Womble Bond Dickinson (US) LLP

1200 Nineteenth Street, NW
Suite 500
Washington, DC 20036

t: 202.467.6900
f: 202.467.6910

January 30, 2019

VIA ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

David Carter
Partner
Direct Dial: 202-857-4593
Direct Fax: 202-261-0083
E-mail:David.Carter@wbd-us.com

Re: **Notice of *Ex Parte, In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155**

Dear Ms. Dortch:

These *ex parte* comments are filed on behalf of Competitive Local Exchange Carriers ("CLECs") BTC, Inc. d/b/a Western Iowa Networks, Goldfield Access Network, Great Lakes Communication Corporation, Northern Valley Communications, LLC, OmniTel Communications, and Louisa Communications in response to the various *ex parte* letters submitted by AT&T Services, Inc., between December 3, 2018, and December 21, 2018.[1]

The CLECs do not agree with AT&T's repeated assertion that the Commission has the "authority" to adopt the "prong one" proposal in the Access Stimulation NPRM,[2] *i.e.* the proposal that, if implemented, would require access-stimulating LECs to "bear the financial responsibility for the delivery of terminating traffic to their end office" in the event the LECs do not accept direct connections.[3]

---

[1] *See* Letter from H. Hultquist to M. Dortch, WC Docket No. 18-155 (Dec. 21, 2018); Letter from M. Nodine to M. Dortch, WC Docket No. 18-155 (Dec. 17, 2018); Letter from M. Nodine to M. Dortch, WC Docket No. 18-155 (Dec. 10, 2018); Letter from M. Nodine to M. Dortch, WC Docket No. 18-155 (Dec. 4, 2018); Letter from M. Nodine to M. Dortch, WC Docket No. 18-155 (Dec. 3, 2018) (collectively, "AT&T *ex parte* letters").

[2] *See, e.g.*, Letter from H. Hultquist to M. Dortch at 1, WC Docket No. 18-155 (Dec. 21, 2018) ("AT&T encouraged swift Commission action to adopt the NPRM's 'prong one' … under its established authority."); Letter from M. Nodine to M. Dortch at 1, WC Docket No. 18-155 (Dec. 17, 2018) ("AT&T encouraged swift Commission action to adopt the NPRM's 'prong one' … based on the Commission's full record and its legal and regulatory precedent.").

[3] *In re Updating the Intercarrier Comp. Regime to Eliminate Access Arbitrage*, at 4, ¶ 9, WC Docket No. 18-155 (June 5, 2018) ("Access Stimulation NPRM").

While the Commission has "discretion" to exercise "broad authority" over interconnection and access services, such authority is not plenary. Indeed, the Supreme Court has recognized that the Commission, like other federal agencies, "literally has no power to act … unless and until Congress confers power upon it."[4] And even where Congress provides an agency with "expansive" powers, "there are limits to those powers."[5] Any action implementing AT&T's "prong one" proposal: (i) would violate the Tenth Circuit's holding in *In re FCC 11-161*; (ii) is unreasonably discriminatory; and (iii) is not consistent with the established definition of a bill-and-keep framework nor the FCC's justifications for implementing bill-and-keep.

I. The NPRM's "Prong One" Proposal Runs Contrary to Binding Precedent:

In reviewing the Commission's *Connect America Fund Order*[6] and the agency's implementation of a bill-and-keep methodology for intercarrier compensation, the U.S. Court of Appeals for the Tenth Circuit determined that, while the Commission has the authority to establish bill-and-keep as a "pricing methodology" for access stimulation traffic, it may not interfere with the states' Section 252(d) authority to: (i) arbitrate "[c]harges for the transport and termination of traffic" where carriers cannot agree on such charges; or (ii) determine carriers' network "edge."[7] If the Commission were to follow AT&T's advice and adopt its "prong one" proposal, it would be violating both of these holdings.

Under its analysis of the Commission's proposed bill-and-keep framework, the Tenth Circuit determined that, "subsection [252](d) preserves state arbitration authority over [transportation and termination] charges" and the "terms and conditions" related thereto.[8] One of those "terms and conditions" that the states retain jurisdiction over, even after the implementation of a bill-and-keep framework, is the determination of each carrier's network "edge":

> Under Section 252(d)(2), states continue to enjoy authority to arbitrate "terms and conditions" in reciprocal compensation. For example, ***even under bill-and-keep arrangements, states must arbitrate the "edge" of carrier's networks. This reservoir of state authority can be significant.***
>
> The "edge" of a carrier's network consists of the points "at which a carrier must deliver terminating traffic to avail itself of bill-and-keep." ***The location of the "edge"***

---

[4] *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986); *see also Michigan v. EPA*, 268 F.3d 1075, 1081 (D.C. Cir. 2001) (recognizing that all federal agencies, "ha[ve] no constitutional or common law existence or authority, but only those authorities conferred upon it by Congress").

