(c) obligations include the duty to "negotiate in good faith in accordance with section 252 the particular terms and conditions of agreements" with other telecommunications carriers to fulfill the section 251(b) and (c) requirements.[13]

16. Section 252 of the FTA[14] directs state commissions to mediate and arbitrate interconnection disputes involving ILECs and other telecommunications carriers, as well as to review interconnection agreements arrived at "by negotiation and arbitration" with other telecommunications carriers.[15] Under Section 252(a), when an ILEC receives a request from another telecommunications carrier for "interconnection, services, or network elements pursuant to section 251," and enters into voluntary negotiations, the ILEC may negotiate without regard to the standards set forth in Sections 251(b) and (c).[16] Furthermore, Section 252(b) sets forth a mandatory arbitration scheme for interconnection disputes.

17. A telecommunications carrier's rights and obligations under Section 251(a) are predicated on the status of the entity requesting interconnection. Specifically, Section 251 states that telecommunications carriers, which, for purposes of this proceeding, are RLECs, have a duty "to interconnect directly or indirectly with the facilities and equipment *of other telecommunications carriers*."[17] The FCC has "emphasized that the rights of telecommunications carriers to section 251 interconnection are limited to those carriers that, at a

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[12] 47 U.S.C. § 251(c).

[13] *Id.*

[14] 47 U.S.C. § 252.

[15] 47 U.S.C. §§ 252(a)(1), (e)(1).

[16] 47 U.S.C. § 252(a)(1).

[17] *Id.* (emphasis added).

minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis."[18]

2. **Telecommunications services are treated differently than information services. Telecommunications services are entitled to Section 251 interconnection, while information services are not.**

18. Services provided by carriers are classified as either telecommunications services or information services, and such classification affects a state's ability to regulate interconnection issues. Telecommunications services are generally subject to "dual state and federal regulation."[19] "Only telecommunications carriers have the right to compel interconnection with a local exchange carrier."[20] In contrast, information service providers do not have interconnection rights under Section 251(a).[21] In adopting rules to implement the interconnection provisions of the federal act, the FCC "made it clear that an information service provider would not be able to avail itself of the interconnection requirements of section 251 of the [federal] Act."[22] "[I]nformation service providers may take advantage of the interconnection provisions of the Act only to the extent that they also provide telecommunications services . . . because telecommunications carriers that have interconnected or gained access under sections 251(a)(1), 251(c)(2), or 251(c)(3) [of the federal act], may offer information services through the

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[18] *Time Warner Cable Request for Declaratory Ruling that Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services To VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd. 3513, 3520 ¶ 14 (2007) (ruling that VoIP providers can route calls to RLECs through other telecommunications carriers) ("*Time Warner Declaratory Ruling*").

[19] *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 375 (1986).

[20] *Iowa Telecomms. Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 (8th Cir. 2009) (citing 47 U.S.C. § 251(c)(2)).

[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15985-92 (1996) ("*Local Competition Order*").

[22] *Letter Ruling,* 11 FCC Rcd. 15046 (1996) (citing *Local Competition Order*).

same arrangement, so long as they are offering telecommunications through the same arrangement as well."[23]

19. The FTA defines "telecommunications carrier" as "any provider of telecommunications services" and specifies that "[a] telecommunications carrier shall be treated as a common carrier . . . only to the extent that it is engaged in providing telecommunications services."[24] The term "telecommunications service" means the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively directly to the public."[25] "Telecommunications" are defined as "the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent or received."[26]

20. In 1980, the FCC issued its *Computer II* decision,[27] in which it addressed technological developments that blurred the boundary between traditional telecommunications and data processing services. The FCC adopted a regulatory framework that distinguished between the offering of "basic transmission service" and "enhanced service." The FCC defined "basic service" as "limited to the common carrier offering of transmission capacity for the movement of information."[28] "In offering this capacity, a communications path is provided for the analog or digital transmission of voice, data, video, etc. information," and "the carrier's basic transmission network is not used as an information storage system."[29] In other words, "a carrier

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[23] *Id.* (citing and quoting *Local Competition Order* ¶ 995).

[24] 47 U.S.C. § 153(44).

[25] 47 U.S.C. § 153(46).

[26] 47 U.S.C. § 153(43).

[27] *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, 77 F.C.C.2d 384 (1980) ("*Computer II*").

[28] *Id.* at 387, 419, ¶¶ 5, 93.

[29] *Id.* at 419-420, ¶¶ 93, 95.

essentially offers a pure transmission capability over a communications path that is virtually transparent in terms of its interaction with customer supplied information."[30] In contrast, the FCC defined "enhanced service" as "any offering over the telecommunications network which is more than basic transmission service."[31] The FCC further determined that only basic services were subject to mandatory Title II regulation, whereas enhanced services were not.[32]

21. The FCC has determined that the term "information service" has essentially the same meaning as the term "enhanced service" for purposes of applying the FTA.[33] An "information service" is "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications."[34] The fact that a telecommunications carrier offers an "information service" – and seeks to interconnect to exchange such traffic – does not void the carrier's interconnection rights, provided that the carrier also offers "telecommunications services."[35] The determination of whether VoIP is a telecommunications service or an information service is critical in determining whether VoIP providers have common carrier interconnection rights under Sections 251/252 of FTA.

B. Classification of VoIP as Telecommunications or an Information Service.

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[30] *Id.* at 420, ¶ 96.

[31] *Id.* at 420, ¶ 97.

[32] *Id.* at 387, ¶¶ 5, 7. Title II contains the so-called "common carrier provisions" of the FTA. *See* 47 U.S.C. §§ 201-03, 205-06, 214. Congress amended Title II through the passage of the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, to include additional common carrier obligations, such as Sections 251 and 252, 47 U.S.C. §§ 251 and 252. *See generally* 47 U.S.C. §§ 201-276.

[33] *See, e.g., Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended*, 11 FCC Rcd. 21905, 21955, ¶ 102 (1996); *Federal-State Joint Board on Universal Service*, Report to Congress, 13 FCC Rcd. 11501, 11511, ¶ 21 (1998). *See also* 1996 Act Conference Report, S. Rep. 104-230 at 18 (Feb. 1, 1996) (stating that the 1996 Act "defines 'information service' similar to the FCC definition of 'enhanced services'"); *NCTA v. Brand X Internet Svcs.*, 545 U.S. 967, 992-994 (2005).

[34] 47 U.S.C. § 153(20).

[35] *See, e.g., Time Warner Declaratory Ruling*, 22 FCC Rcd. at 3513, ¶ 14 & n.39 (citing 47 C.F.R. § 51.100(b)).

1. The FCC has not determined that VoIP is a telecommunications service, though it has promulgated rules unrelated to the interconnection rights of VoIP carriers.

22. The FCC has promulgated a number of rules that apply to VoIP services without having actually decided such services' classification. The agency has extended a number of specific consumer protection and public safety requirements to VoIP service. For example, in 2005, the FCC required interconnected VoIP providers to supply 911 emergency calling capabilities to their customers.[36] In 2006, the FCC established universal service contribution obligations for interconnected VoIP providers.[37] In 2007, the Commission extended the customer privacy requirements of Section 222 (47 U.S.C. § 222) to interconnected VoIP providers.[38] Also in 2007, the Commission extended the Section 255 (47 U.S.C. § 255) disability access obligations to providers of interconnected VoIP services and to manufacturers of specially designed equipment used to provide these services.[39] The FCC also extended the Telecommunications Relay Services ("TRS") requirements to providers of interconnected VoIP services, pursuant to Section 225(b)(1) of the Act, thus requiring interconnected VoIP providers to contribute to the Interstate TRS Fund under the FCC existing contribution rules, and to offer 711 abbreviated dialing for access to relay services.[40] Additionally in 2007, the Commission extended local number portability ("LNP") obligations and numbering administration support

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[36] *IP-Enabled Services; E911 Requirements for IP-Enabled Service Providers*, First Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 10245, 10246, ¶1 (2005).

[37] *Universal Service Contribution Methodology*, Report and Order and Notice of Proposed Rulemaking, 21 FCC Rcd. 7518, 7538-43, ¶¶ 38-49 (2006).

[38] *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information; IP-Enabled Services*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 6927, 6954-57, ¶¶ 54-59 (2007).

[39] *IP-Enabled Services*, Report and Order, 22 FCC Rcd. 11275, 11283-291, ¶¶ 17-31 (2007).

[40] *See id.* at 11291-97, ¶¶ 32-43.

obligations to interconnected VoIP providers and their numbering partners pursuant to sections 251(e) and 251(b)(2) of the FTA.[41]

23. None of these rules promulgated by the FCC, however, relate to whether VoIP providers have common carrier interconnections rights and obligations under Sections 251 and 252 of the FTA. Had the FCC classified VoIP service as a telecommunications service, its multiple express extensions of specific rights to VoIP providers would have been unnecessary, as those enumerated rights would have become available to the VoIP providers automatically upon such classification. Under the maxim *expression unius est exclusio alterius,* the regulatory extension to VoIP providers of the specific rights enumerated above is evidence that VoIP providers do not enjoy the entire range of rights afforded to providers of telecommunications services.

2. Recent FCC and court decisions show that VoIP services are information services that do not have common carrier interconnection rights and obligations under Sections 251/252 of the FTA.

24. "[T]o date, the [FCC] has not classified interconnected VoIP service as either a telecommunications service or an information service."[42] Nonetheless, a 2018 FCC decision supports classifying VoIP as an information service, rather than a telecommunications service. Prior to 2015, the FCC had classified broadband service as an information service, which meant that broadband Internet service was not subject to FTA Title II common carrier regulation.[43] In

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[41] *VoIP LNP Order*, 22 FCC Rcd. 19531.

[42] *Public Notice*, Consumer & Governmental Affairs Bureau Seeks to Refresh the Record on Truth-in-Billing Rules to Ensure Protections for All Consumers of Voice Services, CC Docket No. 98-170, WC Docket No. 04-36, FCC DA No. 19-1271, 2019 WL 6837870, n.4 (rel. Dec. 13, 2019); *see also Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as Amended by the Cable Television Consumer Protection and Competition Act of 1992*, Second Further Notice of Proposed Rulemaking, 33 FCC Rcd. 8952 ¶ 25 & n.112 (2018).

[43] *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 FCC Rcd. 311, 316-17 (2018) ("*Net Neutrality Repeal Order*"), *aff'd in part, remanded in part. Mozilla Corp. v. FCC*, 930 F.3d 1 (2019) (upholding most parts of the *Net Neutrality Repeal Order*, including the FCC's decision to reclassify broadband Internet as an information service).

