Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

COMMENTS OF AT&T SERVICES INC. TO REFRESH THE RECORD

Keith Krom
Gary Phillips
David Lawson
AT&T Services, Inc.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20005
(202) 457-3090

James P. Young
Michael Hunseder
Christopher T. Shenk
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Services, Inc.

October 26, 2017

TABLE OF CONTENTS

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Pursuant to the Commission's Public Notice, dated September 8, 2017, in the above-captioned proceeding,[1] AT&T Services, Inc. ("AT&T") submits these comments to refresh the record.

INTRODUCTION AND SUMMARY

The Commission's *Refresh Notice* is extremely welcome and long overdue. In its 2011 *Transformation Order*,[2] the Commission decided to transition the intercarrier compensation regime for traffic on the public switched telephone network ("PSTN") to a bill-and-keep system. The *Transformation Order* established an initial phase for this transition, which focused mostly on terminating end office charges and slowly reduced those intercarrier rates to zero. The *Transformation Order* left the remaining aspects of the transition to a further notice of proposed rulemaking, and now (six years later) the Commission asks the parties to refresh the record on the

[1] Public Notice, *Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport and Transit,* WC Docket No 10-90; CC Docket No. 01-92 (Sept. 8, 2017) ("*Refresh Notice*").

[2] *Connect America Fund, et al.*, 26 FCC Rcd. 17663 (2011) ("*Transformation Order*").

issues necessary to complete the transition for all terminating charges. In the years since the *Transformation Order*, as the transition to bill-and-keep has eliminated most of the arbitrage opportunities involving end office charges, carriers have shifted their arbitrage activities to the elements of the historic system that have yet to switch to bill-and-keep, including not just terminating tandem and transport charges, but also originating access charges (including, especially, charges for 8YY calls). Given that these arbitrage schemes involve billions of minutes and massive access charges, the need to complete the transition to bill-and-keep – for the *entire* intrercarrier compensation system, not just terminating charges – has become increasingly urgent.

To complete the transition for terminating charges, the Commission will need to resolve two sets of issues. First, the Commission will need to adopt a rule establishing a default "network edge" – the point marking where the financial responsibilities of the sending and terminating carriers begin and end. The end-state bill-and-keep system with a network edge will not end all intercarrier payments, however, because sometimes the sending carrier will need to engage (and pay) a third carrier to deliver calls to the designated edge. Thus, the Commission will also need to determine what residual regulation, if any, should govern these intermediate arrangements on the sending carrier's side of the edge.

With respect to the first set of issues, AT&T submitted a detailed network edge proposal in its original comments in 2012. The precise locations of default network edges, however, are far less important than their existence. AT&T expects that once a default set of edges is established, most carriers will negotiate arrangements to exchange to traffic efficiently. Such arrangements might incorporate the use of default edges or, as is more likely, could involve the use of traffic exchange points like carrier hotels. Accordingly, these comments will focus primarily on the second set of issues. Regardless of where the Commission establishes the network edge, the Commission's end-state bill-and-keep regime should have the following four features:

First, a necessary corollary to any network edge rule is a rule that explicitly guarantees that the party that has the financial responsibility to carry traffic to or from a network edge has the unfettered freedom to choose how, and by what arrangements, that party will carry the traffic on its side of the edge. The network edge rule, by itself, is not enough: some terminating carriers today engage in a variety of tactics designed to force a sending carrier to use inefficient and costly arrangements to deliver traffic to their networks, and these carriers could continue to pursue such tactics even in a bill-and-keep world with network edge rules. Accordingly, the Commission should adopt a network edge rule that *explicitly* ensures a carrier's freedom to choose how it will deliver traffic on its side of the designated edge.

Second, the Commission should detariff and remove most *ex ante* rate regulation from all intercarrier payments for intermediate services that may survive on the sending carrier's side of the edge. As AT&T has explained previously and reiterates below, the Commission has no authority to regulate the rates of these intermediate services under any provision of Sections 251 and 252, and there is no continuing policy justification for general *ex ante* rate regulation (such as price cap regulation) of such services under Section 201.

Third, the Commission will need to maintain some residual regulations to combat the lingering threat of unlawful traffic stimulation schemes. Carriers in remote areas of the country should not be allowed to abuse the network edge rules by partnering with unscrupulous tandem or transport providers on the sending carrier's side of the edge to engage in traffic-pumping schemes or traffic aggregation schemes. The Commission should therefore adopt a bill-and-keep/network-edge rule that if the ratio of traffic goes above 3-to-1, the network edge will automatically revert to any tandem in the LATA selected by the sending carrier.

Fourth, the Commission should reaffirm that it has no statutory authority to regulate IP-to-IP interconnection; the rules contemplated here apply only to PSTN traffic. Similarly, the Commission should confirm that its prior VoIP decisions, which hold that VoIP and other IP-based services are indivisibly interstate and which broadly pre-empt state commission regulation of IP-based calls, extend to IP-to-IP interconnection.

Finally, as explained below, carriers are also engaging in massive arbitrage schemes involving originating traffic as well, and therefore the Commission should expeditiously complete the transition to bill-and-keep for originating access charges.

I. DEVELOPMENTS SINCE 2011 CONFIRM THAT, IN COMPLETING THE TRANSITION TO BILL-AND-KEEP FOR TERMINATING PSTN TRAFFIC, THE COMMISSION SHOULD ADOPT RULES AND TAKE OTHER ACTIONS TO COMBAT ABUSIVE PRACTICES.

The *Transformation Order* began the transition to a bill-and-keep regime by reducing a specified subset of carrier rate elements, relating mostly to end office charges, to zero.[3] Now that this initial transition is mostly complete, many carriers have shifted their arbitrage schemes to the portions of the PSTN-related intercarrier compensation regime that have not yet been reformed to bill-and-keep. Accordingly, as AT&T has argued elsewhere, the transition to a full, end-state bill-

[3] Specifically, this initial transition applied to (1) price cap ILEC end office charges (*Transformation Order* ¶ 800), (2) price cap ILEC tandem and transport charges in cases where the ILEC also owned the end office (*id.* ¶¶ 800, 1312); (3) CLEC tandem, transport and end office charges, to the extent CLECs must benchmark those rates to ILEC rates under the pre-existing CLEC access charge rules (*id.* ¶ 807); and (4) LEC-CMRS reciprocal compensation arrangements (*id.* ¶ 806). All of these intercarrier rates were (or will be) transitioned to zero, thus implementing a default bill-and-keep arrangement for these specified rate elements. *Id.* ¶ 812 (transition rules are default rates and "carriers remain free to enter into negotiated agreements that differ from the default rates"). The Commission also implemented a similar transition for rate-of-return carrier rate elements. *See id.* ¶ 800.

and-keep regime has become increasingly urgent.[4] To *complete* the transition to a comprehensive bill-and-keep system, however, the Commission will have to address two significantly more complex sets of issues.