[5] *Accuracy in Media, Inc. v. FCC*, 521 F.2d 288, 293 (D.C. Cir. 1975).

[6] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C. Rcd. 17663, ¶ 34 (2011) ("*Connect America Fund Order*").

[7] *See In re FCC 11-161*, 753 F.3d 1015, 1125-27 (10th Cir. 2014).

[8] *Id.* at 1126.

> ***of a carrier's network determines the transport and termination costs for the carrier.***[9]

Under the "prong one" proposal, local carriers would be forced to pay for the transportation of access stimulation traffic from the IXC's POP to the local carrier's central office in *all* circumstances. This would create a new network "edge," establishing the IXC's POP as the "edge" of the CLEC's network. Such a proposal clearly violates the Tenth Circuit's determination that *states – not the Commission* – are authorized to determine carriers' network "edge" for the purpose of instituting bill-and-keep.[10]

As the CLECs have previously discussed, the bill-and-keep methodology adopted in the *Connect America Fund Order* has already been fully implemented with respect to terminating access stimulation traffic.[11] The "prong one" proposal would go well past what the Commission concluded was warranted and would, instead, move the CLECs' network "edge" all the way to AT&T's POP, shifting the work that AT&T's customers pay AT&T to perform onto the CLECs. This is inconsistent with the economic analysis that the Commission relied upon to justify its transition to bill-and-keep and is in no way supported by the current record. Moreover, as explained above, implementing such a proposal would violate the Tenth Circuit's determination that states – not the Commission – are vested with the authority to determine the network "edge" for purposes of instituting the Commission's bill-and-keep regime.

II. The Commission's "Prong One" Proposal Unreasonably Discriminates Against Access-Stimulating CLECs:

Furthermore, even if AT&T's "prong one" proposal does not unlawfully interfere with the states' right to determine carriers' network "edge," the proposal unreasonably discriminates against access-stimulating CLECs in violation of Section 202(a).

While the Commission has broad authority under Section 201(a) "to regulate interstate communications to ensure that 'charges, practices, classifications, and regulations' are 'just and reasonable' and not unreasonably discriminatory,"[12] such authority is limited by Section 202(a)'s prohibition against unreasonably discriminatory regulations.[13] As the CLECs have already noted, the

---

9 *Id.* (emphasis added).

10 Indeed, statutory provisions are in line with the Tenth Circuit's determination and implicitly signal that the states retain authority over the charges, terms, and conditions associated with the transport and termination of traffic to rural local exchange carriers, including the authority to determine carriers' network "edge" where carriers cannot reach agreement. *See* 47 U.S.C. § 251(f)(1)(B) ("The party making a bona fide request of ***a rural telephone company for interconnection, services, or network elements*** shall submit a notice of its request to the ***State commission***.") (emphasis added).

11 *See* Reply Comments of Competitive Local Exchange Carriers at 25-31, WC Docket No. 18-155 (Aug. 3, 2018) ("CLEC Reply Comments").

12 *See Connect America Fund Order*, ¶771.

13 *See* 47 U.S.C. § 202(a).

Commission's "prong one" proposal violates these statutory commands, as such a rule would intentionally discriminate against one type of traffic without adequate explanation or justification.[14]

Indeed, the Commission has previously considered proposals to treat access stimulation traffic in a discriminatory manner, but on each occasion it has neglected to do so.[15] Moreover, where the Commission has determined that discriminatory treatment is permissible, it has only done so with the support of substantial evidence and a reasoned decision-making process that complies with the Administrative Procedures Act and federal precedent.[16]

AT&T's continued reliance on the Commission's pre-reform 2011 requirements to support the discriminatory outcome it desires simply does not hold water. And its latest *ex parte* filings simply rehash those conclusions, but noticeably still fail to present current, relevant, and corroborative evidence for its assertions.[17] As the CLECs have already explained, the record before the Commission fails to establish that access stimulation has any impact on the rates paid by consumers.[18] Indeed, despite giving AT&T significant savings since 2011, AT&T's prices to consumers have only risen.[19] There is no logical basis to conclude that AT&T's "prong one" proposal would do anything other than create greater profits for AT&T.