2015, the FCC adopted an order reclassifying broadband Internet access service from an information service to a telecommunications service.[44] However, in January 2018, the FCC issued its *Net Neutrality Repeal Order* in which it reinstated the information service classification of broadband Internet access service. In doing so, the FCC relied on the definition of "information service" in the FTA, which defines information service as:

> the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service.[45]

The FCC's analysis determined that broadband Internet access met the definition of an "information service" in the FTA, and therefore that service should be classified as an information service rather than a telecommunications service.

25. Although the FCC's *Net Neutrality Repeal Order* only applied to broadband Internet access generally and did not specifically address VoIP services discretely, the U.S. Court of Appeals for the Eighth Circuit undertook the same analysis as the FCC did in the *Net Neutrality Repeal Order* to determine that VoIP service is an information service, and therefore, not subject to state public service commission[46] or Title II regulation. In *Charter Advanced Services (MN) v. Lange*, 903 F.3d 715 (2018), the Minnesota Public Utilities Commission sought to regulate Charter Advanced by asserting that VoIP was a "telecommunications service" as

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[44] *Id.* at 317 (citing *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 (2015)).

[45] *Id.* (citing 47 U.S.C. § 153(24)).

[46] The FCC has recognized that interconnected VoIP is an "IP-enabled service." *IP-Enabled Services*, Report and Order 24 FCC Rcd. 6039, 6043-43, ¶ 8 (2009). It is well-settled that IP-enabled services are jurisdictionally interstate because "a substantial portion of Internet traffic involves accessing interstate or foreign websites." *Bell Atl. Tel. Cos. v. FCC*, 206 F.3d 1, 5 (D.C. Cir. 2000) (quoting *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Inter-Carrier Compensation for ISP-Bound Traffic*, Declaratory Ruling, 14 FCC Rcd. 3689, 3701-02, ¶ 18 (1999)). Because VoIP service is jurisdictionally interstate, state public service Commissions have limited authority to regulate it.

defined by the federal act. The Eighth Circuit noted that the "FCC has so far declined to classify VoIP services as either information or telecommunications services, despite repeated opportunities to do so."[47]

26. As a result of the FCC's failure to classify VoIP expressly as either an information service or a telecommunications service, the Eighth Circuit interpreted the language of the FTA itself to determine VoIP's classification. The court analyzed the same section of the FTA that the FCC had addressed in the *Net Neutrality Repeal Order*, and concluded that VoIP service was an "information service" under the FTA because "the touchstone of the information services inquiry is whether [VoIP] acts on the consumer's information—here a phone call—in such a way as to 'transform' that information."[48] The Eighth Circuit concluded that VoIP "is an information service because it 'mak[es] available information via telecommunications' by providing the capability to transform that information through net protocol conversion."[49] Because VoIP is an information service, the Eighth Circuit ruled that state regulation of the VoIP service was preempted, and that the state public service commission did not have jurisdiction over VoIP. "[A]ny state regulation of an information service conflicts with the federal policy of nonregulation," so that such regulation is preempted by federal law.[50]

27. The Eighth Circuit's determination that VoIP services are information services, and not telecommunications services, is not an outlier decision. Rather, it is merely one of a line of court decisions finding that the classification of VoIP services as information services is

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[47] *Charter Advanced Services*, 903 F.3d at 718 (citing the FCC's amicus brief filed with the Eighth Circuit; other citations omitted).

[48] *Id.* at 719 (citing the definition of information service in 47 U.S.C. § 153(24)).

[49] *Id.* at 720 (citations omitted).

[50] *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

consistent with the U.S. Supreme Court's decision in *Brand X Internet Services*[51] that a net protocol conversion – a defining attribute of information services – is a necessary feature of VoIP services.[52] As a result of the *Charter Advanced Services* decision finding that VoIP is an information service, the LEC interconnection obligations under Section 251 of the FTA do not apply to VoIP services because Title II of the FTA only applies to telecommunications carriers.

3. Section 51.100 of the FCC's rules prohibit VoIP providers from using interconnection with rural carriers to provide a purely non-telecommunications service.

28. As discussed above, Section 251(a) of the Act provides the general requirement that telecommunications carriers interconnect directly or indirectly with each other. The FCC further clarified the parameters of a telecommunications carrier's use of its interconnection with another carrier by promulgating FCC Rule 51.100. That rule prescribes the type of interconnection access granted by one telecommunications carrier to another telecommunications carrier that has obtained interconnection pursuant to Section 251. Specifically, Section 51.100(b) of the FCC's rules provides, in relevant, that:

> A telecommunication carrier that has interconnected or gained access under Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act, may offer information services through the same arrangement, *so long as it is offering telecommunications services through the same arrangement as well*.[53]

29. Section 51.100 addresses the exchange of traffic between two common carriers via an interconnection arrangement. The carrier obtaining the interconnection must, as an initial

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[51] *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

[52] *See FTC v. Educare Ctr. Servs., Inc.*, No. EP-19-CV-196-KC, 2020 WL 218519, at *9 (W.D. Tex. Jan. 14, 2020); *PAETEC Comm'ns, Inc. v. CommPartners, LLC*, 2010 WL 1767193, at *3 (D.D.C. 2010); *Sw. Bell Tel., L.P. v. Mo. Pub. Serv. Comm'n*, 461 F. Supp. 2d 1055, 1079–83 (E.D. Mo. 2006); *Vonage Holdings Corp. v. N.Y. State Pub. Serv. Comm'n*, No. 04 CIV. 4306 (DFE), 2004 WL 3398572, at *1 (S.D.N.Y. July 16, 2004); *Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 290 F. Supp. 2d 993, 999 (D. Minn. 2003).

[53] 47 C.F.R. § 51.100(b) (emphasis added).

matter, be transmitting telecommunications traffic pursuant to Sections 251(a)(1), 251(c)(2), or 251(c)(3) of the Act. Only after this initial criterion is established, *i.e.*, that telecommunications service traffic is being transmitted, may a telecommunications carrier use the excess capacity of the same interconnection facility to exchange non-telecommunications service traffic.[54] Section 51.100 specifically prohibits VoIP providers from obtaining interconnection from LECs solely for non-telecommunications purposes.[55] The FCC emphasized in the *Time Warner Declaratory Ruling* that "the rights of telecommunications carriers to Section 251 interconnection are limited to those carriers that, at a minimum, do in fact provide telecommunications services to their customers, either on a wholesale or retail basis,"[56] and that the telecommunications carrier must also be "offering telecommunications services through the same arrangement" for which it requests interconnection.[57] Because VoIP providers do not provide telecommunications services, and provide only information services, VoIP carriers do not qualify.

C. Duties applicable to LECs under Section 251(b) do not supersede interconnection requirements under Section 251(a).

30. Sections 251(a) through (c) of the FTA create "a three-tiered hierarchy of escalating obligations based on the type of carrier involved."[58] The nature and scope of these obligations vary depending on the type of service provider involved. Section 251(a) sets forth general duties applicable to all telecommunications carriers, including the duty "to interconnect

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[54] *See, e.g., F. Cary Fitch D/B/A/ Fitch Affordable Telecom Petition For Arbitration Against SBC Texas Under § 252 of the Communications Act*, Proposal for Award, Texas PUC Docket No. 29415 (Jun. 2005) at 20; *aff'd, F. Cary Fitch v. Public Utility Commission of Texas*, 261 Fed. App. 788; 2008 U.S. App. LEXIS 919 (5th Cir. 2008) (court described Section 51.100 as being "the heart of this dispute" on the issue of the use of interconnection facilities to carry information service traffic).

[55] *See Id.*

[56] *Time Warner Declaratory Ruling* at ¶ 14 and n.39 (2007).

[57] *Id.* at n.39 (quoting 47 C.F.R. § 51.100).

[58] *Guam Public Utilities Commission*, Declaratory Ruling and Notice of Proposed Rulemaking, 12 FCC Rcd. 6925, 6937, ¶ 19 (1997).

directly or indirectly with the facilities and equipment of other telecommunications carriers,"[59] which, relevant to this proceeding, does not apply to LEC interconnections with VoIP providers because VoIP is an information service, and not a telecommunications service. Section 251(b) sets forth additional duties for LECs pertaining to resale of services, number portability, dialing parity, access to rights-of-way, and reciprocal compensation.[60] Section 251(c) sets forth the most detailed obligations, which apply to ILECs.[61]

31. The FCC's promulgation of rules for the porting of numbers between wireline and VoIP providers pursuant to Section 251(b)(2) does not create an obligation to interconnect with VoIP providers pursuant to Section 251(a). The obligations in Sections 251(a), (b), and (c) are separate statutory mandates.[62] As such, those obligations are mutually exclusive, and LECs that are obligated to perform Section 251(b) duties are not necessarily obligated to perform duties under Section 251(a) if a carrier requesting interconnection is not a telecommunications carrier. There is no inconsistency in requiring VoIP providers to enter into commercial agreements, rather than Section 251 interconnection agreements, in order to exchange traffic and to port numbers. Indeed, the FCC is specifically authorized to issue number portability regulations that are separate from interconnection obligations for LECs.[63] The FCC has been selective in requiring number portability for VoIP, but not Section 251 interconnection intended only for telecommunications services.

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[59] *Petition of CRC Communications of Maine, Inc. and Time Warner Cable Inc. for Preemption Pursuant to Section 253 of the Communications Act, as Amended*, Declaratory Ruling, 26 FCC Rcd. 8259, 8260 (2011).

[60] *Id.*

[61] *Id.*

[62] *Id.* (citation omitted).

[63] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 802 n.23 (8th Cir. 1997), *as amended on reh'g* (Oct. 14, 1997), *aff'd in part, rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 119 S. Ct. 721, 142 L. Ed. 2d 835 (1999)

1. Interconnection can be required only at a technically feasible point in an RLEC's service area.

32. A VoIP provider seeking to rely on a third party's facilities for transport to or from an RLEC's network should recognize and comply with the terms of service offered by the third party. Permitting a VoIP carrier to use third-party facilities for both access and non-access traffic for free would enable such a provider to avoid tariff rates that apply to VoIP calls as a result of the VoIP Symmetry Rule. To avoid burdening the RLECs and their rural subscribers with the costs of transport outside the LEC's service areas, a VoIP provider must assume responsibility for transport of local traffic at a technically feasible point within the LEC's exchange area.

