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FAX COVER SHEET

DATE:	February 3, 2006
DELIVER TO:	Patricia Van Gerpen
FAX NUMBER:	773-3809
FROM:	Darla Pollman Rogers
RE:	Docket RM05-002

TOTAL NUMBER OF PAGES INCLUDING THIS COVER SHEET: 21

MESSAGE FROM SENDER:

Dear Patricia:

Attached hereto are the Joint Comments of LECA and SDTA in RM05-002.

Hard copy is in the mail.

Darla Pollman Rogers

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF SOUTH DAKOTA

IN THE MATTER OF REVISIONS AND/OR ADDITIONS TO THE COMMISSION'S SWITCHED ACCESS RULES CODIFIED IN ARSD 20:10:27 THROUGH 20:10:29.	DOCKET RM05-002 JOINT INITIAL COMMENTS OF LECA AND SDTA

The Local Exchange Carriers Association (LECA), on behalf of its member local exchange carriers (LECs), and the South Dakota Telecommunications Association (SDTA), on behalf of its member LECs (some of which are not members of LECA), respectfully jointly submit the following initial comments to the South Dakota Public Utilities Commission (Commission) in the above-captioned proceeding.

INTRODUCTION

Although the Commission has not yet given any indication that an opportunity for reply comments will be provided in this matter, LECA and SDTA would ask that an opportunity for further comments be provided so that all parties can fully respond to any specific rule changes that may be proposed. At this time, however, LECA and SDTA, in response to the notice of this matter provided in the Commission's "Weekly Filings" publication, would offer general comments related to this rulemaking inquiry. These general comments will be focused in the following areas. First, we will review the conclusions of the Federal Communications Commission (FCC) in its Report and Order and Notice of Proposed Rulemaking issued on September 23, 2005, in CC Docket No. 02-33 (FCC 05-150), *In the Matter of the Appropriate Framework for Broadband Access to the Internet over Wireline Facilities* (hereinafter referred to as the *DSL Order*). While in that Order, the FCC generally reclassified retail DSL service offered by incumbent regulated LECs as an "information service," it also specifically concluded that "wireline broadband transmission" would continue to be treated as a regulated activity under Part 64 of its cost allocation rules.[1] Based on this conclusion, the FCC has, to this point, rejected proposals to change the regulatory cost allocation treatment of DSL services. Second, we will comment generally on how intrastate switched access compensation under the current rules has been critical to the preservation and advancement of universal service in South Dakota, and how, in helping to achieve universal service goals, the current rules and Commission action pursuant to such rules have been consistent with not only the South Dakota statutes but also the Federal Communications Act (hereinafter referred to as the Act or Federal Act) and actions of the FCC in implementing the Act. Third, we will comment on the timing of this docketed proceeding, particularly in light of ongoing efforts before the FCC to establish a unified intercarrier compensation regime (involving both interstate and intrastate access charges).

I. DSL Order

With the issuance of its *DSL Order*, the FCC made several important decisions and made note of a number of important facts that we believe should be considered in this pending docket. In pertinent part, the FCC included the following findings/conclusions in its *DSL Order:*

1. Facilities-based wireline carriers are permitted to offer broadband Internet access transmission arrangements for wireline broadband Internet access services on a common carrier basis or a non-common carrier basis. *Par. 5.*

[1] FCC 05-150 (DSL Order) at par. 139.

2. Our primary goal in this proceeding is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband. *Par. 89.*

3. . . . [W]e conclude that facilities-based providers of wireline broadband Internet access services must continue to contribute to existing universal service support mechanisms based on the current level of reported revenue for the transmission component of their wireline broadband Internet access services for a 270 day period after the effective date of this Order or until adopt new contribution rules in the *Universal Service Contribution Methodology* proceeding. *Par. 113.*

4. . . . [W]e address cost allocation issues raised by our decision to allow incumbent LECs to enter into non-common carriage arrangements with affiliated and unaffiliated ISPs for the provision of wireline broadband Internet access transmission using facilities that are also used for the provision of regulated telecommunications services. Specifically, we address whether we should require incumbent LECs subject to our part 64 cost allocation rules to classify that activity as a regulated activity, as opposed to a nonregulated activity, under our part 64 cost allocation rules. <u>We conclude that incumbent LECs should classify this non-common carrier activity as a regulated activity under those rules and that this accounting treatment is consistent with section 254(k) of the Act.</u> *Par. 128. [Emphasis added].*