First, the Commission must adopt a federal rule establishing a "network edge." *See Refresh Notice* at 1-2. Every coherent bill-and-keep regime has a default point on each terminating carrier's network, known as the network "edge," that marks where the sending carrier's financial obligations end and the terminating carrier's obligations begin. The Commission will need to balance a number of competing considerations to establish a default edge that is easy to identify and enforce, that gives all parties appropriate incentives to negotiate the most efficient arrangements, and that eliminates arbitrage opportunities to the maximum extent possible.[5]

Second, the Commission must determine what level of regulation is necessary for the tandem, transport, and transit services that remain. *Refresh Notice* at 2-3. The end-state bill-and-keep regime will not eliminate intercarrier compensation altogether. Once the edge has been established, the sending carrier (*i.e.*, the originating carrier for non-access traffic or the IXC for access traffic) will be responsible for the costs of delivering that traffic to the terminating carrier's edge. If the sending carrier does not interconnect physically at the network edge, it can satisfy its financial obligation to deliver its traffic to the terminating carrier's edge in a variety of ways, including by purchasing intermediate services from a third party. Accordingly, even after the

[4] *See, e.g.*, Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), *Petition of AT&T Services, Inc. for Forbearance Under U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 16-363 (filed Sept. 30, 2016) ("AT&T Forbearance Petition").

[5] The Commission should establish the default network edge via a federal rule that applies uniformly across the country. *See Refresh Notice* at 2 (seeking comment on state involvement in selecting edge). A federal rule is necessary to promote predictability and reduce transaction costs, whereas a patchwork of state-determined edges would make negotiations for efficient arrangements more difficult.

default network edge rules have been established, the Commission will still need to fashion the right mix of regulatory relief for the remaining intermediate services and residual rules that guard against any lingering opportunities for arbitrage.

With respect to the first set of issues – how to set the network edge – AT&T put forward a detailed proposal in its 2012 comments.[6] AT&T is also open to other potential proposals for setting default edges. As long as the default edges fairly apportion responsibility, carriers will have appropriate incentives to establish efficient traffic exchange points. These comments will thus focus primarily on the second set of issues, relating to what types of residual regulation may be necessary for the intermediate intercarrier services that remain. Regardless of where the Commission sets the network edge, the Commission's end-state bill-and-keep regime should explicitly include the following four features: (1) as a corollary to the network edge rules, the Commission should adopt rules that specifically give carriers on the originating side of the network edge complete freedom to decide how they will deliver traffic to a network edge; (2) the Commission should remove all tariffing requirements and *ex ante* rate regulation from whatever tandem and transport services remain on the originating side of any network edge; (3) the Commission should adopt residual bill-and-keep/edge rules to combat any lingering risk of abusive traffic stimulation arbitrage schemes; and (4) the Commission should make clear that IP-to-IP interconnection for voice services will be subject to the same regime of "unregulation" that has successfully applied to the peering and transit marketplace for Internet exchange services for the last two decades.

[6] *See* Comments of AT&T, *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*. (filed Feb. 24, 2012) ("AT&T 2012 Comments").

A. The Commission Should Adopt A Rule Guaranteeing The Sending Carrier's Unfettered Right to Decide How It Will Deliver Traffic To A Terminating Carrier's Edge.

The establishment of an end-state bill-and-keep system with a default network edge will not end all intercarrier compensation. The network edge establishes where the parties' *financial* obligations begin and end – *i.e.*, the originating and terminating carriers each bear their own costs on their respective sides of the edge. The parties' financial responsibilities, however, need not coincide with the physical points of interconnection, and thus there will be cases in which either carrier may contract with either the other carrier or third-party providers to ensure that traffic is delivered to or from the designated edge. Although a network edge rule will give all parties more appropriate incentives to use the most efficient arrangements, the mere establishment of the network edge, alone, is not sufficient to prevent abusive tactics designed to force the other carrier to use less efficient arrangements. Accordingly, the Commission should adopt a rule, as a necessary corollary to the network edge rule, that the carrier that bears the financial responsibility to deliver traffic to (or from) the edge has the unfettered right to choose how and by what arrangements it will deliver that traffic to (or from) the designated edge.

A rule that aligns the financial responsibility for transport to a network edge with the choice of implementing the interconnection obligation would help reduce interconnection disputes, bring about more efficient interconnection arrangements, and help curtail arbitrage opportunities that arise under the Commission's current regime. Under the current Commission rules, there is a mismatch, because the sending carrier can be obliged in most cases to deliver and pay the costs of transporting the call to the terminating end office, but then some terminating carriers and/or intermediate transport providers have insisted that they have the right to dictate the transport route used by the sending carrier.[7] As described in more detail below, this mismatch—combined with the Commission's incomplete reforms on certain tariffed tandem and transport services—creates arbitrage opportunities.[8] In some cases, terminating carriers and intermediate transport providers seek to force sending carriers to route traffic via a particular tandem switch owned by the intermediate provider, and then agree to share the resulting revenues from tariffed tandem and transport charges. In other cases, terminating carriers or intermediate transport providers have even claimed they have an *exclusive* right to transport traffic and assess inflated tariffed tandem and transport charges on sending carriers, which, they say, have no right to deliver the traffic directly or via a third party that the sending carrier chooses.[9]

In both cases, the terminating carriers charging for the tariffed tandem and transport services have no incentive to select the most efficient route, based on economic or engineering

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[7] Incumbent LECs, however, are required to enter into interconnection agreements and generally to permit interconnection either at their tandem switches or at the end offices, and thus the sending carriers are generally able to elect the most appropriate transport route when routing calls to the customers of incumbent LECs. For other carriers, the Commission's interconnection rules are not as well-established, and some carriers have attempted to take advantage of perceived ambiguities in the Commission's rules to insist that a particular transport route must be used.

[8] *See also* AT&T Forbearance Petition at 8 ("much of the problem arises because, under the Commission's traditional rules, IXCs generally must pay properly tariffed and billed tandem and transport charges, but are not always clearly permitted to select the provider of those services or the most efficient means to transport traffic. This perverse economic relationship means that IXCs are often billed for inefficient and costly tandem and transport services, which they would not willingly choose if they could more freely select among competitive providers of tandem and transport services.").