33. Section 251 of the FTA and the FCC's implementing rules require an ILEC to allow a CLEC to interconnect at any technically feasible point.[64] The FCC has interpreted this provision to mean that CLECs have the option to interconnect at a single POI within an ILEC's local exchange area.[65] Indeed, Section 51.305 of the FCC's rules provides, in relevant part, that ILECs "shall provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the incumbent LEC's network: (1) For the transmission and routing of telephone exchange traffic, exchange access traffic, or both; (2) At any technically feasible point within the incumbent LEC's network . . . ."[66]

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[64] 47 U.S.C. § 251(c)(2)(B). Although this issue is beyond the scope of this proceeding, rural telephone companies are exempt from Section 251(c) obligations by virtue of the "rural exemption." Section 251(f) states that "[s]ubsection (c) of this section [251] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State Commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof)."

[65] *See* 47 U.S.C § 251(c)(2),(3); *see also* 47 C.F.R. § 51.305(a)(2); *see, e.g., Application by SBC Communications Inc., Southwestern Bell Tel. Co. 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*, Memorandum Opinion and Order, 15 FCC Rcd. 18354, 18390, ¶ 78 n.174 (2000).

[66] 47 C.F.R. § 51.305(a)(1), (2).

34. In the FCC's proceeding regarding intercarrier compensation for ISP-bound traffic and IP-enabled services, the FCC had to contend with the issue of the parties' transport responsibilities when traffic was required to be routed outside of a rural carrier's service area.[67] When carriers seeking interconnection with a RLEC establish a point of interconnection outside of a RLEC's serving area, a disproportionate burden is placed on RLECs to transport originating calls to the interconnection points. Furthermore, requiring RLECs to port telephone numbers to out-of-service-area points of interconnection could create an even heavier burden. To address these issues, the FCC ruled that "for local and extended area service (EAS) calls made by a rural [I]LEC's customer to a non-rural carrier's customer, the rural ILEC will be responsible for transport to a non-rural terminating carrier's point of presence (POP) when it is located within the rural [I]LEC's service area. When the non-rural terminating carrier's POP is located outside the rural [I]LEC's service area, the rural [I]LEC's transport and provisioning obligation stops at its meet point and the non-rural terminating carrier is responsible for the remaining transport to its POP."[68]

35. The FCC recognizes that out-of-area transport costs are a significant concern for rural carriers. This is particularly true for IP-enabled services given that there may not necessarily be a well-defined "network edge" (see ¶ 44, *infra.*) for IP networks. The transport issues resolved by the FCC for ISP-bound traffic – an IP-enabled service – ensure that rural carriers and their customers do not subsidize the costs for new market entrants that do not

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[67] *High-Cost Universal Service Support; Federal-State Joint Board on Universal Service, Universal Service Contribution Methodology; Numbering Resource Optimization; Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Developing A Unified Intercarrier Compensation Regime; Intercarrier Compensation for ISP-Bound Traffic; IP-Enabled Services*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd. 6475 (2008)

[68] *Id.* at 6819, ¶ 270.

provide facilities in rural areas. VoIP is also an IP-enabled service,[69] and the FCC's decision for requiring carriers to be responsible for their fair share of the transport costs for IP-based traffic is just as valid for VoIP services as it is for ISP-bound traffic generally.

2. Interconnection can be Achieved Through Commercial Agreements, Rather than Section 251/252 Interconnection Agreements.

36. Interconnection agreements are contracts that memorialize the terms and conditions pursuant to which ILECs will exchange traffic and provide other related services to requesting telecommunications carriers. Those agreements are subject to the Section 251/252 voluntary negotiation and compulsory arbitrations provisions and must be filed for approval with the appropriate state commissions. When services provided by an ILEC are not subject to the Section 251/252 negotiation and arbitration regime established by Congress, the use of commercial agreements, which are not subject to the voluntary negotiation and arbitration provisions in Sections 251/252, is appropriate.

37. Past experience shows that commercial agreements work to foster competition and lower rates for services that fall outside of the Section 251/252 mandates. For example, in response to the U.S. Court of Appeals for the D.C. Circuit decision vacating and remanding in part the FCC's *Triennial Review Order*,[70] the FCC issued its *UNE-P Remand Order*,[71] which eliminated the requirement for ILECs to provide unbundled network element platform

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[69] *See* n.46, *supra.*

[70] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978 (2003) ("*Triennial Review Order*"), *corrected by* Errata, 18 FCC Rcd. 19020 (2003), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[71] *Unbundled Access to Network Elements*, Order on Remand, 20 FCC Rcd. 2533 (2005) ("*UNE-P Remand Order*").

("UNE-P") lines pursuant to Section 251(c).[72] As a result of the removal of UNE-P from the Section 251 framework, the FCC encouraged ILECs and competitive carriers to negotiate commercial whole platform service agreements as a replacement for UNE-P. The marketplace responded, and commercial agreements to replace UNE-P became commonplace.

38. Reaffirming its confidence in commercially negotiated agreements, the FCC has noted that:

> LECs have an incentive to develop reasonable commercial wholesale arrangements with these competitive LECs in response to facilities-based competition from cable provider VoIP services and wireless alternatives. Such wholesale arrangements enable . . . LECs to continue earning revenues from their networks rather than lose any revenue opportunity altogether if the competitive LEC's customer migrates to a different intermodal provider. This expectation is borne out by our past observations regarding incumbent LECs' response to intermodal competition in the voice marketplace.[73]

39. Commercial agreements have been used for more than 15 years to implement service arrangements not mandated by Section 251 of the FTA. There is no reason why commercial agreements cannot be used for the exchange of traffic between RLECs and VoIP providers, provided that such agreements do not require RLECs or their customers to shoulder VoIP carrier costs, or otherwise abrogate important service considerations in rural areas.

D. Important regulatory issues the Commission must consider before addressing VoIP interconnection..

40. Before taking any action addressing VoIP interconnection, the Commission should recognize the necessity for conformance with existing preemption by current federal regulation, as well as the potential for negation of state action regarding any matter currently

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[72] UNE-P was the combination of ILEC loop UNE, switching UNE, and transport UNE that was replaced by commercial agreements. *Voice Telephone Services: Status as of December 31, 2018*, 2020 WL 1082281, at *5 (rel. Mar. 6, 2020).

[73] *Petition of USTelecom for Forbearance Pursuant to 47 U.S.C. 160(c) to Accelerate Investment in Broadband and Next-Generation Networks*, Memorandum Opinion and Order, 2019 WL 3605125, at *7, ¶ 19 (rel. Aug. 2, 2019).

under consideration by the FCC, such that any decisions issued by the Commission may ultimately conflict with and become superseded by the FCC. There are several reasons why the Commission should not adopt rules that impose on RLECs new costs caused by VoIP providers.

41. First, the FCC is considering the appropriate definition of the "network edge" where bill-and-keep applies for VoIP calls. This distinction is important because of the controlling role the network edge (see ¶ 44, *infra.*) plays regarding transport and cost obligations for RLECs. Carriers are only responsible for transport costs up to the network edge, and currently the network edge is an RLEC's end office.

42. Second, the VoIP Symmetry Rule requires VoIP providers to pay the filed tariff rates for access service traffic. Not only would bill-and-keep violate the FCC's VoIP Symmetry Rule should the Commission allow VoIP provider to use the access service network for free, it would result in rate discrimination, providing the VoIP provider with an unfair advantage over those other VoIP carriers that are subject to the VoIP Symmetry Rule and pay the filed tariff rates. Moreover, "traditional" long distance carriers would also be unfairly discriminated against if the Commission decided that all wireline-VoIP traffic was exempt from the tariff rates for access service, because traditional carriers would continue to be subject to access charges while VoIP providers would not.

43. Third, the filed rate doctrine requires tariffs to be strictly enforced. The Commission cannot create a biased regulatory regime whereby RLECs' access tariffs only apply in some circumstances or to certain protocols (i.e., traditional TDM voice traffic), but not in others (i.e., VoIP traffic). The filed rate doctrine requires all carriers, regardless of the technology used, to uniformly pay for access service to ensure non-discrimination among all users of a LEC's access service network.

1. FCC further rulemaking in the Connect America proceeding

44. In the FCC's 2011 *USF/ICC Transformation Order*,[74] the FCC noted that "[a] critical aspect to bill-and-keep was defining the 'network edge' for purposes of delivering traffic."[75] The "edge" is the point where bill-and-keep applies, and a carrier is responsible for carrying its traffic to that edge either directly or, if applicable, indirectly by paying another carrier.[76] The order also contained a further notice of proposed rulemaking in which the FCC sought comments on defining the network edge, which included such possibilities as (1) a "competitively neutral" location[77] (2) a point in each Local Access and Transport Area ("LATA") determined by a terminating carrier for mutually efficient traffic exchange,[78] or (3) a terminating carrier's central office.[79] The FCC made it clear that addressing this issue was required in order to establish a transition path to bill-and-keep for VoIP-terminated calls.[80] The FCC sought to refresh the record on this issue in 2017 by releasing a public notice seeking comment on, among other things, network edge issues.[81]

a) The definition of the network edge in a bill-and-keep environment for IP-enabled services is an RLEC's end office.

45. The FCC is currently determining where the network edge should be for VoIP services in order to transition to a bill-and-keep regime for such services. Until that decision is

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[74] *USF/ICC Transformation Order*, 26 FCC Rcd. 17663.

[75] *Id.* at 18117, ¶ 1320.

[76] *Id.*

[77] *Id.* at 18117-18, ¶ 1321 & n.2388.

[78] *Id.* at 18117-18, ¶ 1321 & n.2389.

[79] *Id.* at 18117, ¶ 1320.

[80] *Id.*

[81] *See Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, Public Notice, 32 FCC Rcd. 6856 (2017) ("*Network Edge Public Notice*").

made, the FCC has ruled that an RLEC is not required to provide transport beyond its service area boundary for IP-enabled services, which includes VoIP services.[82] It is consistent with the FCC's goal of transitioning to bill-and-keep for all intercarrier compensation to require VoIP providers to connect at any technically feasible point inside the RLECs' service area, as that practice will ensure that RLECs are not burdened with onerous transport costs if a VoIP carrier's POP is located far from the LEC's exchange area.

46. Consider, *arguendo,* the scenario where the network edge is at the VoIP carrier's POP rather than at a POP or a meet point located inside an RLEC's service area. In that situation, if a VoIP carrier's customer calls a RLEC's customer, the handoff for the call would be at the VoIP's POP, and the rural carrier would have to pay a third party to transport the call, regardless of distance, back to the RLEC's service area. The Rural Transport Rule for IP-enabled services was implemented specifically to avoid burdening RLECs and their customers with unnecessary and unexpected transport fees that cannot be recouped from the cost-causing VoIP provider.[83]

47. The FCC has stated that it "believe[s] states should establish the network edge," but that they should only do so "pursuant to [FCC] guidance."[84] It is important to note that this is only a proposal and not a binding decision as the FCC "has not addressed [network edge issues for VoIP calls] . . . and is still actively considering them."[85] Moreover, the FCC is also

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[82] *See USF/ICC Transformation Order*, 26 FCC Rcd. 17663, ¶¶ 998-999.