5. In this Order, we allow the non-common carrier provision of wireline broadband Internet access transmission that we previously have treated as regulated interstate special access service, but <u>we do not preemptively deregulate any service currently regulated by any state. Therefore, as specified in section 32.23 of our rules, the provision of this transmission is to be classified as a regulated activity under part 64 "until such time as the Commission decides otherwise."</u> We do not "decide otherwise" at this time because we find that the costs of changing the federal accounting classification of the costs underlying this transmission would outweigh any potential benefits and that section 254(k) of the Act does not mandate such a change. *Par. 130. [Emphasis added].*

6. Requiring that incumbent LECs classify the provision of broadband Internet access transmission provided on a non-common carrier basis as a nonregulated activity under part 64 would mean, among other matters, that incumbent LECs would have to develop, and we would have to review, methods for measuring the relative usage that this transmission and the incumbent LECs traditional local services make of incumbent LEC's transmission facilities. <u>Incumbent LECs argue that they should not have to undertake this task because it would impose significant bur-</u>

dens upon them with little discernible benefit. We agree. *Par. 131. [Emphasis added].*

7. Requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission activities as nonregulated activities under part 64 would impose significant burdens that outweigh these potential benefits. In particular, the cost allocation principles set forth in our part 64 rules assume that meaningful measures of cost causality and usage will be available to help allocate a carrier's investments and expenses between regulated and nonregulated activities. If we were to require that incumbent LECs classify their non-common carrier, broadband Internet access transmission activities as nonregulated activities under part 64, the extent of nonregulated usage of incumbent LEC's networks could increase dramatically. New measures of cost causality and usage would have to be developed to reflect this increased nonregulated usage. These measures, moreover, would have to reflect the evolution of the incumbent LECs' networks from traditional circuit-switched networks into IP-based networks. The proceedings to set these measures would be both resource-intensive and, given the changes in network technology from the time when the part 64 cost allocation rules were developed, likely lead to arbitrary cost allocation results. *Par. 134. [Emphasis added].*

8. Because the costs of requiring that incumbent LECs classify their non-common carrier, broadband Internet access transmission operations as nonregulated activities under part 64 exceed the potential benefits, we decline to require such a classification. *Par. 135.*

9. . . . [A]ll rate-of-return carriers that have participated in this proceeding have stated that they wish to continue offering broadband transmission as a Title II common carrier service. We have provided them with this option. Such, we do not, at this time, address the treatment of private carriage arrangements by rate-of-return carriers because the issue is entirely hypothetical. *Par. 138.*

10. By continuing to treat the provision of wireline broadband transmission as a regulated activity under part 64, we do not change the regulatory cost allocation treatment and thus do not change their status under section 254(k). *Par. 139. [Emphasis added].*

11. We reject NARUC's and the State Consumer Advocates argument that we must, under section 254(k), require incumbent LECs to reallocate a portion of their joint and common loop costs from "universal services" as a group to wireline broadband Internet access transmission. *Par. 140.*

12. We note that the question of whether there should be any changes to the jurisdictional allocation of loop costs in light of use of the loop for broadband services was referred to the Federal-State Joint Board on Separations in 1999. . .. This issue remains pending. [And,] [i]n any event, separations is now subject to a five-year freeze, and the Joint Board is working on the approach that should follow this freeze; the issues we describe in this Order already fall within this context. After the Joint Board makes its recommendation, we can reexamine the question of how any additional costs that might be assigned to the interstate jurisdiction may be recovered by local exchange carriers. *Par. 144. [Emphasis added]*.

Even though the FCC has now by its *DSL Order* generally classified facilities-based wireline broadband Internet access service as an "information service," consistent with the U.S. Supreme Court's decision in National Cable & Telecommunications Association v. Brand X Internet Services, 125 S. Ct. 2688 (2005), the above-cited findings/conclusions indicate very clearly that the FCC does not at this time, as a result of that classification, believe changes are necessary to the current method of allocating wireline broadband transmission costs. The FCC has determined that wireline broadband transmission should continue to be treated as a regulated service for cost allocation purposes. It has specifically rejected proposals to reallocate a portion of joint and common loop costs away from traditional POTS services to wireline broadband Internet access transmission.[2] The FCC has further indicated that it continues to believe that issues "associated with how to allocate loop plant between voice and data services for purposes of jurisdictional separations" are important issues that should be addressed by the FCC in conjunction with the Federal-State Joint Board on Separations.[3]

In making these determinations related to the allocation of costs between traditional POTS and wireline broadband transmission services, the FCC cited various

[2] *DSL Order*, pars. 140-143.