[9] As AT&T explained in its comments on originating access as to 8YY services and below in Section II, similar arbitrage practices have become prevalent on originating 8YY traffic, which the Commission has acknowledged is similar to terminating access. On originating 8YY traffic, numerous arbitrage schemes have developed because of the same type of mismatch: the originating carrier or intermediate carrier will seek to force the receiving carrier to use a certain transport route to originate 8YY calls, and the receiving carrier can be required to pay tariffed tandem and transport charges that are not efficient and that it would seek to avoid if it had the clear ability to select the transport route. *E.g.*, *AT&T Servs., Inc. v. Great Lakes Comnet, Inc.*, 30 FCC Rcd. 2586, ¶¶ 13-15, 21, 23 (2015), *aff'd in relevant part, remanded in part on other grounds*, *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016) (describing a scheme to overcharge transport on aggregated 8YY traffic, and confirming that IXCs may "'have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier. . . .'") (citing *Access Charge Reform*, 19 FCC Rcd. 9104, ¶¶ 15, 17 (2004)).

considerations—to the contrary, certain carriers are seeking to force the use of particular transport routes because they will be able to collect or share in tariffed tandem and transport charges. Accordingly, a rule establishing a reasonable network edge, by itself, is not enough: the Commission should also issue rules making clear that the sending carrier, which has the financial responsibility to carry the traffic to the network edge, has the right to select how to transport the traffic to the edge, *i.e.*, which route to take, and whether to do so with its own facilities or via the use of a third party provider. The receiving carrier would be obligated to accept the traffic at its edge, and could not refuse to interconnect at that point, or impose conditions or obligations on the interconnection (so long as the method of interconnection were technically feasible).

"Tandem Rehoming." One practice that has arisen in light of the Commission's partial and incomplete intercarrier compensation reforms involves sudden network rearrangements that AT&T has referred to as "tandem rehoming." Typically, when it exchanges traffic with a particular carrier, AT&T has developed over the years a mixture of transport routes, sometimes exchanging traffic via direct connections to a carrier's end office, and in other instances connecting indirectly using tandem switches operated by either incumbent LECs or third parties. These existing arrangements involve transport facilities that are appropriately sized to handle the traffic volumes in a given area. In recent years, however, AT&T has received sudden, radical, and unilateral demands—often issued via changes to the industry database known as the Local Exchange Routing Guide ("LERG")—that AT&T must promptly revise all its existing traffic arrangements with a particular carrier. The carrier may refuse to allow direct connections, and, using the LERG, will specify that all of the traffic between AT&T and the carrier should be exchanged at one or a few tandem switches owned by alternative providers. The re-arrangements do not appear to be always necessary on engineering, economic, or competitive grounds, but rather are likely to arise because the alternative tandem provider and the other carrier have executed a revenue sharing agreement. Under such agreements, the intermediate tandem provider agrees to share a portion of the resulting increase in tariffed tandem and transport access charges with the carrier, if the carrier will make the LERG changes to re-designate the tandem provider's switch as the interconnection point.[10]

These sudden and unilateral changes to existing transport arrangements often result in substantial potential increased costs for sending carriers. AT&T would need to build or significantly augment facilities to the new tandem operated by the alternative provider, because AT&T may either have no existing connection, or the existing transport is far too small to handle the large volumes of traffic that are being re-routed from existing connections to the newly designated tandem. AT&T also must pay to remove or resize existing connections. The costs of these re-arrangements, which were caused by the terminating carrier—and its likely receipt of a share of tandem and transport revenue from the alternative provider—can be many millions of dollars. Moreover, AT&T also could be forced to pay increased transport charges, because the new recurring tandem and transport charges can be more expensive than the existing arrangements.[11] These tandem rehoming disputes, if not checked, could also lead to increased

[10] A carrier's designations in the LERG that a particular tandem switch should be employed to route traffic are not legally binding, and the LERG has consistently been described as an "industry guide." *See, e.g.*, *Numbering Policies for Modern Communications*, 28 FCC Rcd. 5842, ¶ 14 n.53 (2013). Nevertheless, when carriers use the LERG to designate a new route when they begin offering service in a new area, or make incremental changes to existing network routing arrangements, carriers generally implement those LERG changes without substantial dispute. With tandem rehoming, however, some carriers are seeking to rely on the LERG to make broad and unilateral changes to virtually all traffic they exchange with other carriers.

[11] For example, if the terminating carrier no longer is willing to directly connect with AT&T at an end office with large traffic volumes, then the tandem and transport costs will likely exceed the costs of a direct connection.

instances of network blocking, because carriers may not be able to arrange for transport facilities that can accommodate all of the "rehomed" traffic.

Although there is nothing improper about re-arranging existing transport facilities to achieve greater efficiencies, the tandem rehoming described here is occurring at least in part because there is a mismatch between the carriers selecting the transport route and the carrier that bears the financial obligation for paying for the route—and because the Commission's existing rules on tandem and transport services provide a revenue opportunity for carriers willing to engage in arbitrage. To prevent disputes about such actions, the Commission should adopt a rule ensuring that the carrier with the financial obligation to transport traffic has the right to dictate how to carry the traffic up to the network edge. The carrier with the financial responsibility to deliver the traffic to an edge has the appropriate incentives to use the most efficient arrangements and thus should have the right to deliver the traffic to the edge using the arrangements of its choice.

At the same time, such a rule would reduce wholesale changes in network routing that are motivated by access arbitrage, rather than network efficiency. Under AT&T's proposed rule, a carrier would be able to rehome its traffic to a different carrier's tandem, and insist that sending carriers deliver their traffic to that carrier, *only* if all of those arrangements remained on the terminating side of the edge – which means that the terminating carrier would have the responsibility to bear the costs of transporting that traffic to and from the tandem. A terminating carrier presumably would agree to incur those costs only if the alternative tandem provider offered genuine efficiencies compared to the existing transport arrangements—as one would expect in actual, competitive markets. By contrast, where a tandem rehoming request arises primarily because the alternative tandem provider is willing to pay the terminating carrier a share of the tandem and transport revenues, then rehoming would not be likely to occur because the terminating carrier would be obliged to incur the transport costs.

Mileage-Pumping And Other Arbitrage Schemes. The mismatch between the financial obligation for tariffed tandem and transport charges and the selection of transport routes has also exacerbated so-called "mileage-pumping" schemes, especially in connection with access stimulation on terminating traffic and originating traffic on 8YY calls. In 2011, the Commission agreed that "the continuation of transport charges in perpetuity would be problematic." *Transformation Order*, ¶ 820. The Commission specifically pointed to "mileage-pumping," in which "service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges." *Id.*

Unfortunately, the Commission's failure to reform the tandem and transport rules has only exacerbated these issues since 2011. As opportunities for arbitrage using terminating end office access charges declined when the Commission began transitioning those charges to bill-and-keep, unscrupulous carriers have turned to arbitrage using originating charges on 8YY traffic, and to manipulating tandem and transport charges to support arbitrage and access stimulation schemes.[12] Even worse, some carriers have become emboldened, brazenly asserting that they have a *de jure* right to be the exclusive provider of tandem or transport services. Although a number of these schemes are already unlawful under the Commission's existing rules, litigating the disputes is