[83] The reverse situation (i.e., a RLEC's customer calls a VoIP carrier's customer) also requires a third party to transport the call to the VoIP provider's out-of-area POP. The VoIP provider's decision to locate the POP far from the LEC's service area causes the LEC to incur additional third-party transport costs that would not be necessary if the VoIP provider's POP were located within the LEC's service area.

[84] *USF/ICC Transformation Order*, 27 FCC Rcd. at 18117-18, ¶ 1321.

[85] *Level 3 Communications, LLC, v. AT&T Inc.*, Memorandum Opinion and Order, 33 FCC Rcd. 2388, 2395, ¶ 19 (2018).

considering comments on its preliminary proposal "that states should establish the network edge pursuant to FCC guidance."[86] In light of the fact that the FCC is still deliberating network edge issues for VoIP services, and that the states must wait for FCC guidance in order to establish the network edge, the network edge is effectively the LEC's end office. This is not only required by the Rural Transport Rule currently in place for IP-enabled services; RLEC tariffs contain rates, terms, and conditions for SIP trunks and other facilities with which VoIP providers must comply under the filed rate doctrine for the transport of traffic to LEC end offices to avoid discrimination against other carriers and unlawful implicit subsidies. RLECs cannot lawfully provide those facilities to VoIP providers for free in the current regulatory environment.

48. There are obvious potential conflicts with the FCC's existing decisions and the ongoing *Connect America Fund* rulemaking proceeding if this Commission (1) implements rules for VoIP traffic that are inconsistent with the Rural Transport Rule applicable to IP-enabled services, (2) determines that RLECs are required to provide transport to a point outside the LEC's service area, or (3) establishes a network edge for VoIP services that is outside the service areas of RLECs in light of the Rural Transport Rule and the absence of any guidance from the FCC. Accordingly, the Commission should, at a minimum, require VoIP providers to establish a POP or a meet point within the exchange of RLECs, and to pay the tariff rates set forth in the RLECs tariffs for services necessary to transport calls to the LECs' end offices.

b) RLECs are only obligated to port numbers if service portability is not location portability.

49. In 2007, the FCC extended LNP obligations to interconnected VoIP providers to ensure that customers could port their telephone numbers to VoIP carriers when changing service

[86] *Network Edge Public Notice*, 32 FCC Rcd. at 6857.

providers.[87] Number portability is synonymous with "service portability." In contrast, "location portability" is "the ability of users of telecommunications services to retain existing telecommunications numbers . . . when moving from one physical location to another."[88] Service portability is not location portability, and there are several reasons why the Commission should not require RLECs to port numbers to VoIP providers unless certain requirements are met to ensure that VoIP number portability is not actually location portability in disguise.

50. First, any rules adopted by the Commission for VoIP interconnection and number portability must adhere to the Rural Transport Rule. Requiring porting between a RLEC and a VoIP provider when the VoIP provider does not have a POP in the same service area would raise intercarrier compensation issues as the RLEC would be required to transport calls to ported numbers through points of interconnection outside of the LEC's serving area. Moreover, cost causation principles and the prohibition on implicit subsidies require VoIP provides to cover the cost of service for their customers. "Cost causation" is the principle that the cost causer pays the costs for which it is "causally responsible."[89] Requiring RLECs to subsidize VoIP carrier costs by paying for third-party transport costs would "contravene[] the long-standing principle that costs should be borne by the cost-causer."[90] Strict adherence to the Rural Transport Rule would avoid imposing burdensome transport costs on RLECs, ensure that VoIP providers, as the cause-causers, pay for their cost of service, and ensure that ported numbers to VoIP carriers are not removed from their home rate center. VoIP providers must maintain a POP in the exchange that

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[87] *VoIP LNP Order*, 22 FCC Rcd. 19531.

[88] *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd. 8352, 8443 ¶ 174 (1996)

[89] *See, e.g., Implementation of Section 224 of the Act*, Order on Reconsideration, 30 FCC Rcd. 13731, ¶ 11 (2015).

[90] *Toll Free Service Access Codes*, Fifth Report and Order, 15 FCC Rcd. 11939, 11953 (2000).

has been assigned those numbers in order to serve those numbers in compliance with the FCC's number portability rules.

51. Second, Section 251(b)(2) of the FTA only requires LECs to provide number portability to the extent technically feasible.[91] In the FCC's *Intermodal Number Portability Order*,[92] the FCC stated that it was not requiring location portability for wireline-to-wireless number porting because a wireless carrier's coverage area was required to overlap the porting LEC's service area, and the ported number was required to retain its original rate center designation, i.e., the number remains at the same location despite the fact that a wireless subscriber may travel outside a rate center and make calls without incurring toll charges.[93] In other words, the wireless carriers had facilities in the LEC's exchange, which made it technically feasible for the LECs and the wireless carriers to exchange traffic through direct network interconnections with the LEC's service area to facilitate number portability.

52. Similarly, if a VoIP provider's network overlaps the service area of an RLEC by way of the VoIP provider's in-service-area POP, then the threshold technical feasibility issue in Section 251(b)(2) is satisfied because both parties' networks can be directly interconnected for the exchange of traffic. If the VoIP provider does not have an in-area POP, then there is no overlap with the LEC's service area, and it is not technically feasible to port numbers because the parties' networks cannot be directly connected for the exchange of traffic, which is necessary to avoid violating the Rural Transport Rule.

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[91] 47 U.S.C. § 252(b)(2).

[92] *Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues*, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 23697 (2003) ("*Intermodal Number Portability Order*").

[93] *See id.* at 23708-09, ¶ 28.

53. Third, the Commission must ensure that numbers ported to VoIP providers in rural areas do not become a loophole for location portability. The FCC's number portability rules call for service portability, not location portability. VoIP services can be "nomadic," and "nomadic interconnected VoIP service need not be tied to a particular geographic location."[94] "In this way, nomadic interconnected VoIP service is similar to mobile service, but distinct from fixed telephony service."[95] Should a VoIP customer be permitted to relocate its telephone number outside of the original rate center, which can easily be done due to the nature of IP-based services, the result would be imposition of an undue burden on RLECs in terms of transport and intercarrier compensation costs, not just for long distance calls but for local calls as well. In order to ensure that VoIP providers do not turn number portability into location portability, VoIP providers must be required to not only adhere to the Rural Transport Rule and in-area POP requirement, they must also be required to provide service to customers at a location that is physically located within the relevant LECs' service area. Only by mandating all three of these requirements can the Commission ensure that RLECs and their customers are protected from subsidizing costs for service elements offered by VoIP providers to their subscribers for a fee.

2. **FCC Connect America order**

a) Access charges apply to VoIP-PSTN traffic

54. In 2011, the FCC recognized that, as a consequence of the transition to IP-based networks and services, consumers were increasingly purchasing VoIP services.[96] As a result, voice telephone traffic increasingly originated or terminated in IP format, but was also exchanged over PSTN facilities. To address the growing VoIP-PSTN traffic, the FCC adopted

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[94] *Numbering Policies for Modern Communications*, Report and Order, 30 FCC Rcd. 6839, 6848-49, ¶ 21 (2015).

[95] *Id*. n.67.

[96] *See Connect America Fund*, 26 FCC Rcd. at 18026-27, ¶ 970.

the "VoIP Symmetry Rule," whereby LECs can charge for access service provided for the switching of VoIP-based calls, and vice versa to the extent an interconnecting LEC or its VoIP partner provides a physical connection to the last-mile facilities used to serve an end user.[97] If neither the LEC nor its VoIP provider partner provides such physical connection to the last-mile facilities used to serve the end user, the VoIP-LEC partnership is not providing the functional equivalent of end office switched access and the partnering LEC may not assess end office switched access charges.[98]

55. Given that the VoIP Symmetry Rule applies the standard access charge regime to VoIP calls, any demand that RLECs exchange traffic indirectly on a bill-and-keep basis is problematic for a number of reasons. First, bill-and-keep only applies to non-access (or local) traffic, and not to long distance traffic. Long distance calls, whether they be VoIP or TDM-based calls, are still subject access charges set forth in LEC access tariffs filed with the FCC and the Commission. As further discussed below, allowing VoIP providers to avoid paying access charges violates the filed rate doctrine, which requires tariff rates, terms, and conditions to be strictly enforced.

56. Second, any proposal to exchange traffic with LECs indirectly over existing AT&T access service trunks or similar jointly provisioned facilities is particularly problematic. Due to the commingling of access and non-access traffic over the same lines, it would be difficult, if not impossible, for LECs to identify the jurisdiction (interstate v. intrastate, or toll v.

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[97] *Connect America Fund, Developing A Unified Intercarrier Compensation Regime*, WC Docket No. 10-90; CC Docket No. 01-92, FCC 19-131, Order on Remand and Declaratory Ruling, 2019 WL 7018968, at *1 (rel. Dec. 17, 2019) (citations omitted) ("*VoIP Remand Order*").

[98] *Id.*

local) of commingled VoIP traffic, and thus, the portion of traffic that is subject to bill-and-keep, and the portion that is subject to tariff access charges.

57. Not only does the commingling of traffic cause jurisdictional identification issues for LECs, the jointly provisioned AT&T trunks are intended to be used solely for the exchange of access traffic between the respective LECs and AT&T. Those circuits are not provided or intended to be used, either by VoIP or TDM service providers, for the transmission of non-access traffic. Access and non-access traffic for VoIP charges must be sent over dedicate circuits to ensure compliance with the VoIP Symmetry Rule, and to ensure tariff rates are properly applied to the appropriate traffic.

b) The filed rate doctrine requires LEC tariffs to apply to VoIP Traffic.

58. The filed rate doctrine requires VoIP carriers to pay the LECs' tariff rates in order to avoid discrimination against other customers that have paid the LECs' tariff rates for access services. The filed rate doctrine is a common law construct that originated in judicial and regulatory interpretations of the Interstate Commerce Act and was later codified at Section 203(c) of the FTA,[99] which requires interstate tariffs to be filed with the FCC. In Kansas, the filed rate doctrine is codified in K.S.A. 66-109, which forbids common carriers and public utilities to "charge, demand, collect or receive a greater or less compensation . . . than is specified in the printed schedules or classifications" required by the Commission. "Kansas has long followed the filed rate doctrine when utilities vary their charges or services from the rates

[99] 47 U.S.C. § 203(c).

and standards approved by the Commission."[100] The filed rate doctrine has been applied consistently to a variety of regulated industries for almost a century.

