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

In the Matter of Petition for Expedited Declaratory Ruling of South Dakota Network, LLC	)	WC Docket No. 18-41

REPLY COMMENTS OF AT&T SERVICES, INC.

Pursuant to the Commission's Public Notice in the above-captioned proceeding,[1] AT&T Services, Inc. ("AT&T") submits these reply comments on the Petition ("Pet.") for Expedited Declaratory Ruling of South Dakota Network, LLC.

The record here—as in other recent proceedings before the Commission—confirms that the Commission's existing intercarrier compensation system continues to be "riddled with inefficiencies and opportunities for wasteful arbitrage," and remains "unfair for consumers, with hundreds of millions of Americans paying more on their wireless and long distance bills than they should in the form of hidden, inefficient charges."[2] Because the Commission has not completed its efforts to reform the intercarrier compensation system, or taken other additional steps to address

[1] Public Notice, *Wireline Competition Bureau Seeks Comment On Petition For Expedited Declaratory Ruling,* WC Docket No 18-137, DA 18-137 (Feb. 12, 2018).

[2] *Connect America Fund*, 26 FCC Rcd. 17663, ¶ 9 (2011) ("*Transformation Order*"), *pets. for review denied sub nom. In re FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014). *See also, e.g.*, Comments of AT&T, WC Docket No. 10-90 (July 31, 2017) (urging the Commission to eliminate access charges on toll-free traffic and to complete ICC reform); Comments of AT&T, WC Docket No. 10-90 (Oct. 26, 2017) (the Commission's further notice to finish ICC reform is "extremely welcome and long overdue" because 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") ("AT&T ICC Refresh Comments").

access stimulation, access stimulation remains a prevalent practice, and still "cost[s] carriers and ultimately consumers hundreds of millions of dollars annually."[3] AT&T thus urges the Commission to take prompt action in response to its recent *Public Notices* that sought to refresh the record on issues related to further reform of the intercarrier compensation system.[4]

In this proceeding, the Commission can and should take two steps to underscore intercarrier compensation issues that are (or should be) well-settled as to competitive local exchange carriers ("CLECs").[5] *First*, the Commission should re-affirm that CLECs may negotiate contracts for intercarrier compensation for services subject to Subpart J of Part 51 of the Commission's rules—including contracts that address access charges. *See* 47 C.F.R. § 51.905(a). In 2011, the Commission adopted a transition plan for access charges whereby certain charges were capped and others were reduced to zero, *Transformation Order*, ¶¶ 798-808, but the Commission unambiguously provided that its new transition rules "are default rules and carriers are free to negotiate alternatives that better address their needs." *Id.* ¶ 35. Under the transition plan, the Commission "preserved a role for tariffing [access] charges for toll traffic during the transition,"

[3] *Transformation Order*, ¶ 33; *see, e.g.*, Comments of Verizon, at 1, 3, WC Docket No. 16-363 (Dec. 2, 2016) ("traffic pumping remains a problem;" "traffic pumpers are stimulating hundreds of millions of minutes each month to Iowa and South Dakota"); Comments of CenturyLink, at 2, WC Docket No. 16-363 (Dec. 2, 2016) ("[access] charges related to access stimulation continues to be a problem").

[4] Public Notice, *Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform*, WC Docket Nos. 10-90 and 07-135; CC Docket No. 01-92, DA 17-631 (rel. June 29, 2017); 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).

[5] The Petition discusses litigation between SDN and Northern Valley Communications, Inc. ("NVC"). AT&T has had its own disputes with NVC. However, AT&T's reply comments in this proceeding are directed to general issues regarding the implementation of the Commission's existing rules. Nothing in these comments is targeted to a specific dispute between particular carriers.

so that carriers could file tariffs consistent with the default rates and other Commission rules, but the Commission made it absolutely clear that "carriers remain free to enter into negotiated agreements that differ from the default rates." *Id.* ¶ 812. The Commission took these steps because it sought to "facilitate the benefits that can arise from negotiated agreements." *Id.*

In fact, as part of its Transitional Access Service Pricing Rules, *see* 47 C.F.R. §§ 51.901 *et seq.*, the Commission issued a regulation that is also unambiguous: "The rates set forth in this section are default rates. ***Notwithstanding any other provision of the Commission's rules, telecommunications carriers may agree to rates different from the default rates.***" 47 C.F.R. § 51.905(a) (emphasis added). This Commission rule is binding, and, at least as to CLECs, means precisely what it says: regardless of any other Commission rule, CLECs may negotiate intercarrier compensation rates for services subject to Subpart J of Part 51 of the Commission's rules—including interstate or intrastate access rates[6]—that differ from the rates specified in the Commission's access charge rules or in a carrier's tariffs.