[12] *See* AT&T Forbearance Petition at 3-4, 8, 9-10. If the relief in AT&T's Petition were granted, then carriers could no longer tariff tandem and transport charges on access stimulation traffic. Although that relief is warranted under the statutory forbearance criteria, the Commission should also act in this proceeding to set new rules to define the network edge, and to clarify that the sending carrier, which has the financial responsibility to carry the traffic to the network edge, has the right to select how to transport the traffic to the edge.

costly, and more comprehensive intercarrier compensation reform could eliminate the incentives to engage in such arbitrage schemes in many cases.[13]

Because of the Commission's incomplete reforms, there is a clear incentive for unscrupulous carriers to inflate tandem and transport charges to unreasonable levels. The access stimulation schemes that have endured often involve situations in which carriers have refused direct connections (despite Commission and court precedent),[14] and then bill excessive transport charges, including lengthy per-mile, per-minute charges to remote areas on large volumes of stimulated or aggregated traffic. In fact, one such scheme has grown so large that the *one* transport provider at issue is responsible for over *12 percent* of AT&T's *total, nationwide* billed terminating switched access expense—even though AT&T is billed by over 1,300 different LECs.[15]

As a result of the lack of reform, and the arbitrage schemes unleashed by certain carriers, literally billions of minutes of long distance traffic have been inefficiently transported to or from remote locations like Spencer, Iowa; Westphalia, Michigan; and, Redfield, South Dakota. There is no legitimate economic or engineering reason why carriers – and ultimately consumers – must

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[13] As explained below in Section I.C, even if the Commission adopts clear network edge rules and clarifies the interconnection obligations, there will likely remain arbitrage opportunities in certain circumstances. Accordingly, the Commission also should keep and strengthen its access stimulation rules so that they can be applied under the new network edge regime.

[14] *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 27 (2008) ("a competitive LEC will permit an IXC to install direct trunking from the IXC's point of presence to the competitive LEC's end office, thereby bypassing any tandem function" and associated transport charges).

[15] *See* Formal Complaint of AT&T Corp., *AT&T Corp. v. Iowa Network Servs. Inc.,* EB Docket No. 17-56, ¶ 8 (filed Jun. 8, 2017). Making matters worse, the carrier at issue even contends that the Commission has adopted a "mandatory use" requirement that compels sending carriers to use only the carrier's transport services, and that all competitive transport alternatives are foreclosed as a matter of law. In practice, however, no such mandatory use requirement was followed. Nevertheless, because of this carrier's tariffing and billing practices, along with the refusal of terminating LECs to provide or permit direct connections, a "price umbrella" was created such that the price of alternatives to the carrier's transport was inflated well above any reasonable market rate. Indeed, AT&T estimates that, if direct connections were used to carry the traffic, the costs would be a tiny fraction of the tariffed transport charges. *Id.* ¶ 13.

pay outdated tariffed transport charges to carry incredibly large volumes of traffic to these areas. The only reason that extraordinarily large volumes of traffic are being routed to these remote areas are that carriers continue to engage in access stimulation schemes in such locations, and are seeking to exploit the Commission's existing, incomplete rules for tariffing tandem and transport services. The Commission should promptly implement rules that put a stop to transport routing schemes like these that divert carrier resources and harm consumers. *See Transformation Order* ¶¶ 9, 662-65.

Along with revised rules for access stimulation, *see infra* Part I.C, one step in that direction would be for the Commission to set rules for an appropriate network edge, and then align its rules to provide that (i) the carrier with the financial obligation to carry the traffic to the network edge has control over how to route the traffic to the edge (*e.g.*, that it could choose to do so itself or use a third party provider of its choice) and (ii) that the receiving carrier is obliged to accept the traffic at the edge, and may not charge, or impose conditions for, any technically feasible method of interconnection. In the absence of such a rule, some carriers have sought to force sending carriers to use inflated and inefficient transport options. For example, in one case, a carrier elected to locate an access stimulation scheme in rural South Dakota, over 190 miles away from the nearest tandem switch. The carrier has for years billed over 190 miles of tariffed, per-mile, per-minute transport charges on its billions of minutes of access stimulation traffic, leading to excessive and unreasonable transport charges. This carrier has flatly refused to provide or permit direct connections that would bypass its tandem transport charges. In fact, when AT&T negotiated an alternative transport arrangement that covered a substantial part of the transport route, and substantially reduced the expense, the carrier sued AT&T and the alternative transport provider, claiming that, as the terminating carrier, it had the exclusive right to bill the 190 miles of transport, and that the agreement for competitive transport services was unlawful. Although such abusive practices are plainly unlawful, *see, e.g.*, 47 C.F.R. § 61.26(g); *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 27; *Transformation Order*, ¶ 812, the lack of reform on transport charges has emboldened such misconduct, and new rules should be put in place so that tariffed tandem and transport charges are no longer abused.

B. Under A Bill-And-Keep Regime With An Established Network Edge, The Commission Should Detariff and Deregulate Tandem and Transport Services.

Depending on where the Commission (by default) or the parties (by agreement) set the network edge, many services that now entail intercarrier switched access charges or reciprocal compensation payments will move to the terminating side of the edge and thus will transition to bill-and-keep. But there will still be many instances in which a sending carrier will choose to fulfill its financial commitment to deliver traffic *to* the terminating carrier's edge by contracting with a third party provider. Under the end-state bill-and-keep regime, the Commission should deregulate and detariff all such intermediate, intercarrier arrangements and charges.[16]

Switched Services. The end-state bill-and-keep regime should bring all intermediate, third-party services that carriers use for *indirect* interconnection under one unified regulatory umbrella. In most of these contexts, the sending carrier hands off traffic to a third-party provider, which transports it over its own network and in turn hands it off to the terminating carrier. The third-party provider may perform different types of switching and transmission functions in this process, and under the current "calling party's network pays" regimes those functions go by a variety of different names and are subject to a variety of different regulatory regimes (*e.g.*, "transit,"

[16] There will also inevitably be cases in which the terminating carrier contracts with a third party to carry some portion of a call from the edge to the end user on the terminating carrier's side of the edge. Such instances are likely to be less frequent, depending on where the Commission or the parties establish the edge, but any such intermediate services should also be detariffed and deregulated, for the reasons discussed in this section.

"dedicated transport," "tandem switching and transport," *etc.*). But the basic concept is the same in all cases: the sending carrier has hired this third party to fulfill its financial obligation to deliver traffic to the terminating carrier's edge, and all such scenarios should be treated the same in the Commission's final bill-and-keep regime.[17] In this way, the final bill-and-keep and network edge rules should create financial arrangements that give the sending carrier appropriate incentives *either* to build out its network *or* to outsource the same network functions to a third party, depending on whether it is more economically efficient to build or to buy.