59. The primary purpose of the filed rate doctrine is to prevent discrimination among customers by ensuring that all customers pay the same tariffed rates, receive the same tariffed service, and have the same remedies under the filed tariff.[101] "However, the filed rate doctrine does not just protect consumers—it protects both the regulated business and its customers by not allowing 'either a shipper's ignorance or the carrier's misquotation of the applicable rate to serve as a defense to the collection of the filed rate.'"[102] [T]he rationale underlying the filed rate doctrine applies whether the rate in question is approved by a federal or state agency."[103]

60. In other dockets before the Commission, it has been claimed that all traffic exchanged with LECs over AT&T's Feature Group D trunks[104] should be subject to bill-and-keep rather than the filed and approved tariff rates. This is wrong. A VoIP provider has the choice of properly sending local traffic to LECs through direct interconnections located in the LECs' service area, allowing such traffic to be subject to bill-and-keep. Assuming that a VoIP provider could appropriately use the AT&T Feature Group D trunks for all traffic, the federal and state tariffs for the LECs would apply to all traffic carried on Feature Group D access trunks to AT&T's access tandem.

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[100] *SWKI-Seward W. Cent., Inc. v. Kansas Corp. Comm'n*, No. 116,795, 2018 WL 385692, at *7 (Kan. Ct. App. 2018), citing *Sunflower Pipeline Co. v. Kansas Corp. Comm'n*, 5 Kan. App. 2d 715, 722-23 (1981).

[101] *AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 222-223 (1998); *Stein v. Sprint Corp.*, 22 F. Supp. 2d 1210, 1211 (D. Kan. 1998).

[102] *SWKI-Seward W. Cent., Inc.* 2018 WL 385692, at *11 (citing *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 120-21 (1990)).

[103] *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992).

[104] *Guam Telephone Authority Petition for Declaratory Ruling*; Memorandum Opinion and Order, 9 FCC Rcd. 4890 (1994) (citing *Access and Divestiture Tariffs*, 101 FCC 2d 911 (1985)).

61. Feature Group D trunks are long distance circuits that enable equal access and allow "end users to access facilities of a designated interexchange carrier ("IXC") by dialing '1' only. The end user has the additional capability of using other IXCs by dialing a five-digit access code (10XXX)." In 2004, prior to the FCC's decision adopting the VoIP Symmetry Rule, AT&T asked the FCC to declare that "'phone-to-phone' internet protocol ("IP") telephony services [i.e., VoIP calls,] are exempt from the access charges applicable to circuit-switched interexchange calls."[105] These calls are routed over Feature Group D trunks, and AT&T pays originating interstate access charges to the calling party's LEC.[106] The FCC declined to grant AT&T's petition, and consistent with its subsequent order adopting the Voice Symmetry Rule, determined that calls placed over Feature Group D trunks are subject to tariff access charges.[107]

62. It is important to note that the U.S. Court of Appeals for the Fifth Circuit has recently ruled that wireless local calls routed over Feature Group D trunks are subject to the access tariff rates.[108] The Fifth Circuit ruled that traffic sent over Feature Group D trunks of long distance carriers is subject to the LECs' access tariff rates. Similarly, all VoIP traffic sent over Feature Group D trunks would also by subject to LEC access tariff rates. As a jurisdictional matter, this ruling by the 5th Circuit came in review of consolidated multidistrict litigation including proceeding originally initiated in the District of Kansas seeking recovery from numerous Kansas carriers including RLECs among these commenters. See IN RE: IntraMTA Switched Access Charges Litigation, No. 18-10768, 5 Cir., Opinion May 27, 2020. 2020 U.S. App. LEXIS 16844 (5th Cir. May 27, 2020).

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[105] *Petition for Declaratory Rule that AT&T's Phone-to-Phone IP Telephony Services are Except from Access Charges*, Order, 19 FCC Rcd. 7457, 7457, ¶ 1 (2004) ("*IP-in-the-Middle Order*").

[106] *Id.* at 7464, ¶ 11.

[107] *Id.* at 7472, ¶¶ 24-25.

[108] *In re: IntraMTA Switched Access Charges Litigation*, No. 10-10768, slip op. (5th Cir. May 27, 2020).

63. Precluding LECs from billing tariff rates to VoIP providers for interexchange calls placed by their customers, or for any traffic VoIP providers route over Feature Group D access trunks, would conflict with the LECs' federal and state access tariffs, the FTA provisions requiring compliance with tariffs, and the filed rate doctrine. To avoid such a result, and in accord with the FCC's Voice Symmetry Rule and its decision in the AT&T declaratory ruling, the Commission should require all traffic routed over Feature Group D trunks, including local traffic, to be subject to tariffed access charges. Should VoIP providers want to exchange local traffic on a bill-and-keep basis, they may do so using direct interconnections so that such traffic can be properly segregated from access traffic, thereby complying with the Rural Transport Rule and number portability requirements.

E. Commission regulation of VoIP services

1. Jurisdictional issues

64. As an initial matter, the Commission has apparent statutory jurisdiction to regulate certain specific aspects of services offered in Kansas by VoIP providers. For example, in Docket. No. 07-GIMT-432-GIT, the Commission determined – and K.S.A. 66-2017 has codified – that it had jurisdiction to require VoIP providers to contribute to the Kansas Universal Service Fund ("KUSF") to the extent not prohibited by federal law.[109] The Commission also has concluded it has authority to determine whether VoIP providers that are certificated as CLECs, and that are providing service as common carriers, are eligible to receive FUSF support.[110] To

[109] *See Investigation to Address Obligations of VoIP Providers with Respect to the KUSF*, Implementation Order, Docket No. 07-GIMT-742-GIT (rel. Sep. 22, 2008).

[110] *See, e.g., Application of IdeaTek Telecom, LLC as an Eligible Telecommunications Carrier for Purposes of Receiving Federal Universal Service Support as Awarded Under the Connect America Fund Phase II Auction (Auction 903) Program*, Docket No. 19-WLDT-l02-ETC.

the extent VoIP services are not implicated, the Commission also has authority to approve interconnection agreements between telecommunications carriers and CLECs.[111]

65. It should be noted that a VoIP provider may seek and secure Kansas certification as a competitive local exchange carrier, thereby becoming subject to KCC regulation generally, and that an entity holding geographically specified Kansas CLEC certification may subsequently offer VoIP service, but to date no VoIP service provider is authorized to provide competitive local exchange services in any area of the state in which an RLEC is the incumbent local exchange carrier.

66. Although the Commission has authority to regulate VoIP service providers in a manner that does not conflict with state and federal law, K.S.A. 66-2017 presents significant questions regarding Commission authority to regulate VoIP interconnection, and to mandate number portability when VoIP carriers do not have POPs in RLEC service areas making number porting technically feasible. K.S.A. 66-2017 states that: "Except as otherwise provided in this section, no VoIP service, IP-enabled service, or any combination thereof, shall be subject to the jurisdiction of, regulation by, supervision of or control by any state agency or political subdivision of the state."[112] The exceptions to Commission's authority to regulate VoIP pertain to the KUSF and the Kansas 911 Act.[113] K.S.A. 66-2017 also states that none of its provisions is to be construed to modify, among other things, the Commission's authority under Sections

[111] *See, e.g.,* Docket Nos. 07-UTDT-376-IAT; 08-UTDT-393-IAT; and 09-UTDT-498-IAT (Commission approved interconnection, colocation, and resale agreements between Wildflower and United Telephone Company of Eastern Kansas d/b/a Embarq et. al (CenturyLink)).

[112] K.S.A. 66-2017(a).

[113] K.S.A. 66-2017(b).

251/252 of the FTA, or the regulation of any rural telephone company.[114] K.S.A. 66-2017 precludes the Commission from regulating RLECs-VoIP interconnection for several reasons.

67. First, the plain language of K.S.A. 66-2017 clearly states that VoIP and IP-enabled services are not subject to the jurisdiction of or regulation by the Commission, subject to certain explicitly defined exceptions in the statute. The Commission regulation of VoIP carriers must fall into one of the exceptions in the statute or must relate to the regulation of service providers certificated as CLECs, rather than the regulation of VoIP services. Adopting rules that control responsibility for provision of any element VoIP services, and in particular, VoIP interconnection requirements, is a direct regulation of VoIP that is prohibited by statute.

68. Second, the Commission cannot do indirectly that which it cannot do directly. K.S.A. 66-2017 does not expand the Commission's ability to regulate rural telephone companies. Mandating how and whether RLECs interconnect with VoIP providers, rather than mandating how VoIP carriers interconnect with RLECs, simply does an end-run around the prohibition against Commission regulation of VoIP services. Regulation of RLEC interconnection with VoIP services defined by K.S.A. 66-2017 would expand and thus modify the Commission's regulation of rural telephone companies in contravention of K.S.A. 66-2017(c)(5).

69. Further, the Commission's ability to regulate interconnection arises out of Sections 251/252 of the Act. Congress enacted Section 251(a) regarding the interconnection rights between LECs and other telecommunications carriers. The Kansas Supreme Court has noted that a government entity must not adopt regulations that "directly or indirectly contravene the general law, nor can such regulations by repugnant to the policy" in the law. In situations where Congress has enacted a comprehensive federal regulatory scheme of regulation, state

[114] K.S.A. 66-2017(c)(2) & (5).

orders that "deal with matters which directly affect the ability of the [federal agency] to regulate comprehensively and effectively . . . and to achieve the uniformity of regulation . . . . invalidly invade[s] the federal agency's exclusive domain."[115] Commission regulation of VoIP service interconnection would overstep the Commission's authority conveyed by Congress under Section 251/252 because those statutes only permit state commissions to regulate interconnection involving other telecommunications carriers, which does not include VoIP providers.[116]

70. Third, K.S.A. 66-2017 states the statute is not to be construed to modify the Commission's authority under Section 251/252 of the FTA. The Commission is constrained by the regulatory framework discussed above when considering whether to adopt rules governing LEC-VoIP interconnection issues. The Eighth Circuit has ruled that for purposes of Section 251, VoIP providers are not telecommunications carriers, and VoIP is not a telecommunications service. Moreover, the FCC is considering important issues concerning VoIP services in the *Connect America Fund* rulemaking proceeding. Under these circumstances, it would not only be premature for the Commission to adopt rules regarding interconnection, but such action would also impermissibly expand the Commission's authority under Section 251 to regulate VoIP interconnection, invade the domain of the FCC to decide matters necessary for uniform VoIP regulations throughout the nation, and contravene court precedent finding that state commissions do not have authority under Section 251 to regulate LEC-VoIP interconnection.

2. The Commission must also take into account the impact its decision will have on rural subscribers if they are forced to subsidize market entry by VoIP providers.