[3] *Id.* at par. 144.

reasons for not changing the current allocation method. Concerns were expressed with the difficulties presented in measuring the relative usage between broadband transmission and the incumbent LECs' traditional local services.[4] The FCC recognized that some meaningful measures of cost causality and usage would have to be developed in order to fairly allocate each carrier's investments and expenses between the pertinent regulated and nonregulated activities, and noted that this task would be "resource intensive."[5] The FCC also expressed concern that the task would be especially difficult given the substantial network changes that have occurred since the Part 64 rules were first adopted. Whatever changes are adopted in the future, the FCC has indicated that they should fairly "reflect the evolution of the incumbent LECs' networks from traditional circuit-switched networks into IP-based networks."[6]

More generally with respect to the broadband-traditional POTS cost allocation issues, the FCC highlighted its concern that nothing be done at this time that would work as a disincentive to the continued deployment of wireline broadband services. As indicated in paragraph 89 of the *DSL Order*, the FCC's primary goal "is to facilitate broadband deployment in the manner that best promotes wireline broadband investment and innovation, and maximizes the incentives of all providers to deploy broadband." Acting in a manner consistent with this goal, the FCC has demonstrated a clear preference toward approaching with caution the "broadband-traditional POTS" cost allocation issues. LECA and SDTA strongly urge this Commission in this rulemaking docket to take the same cautious approach.

[4] *Id.* at pars. 131, 134.

[5] *Id.* at par. 134.

[6] *Id.*

Among the "industry-wide policy issues" noted as the basis for this docket, there is a specific reference in the Commission's *Order Opening Docket* herein, dated December 14, 2005, to issues concerning "the proper regulatory treatment of investments in joint-use plant serving both regulated and unregulated services." With respect to any issues falling into this category, LECA and SDTA would ask this Commission to proceed carefully and to avoid any action that would be inconsistent with the encouragement of continued upgrade of the telecommunications network in South Dakota. The difficulties faced by telecommunications carriers in deploying high-speed broadband services throughout the high-cost areas of South Dakota are already substantial, and ongoing deployment efforts should not be made more difficult through the adoption of access rule changes that would force either cuts in broadband investment or broadband price hikes.

It is especially important that this Commission carefully analyze any proposals that may be presented concerning cost allocation between broadband and other provided services because currently, alternative cost recovery sources in South Dakota are limited. In contrast to the situation in South Dakota, at the federal level, a large proportion of the loop related costs allocated to the interstate jurisdiction is recovered through the federal "Subscriber Line Charge" or "SLC" and through the federal universal service fund. Many state jurisdictions across the country also have either a state "SLC" mechanism and/or a state universal service fund. Although in South Dakota there have been attempts through the state legislative process to establish these types of alternative mechanisms that would allow for a reduction of state access rates, to date they have not been successful. As this Commission is well aware, there is not a state "SLC" in South

Dakota, nor is there a state universal service fund. That being the case, the options for addressing cost recovery concerns in South Dakota, in a manner that is consistent with achieving universal service goals, are limited. If changes are made to South Dakota's intrastate switched access rules and these changes result in a greater portion of loop investment costs being removed from the intrastate switched access rates, the re-allocated costs will have to be recovered directly from end user customers in some fashion. The most likely result to end user customers would be higher "local connection" charges in the form of either higher local service rates or higher broadband service rates.

