

Intercarrier Compensation Reforms—Integration of VoIP Calling

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Integration of VoIP Calling. The intercarrier compensation status of calls to and from VoIP services has been controversial. The Order sets new rules that apply prospectively to govern intercarrier compensation for such calls. Non-toll VoIP calls will be subject to reciprocal compensation under Section 251(b)(5). VoIP calls that would normally be considered toll calls (that is, typically, where the calling and called party are in different calling areas) will be subject to **interstate** access charges as of the effective date of the rules. This new rate level applies even to VoIP toll calls that are **intrastate** in nature (such as calls from Los Angeles to San Francisco, or Houston to Dallas). So, from that date until July 1, 2013 (when inter- and intrastate access charges become identical), intrastate **VoIP** toll traffic will be subject to different access rates than intrastate **non-VoIP** toll traffic (that is, traditional toll calls). The permitted compensation rates for VoIP may be set in carrier-to-carrier agreements or, for VoIP toll traffic, in FCC and state access tariffs. In addition, the permitted compensation for VoIP traffic must be paid to the LEC that terminates the calls, even if some termination functions are provided by the LEC's VoIP-provider customer, including affiliates of the LEC.

The VoIP Compromise. The Order's treatment of VoIP calling is a compromise reflecting the result of an intense lobbying battle between large ILECs and their allies on one side, and cable-affiliated CLECs and VoIP providers on the other. The cable-CLECs pressed to have VoIP traffic treated exactly like traditional voice traffic, including the application of full intrastate access charges on intrastate toll calls to or from VoIP services. The large ILECs (along with their interexchange carrier affiliates), wanted compensation for the exchange of all VoIP traffic, including toll calls to and from VoIP services, to be immediately set at \$0.0007 per minute; some VoIP entities wanted all VoIP-related traffic to be immediately moved to a bill-and-keep system. The ILECs and their allies also wanted the FCC to declare that all VoIP traffic was inherently jurisdictionally interstate in nature, both to eliminate any potential for future disputes in the states, and to provide ammunition against state jurisdiction in a number of ongoing controversies about compensation for VoIP traffic.

While the FCC did limit compensation for intrastate VoIP toll traffic to interstate access levels, it did so by means of a legal rationale that allowed it to reject the ILECs' efforts to cut state regulation out of the process. The Order takes pains to state that its new system is prospective only, and that the FCC is not deciding the many ongoing disputes about compensation for VoIP traffic. In addition, the Order appears inconsistent with a number of claims advanced by ILECs in disputes over VoIP compensation, e.g., that the FCC had already preempted the application of intrastate access charges to VoIP traffic. In addition, as noted, the Order makes clear that a CLEC partner of a retail VoIP provider is entitled to terminating compensation in accordance with the FCC's new system, even though the final delivery of the calls to end users is handled in IP by the VoIP provider and not by the CLEC itself. This severely undercuts an argument that had been pressed by various interexchange carriers, led by AT&T, that a CLEC routing calls to a VoIP provider was actually only performing the function of **tandem** switching, compensable at a much lower rate than the **end office switching** that the affected CLECs have asserted they are performing.

Legal Rationale. The FCC states that it has the legal authority to take over the entire field of intercarrier compensation, including intrastate access charges that have previously been regulated solely by the states, under Section 251(b)(5) of the Act. That provision requires all LECs to establish reciprocal compensation (not access charge) arrangements for the "transport and termination" of all "telecommunications." It therefore applies fully not only to local traffic (which has been the focus of reciprocal compensation since the passage of the 1996 Act) but to toll traffic, and all other traffic, including VoIP traffic, as well. The FCC specifically ruled that bringing the carrier-to-carrier exchange of VoIP traffic within Section 251(b)(5)'s reciprocal compensation regime still leaves open the long-pending classification question of whether retail VoIP service is a "telecommunications service" or an "information service." (This dodge by the FCC is legally viable because, under the statutory definitions, **all** "information services" are provided "via telecommunications," and so have a "telecommunications" aspect that brings them within Section 251(b)(5).)

Applying Section 251(b)(5) to toll traffic displaces the traditional access charge regime for the first time. This statutory authority acts as an overlay to existing state authority, rather than a direct displacement of state authority by means of a "preemption" analysis. By relying on this statutory authority—as opposed to "preempting" states from any power over intrastate traffic—the FCC was able to permit simultaneous state tariffing and review of intrastate access charges (including charges for VoIP toll calls), subject to the over-arching phase-down rules the FCC is adopting. While some states will almost certainly challenge the FCC's action in any event, the Section 251(b)(5) rationale is

less likely to be struck down on appeal than a pure “preemption” ruling would have been.

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