71. The FCC has construed Congressional federal policy to eliminate implicit subsidies. In its access charge reform proceeding, the FCC stated that its goal was to eliminate

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[115] *N. Nat. Gas Co. v. State Corp. Comm'n of Kan.*, 372 U.S. 84, 91 (1963).

[116] *See Charter Advanced Services*, 903 F.3d 715.

implicit subsidies through free market forces rather than new regulation. The FCC previously indicated that "we prefer to rely on the market rather than regulation to identify implicit support because we are more confident of the market's ability to do so accurately."[117]

72. Rural residents who never use VoIP services should not bear the VoIP carriers' operating costs, nor should they suffer degraded levels of service resulting from a requirement that RLECs divert their limited resources to subsidize a VoIP carrier. Requiring LECs to interconnect with VoIP carriers and incur third-party transport costs to deliver traffic to out-of-area VoIP POPs (in contravention of the Rural Transport Rule), would force an RLEC to subsidize the costs of VoIP providers. This implicit subsidy would be eliminated if the Commission were to require VoIP carriers to comply with the Rural Transport Rule and establish POPs within a RLEC's service area. Furthermore, the avoidance of this implicit subsidy enables RLECs to continue to provide advanced, high quality services at affordable rates to the rural communities in which they operate, rather than redirecting revenues paid by their customers to subsidize the VoIP carriers' costs.

73. Requiring RLECs to provide free transport to VoIP providers will increase upward pressure on local vertical service rates in small towns and rural areas throughout Kansas, such rates being the only sources of intrastate revenues not presently limited by statute. Rates for such services are relatively inelastic; increases will most likely result in discontinuance of services by many customers, resulting in a reduced scope of services and a net revenue loss to RLECs. VoIP customers, as the cost-causers, should bear the costs of transporting VoIP provider traffic to and from the end offices of the RLECs.

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[117] *In the Matter of Access Charge Reform*, 12 FCC Rcd. 15982, 15987 ¶ 9 (1997).

F. Specific responses to Commission questions

a) Does the Commission have jurisdiction under the Federal and Kansas Telecommunications Acts to address interconnection issues that include VoIP and IP-enabled technology? What impact does K.S.A. 66-2017 have on the Commission's jurisdiction to address issues related to an Incumbent LEC's and electing carrier obligations for interconnection, including interconnection with providers that use VoIP and IP-enabled technology?

74. The question of whether the Commission has jurisdiction under the federal and Kansas Telecommunications Act to address interconnection issues that include VoIP and IP-enabled technology hinges on whether there is a net protocol conversion at the point of interconnection. As discussed above in Section III.B, the Eighth Circuit concluded in *Charter Advanced Services* that VoIP is an information service because there is a net protocol conversion.[118] Accordingly, to the extent that VoIP traffic at the point of interconnection is in IP format, the Commission does not have jurisdiction to address interconnection issues, and "any state regulation of an information service conflicts with the federal policy of nonregulation" and is preempted by federal law.[119]

75. That is not to say that the Commission has no jurisdiction at all over interconnection issues if IP-enabled services are involved. If IP technology is used for transmitting a voice call where there is no net protocol conversion, i.e., IP-in-the-middle, then standard interconnection regulations apply. In the FCC's *IP-in-the-Middle Order*,[120] AT&T's services were initiated and terminated in the same manner as a traditional interexchange call. Only the use of IP technology to transport the call over AT&T's Internet backbone differentiated

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[118] *Charter Advanced Services*, 903 F.3d at 720.

[119] *Minnesota Pub. Utils. Comm'n v. FCC*, 483 F.3d 570, 580 (8th Cir. 2007).

[120] *IP-in-the-Middle Order*, 19 FCC Rcd. at 7457, ¶ 1.

AT&T's technology from a traditional circuit-switched call.[121] As a result, the FCC found that AT&T's use of IP technology resulted in no net protocol conversion and provided no enhanced functionality to the end user, and therefore the services were properly classified as telecommunications and subject to traditional access charge and FTA Title II interconnection regulation.

76. As discussed above, the Commission is precluded by KSA 66-2017 from regulating VoIP services as defined in that section. Expanding regulation of RLECs to control the terms and conditions of exchange and transport of VoIP traffic employs an impermissible "end-run around" K.S.A. 66-2017 by regulating VoIP indirectly when the Commission is prohibited from regulating VoIP directly.

b) What obligations exist for Incumbent LECs or electing carriers to port customers to a VoIP provider? Does an Incumbent LEC or electing carrier have an obligation to ensure it has facilities in place to port numbers to competitive providers?

77. Rural ILECs are obligated to perform their duties under Section 251(b) of the Act. Those duties include the obligation to provide resale, number portability to the extent technically feasible (which, in the context of this proceeding, means that the VoIP provider has a POP located in the RLECs' service areas), dialing parity, access to rights of way, and reciprocal compensation. The duties under Section 251(b) do not supersede the FTA's requirement under Section 251(a) that a LEC's interconnection obligations only arise when another telecommunications carrier is involved. VoIP providers are not telecommunications carriers, and therefore, no interconnection duties are implicated under Section 251(a).

[121] *Id.* at 7465, ¶ 12.

78. It is important to note that number porting obligations under Section 251(b)(2), only attach when a VoIP provider has a direct interconnection with a RLEC. It would be technically infeasible for calls to be routed to numbers ported to VoIP providers unless there is a direct interconnection, and such direct interconnections can be accomplished through a commercial agreement.

c) What responsibilities do Incumbent LECs, electing carriers, and competitive VoIP providers have to ensure their customers' calls are completed to another provider?

79. VoIP providers are required to ensure that their customers' calls can be completed to another provider – particularly in rural areas, and that calls originating on the PSTN can be received by their customers, as such capability is statutory designated an element of VoIP service. To that end, VoIP providers have the responsibility to ensure that they have the appropriate facilities or third-party intermediate carrier arrangements in place to ensure that their customers' calls are completed. It is unreasonable to permit a VoIP provider to sell its services to Kansas consumers, and only then demand that other carriers create or secure new transport capabilities for the benefit of the VoIP provider.

80. RLECs have a responsibility to route calls to other providers, but those responsibilities are necessarily dependent on the interconnection arrangements in place. RLECs do not have the obligation in incur additional costs required to route traffic beyond their service area boundaries.

d) When do the obligations imposed under 47 U.S.C. § 251(b)(2) and (c)(2) require direct interconnection with an Incumbent LEC or electing carrier? When is an Incumbent LEC or electing carrier required to allow indirect interconnection with a VoIP provider?

81. Section 251(b)(2) of the FTA sets forth the obligation for LECs to provide number portability to the extent technically feasible. The FCC has already determined that

Section 251(b)(2) applies to VoIP services, and LECs are required to port numbers to VoIP providers. That obligation, however, is not unqualified and porting is not required if the "technically feasible" requirement is not met. In rural areas, technical feasibility means that the VoIP provider must have a POP located in the porting-out LEC's service area. If the VoIP carrier does not have an in-service-area POP, the VoIP provider would need to purchase third party transport services to route local calls placed by the RLEC's customers from the RLEC exchange area to a VoIP provider's POP outside the RLEC's service area. As discussed above, it is not technically feasible to port numbers because the parties' networks cannot be directly connected for the exchange of traffic, which is necessary to avoid violating the Rural Transport Rule.[122]Section 251(c)(2) requires ILECs to provide interconnection with the LEC's network. This section does not apply, however, in the context of VoIP services because that section states that ILECs have "the duty to provide, for the facilities and equipment of any requesting *telecommunications carrier*, interconnection with the local exchange carrier's network. This is similar to the requirement in Section 251(a), which applies only when there is a requesting telecommunications carrier. Because VoIP providers are not telecommunications carriers, the obligations under Section 251(c)(2) are not triggered.

82. Finally, it is well-settled that ILECs are required to allow indirect interconnection when a VoIP provider is sending traffic through another carrier that is a telecommunications carrier. In the *Time Warner Declaratory Ruling*,[123] the FCC considered the issue of whether ILECs, and in particular, rural ILECs, were required to enter into interconnection agreements with other telecommunications carriers – in that case, MCI and Sprint – for the purpose of

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[122] *See* Paragraphs 51-52, *supra.*

[123] *Time Warner Declaratory Ruling,* 22 FCC Rcd. 3513.

originating and terminating VoIP traffic on the PSTN for VoIP providers. The FCC ruled that telecommunications carriers such as MCI and Sprint are entitled to interconnect and exchange traffic with ILECs pursuant to Section 251(a) and (b) of the FTA for the purpose of providing wholesale telecommunications services to VoIP providers.[124] The FCC did not extend interconnection rights to VoIP carriers, and indeed, the Eighth Circuit's decision in *Charter Advanced Services* confirms that VoIP carrier interconnection does not fall under the Section 251/252 interconnection regime.[125]

e) Does the technology used by a competitive provider impact an Incumbent LEC's or electing carrier's obligations to port customers, complete calls, and/or interconnect under Sections 251 and 252? Does an Incumbent LEC's or electing carrier's obligations change when VoIP technology is used? What role, if any, does the technology used by a competitive provider have on its interconnection, porting and call completion obligations?

83. The duty of an ILEC to provide interconnection under Sections 251/252, and the duty to provide, among other things, number portability under Section 251(b) are subject to different standards. As a threshold matter, the technology used is relevant to the prerequisite determination of whether the requesting provider is a telecommunications carrier as defined under the FTA, and even then only to the extent that there is not a net protocol conversion. If VoIP technology is used and there is a net protocol conversion, then the Section 251(a) interconnection requirements would not apply. There is a presumption that Congress knew of the FCC's treatment under Title II of the FTA for basic services versus enhanced services when

[124] *Id.* at 3517, ¶ 8.

[125] *Charter Advanced Services*, 903 F.3d 715.

Congress enacted the Section 251(a) requirement applying only to telecommunications carriers, and the Commission must follow the statute.[126]

84. In contrast, the duties under Section 251(b) are technology agnostic, and porting and call completion obligations are the same for ILECs and competitive providers, regardless of the technology used. The question remains, however, whether number porting is technically feasible. In rural areas, technical feasibility means that a porting-out VoIP carrier must have a POP in the service area of the RLEC to avoid violating the Rural Transport Rule, saddling the RLEC with the VoIP provider's cost of service, and imposing new burdens on the RLECs and their customers for costs that should be borne by the VoIP carrier to meet its statutory obligations to its customers.

f) Under what circumstances is a commercial agreement appropriate? Are there other technical arrangements that may be appropriate to ensure an Incumbent LEC or electing carrier can exchange local traffic with a competitive provider and, specifically, VoIP competitors? To assist the Commission, diagrams of the interconnection points may be provided to illustrate each circumstance.