As AT&T has previously explained, the Commission has no legal authority to regulate the *rates* for any of these intermediate services under the Section 251(b)(5) bill-and-keep framework. Such services are not subject to the rate regulation provisions of Sections 251(b)(5) and 252(d)(2) because those provisions apply only to compensation for the "transport *and termination*" of traffic, and by definition intermediate third parties do not "terminate" traffic. 47 U.S.C. § 251(b)(5) (emphasis added). The Commission's existing reciprocal compensation regulations already make clear that "transport," as used in Section 251(b)(5), includes only situations in which the carrier providing the transport is also the terminating provider.[18] In particular, "[t]he reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier

[17] *See Transformation Order* ¶ 1311 ("[A]lthough transit is the functional equivalent of tandem switching and transport, today transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic. As all traffic is unified under section 251(b)(5), the tandem switching and transport components of switched access charges will come to resemble transit services in the reciprocal compensation context where the terminating carrier does not own the tandem switch.").

[18] 47 C.F.R. § 51.701; *see also Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1261 (10th Cir. 2005) ("Under the Act, reciprocal compensation is based solely on the costs of transport and termination incurred by the terminating provider.").

and a terminating carrier, but the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider."[19]

To the extent any of these intermediate services remain subject to *ex ante* rate regulation under the access charge rules today, the Commission should detariff and deregulate such services under the final bill-and-keep regime. There is no justification for continuing to apply *ex ante* rate regulation to tandem and transport services, whether provided by ILECs or anyone else, because these services are now highly competitive in most areas of the country.[20] For example, Inteliquent (formerly Neutral Tandem) claims to be the first—although certainly not the last or only—competitive tandem transit service provider.[21] The company started in a few major markets in 2004 and expanded to "almost all markets in the contiguous United States, Hawaii, and Puerto Rico."[22] In early 2017, Inteliquent was acquired by a private entity but continues to operate under

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[19] *See* Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 120 (2005). As AT&T previously explained, switched services also do not qualify as direct "interconnection" within the scope of Sections 251(c)(2) and 252(d)(1). As the Commission has explained, "the term 'interconnection' under section 251(c)(2) refers only to the physical linking of *two networks* for the *mutual exchange* of traffic." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 176 (1996) (emphasis added); *see also* 47 C.F.R. § 51.5 ("Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include transport and termination of traffic."). Thus, the duty of an ILEC to provide "interconnection" under section 251(c)(2) is limited to providing a direct link to that ILEC's *own network*. That duty does not include providing intermediate routing or other "services" between two other carriers' networks, as in the switched transit context. *See AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003); *see also Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997).

[20] As explained in Section I.C, *infra*, the Commission will need to retain targeted rules to guard against continuing opportunities for abusive traffic stimulation schemes .

[21] Inteliquent, Inc., Annual Report (Form 10-K), at 3 (Feb. 18, 2016) ("Inteliquent 2015 10-K").

[22] *Id.* at 4. According to one filing it made with the FCC, Inteliquent provides competitive tandem services in 189 of the 192 Local Access and Transport Areas ("LATAs") in the United States and Puerto Rico (all except Fishers Island and parts of the Navajo Nation). *See* Comments of Neutral Tandem, Inc. In Support of Vonage's Petition for Waiver of the Commission's Rules Regarding Access to Numbering Resources, *Administration of the North American Numbering Plan*, CC Docket No. 99-200, at 1, n.1 (Feb. 21, 2012).

the Inteliquent brand.[23] Prior to the acquisition, Inteliquent reported that competition in the market had intensified[24] and that it "faced increasing direct competition from other competitive providers of voice services, including Level 3, Peerless Network, and Hypercube."[25] Indeed, Inteliquent refers to itself as "in competition with incumbent LECs."[26]

Other companies are also competing in the market. West Telecom Services—formerly known as HyperCube—provides tandem switching services throughout the United States.[27] According to one Commission filing, West Telecom Services provides "facilities-based competitive tandem service[]" in 47 states and the District of Columbia.[28] Level 3 has its own tandem network with five regional tandems.[29] Peerless Network also provides "tandem switched access services to other carriers, and local and access tandem services."[30] The company has invested "nearly $30 million in over 40 major markets across the country" and "provides a combined TDM and IP network connected to nearly every major domestic carrier offering call origination and termination services in over 100 LATAs (Local Access Transport Areas) and 30

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[23] Inteliquent, *GTCR Completes Acquisition of Inteliquent* (Feb. 10, 2017), http://ir.inteliquent.com/releasedetail.cfm?ReleaseID=1011437. GTCR also owns Onvoy, which previously offered its own tandem switching product that is now a part of Inteliquent.

[24] Inteliquent 2015 10-K at 4.

[25] *Id.* at 7.

[26] Comments of Inteliquent, Inc., *Connect America Fund*, WC Docket No. 10-90, at 3 (May 4, 2017).

[27] *See* West Corporation, Annual Report 2016, at 8, http://files.shareholder.com/downloads/WTSC/5442591519x0x934878/89D13E47-D295-4A84-8EAE-26BE93B11167/West_Corp_2016_Annual_Report.pdf. ("West Corp. 2016 Annual Report").

[28] Letter from M. Hazzard (counsel for HyperCube) to M. Dortch (FCC), *Access Charge Reform*, CC Docket No. 96-262, Attachment at 2 (filed June 12, 2009). *See also* West Corp. 2016 Annual Report at 19.

[29] See Letter from J. Nakahata (counsel for Level 3) to M. Dortch (FCC), *Connect America Fund*, WC Docket No. 10-90, at 6 (filed April 15, 2013).

[30] Letter from H. Kelly (counsel for Peerless Networks) to M. Dortch (FCC), *IP-Enabled Services*, WC Docket No. 04-36, at 2 (filed Sept. 8, 2008).

MTAs (Major Trading Areas)."[31] Tandem Transit, LLC is an "IP alternative" that works as a "third party transit manager."[32]

The Commission could adopt a detariffing transition similar to the one it recently adopted in the *Business Data Services* proceeding, in which it set a date certain for mandatory detariffing while permitting permissive detariffing in the interim. That type of transition would give carriers ample opportunity to transition to negotiated agreements. Once such services are detariffed, the Commission would retain authority to address any case-specific concerns about individual intermediate service arrangements via complaints brought pursuant to sections 201 and 202 of the Act. Those provisions enable the Commission to ensure that any intermediate third-party services are offered on just, reasonable, and non-discriminatory terms. *See* 47 U.S.C. §§ 201, 202. There would be no need for continuing *ex ante* rate regulation of those services.

Dedicated transport service. When a third-party intermediary sells dedicated transport to connect two other carriers, the Commission's end-state bill-and-keep regime should treat those services the same as switched services. If a sending carrier chooses to purchase dedicated transport from a third-party carrier to reach the terminating carrier's edge, the third-party carrier should be permitted to charge the sending carrier for that service, just as a switched service provider would. Any such dedicated transport service would not be subject to the rate regulation provisions of Section 251(b)(5) and 252(d)(2), because such transport does not involve "termination" of traffic.