LECA and SDTA also have concerns with the Commission addressing cost allocation issues related to broadband and other provided services prior to the time that the FCC addresses the same issues for its purposes. As was referenced in the *DSL Order*, the separations factors utilized to determine the cost separations between interstate and intrastate are currently frozen, subject to the 5 year separations freeze which took effect on July 1, 2001. The Joint Board is working on the approach that should follow this freeze, and, as noted above, the FCC has specifically indicated in its *DSL Order* that in this context issues related to the allocation of joint loop costs between broadband and other provided services should also be addressed.[7] It would seem sensible that there be some consistency between the method that the FCC adopts for allocating joint and common costs between broadband and traditional POTs services, in particular for jurisdictional separations purposes, and the method this Commission utilizes for separating allocated intrastate costs between broadband and other intrastate telecommunications services. Until the FCC acts and determines the method or methods it will use for separat-

[7] *Id.* at 144.

ing costs and through these determinations actually identifies on a going forward basis what portion of any costs shifted to broadband services are to be moved to the state jurisdiction for recovery, if any, this Commission is essentially "operating in the dark" in reviewing its own possible rule changes. The FCC has clearly indicated that issues related to the allocation of local loop costs between voice and data services are currently pending with the Joint Board. Until the Joint Board and FCC address these issues and determine the degree to which the states may be responsible for any loop costs shifted to broadband, it would seem difficult if not impossible to reasonably judge the impact of any proposed state changes. The actual financial impact associated with any proposed related state rule changes cannot be gauged without first knowing the extent to which broadband costs will ultimately be allocated to the state jurisdiction for cost recovery.

II. State Role in Preserving and Advancing Universal Service.

Under the provisions found in Section 254 of the Federal Act, both the federal and state jurisdictions are charged with the responsibility to preserve and advance universal service. Subsection 254(b) (5) states specifically that "[t]here should be specific, predictable and sufficient Federal and State mechanisms to preserve and advance universal service." (*Emphasis added.*) The state responsibility with respect to universal service is more specifically defined pursuant to Subsection 254 (f) of the Act, which reads as follows:

> STATE AUTHORITY- A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. Every telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and nondiscriminatory basis, in a manner determined by the State to the preservation and advancement of universal service in that State. A State may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations

> adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.

The above federal provisions make it clear that intrastate telecommunications services and carriers providing such services are intended to play a part in carrying the universal service burden. Every telecommunications carrier providing intrastate telecommunications services within a state is required to contribute on an "equitable and non-discriminatory" basis toward the preservation and advancement of universal service in that state. Furthermore, to the extent that any state seeks to establish within its jurisdiction an expanded definition of universal service (beyond what is defined as universal service by the FCC), the state is obligated to establish an additional state mechanism or mechanisms to support the expanded definition.

Contrary to what may be suggested by other commenting parties in this docket, the Commission must be mindful of the State's universal service obligations in considering any possible switched access rule changes. The current access rate structure has helped to keep basic local service rates affordable in South Dakota in even the highest cost areas. It also has been successful in encouraging continued investment in the telecommunications facilities network by South Dakota's rural telecommunications carriers. To the extent that the current access rules have assisted in keeping local service rates universally affordable and enabled continued investment in state-of-the-art telecommunications facilities, they have, in fact, worked to "preserve and advance" universal service and have, accordingly, served to meet the state's universal service obligations imposed under the federal law.

As already noted herein, there are presently no alternative cost recovery mechanisms in South Dakota such as a state "SLC" or a state universal service fund. The current absence of these mechanisms cannot be ignored in this process of reviewing possible switched access rule changes.

In the federal jurisdiction, as part of its most recent interstate access reforms applicable to rate-of-return regulated carriers (which includes the member companies of LECA and SDTA), the FCC acted in a manner consistent with the federal universal service statutes, at least insofar as interstate access rate reductions implemented were offset by additional explicit universal service support. *Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166*, 66 Fed. Reg. 59719, FCC 01-304, released November 8, 2001 (hereinafter referenced as *MAG Order).*[8] In issuing the *MAG Order*, the FCC was mindful of its universal service obligations and took action to avoid a shift of its universal service responsibilities to the state jurisdictions and to protect against negative universal service impacts. Although the FCC reduced interstate access rates, it also increased interstate SLCs and established an additional universal service support element or mechanism ("Interstate Common Line Support"). *MAG Order*, par. 15. Through these steps the interstate access rate reductions were offset by sufficient support from other revenue sources.

[8] It should be noted that SDTA presently has pending with the FCC a Petition for Reconsideration challenging that part of the FCC's *MAG Order* which proposed the eventual complete elimination of interstate carrier common line charges. The Petition, more specifically, disputes on legal grounds the FCC's categorization of all interstate carrier common line charges as being an "implicit subsidy.