85. Commercial agreements are appropriate in cases where the duties under Section 251 do not apply. As discussed above, RLECs do not have any obligation to interconnect directly or indirectly with VoIP services pursuant to Section 251/252 interconnection agreements. Negotiated commercial agreements are well-suited for interconnection, traffic exchange, and number portability arrangements between carriers. Indeed, past experience has shown that commercial agreements allow competitive carriers to enter the market, foster competition, and bring new and innovative services to consumers.

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[126] *See, e.g., Commissioner v. Keystone Consol. Industries, Inc.*, 508 U.S. 152, 159 (1993) (noting presumption that Congress is aware of "settled judicial and administrative interpretation[s]" of terms when it enacts a statute).

86. With regard to the technical arrangements necessary to ensure RLECs can exchange local traffic with VoIP competitors, there are no significant technical hurdles that would prevent the exchange of local traffic. The primary consideration is that interconnection must occur at a technically feasible point within the RLEC's service area to avoid burdening rural customers with costs that should be borne by the VoIP provider. This can be achieved through a direct interconnection whereby the VoIP carrier establishes an in-area POP. That POP can be at any technically feasible point established though the VoIP provider's own facilities, or by using facilities that it leases from other carriers. Traffic exchange can also be achieved through indirect interconnections using the services of third-party transport providers, provided such transport is consistent with requirements of the third-party providers and with applicable regulatory traffic classification and compensation requirements. Regardless of how the interconnection is established, any solution must ensure that RLECs are not required to pay for out-of-area transport costs, or to provide number portability in a manner that can be used for location portability rather than service portability purposes.

g) If a competitive provider has an existing agreement for transiting traffic, can the agreement be modified to include local call routing or are new agreements necessary?

87. Any existing agreement necessarily should be specific to the services and parties involved. Whether an agreement can be modified will depend on the transiting carrier and the terms of the existing agreement. As a general matter, transiting agreements specify the type of traffic that can be sent over circuits ordered under the agreement. For example, if a transiting agreement only allows for access traffic to be sent over access trunks, non-access (local) traffic may not be sent over the same lines. The reason for this requirement is to avoid the commingling of access and non-access traffic, which can lead to intercarrier compensation disputes. Unless there is a mechanism in place to determine the jurisdiction of the traffic, or

unless the parties agree on "traffic factors" regarding the percentage of interexchange v. local traffic, all traffic sent over a particular Feature Group D circuit is presumed to be access traffic.

88. As a practical matter, new agreements would likely be required because long distance trunks used to transport access traffic cannot be used for local traffic, and vice versa. If a VoIP provider wants to send all traffic – which includes both local and long distance calls – over existing trunks connected to an access tandem, the VoIP provider must make arrangements with the transiting provider to pay for the use of those circuits in that manner. The VoIP carrier must also ensure that the jurisdiction of that traffic can be accurately identified to ensure that local traffic is subject to bill-and-keep and long distance traffic is subject to access charges, as required by the VoIP Symmetry Rule and the LECs' access tariffs.

h) When a competitive provider relies on third-party facilities, should verification of the agreement for transiting traffic be provided to an Incumbent LEC or electing carrier upon request to confirm the authorized use of the facilities?

89. Existing jointly provisioned trunks between RLECs and other providers are intended and used for the exchange of access traffic. The exchange of all traffic on a bill-and-keep basis over such facilities would be inappropriate due to the resulting presence of a jurisdictional mixing of calls subject to both bill-and-keep with calls subject access charges. Given that the intended use of those third-party facilities is for access-only traffic, it is incumbent on VoIP providers to provide verification that appropriate arrangements have been made with the third-party carrier for the use of those facilities for both local and long distance traffic, and that appropriate arrangements have been made to segregate that traffic to ensure proper billing. Proper prior verification will avoid intercarrier compensation disputes between RLECs and VoIP providers.

90. Alternately, if a VoIP provider unilaterally represents that certain trunks or other facilities may lawfully be utilized for transport of local VoIP traffic, full indemnification by the VoIP provider of the incumbent provider for all resulting claims, costs and expenses could be considered as an alternative in lieu of verification.

i) What impact does evolving technology have on the "technically infeasible" standard?

91. Technology often evolves extremely quickly, and rural carriers are often hard pressed to deploy the most recent developments that come on the market due to the high cost of adopting new technologies. This could mean that VoIP/IP-enabled providers may use technology that a RLEC does not yet have or cannot afford to implement. The Commission should not require RLECs to prematurely update their networks and incur additional costs to interconnect with VoIP providers. If VoIP carriers insist on using technology that is incompatible with existing LEC networks or that require expensive upgrades, the VoIP carriers should be required to pay for any upgrades or new equipment required to accommodate VoIP traffic.

92. Furthermore, as discussed above, a technically feasible point of interconnection means a location within the RLEC's service area where the parties can exchange traffic. If VoIP carriers do not have a POP located in a LEC's exchange, or if they utilize incompatibility technology, they can pay for the use of a third-party carrier's facilities in order to transport VoIP calls to the LEC. "Evolving technology" is not material to the presence or absence of facilities to transport local traffic.

j) What costs arise from transiting local traffic between providers? Which provider is responsible for costs for originating local traffic? Are different costs imposed on the respective parties to provide transmission and routing for local exchange service when a provider uses VoIP?

93. Transiting carriers charge for their service on a per minute basis unless the parties agree that the traffic is subject to bill-and-keep. The party responsible for the costs of the originating traffic is generally the originating carrier. As a practical matter, if the originating carrier cannot be determined, the transiting carrier will bill the carrier that sent the traffic, and the billed carrier will then seek compensation from the next carrier in the chain of traffic. If the amount of traffic to the transiting carrier becomes too voluminous, it is possible that the transiting carrier will require parties to make arrangements for a direct interconnection.

94. The commenting RLECs are not aware of differences in transport costs as a result of the technology utilized, but the question is better directed to the owner/operator of the transport facilities in question.

k) What role does the FCC's intercarrier compensation reforms play in the transiting traffic costs? How does the FCC's requirement for all traffic, including VoIP-PSTN traffic, to be subject to Section 251(b)(5) impact the costs arising from transiting local traffic (reciprocal compensation for transport and termination of traffic)? What role does bill-and-keep have in the exchange of LEC/electing carrier to VoIP services?

95. In 2011, the FCC reformed its intercarrier compensation regime and adopted a timeline for transitioning to a uniform national bill-and-keep framework for telecommunications traffic exchanged with LECs.[127] In the *USF/ICC Transformation Order*, the FCC adopted a seven-year plan for transitioning the rates of certain categories of switched access services to bill-and-keep by July 1, 2018.[128] The *USF/ICC Transformation Order* did not address the transition to bill-and-keep for other tandem switching and transport charges, and instead, sought further comment on the transition and "proper scope" of such reform. In its 2017 *Network Edge*

[127] *USF/ICC Transformation Order*, 26 FCC Rcd. at 17904-914, ¶¶ 736-59.

[128] *Id.* at 17932-38, ¶¶ 798-808; 17934-35, ¶ 801, Figure 9. 47 C.F.R. § 51.907(a)-(h).

Public Notice, the FCC invited interested parties to refresh the record and sought comments, *inter alia*, on how to transition the remaining price cap carrier tandem switching and transport charges, i.e., those not addressed in the *Transformation Order*, to bill-and-keep.[129]

96. The FCC made it clear in the *USF/ICC Transformation Order* that it was establishing a separate transition path for tandem services for VoIP-terminated calls. The FCC indicated in its order that addressing these and other reforms required it to define the point at the "network edge" where bill-and-keep applies, and, thus, when a "carrier is responsible for carrying . . . its traffic to that edge."[130] The FCC sought comment on this "critical aspect to bill-and-keep," as well as on "closely related" issues, including the appropriate transition for tandem switching and transport charges where the terminating carrier does not own the tandem.[131] At this time, the FCC has not modified tandem switching and transport charges for traffic that traverses the tandem switch of a price cap carrier, but is terminated by a third party. Accordingly, the FCC's intercarrier compensation reforms do not currently impact transiting traffic costs.

97. To the extent that VoIP-PSTN traffic involves non-access (local) traffic, and to the extent such traffic is exchanged directly between a LEC and a VoIP carrier, such traffic would be subject to bill-and-keep. As explained above, however, transiting service charges may still be applicable to such traffic when third-party services are necessary for VoIP providers to provide termination of local traffic originating on the PSTN.

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[129] *Network Edge Public Notice*, 32 FCC Rcd. at 6857.

[130] *USF/ICC Transformation Order*, 26 FCC Rcd. at 18117, ¶ 1320.

[131] *Id.* at 18112-18, ¶¶ 1306-21. *See also Network Edge Public Notice*, 32 FCC Rcd. at 6856-58 (inviting comments on an appropriate transition for the remaining tandem switching and transport services).

98. Further, the FCC recently reconfirmed in December 2019 that the VoIP Symmetry Rule remains in effect, "permit[ting] a LEC to charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed, or the technology used correspond precisely to those used under a traditional TDM (time division multiplexing) architecture."[132] The VoIP Symmetry Rule specifies that, "a local exchange carrier shall be entitled to assess and collect the full Access Reciprocal Compensation charges" in the FCC's rules "that are set forth in a local exchange carrier's interstate or intrastate tariff for the access services . . . ."[133] While bill-and-keep applies to the exchange of local traffic (setting aside intercarrier compensation issues associated with third-party transiting service), the traditional access charge regime and state and local access tariffs apply to VoIP access traffic.

l) What role do the number porting waivers granted to the RLECs for porting numbers to wireless providers play in today's telecommunications market? Do they remain in effect, should they be voided, or have they been rendered moot through advances in technology?

99. The numerous number porting waivers granted individually to requesting rural telephone companies remain valid and in effect. As a general matter those waivers, granted pursuant to state authority arising under 47 U.S.C. §251(f)(2), have recognized the technological infeasibility resulting from an absence of facilities connecting to the respective rural companies' networks. On occasion this Commission has additionally granted waives of porting requirements based on a finding of the resulting financial burden on the party requesting a waiver. The finding of technical infeasibility typically recommended by Commission Staff and found to exist by the

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[132] *VoIP Remand Order*, 2019 WL 7018968, at *3 (*citing USF/ICC Transformation Order*, 26 FCC Rcd. at 18026-27, ¶ 970.

[133] 47 C.F.R. § 51.913(b).

Commission is a recognition of the absence of local connectivity resulting in the unavailability of a reasonably available and effective means to transport local traffic to the provider requesting porting.