[31] Comments of Peerless Network, Inc., *Technologies Transitions Policy Task Force*, GN Docket No. 13-5, at 2 (filed July 8, 2013). In mid-2016, Peerless Network announced it offered service in 103 LATAs. *See* Peerless Expands into 10 New Markets – Now in 103 LATAs, https://www.peerlessnetwork.com/new-market-announcement-september-2016/. Peerless now operates in 42 states. *See* Comments of West Telecom Services, LLC and Peerless Network, Inc., *Connect America Fund*, WC Docket No. 10-90, at 3 (filed May 4, 2017).

[32] Marisa Torrieri, *Advanced IP Carrier Report: Tandem Transit Offers Cost-Saving, IP-Based Alternative*, Tandem Transit, http://www.tandemtransit.com/it-news.html.

And, like switched services, such transport services should be detariffed and deregulated (to the extent they are not already) and governed solely by the statutory standards of Sections 201 and 202.

The same rule should apply if the sending carrier chooses the terminating carrier's *own* transport service to reach the terminating carrier's edge; any other approach would defeat the purpose of defining an edge.[33] As AT&T has previously explained, implementing this specific aspect of the bill-and-keep regime will require the Commission to adopt a different interpretation of Section 251(b)(5) as it relates to a bill-and-keep regime. Specifically, the Commission should now make clear that *all* transport provided on the sending carrier's side of the edge falls outside the scope of the statutory term "transport" for purposes of section 251(b)(5) and thus outside the pricing rules of section 252(d)(2). Under the current regime, the Commission has understood "transport" in Section 251(b)(5) to apply to all transmission from the physical point of interconnection with an ILEC to the ILEC's terminating end office switch.[34] While that definition may have made sense in a "calling party's network pays" regime, requiring the ILEC to bear the costs of transmission from the physical point of interconnection to its terminating end office switch, even when that point of interconnection is not at its network edge, would encourage sending carriers inefficiently to shift their edge-related financial obligations to the ILEC. Such a rule would discourage such sending carriers from any further build-out of their networks to that edge, because they could now obtain all the same objectives without paying anything. Accordingly, the Commission should clarify that, for purposes of a Section 251(b)(5) bill-and-

[33] In its 2012 Comments, AT&T called this "extra-Edge transmission." *See AT&T 2012 Comments* at 63 & Appendix A, § 1.j.iii

[34] 47 C.F.R. § 51.701(c).

keep regime that necessarily includes a default edge, "transport" is limited to the function of carrying traffic from the terminating carrier's *edge* to the end-office switch serving the called party.

This end-state bill-and-keep regime will also require the Commission to adopt a different interpretation of incumbent LECs' Section 251(c)(2) interconnection obligations with respect to entrance facilities used to link the sending carrier's network to the point of interconnection on the terminating carrier's network.[35] In *Talk America Inc. v. Michigan Bell Telephone Co.*, the Supreme Court held that an incumbent LEC must make its existing entrance facilities available at cost-based rates if they are to be used for interconnection.[36] As the Court acknowledged, however, "[n]o statute or regulation squarely addresses whether an incumbent LEC must provide access to entrance facilities at cost-based rates as part of its interconnection duty under § 251(c)(2)," and thus it simply deferred to a position endorsed in an FCC amicus brief.[37] The Commission is free to reconsider that interpretation and conclude that entrance facilities do not qualify as "interconnection" for purposes of Section 251(c)(2), and should do so now. As the Supreme Court noted, "the statute makes clear that an incumbent LEC need not provide access to *any* facilities—much less entrance facilities—to provide interconnection. . . . § 251(c)(2) does not mention incumbent LECs' facilities, but rather mandates only that incumbent LECs provide interconnection 'for the facilities and equipment of any [competing] carrier.'"[38] Thus, an ILEC's

[35] The Commission has already held that transport provided by the terminating carrier *from* the point of interconnection on its network is not section 251(c)(2) "interconnection" to which the pricing standards of section 252(d)(1) apply. The relevant regulation defines "interconnection" as "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." 47 C.F.R. § 51.5.

[36] *Talk Am., Inc. v. Mich. Bell Tel. Co.,* 564 U.S. 50 (2011).

[37] *Id.* at 57-58; *see also id.* at 58 ("Nothing in that language expressly addresses entrance facilities. Nor does any regulation do so.").

[38] *Id.* (alteration in original). The statutory text provides that an ILEC has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [ILEC's] network" at a "point within" the ILEC's network. 47 U.S.C. § 251(c)(2)(B).

obligation under section 251(c)(2) is merely to enable competitors to connect their *own facilities and equipment* to the ILEC's network at an interconnection point, and the Commission should now so hold.

C. The Commission's Bill-And-Keep Regime Will Need Residual Protections Against Unreasonable Traffic-Stimulation Schemes.

Although it is critical for the Commission to complete the transition to bill-and-keep, and to establish clear network edge and interconnection rules, those rules alone will not prevent all forms of access arbitrage. Unscrupulous carriers have proven to be obstinate in seeking out opportunities for arbitrage based on the Commission's rules. Even though more complete reform of intercarrier compensation will likely reduce arbitrage, it will not eliminate it entirely.[39] The Commission should thus continue and strengthen safeguards against access stimulation and other arbitrage schemes.

First, as stated above, the Commission should emphasize that, even after reform is complete, carriers providing regulated service, although not priced according to *ex ante* regulations, remain subject to Sections 201 and 202 of the Act.[40] These sections provide the

[39] Under the Commission's rules, even if additional reform were implemented, there are certain aspects of its intercarrier regime that allow arbitrage schemes to arise. For one, the Commission has adopted strong rules against the blocking of traffic, because of the public interest in having calls completed. *See, e.g.*, *Transformation Order* ¶ 718 n.1234; *id.* ¶ 734. While that may be a salutary public interest goal, truly competitive markets depend upon wholly voluntary transactions. Because of the Commission's anti-blocking rules, however, carriers are forced to deal even with entities that act unreasonably and that are determined to exploit loopholes for financial gain. In addition, for interexchange carriers, the Commission has continued to retain its geographic averaging rules, which prevent IXCs from passing on high terminating costs imposed by certain carriers engaged in arbitrage. *See Access Charge Reform*, 16 FCC Rcd. 9923, ¶ 31 (2001). In truly competitive markets, appropriate pricing signals are provided to the entities that cause costs to be incurred, but the Commission's averaging rules limit the use of such price signals. Finally, although competition for intermediate transport is generally robust, there are undoubtedly specific transport routes where effective competition is lacking, and in those instances, arbitrage schemes could proliferate even after the Commission completes reform of intercarrier compensation.