III. The Commission's "Prong One" Proposal Is Not Consistent with the Established Bill-and-Keep Regime Nor the Commission's Justifications for Instituting Such A Regime

Finally, the "prong one" proposal runs contrary to the established definition of, and justification for adopting, a bill-and-keep framework.

In the *Connect America Fund Order*, the Commission justified its adoption of a bill-and-keep framework by recognizing that: (i) both the calling and called party benefit from calls,[20] and (ii) such a framework, when implemented, still provides for the mutual recovery of costs.[21] The Tenth Circuit relied on these justifications in determining that the FCC could implement its bill-and-keep

---

14 *See generally* Comments of Competitive Local Exchange Carriers at 51-56, WC Docket No. 18-155 (July 20, 2018) ("CLEC Comments").

15 For example, when AT&T and Sprint argued in favor of complete detariffing in 2011, the Commission elected to "reject the suggestion" and instead implement the current regulatory framework. *See Connect America Fund Order*, ¶ 692.

16 *See* CLEC Comments at 53-56.

17 *See, e.g.*, Letter from H. Hultquist to M. Dortch, WC Docket No. 18-155 (Dec. 21, 2018) (failing to cite any precedent in support of AT&T's request).

18 *See* CLEC Comments at 14-21, 33-35; *see also* Expert Report of Oliver Grawe, Ph.D. in Response to the Notice of Proposed Rulemaking Entitled "Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage," at 8-11 (July 20, 2018) ("Grawe Report") (attached to CLEC Comments); CLEC Reply Comments at 6-7, 11-12.

19 *See* CLEC Comments at 6-14; *see also* Grawe Report at 8-11, Exhs. 1-4.

20 *See Connect America Fund Order*, ¶ 756.

21 *See id.* ¶¶ 757-59.

methodology under the Communications Act,[22] and since then these principles have become the Commission's go-to arguments for any proposed regulations related to bill-and-keep. The "prong one" proposal, however, turns both of these justifications on their head.

Indeed, if the Commission were to unilaterally move a CLEC's network "edge" to the IXC's POP, it would be placing the costs associated with the transport of access stimulation traffic on the CLEC's end users without providing the CLEC with a reciprocal benefit. Such a proposal violates the Commission's analysis that "bill-and-keep allows for mutual recovery of costs," as it would be providing IXCs with free traffic transport in one direction without providing CLECs with free traffic transport in the other direction.[23]

Despite what AT&T says, conference calling service providers are not the sole "cost causer." Rather, as the Commission correctly concluded, AT&T's customers who use these services are equally "cost causers." The record is replete with evidence of the tremendous value that consumers gain from being able to utilize these services, rather than having to pay inflated per-minute, per-user charges. Indeed, ***more than two thousand consumers*** have personally weighed in to express their strong desire to maintain access to these services,[24] which provide a unique value to many underserved communities.

While the CLECs do not dispute the Commission's power to institute a *uniform* bill-and-keep methodology for all access traffic, they do dispute AT&T's assertion that the Commission is empowered to create arbitrary rules that apply to a single type of traffic, going in one direction, with no mutual benefits assured. AT&T's "prong one" is not a uniform bill-and-keep regime for the mutual exchange of traffic and therefore stands entirely at odds with the regime that the Commission said it intended to implement and that the Tenth Circuit upheld.

IV. Conclusion

As explained above, the authority to determine the network edge is a power that, under existing precedent, is reserved to the states under Section 252(d). AT&T's "prong one" proposal would displace the states' authority in this area and violates the Tenth Circuit's conclusions in *In re FCC 11-161*. Moreover, the "prong one" proposal unfairly discriminates against access-stimulating CLECs and runs contrary to the established definition of bill-and-keep, the Commission's justification for adopting bill-and-keep, and the FCC's duty to establish "reciprocal compensation"

---

[22] *See In re FCC 11-161,* 753 F.3d at 1130.

[23] Such an unequal arrangement would also violate the Commission's Section 251(b)(5) authority to adopt "reciprocal compensation" arrangements, as the Tenth Circuit has concluded that, pursuant to this statute, the Commission needs to ensure an "in-kind exchange of services." *See id.* at 1129.

[24] *See generally In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage,* WC Docket No. 18-155 (listing approximately 1,785 express filings and approximately 674 mailed-in letters opposing the Commission's proposed access stimulation reforms, for a total of approximately ***2,459 consumer comments***) (last updated Jan. 3, 2019).

arrangements. On the record before it, the Commission has not established a basis for circumventing all of these constraints on its authority; the prong one proposal cannot – and should not – be adopted.

Respectfully submitted,

G. David Carter