LECA and SDTA believe that, in its process of implementing any intrastate access reform, this Commission is obligated to take a similar approach that gives full recognition to any universal service concerns presented. Switched access rule changes cannot be made without simultaneously addressing the impact that any such changes will have on universal service. To make access rule changes without ensuring at the same time that state universal service responsibilities continue to be met would be contrary to the federal universal service statutes and also contrary to the best interests of South Dakota consumers.[9]

It is also essential that this Commission give weight to the universal service impacts caused by any proposed access rule changes, given the expressed intent of the State legislature that South Dakota have a telecommunications infrastructure that meets "advanced communications needs." SDCL 49-31-60. The State legislature, through the enactment of SDCL 49-31-60, has stated its commitment to the development of advanced communications services, including broadband services, throughout South Dakota.[10] LECA and SDTA urge the Commission in this proceeding to act in a manner consistent with these state statutory provisions and by ensuring that any actions taken to

[9] Such action would also be contrary to language contained in SDCL 49-31-18 which specifically references the establishment of access rates by rules adopted pursuant to SDCL 1-26. That section provides in pertinent part that the Commission "[t]o provide access facilities at reasonable rates <u>and to enhance and preserve universal service</u>, . . . may establish methods designed to determine and implement fair and reasonable access rates by rules promulgated pursuant to chapter 1-26." *Emphasis added.*

[10] SDCL 49-31-60 is consistent with the FCC's position reflected in the Fourteenth Report and Order, Twenty-Second Order on Reconsideration, and Further Notice of Proposed Rulemaking in CC Docket No. 96-45, and Report and Order in CC Docket No. 00-256[10] (RTF Order) that prudent network upgrade investments, including upgrades for both universal services and broadband, can be paid for with universal service funds. Pars. 200 and 201.

reform the current intrastate access rules do not impede the furtherance of broadband investment in the State.[11]

It may be suggested by certain other commenting parties that this Commission is legally obligated to change the current access rules. LECA and SDTA disagree with any such claims. The current switched access rates are appropriately based on a "fully distributed, embedded cost" method that fairly recognizes the cost of all facilities actually utilized in the provisioning of intrastate access services. Further, even if it were determined by this Commission that the current intrastate access rates contain certain "implicit" universal service support, a recent decision of the U.S. Court of Appeals for the 10th Circuit squarely addresses the issue and indicates that the existence of implicit universal service support in intrastate rates is not in violation of the Federal Act. In Qwest Communications International, Inc. v. FCC, Case No. 03-9617, released February 23, 2005 (hereinafter referenced as Qwest II), various petitioners challenged on appeal to the U.S. Court of Appeals the FCC's "Order on Remand, Further Notice of Proposed Rulemaking, and Memorandum Opinion and Order" issued in CC Docket No. 96-45, In the Matter of the Federal-State Joint Board on Universal Service, FCC 03-249, released October 27, 2003. In part, in the appeal proceedings, the petitioners disputed the FCC's determination that "the Act does not mandate that states transition from implicit to explicit subsidies." (Qwest II, Slip Opinion, pp. 16-17). Upon concluding that the issue

[11] The intent of the State legislature to not only preserve, but also advance universal service in South Dakota is also evidenced by SDCL 49-31-83. That statute provides: "The commission may not prohibit telecommunications companies from voluntarily forming an association to assist in the administration and filing of schedules or tariffs and to engage in the pooling of access costs and revenues in a manner which is consistent with preserving and advancing universal service throughout this state or consistent with the Public Communications Network Infrastructure policies set forth in §§ 49-31-60 and 49-31-61." These state pronouncements supporting the advancement of universal service are entirely consistent with the stated goals found in Sections 254 of the Federal Communications Act to provide "access to advanced telecommunications and information services" in "all regions of the Nation." *See* 47 U.S.C. § 254(b) (2).

over this FCC determination was purely a legal question and that it was a question "ripe for review," the Court of Appeals for the 10th Circuit disposed of the issue as follows:

> As we explained in Qwest I, the Act "plainly contemplates a partnership between the federal and state governments to support universal service." [*Citations Omitted*] The terms of the Act evidence recognition of concurrent state authority, providing:
>
> > A State may adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service. . . . A state may adopt regulations to provide for additional definitions and standards to preserve and advance universal service within that State only to the extent that such regulations adopt additional specific, predictable, and sufficient mechanisms to support such definitions or standards that do not rely on or burden Federal universal service support mechanisms.
>
> From these excerpts, Qwest and SBC deduce a statutory mandate requiring states to transition from implicit to explicit support mechanisms. We reject this argument. In drafting the statute, Congress unambiguously imposed an explicit subsidy requirement on federal support mechanisms; no such requirement is expressly imposed on the states. . . . We agree with the Commission that, having required explicit federal support mechanisms, Congress certainly knew what language to use to impose a similar requirement on the states. We do not find, as urged by Petitioners, that Congress's requirement that state and federal funding be specific, predictable and sufficient, 47 U.S.C. § 254 (b) (5), provides a backdoor to federal manipulation of state support mechanisms. The Petitioners' argument that implicit subsidies are inherently non-specific, unpredictable, and insufficient is unavailing. We find no support in the plain meaning of these terms or in the relevant statutory history for the Petitioners' construction.
>
> Petitioners further argue that the Act's requirement that "[e]very telecommunications carrier that provides intrastate telecommunications services shall contribute, on an equitable and non-discriminatory basis, in a manner determined by the State to the preservation and advancement of universal service," 47 U.S.C. § 254(f), requires that the states replace existing implicit subsidies with explicit support mechanisms. Otherwise, single carriers may be forced to bear a disproportionate and inequitable share of the burden in supporting their own high-cost consumers. We agree with the FCC that the plain text of the statute merely imposes an obligation on the carriers to contribute to universal service funds; it does not impose a requirement of parity with respect to internal functioning and the distribution of funds between and among carriers. Moreover, the language

> of the provision evidences an express commitment of the contribution issue to the states.
>
> In keeping with the dual regulatory scheme embraced by the Act, Congress intended that the states retain significant oversight and authority and did not dictate an arbitrary time line for transition from one system of support to another. . . . Nor did Congress expressly foreclose the possibility of the continued existence of state implicit support mechanisms that function effectively to preserve and advance universal service. Under these circumstances, we will not disturb the Commission's statutory interpretation. *[Emphasis added].*

Qwest II, Slip Opinion, pp. 19-21.

The U.S. Court of Appeals decision in Qwest II makes it clear that even if it were determined that the current intrastate access rates include certain implicit support for universal service, it is within the lawful discretion of this Commission to set the timetable for its reform of intrastate access charges. LECA and SDTA, with respect to this timetable, believe that it should be driven ultimately by decisions made at the state level concerning the establishment of explicit universal service support mechanisms. Actions should not be taken to substantially reform intrastate access rates without first having alternative universal service support mechanisms in place at the state level. It is neither unlawful nor improper for intrastate access rates to play some role in assisting with the preservation and advancement of universal service in South Dakota. Until explicit support mechanisms are established in South Dakota that are sufficient to meet the state's universal service obligations, the current access rate structure, which allows for a full recovery of intrastate access costs and which has helped to meet universal service goals in South Dakota, should be maintained.

III. Pending Federal "Intercarrier Compensation" Reform Proceeding.

In these initial comments, LECA and SDTA stress the importance of coordinating any actions at the state level to reform intrastate access rates with the proceedings now ongoing before the FCC to establish a "unified intercarrier compensation regime." (See *FNPRM, infra*).

As this Commission is well aware, for some time the FCC has been looking into substantial reform of the various compensation mechanisms existing in the telecommunications industry that are intended to compensate regulated carriers for use of their network facilities. The FCC's efforts to establish a unified compensation regime were first initiated by a "Notice of Proposed Rulemaking" issued in April of 2001. *See* Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Notice of Proposed Rulemaking*, 16 FCC Rcd 9610 (2001). A second "Further Notice of Proposed Rulemaking" was issued in March of 2005 seeking comment from interested parties on a number of specific, comprehensive proposals for reform. In the Matter of Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, *Further Notice of Proposed Rulemaking*, FCC 05-33, released March 3, 2005 (hereinafter referenced as the *FNPRM*). Although the FCC has not announced when it may act to actually adopt intercarrier compensation reforms pursuant to its *FNPRM*, there is no question that the FCC views its intercarrier compensation reform efforts as a priority item. This is evidenced by public comments of the FCC Chairman and other Commissioners and the following statement contained in the *FNPRM*:

> As a general matter, the record confirms the need to replace the existing patchwork of intercarrier compensation rules with a unified approach. Many commenters observe that the current rules make distinctions based on artificial regulatory classifications that cannot be sustained in today's telecommunications marketplace. Under the current rules, the rate for intercarrier compensation depends on three factors: (1) the type of traffic at issue; (2) the types of carriers involved; and (3) the end points of the communication. These distinctions create both opportunities for regulatory arbitrage and incentives for inefficient investment and deployment decisions. The record in this proceeding makes clear that a regulatory

> scheme based on these distinctions is increasingly unworkable in the current environment and creates distortions in the marketplace at the expense of healthy competition. Additional problems with the existing intercarrier compensation regimes result from changes in the way network costs are incurred today and how market developments affect carrier incentives. These developments and others discussed herein confirm the urgent need to reform the current intercarrier compensation rules. [*Emphasis added*].

FNPRM, par. 3.

In this process of looking at possible state access rule changes, it is especially important that any changes at the state level track actions taken by the FCC, because the FCC has expressed a clear intention not only to address reciprocal compensation rates and interstate access rates in its reform efforts, but also intrastate access rates. The FCC gave recognition in its *FNPRM* that any "unified [compensation] regime requires a reform of intrastate access charges," and has specifically asked for comment concerning any "alternative legal theories under which the Commission could reform intrastate access charges." *FNPRM*, pars. 63, 80. Parties have also been asked to comment on the specific issue of "whether the Commission [FCC] has authority to replace intrastate access regulation with some alternative mechanism." *FNPRM*, par. 79.

Given this stated intention on the part of the FCC to extend its efforts to unify intercarrier compensation to address intrastate access charges, it is likely that any FCC action taken pursuant to its *FNPRM* will impact intrastate access charges to some extent. That being the case, LECA and SDTA urge this Commission in its efforts to reform the state access rules to purposely trail the FCC's actions. Since what happens at the federal level in the *FNPRM* will impact intrastate access charges, there is good reason to question the expenditure of substantial time and resources within this proceeding by developing, investigating and litigating South Dakota specific proposals for intrastate access reform. The FCC has expressed a preference to implement a "unified intercarrier compensation regime" that would also extend to intrastate access charges. This suggests the possibility that any intrastate state access rule changes adopted in this proceeding without regard to the federal proceedings could be replaced or preempted in a short period of time by the FCC's intercarrier compensation reforms. LECA and SDTA urge the Commission to avoid that result in this docket.

With regard to the FCC's *FNPRM,* LECA and SDTA would also draw this Commission's attention to some of the specific issues being addressed at the federal level that seem particularly relevant to intrastate access reform efforts. In part, the FCC is examining issues concerning the costing standard that should be utilized in a unified intercarrier compensation regime. *FNPRM* pars. 16, 64, 66-73. More specifically, the FCC has focused around the "additional cost" standard set forth in 47 U.S.C. § 251(d) (2) of the Federal Act. The FCC has also raised issues as to how any further forced access rate reductions should be offset with alternative cost recovery mechanisms. It has noticed for comment the issue of whether, if the FCC acts to reduce or eliminate intrastate switched access charges, it is necessary to give price-cap and rate-of-return LECs the opportunity to offset revenue losses with alternative cost recovery mechanisms. *FNPRM* par. 114. The FCC has also asked whether it "should create a federal mechanism to offset any lost intrastate [access] revenues, or whether states should be responsible for establishing alternative cost recovery mechanisms for LECs within the intrastate jurisdiction." *FNPRM* par. 115.

LECA and SDTA believe that the FCC's answers to these sorts of questions are critical to making any reasonable decisions at the state level in reforming the intrastate access rules. If the FCC intends to change the costing standards applicable to the determination of intercarrier compensation, any such changes may obviously limit this Commission's discretion or authority to consider and make decisions on cost allocation issues related to intrastate access charges. LECA and SDTA also believe it would be extremely helpful in making decisions on how the current intrastate access should be reformed to first know whether the FCC or the state jurisdiction will be responsible to establish an alternative revenue source to offset intrastate access rate reductions. *FNPRM* par. 115.

(SIGNATURE PAGE FOLLOWS)

Respectfully submitted this third day of February, 2006.

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