100. Those porting waivers previously granted have been, and remain, limited by their own terms to the circumstance in which a wireless carrier seeks porting of a local number in the absence of a point of presence by the wireless carrier within the exchange area of the carrier seeking waiver. The technical issues, and thus the basis for such a waiver, are no different when the provider seeking porting is a VoIP provider, as the absence of connectivity with the local carrier's network is the controlling consideration.

101. In 2010 this Commission initiated a proceeding (Docket No. 11-GIMT-003-GIT, *In the Matter of the Commission's Review of Waivers Previously Granted to Incumbent Rural Local Exchange Carriers from the Provisioning of Local Number Portability and the Ongoing Granting of Such Waivers*) to review the status and appropriateness of the various individual company waivers that had been granted to rural companies. After receiving and considering arguments and recommendations from numerous national and regional carriers recommending discontinuance of the existing waivers, Commission Staff submitted its Report and Recommendation including the following:

> The issues raised in this general investigation range from technical to economic to public policy. Going forward, the Commission is in a position to fully evaluate any further Petitions for such waivers.... [E]valuating the previously-granted Petitions collectively will be difficult, time consuming and thus, expensive to both the Commission's staff and the involved parties. Such continuation may very well become an academic exercise in that there may or may not be interest by wireless carriers to port numbers in the rural locations in which the RLECs have received waivers.
>
> Staff believes that it must provide due process in reviewing whether the waivers should be rescinded and, to do so, the Commission must review the previously-granted waivers on a company-specific and location-specific basis rather than

> reviewing all 11 waivers and companies collectively. Staff believes any specific reevaluation of existing waivers should be conducted with the benefit of location-specific information and a request by companies desiring to enter the specific markets.

By Order of September 22, 2011 the Commission adopted Staff's recommendation stating it "agrees that this is the best course of action in that it will allow the Commission to act only when necessary and to act in a company-specific manner, with company-specific information and input, rather than information and input on a global, higher-level basis." Thereupon the general investigation was ordered closed.

102. Since the Commission conducted and resolved its previous general investigation no party has requested review or modification of any existing porting waiver, nor has any party presented substantial competent evidence supporting rescission of any existing waiver or modification of existing Commission policy on the issue generally. The specific issue of number porting has not been addressed in either of the complaint proceedings initiated by a VoIP provider against individual rural companies, nor was the matter of number porting included among the numerous issues identified by the Hearing Examiner in the Commission's Docket No. 19-RRLT-277-COM.

103. The utilization of VoIP technology in voice traffic is immaterial to application of the requirement of technical feasibility. As discussed above at some length, nonexistent facilities are no more able to carry traffic in internet protocol format than traffic utilizing any other technology. Further, the discussion of FCC action supra., at ¶¶ 34–35 and 50–53 shows considerations of technical feasibility have been recognized particularly as being applicable to VoIP providers' voice traffic and to the technical considerations applicable to number porting related to such traffic.

m) Should the Commission revisit its Rural Entry Guidelines? Are there specific guidelines that should be modified or eliminated? If yes, which ones?

104. K.S.A. 66-2004(b) required the Commission to adopt rural entry guidelines no later than December 31, 1996, which it did by an Order dated December 27, 1996, in Docket No. 94-GIMT-478-GIT. The Rural Entry Guidelines are as follows:

a. An applicant must be certificated by the Commission pursuant to K.S.A. 66-131 and must demonstrate technical expertise, financial capability, and managerial expertise.

b. An applicant must meet the requirements to qualify as an "eligible telecommunications carrier" under Section 214(e)(1) of the Federal Act and must 1) offer to provide service to all customers in the rural telephone company study area as defined by the FCC and 2) advertise the availability and charges for service using media of general distribution.

c. An applicant must make a bona fide request to the ILEC for interconnection services or network elements. 47 U.S.C. § 251(f)(1), K.S.A. 66-2004(a).

d. An applicant must provide notice of the bona fide request to the Commission. 47 U.S.C. §251(f)(1)(B).

e. The Commission must then determine if the ILEC has been granted an exemption under 47 U.S.C. §251(f)(2); if yes, the inquiry terminates and the new entrant cannot provide service until the exemption expires. If no then . . .

f. The Commission must inquire whether:

i. the request is unduly economically burdensome for the ILEC;

ii. the request is technically feasible; and

iii. the request is consistent with Section 254 (preservation of universal service).

105. The rural entry guidelines were supplemented by the Commission in its February 2, 1997 Order on Reconsideration in the same docket. The additional considerations are:

a. Whether the proposed competitive entry would not negatively effect [sic] preserving and advancing universal service at reasonable and affordable rates and with high service quality, in the incumbent service area.

b. Whether competition pursuant to the application would not negatively effect [sic] the continued existence of a viable carrier of last resort, capable of providing high quality, affordable required telecommunications service to anyone in the service area on request.

c. Whether the service area of the incumbent rural telephone company is capable of sustaining more than one telecommunications service provider.

d. Whether the new entrant into a rural telephone company service area will provide, operate, and maintain high quality capacity facilities and services to schools, medical facilities, and libraries.

e. Whether the new entrant satisfies the Commission that it will not violate the intent of the law and will provide service throughout the service area of the rural telephone company.

f. Whether accommodating multiple service providers in the rural telephone company service area is technically feasible.

g. Whether the economic burden of implementing measures to effect these technical requirements are excessive or unreasonable.

106. The commenting LECs can see no reason why these guidelines should be modified. The guidelines are comprehensive, well-reasoned, and have served as appropriate guidance for the Commission for over twenty-three years and were adopted as required by statute

by December 31, 1996. There is no provision in the statute for the guidelines to be rescinded or materially modified.

107. The public policy legislatively intended to be addressed through the rural entry guidelines was the balance between the benefits of competition and the continuing assurance of reliable, affordable and universally available telecommunications service. Subsequent imposition of limitations on RLEC revenue sources, without relief from the RLECs' service obligations, have aggravated the difficulties of satisfying those governmentally imposed obligations. The regulatory imposition of new burdens and costs would further erode the abilities of RLECs to satisfy the state's service mandates.

108. Current statutory directives would mandate reductions in existing RLEC revenues during the current KUSF year ending March 1, 2021, without reasonable opportunity by the RLECs to recover the lost access to cost recovery. Such a circumstance should give greater weight to the balance supporting universal service. Abrogation or weakening of the guidelines' protections that have enabled the RLECs' investment of private capital would amount to the state "tipping the balance" against the assurance of affordable and reliable service. The state should not engage in such an exercise, which would amount to the state picking winners and losers without creating any assurance of material benefit to consumers or to the public interest generally.

109. The nature of the technology utilized by a putative new voice service provider in an RLEC's service area is immaterial to the statutorily mandated balance between competitive entry and the incumbent's ability to continue provision of ubiquitous high quality, affordable state-mandated service. The Legislature's action, for better or worse, authorizing provision of one particular information technology without geographic restriction is no indication that the

emergence of any technology for the provision of telecommunications service warrants disruption of the existing policies supporting universal availability of vital telecommunications public service.

110. There is no "emergency technology exception" to the statutory mandate (K.S.A. 66-2002(c)) for Commission adoption of "guidelines to ensure that all telecommunications carriers and local exchange carriers preserve and enhance universal service, protect the public safety and welfare, ensure the continued quality of telecommunications services and safeguard the rights of consumers. K.S.A. 66-2002(k) authorizes periodic Commission review and potential modification of the *definition* of universal service, "taking into account advances in telecommunications and information technology and services...." This authority permits expansion of the nature of services that should be made universally available to Kansas consumers. The Legislature granted no comparable authority, in the same section or elsewhere, for Commission review or modification of the adopted guidelines sustaining the universal availability of the range of services deemed universal. Such authority would require prior statutory amendment.

n) Other issues that may assist the Commission with its determinations in this Docket.

111. When the Commission considers whether to adopt rules governing VoIP-PSTN interconnection and number portability issues, it must be mindful of the FCC's current and ongoing rulemaking in the *Connect America Fund* proceeding regarding network edge and unresolved intercarrier compensation issues. It would be imprudent for the Commission to create a conflict through enactment of inconsistent rules that could result in disputes between carriers. For example, the FCC is currently considering network edge issues for VoIP-PSTN traffic which could impact intercarrier compensation between LEC and VoIP carriers. The FCC

has not yet issued any guidance to the states regarding how the network edge is to be determined. Establishing a network edge for Kansas that conflicts ultimately with guidance later issued by the FCC would lead to expensive and protracted litigation by carriers seeking to recoup payments paid (or received) from other carriers. Furthermore, the Commission must also take into account the Rural Transport Rule, VoIP Symmetry Rule, and the filed rate doctrine to ensure that any requirements imposed on RLECs do not violate those laws.

IV. CONCLUSION

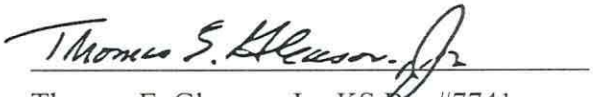
112. The issues raised in this proceeding are myriad and complex and have substantial potential to conflict with established FCC rules and policies, court precedent, and ongoing rulemaking proceedings. The Commission should ensure that it does not move hastily to adopt rules that exceed its jurisdiction, or that serve only to sow confusion in the marketplace and lead to further disputes among carriers. Moreover, the Commission must take into account and protect the interests of the customers in rural areas to ensure that they are not victims of improper efforts to subsidize the costs of service for VoIP providers contrary to well settled cost responsibility rules and to the public interest generally.

113. In light of the risks and complex issues raised by this proceeding, the Commission should find it lacks jurisdiction in the present proceeding. To the extent the Commission determines that it has jurisdiction on the limited scope applicable to providers of information service to adopt rules governing VoIP interconnection and number portability, those rules must ensure that VoIP providers do not impose their costs upon RLECs and their customers, and instead require VoIP carriers to establish a POP or meet point in the LECs' service area, prohibit RLECs from being required to transport traffic beyond their service area boundaries, and ensure

the numbers ported to VoIP providers continue to be used in the ported number's original service area so that service portability does not become location portability.

WHEREFORE, the commenting LECs request the Commission consider these comments, and for such other and further relief as the Commission deems just and equitable.

Respectfully submitted,



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VERIFICATION

I, the undersigned, hereby certify under penalty of perjury pursuant to K.S.A. 53-601 that the foregoing is true and correct. Executed on June 15, 2020.

Colleen R. Jamison

Colleen R. Jamison

CERTIFICATE OF SERVICE

The undersigned certifies that on June 15, 2020, she served the above Comments by electronic mail service to the persons listed below as reflected on the Commission's "service list" for this docket.

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