[40] *Cf. Policy and Rules Concerning the Interstate Interexchange Marketplace*, 12 FCC Rcd. 15014, ¶¶ 76-77 (1997) (after detariffing of long distance charges, carriers remain subject to Section 201 and 202, which

Commission with broad authority to address unreasonable practices, including arbitrage schemes related to intercarrier compensation practices.[41] Further, the Commission can rely on Section 201(b) to find access arbitrage schemes to be unlawful "even where no independent violation of a particular rule was found." *AT&T Corp. v. All Am. Tel. Co.*, 28 FCC Rcd. 3477, ¶ 29 (2013). Sections 201 and 202 can thus provide an important backstop to prevent unreasonable practices even after reform is completed.

Second, the Commission should retain its access stimulation rules but modify them to work within its reformed intercarrier compensation regime. Even after reform is complete, carriers can still engage in access stimulation and other intercarrier compensation arbitrage schemes. To take a paradigmatic example, if a competitive LEC's network edge were set at its central office, then that CLEC could set up an access stimulation scheme in a very remote area that is far from any tandem and where there is no effective competition for transport to or from the network edge (the CLEC end office). Where the CLEC—or an intermediate transport provider—controls the only available transport route to the CLEC end office, then the CLEC and/or the intermediate transport provider would have the incentive and ability to charge excessive, monopoly-based rates for the transport services.

To prevent LECs from abusing the network edge rules and charging unreasonable rates, the Commission should modify its rules on access stimulation to address this type of market failure within the context of a bill-and-keep regime. For example, the Commission could revise its access stimulation rules to provide that, whenever a carrier's traffic is imbalanced such that it carries at

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apply to determine whether rates, terms and conditions for regulated services are just, reasonable, and non-discriminatory).

[41] *See, e.g., Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 48–49 (2007); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *W. Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501, n.2 (D.C. Cir. 1987).

least three or more times more terminating access traffic than originating access traffic (or vice-versa), the default network edge would automatically revert to a tandem within the same LATA as the carrier's end office, to be selected by the sending carrier.[42] Thus, in the example above, if the terminating carrier set up an access stimulation scheme, and the traffic to or from that carrier exceeded the 3-to-1 ratio (or the 100 percent growth trigger), sending carriers could elect to hand off traffic to the terminating carrier at any tandem switch within the LATA, and the terminating carrier (and the carrier operating the tandem) would be obliged to accept the traffic at the tandem, and the terminating carrier would be responsible for the costs of routing the traffic between the tandem and its end office. Such a rule, along with the continued enforcement of Section 201 and 202, would help reduce any access stimulation schemes and protect the public interest.

D. IP-to-IP Interconnection Should Remain Unregulated.

Finally, the Commission has no authority to regulate IP-to-IP interconnection, and therefore the transition on which the *Refresh Notice* seeks comment must be limited to PSTN traffic. The term "IP-to-IP interconnection," as used here, means interconnection between two networks that provide service in IP format. As voice and other communications increasingly migrate to IP networks, most electronic communications now ride as higher-layer applications over IP, and almost all inter-network traffic exchanges will in the future take the form of "IP-to-IP interconnection" in this sense. As AT&T has explained, the long-term policy issues surrounding such IP-to-IP interconnection are distinct from shorter-term issues concerning the provision of the IP-TDM media gateways needed to enable *PSTN* customers to place calls to, or

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[42] Currently, the Commission's triggers for access stimulation are either a terminating-to-originating traffic ratio of 3-to-1, or a growth in traffic of 100%, *see* 47 C.F.R. § 61.3(bbb). Because access stimulation schemes have increasingly migrated to originating access, *see infra* Section II, the Commission should revise the trigger to include an originating-to-terminating ratio of 3-to-1. The Commission should retain the growth trigger, and also the presumption of access stimulation based on a sending carrier's traffic volumes. *See Transformation Order* ¶ 699.

receive calls from, VoIP users ("IP-to-PSTN" interconnection). The Commission should keep these two sets of issues completely distinct. Although the Commission should expeditiously complete the transition to a bill-and-keep regime for PSTN traffic and manage the transition to an all-IP world, interconnection issues in the all-IP world *itself* will not require regulatory intervention any more than Internet peering and transit does today and would in fact be harmful.

As AT&T has previously explained, the Commission has no statutory authority to regulate IP-to-IP interconnection. Neither Section 251(a), (b), nor (c) applies to IP-to-IP interconnection, because those sections apply only to "telecommunications carriers" and give carriers various rights with respect to other "telecommunications carriers" in general and :local exchange carriers" or "incumbent local exchange carriers" in particular. For all relevant purposes, the term "telecommunications carrier" is synonymous with "common carrier," and the Act further specifies that any "telecommunications carrier shall be treated as a common carrier under this [Act] *only to the extent that it is engaged in providing telecommunications services*." 47 U.S.C. § 153(51) (emphasis added). By their terms, those provisions of Section 251 are inapplicable *either* when the party seeking to interconnect *or* when the party from whom interconnection is sought is not itself a "telecommunications carrier." With IP-to-IP interconnection, *both* are true: VoIP providers, like other providers of IP-based services, are not "telecommunications carriers" because they provide "information services" and not "telecommunications services."[43] Similarly, the IP-based terminating provider against whom the request for interconnection would be made would not be acting as any sort of carrier either, but rather as a broadband information services provider.

[43] *See*, *e.g.*, Opposition of AT&T, *tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, at 3-8 (filed Aug. 15, 2011) ("*AT&T tw telecom Opposition*"); Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 33-42 (filed May 28, 2004) (discussing IP-enabled services and VoIP); Reply Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 22-26 (filed July 14, 2004) (same).

Nor can state commissions fill the gap. The Commission has held that VoIP services, and IP-based voice services more generally, are indivisibly *interstate* services.[44] Indeed, the Commission held that such services are inseverably interstate because it would be impossible to separately identify interstate and intrastate VoIP calls for regulatory purposes (and harmful to the Internet to try to do so). The Commission held this to be true even when one end of a VoIP call originates or terminates on the PSTN, and that "impossibility" holding applies even more strongly to IP-to-IP interconnection. Based on these holdings of "impossibility," the Commission has generally pre-empted state commission regulation of VoIP and other IP-based services,[45] and the Commission should now confirm that such pre-emption extends to the arrangements for IP-to-IP interconnection.