In reliance on this rule and the Commission's statements, AT&T Corp. has negotiated contracts with other telecommunications carriers; those contracts provide for rates that do not necessarily match the Commission's default rates or a carrier's tariffed rates. This is precisely what the Commission expected in 2011, when it "recognize[d] that the framework we adopt today encourages carriers to enter into contracts *in lieu of* the tariffing framework." *Transformation Order*, ¶ 812 n.1524 (emphasis added). To the extent any entity contends that CLECs may not enter into negotiated contracts with rates that differ from the Commission's default rates or a carrier's tariffed rates for services subject to Transitional Access Service Pricing Rules, the

[6] *See id*. § 51.901(b) (the Commission's transitional access pricing rules apply to, *inter alia*, "interstate or intrastate exchange access"); *see also id.* § 51.903(h).

Commission should issue a declaratory order reconfirming the unambiguous rule it issued in 2011.[7]

Second, the Commission should confirm that, under the Commission's CLEC access rules and its access stimulation rules, a local exchange carrier that elects to handle access stimulation traffic has no right to insist that long distance carriers use a particular LEC's tariffed access service to transport such access stimulation traffic. As AT&T has explained, because the Commission's transition rules have reduced terminating end office access charges, carriers engaged in arbitrage practices, like access stimulation, have shifted their schemes to take advantage of the access rate elements that have not been reduced, particularly originating access, tandem switching and distance-sensitive transport charges. AT&T ICC Refresh Comments at 2, 4-5. Further, even though the Commission found access stimulation to be harmful, some carriers—relying on the Commission's rules that allow tariffed charges on access stimulation traffic under specified conditions—have insisted that long distance carriers must purchase a particular tariffed transport access service to carry access stimulation traffic to or from a particular point. The Commission should reject any such view.

To start, it is beyond any doubt that, at least since the passage of the Telecommunications Act of 1996, no local exchange carrier enjoys a monopoly over a particular local telephone service, including any switched access service. *See, e.g.*, 47 U.S.C. § 253(a). *A fortiori*, a carrier engaged

[7] As to competitive LECs, the Commission determined long ago that CLECs could—and in many circumstances must—negotiate contracts for their access services. 47 C.F.R. § 61.26; Seventh Report and Order, *Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 3, 57 (2001) (implementing mandatory detariffing of CLEC rates above a benchmark rate; and this benchmark rule "will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs"). In addition, Section 211 of the Act has also long recognized that carriers can negotiate contracts "with other carriers" as to "traffic affected" by the common carrier provisions of the Act. 47 U.S.C. § 211.

in a harmful practice like access stimulation does not enjoy the legal right to demand that an access customer use a particular LEC's switched access service. Further, although the Commission permitted tariffing of access charges on access stimulation traffic, a tariff is merely an offer of service, *e.g.*, *Cahnmann v. Sprint*, 133 F.3d 484, 487 (7th Cir. 1998), and the Commission's access stimulation rules *permitting* the filing of tariffs do not *compel* an access customer to purchase a particular LEC's access service to route access stimulation traffic. That is especially true when another provider is willing to transport the access stimulation traffic for less (either via a tariffed service or a negotiated contact).[8] In fact, as the Commission made clear in 2008 as to CLEC access charges, long distance carriers may elect to bypass a CLEC's tariffed tandem and transport charges, because a CLEC must "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." Order, *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 27 (2008). The Commission has thus long ago recognized that allowing IXCs to elect to bypass and thereby "avoid [a CLEC's] tandem switching function and associated [tariffed] charges" is an important protection to help reduce unjust and unreasonable charges. *Id.* Under this well-established and soundly based principle, a CLEC cannot insist that IXCs use a particular CLEC's tandem and transport services, particularly as to access stimulation traffic.

Finally, the fact that significant volumes of access stimulation traffic are routed via providers of centralized equal access does not change this result; the Commission has unequivocally held that such centralized transport arrangements were put in place "in order to

[8] The Commission's rules generally prevent long distance carriers from blocking calls, *see, e.g.*, *Transformation Order*, ¶ 734, but a long distance carrier that elects to route access stimulation traffic via another provider (rather than the access stimulation LEC or a carrier selected by the access stimulation LEC) does not run afoul of the Commission's anti-blocking rule.

lower the cost of transporting traffic." *AT&T Corp. v. Alpine Commc'ns*, 27 FCC Rcd. 11511, ¶ 29 (2011) (emphasis in original). Accordingly, where providers of such centralized access service offer arrangements, either in tariffs or negotiated agreements, that allow long distance carriers to reduce the costs of transporting access stimulation traffic, then long distance carriers should be free to use such providers. That said, nothing in the Act or Commission's rules compels IXCs to use centralized access providers to carry access stimulation traffic, especially where those providers have raised their rates (or have not lowered them sufficiently). In those circumstances, such providers are not "lower[ing] the cost of transporting [access stimulation] traffic" (*Alpine*, ¶ 29) but in fact are harming consumers by forcing them to pay "hidden, inefficient charges" on their wireless and long distance bills (*Transformation Order*, ¶ 9).

CONCLUSION

For the foregoing reasons, the Commission should issue a declaratory ruling pursuant to 47 C.F.R. § 1.2 to the extent described above.

Respectfully submitted,

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