II. THE COMMISSION SHOULD ALSO COMPLETE THE TRANSITION FOR ORIGINATING ACCESS EXPEDITIOUSLY.

Although the Public Notice focuses on refreshing the record on issues related to terminating traffic, there are certain other related issues that need prompt Commission attention. First, earlier this year, the Commission refreshed the record on 8YY originated traffic, and that record confirms that the Commission should immediately transition that traffic to bill-and-keep.[46] Second, the Commission recently developed a record demonstrating that forbearance from the Section 203 and

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[44] *See Vonage Holdings Corporation*, 19 FCC Rcd. 22404, ¶¶ 20, 31 (2004) ("*Vonage Order*"), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Petition For Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor A Telecommunications Service*, 19 FCC Rcd. 3307 (2004) ("*Pulver Order*"). *See also Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 431 (2015) ("broadband Internet access service is jurisdictionally interstate for regulatory purposes. . . . [t]he 'Internet's inherently global and open architecture' enables edge providers to serve content through a multitude of distributed origination points, making end-to-end jurisdictional analysis extremely difficult—if not impossible—when the services at issue involve the Internet.").

[45] *Vonage Order* ¶ 32; *Minn. Pub. Utils. Comm'n*, 483 F.3d at 578-81 (affirming pre-emption); *Pulver Order* ¶ 16.

[46] Public Notice, *Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform*, WC Docket Nos. 10-90, 07-135, CC Docket No. 01-92 (June 29, 2017) ("8YY Notice").

related rules governing 8YY database queries (DIP charges) is necessary to prevent substantial abuses.[47] Third, the Commission should promptly address the treatment of non-8YY originating traffic.

8YY Traffic. The Commission should immediately transition 8YY originating access services to bill-and keep. Earlier this year the Commission "refresh[ed] the record on 8YY access charges," noting that the industry has observed "arbitrage and access stimulation schemes [that] are increasingly shifting to 8YY service," and sought comment on how to address that issue.[48] The comments submitted in that CLECs have indeed shifted to arbitrage schemes on originating 8YY traffic.[49] Even as 8YY originating minutes have plummeted, CLEC 8YY originating access minutes have exploded, and now account for the majority of all originating access minutes.[50] Moreover, the persistence of this arbitrage opportunity is hindering the transition to IP: in AT&T's experience, CLECs engaged in arbitrage are resisting agreements to exchange traffic in IP format because they are reluctant to relinquish high access revenues from originating 8YY traffic that would go to bill-and-keep under and IP arrangement.[51]

The solution is straightforward. As Ad Hoc and others have explained, the Commission should return to its historical approach to treating 8YY originating traffic in the same way that it

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[47] Public Notice, *Pleading Cycle Established For Comments On AT&T's Petition For Forbearance From Certain Tariffing Rules,* WC Docket No. 16-363 (Nov. 2, 2016) ("DIP Public Notice").

[48] 8YY Public Notice at 1.

[49] *See, e.g.,* Comments of AT&T, *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 4-8 (filed Jul. 31, 2017) ("AT&T 8YY Comments"); Comments of Verizon, *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 5-6 (filed Jul. 31, 2017); Comments of Sprint Corporation, *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 1-3 (filed Jul. 31, 2017). *See also* Letter from C. Boothby (counsel for Ad Hoc Telecommunications Users Committee) to M. Dortch (FCC), *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 1 (filed May 19, 2017) ("Ad Hoc Letter").

[50] *See, e.g.,* Ad Hoc Letter, at 1-2; AT&T 8YY Comments at 8-9.

[51] *Id.*

treats terminating access traffic, and thus transition 8YY originating traffic to bill-and-keep.[52] As the Commission has explained, the originating carrier in an 8YY call is playing the role "more akin to the traditional role of the terminating LEC."[53] The calling party in an 8YY call chooses the originating LEC but does not pay for the call, just like the end user on the terminating end of an ordinary call. This creates a fundamental misalignment of pricing signals: the IXC has no choice but to use the originating LEC chosen by the calling party, but the "calling party . . . has no incentive to select a provider with lower originating access rates" because he "does not pay for the toll call."[54] The proper solution, as the Commission has indicated, is to "distinguish" originating access for 8YY traffic from all other originating access, and treat originating 8YY traffic the same as terminating traffic under the intercarrier compensation regime.[55] Accordingly, the Commission should promptly issue an order that transitions 8YY originating access to bill-and-keep.

DIP Charges. For the reasons set forth in the AT&T's September 30, 2016 forbearance petition and the comments supporting that Petition, the Commission should also forbear from its rules that permit LECs to tariff and assess per query database dip charges for 8YY traffic.[56] These queries enable a LEC to identify the IXC to which an 8YY call should be routed. Under the current regulatory regime, LECs are permitted to tariff these charges. Unfortunately, as demonstrated in the AT&T Forbearance Petition, many LECs (mainly CLECs) have used this regulatory regime to set clearly excessive rates for these queries. As the FCC has previously recognized, the cost of

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[52] *See, e.g.*, Reply Comments of Ad Hoc Telecommunications Users Committee, *Connect America Fund, et al.*, WC Docket No. 10-90, et al. (July 31, 2017) ("Ad Hoc 8YY Comments"); AT&T 8YY Comments, at 4-8.

[53] *Transformation Order* ¶ 1303.

[54] *Id.*

[55] *Id.*

[56] AT&T Forbearance Petition at 18-23.

merely querying a database is negligible.[57] Yet CLECs have tariffed very high rates for these services, often many times higher than the cost the CLEC would incur if it simply purchased those services from a third party.[58] As explained in AT&T's Forbearance Petition, the Commission should put an end to this abusive practice by forbearing from Section 203 of the Communications Act and its implementing rules for these services.[59]

Originating Access In General. More generally, the Commission should promptly complete the full transition to bill-and-keep, including for all originating access services. History shows that, absent comprehensive reform, unscrupulous CLECs will continue to engage in regulatory arbitrage and other misconduct that they claim is permitted under perceived loopholes within the existing, outdated regime, resulting in continued overcharges and decreased broadband investment – to the detriment of consumers and competition.[60]

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[57] *Provision of Access for 800 Service*, 4 FCC Rcd. 2824, ¶ 73 (1989); *see also* AT&T Forbearance Petition at 18.

[58] *See* AT&T Forbearance Petition at 19-20.

[59] AT&T Forbearance Petition at 1-4.

[60] *See, e.g.*, *Transformation Order* ¶ 663 ("[a]ccess stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment."); *id.* ¶ 664 (estimating that these arbitrage schemes cost long distance rate payers between $330 to $440 million per year); *id.* ¶ 33 (describing these "wasteful arbitrage practices, which cost carriers and ultimately consumers hundreds of millions of dollars annually").

CONCLUSION

For the foregoing reasons, the Commission should expeditiously complete the transition to a bill-and-keep regime for originating and terminating PSTN services in accordance with the proposals in these comments.

Respectfully submitted,

/s/ James P. Young

Keith Krom
Gary Phillips
David Lawson
AT&T Services, Inc.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036
(202) 457-3090

James P. Young
Michael Hunseder
Christopher T. Shenk
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Attorneys for AT&T Services, Inc.

October 26, 2017