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

In the Matter of	)	
	)	
Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage	)	WC Docket No. 18-155
	)	

COMMENTS OF NTCA–THE RURAL BROADBAND ASSOCIATION

NTCA–The Rural Broadband Association ("NTCA") submits these comments in response to the Federal Communications Commission's ("Commission") Notice of Proposed Rulemaking in the above-captioned matter.[1] As explained in greater detail below, NTCA supports targeted efforts to eliminate access arbitrage and other abuses of the intercarrier compensation ("ICC") system and finds merit in the Commission's specific proposals to enable direct interconnection between and/or alter financial responsibilities between access-stimulating local exchange carriers ("LECs") and interexchange carriers ("IXCs"). At the same time, the Commission must be careful as it tackles issues under the rubric of "arbitrage" because certain issues—such as whether to modify the definition of "access stimulation" or whether to change interconnection or financial responsibility rules for *all* LECs (as opposed to only access-stimulating LECs)—could have far-reaching, unintended consequences that go well beyond "arbitrage," harming rural consumers and, ultimately, the goals of universal service.

[1] *In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, WC Docket No. 18-155, FCC 18-68 (rel. June 5, 2018) ("*NPRM*").

I. SURGICAL APPROACHES TO ADDRESS ACCESS STIMULATION ARE APPROPRIATE AND USEFUL.

NTCA has long supported efforts to eliminate inefficiencies caused by access stimulators that threaten to undermine the broader integrity of intercarrier compensation mechanisms.[2] The Commission has recognized that intercarrier compensation has been a fundamental pillar of universal service,[3] and—particularly when universal service remains subject to budgetary limitations—intercarrier compensation continues to play an important role in helping carriers in rural, high cost areas maintain and improve existing infrastructure and invest in new services like high-speed broadband at reasonably comparable rates. Efforts to take advantage of the ICC regime undermine the entire system and should be addressed.

To that end, NTCA worked in good faith with other carriers and IXCs to develop and support an industry proposal designed to remove the financial incentives to engage in access stimulation.[4] Under the industry proposal (which is analogous to prong one of the Commission's two-pronged proposal for addressing ongoing terminating access arbitrage), carriers engaged in access stimulation would be required to bear financial responsibility for all terminating switched transport costs (including both flat-rated and usage-sensitive charges) between their end office (or

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[2] *See, e.g.*, Comments of Windstream, Frontier, and NTCA, WC Docket No. 10-90 (July 31, 2017) (suggesting targeted action to address 8YY arbitrage); Comments of NTCA, *et al*., WC Docket No. 10-90 (Apr. 1, 2011) ("NTCA 2011 Comments") (supporting amendments "that require carriers to establish access rates that reasonably reflect actual demand volumes" and other well-defined measures to stem arbitrage).

[3] *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 17,965 ¶ 862 (2011) ("*USF/ICC Transformation Order and FNPRM*") (recognizing that "incumbent LECs have limited control over the areas or customers that they serve, having been required to deploy their network in areas where there was no business case to do so absent subsidies, including the implicit subsidies from intercarrier compensation"); *id.* at 17,968 ¶ 870 (observing that intercarrier compensation rates include an implicit subsidy to offset the cost of providing local access service in expensive to serve, rural areas).

[4] *See* Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, CenturyLink, WTA, USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (Apr. 11, 2018) ("Apr. 11 Letter"); Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, CenturyLink, WTA, USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (Nov. 16, 2017) ("Nov. 16 Letter").

remote or functional equivalent) and the tandem switch to which the terminating carrier requires inbound calls to be routed.[5] In practice, this means that those carriers engaged in access stimulation would not render bills to interexchange carriers for terminating tandem switched transport with respect to stimulated traffic, and would be required to pay the terminating tandem switched transport charges in lieu of IXCs for these calls to other access providers of such transport.[6]

NTCA supports this approach as a means of establishing proper incentives for call routing, but believes the Commission's proposal to include a complementary option for direct interconnection has significant merit as well and could enhance the setting of proper incentives. Allowing providers to select the option that works best given their unique circumstances may help minimize industry disruptions and provide the best possible incentives for negotiation and resolution. Depending on the volume of traffic being exchanged, an access-stimulating LEC may conclude that it makes more economic sense to offer direct interconnection than to pay the cost of transporting such traffic from the point of indirect interconnection. Furthermore, from an administrative standpoint, it may prove easier for an access-stimulating LEC that subtends a centralized equal access provider ("CEA") to directly interconnect, rather than reprogram billing systems to assign the costs of terminating switched transport to the access-stimulating LEC.

Providing an option for direct interconnection as a complement to "flipping financial responsibility" also should help ensure that non-access-stimulating LECs are not inadvertently impacted by the proposal. One of the concerns of non-access-stimulating LECs is that IXCs will treat all LECs who subtend a CEA as the same for purposes of calculating ICC payments, and that

[5] Apr. 11 Letter; Nov. 16 Letter.

[6] Apr. 11 Letter; Nov. 16 Letter.

they will refuse to pay *any* terminating, tandem switched, transport fees assessed by the CEA, even if only one or two of the LECs that subtend the CEA are engaged in access stimulation. Were this to occur, non-access stimulating LECs would, through no fault of their own, be deprived of the ICC revenues to which they are entitled under the Commission's rules and on which they rely to be able to offer services to rural consumers at reasonably comparable prices. A direct interconnection option would help to avoid such a result by physically disaggregating stimulated and non-stimulated traffic, thereby allowing each to be measured and billed separately.

In addition, the Commission's proposal "would align the responsibility for determining how terminating access traffic should be routed with the financial responsibility for that decision."[7] If, under the Commission's proposal, an access-stimulating LEC offers to directly interconnect with an IXC and the IXC declines that offer, the IXC will effectively have chosen its preferred routing path (*i.e.*, indirect interconnection through an intermediate provider of the LEC's choosing) and should, at that point, rightfully be made to bear the cost of transporting that call to the LEC. In this regard, the Commission's proposal could be viewed as enhancing the industry proposal by incenting both access-stimulating LECs and IXCs to reach agreements to directly interconnect.

To implement its proposed reforms, the Commission should require access-stimulating LECs to notify affected IXCs and intermediate access providers of their intent to accept financial responsibility for calls delivered to their networks or to accept direct connections from either IXCs or intermediate access providers of the IXCs' choosing. Access-stimulating LECs that elect direct interconnection should be required to accept direct connections at current points of interconnection with intermediate access providers, as well as at the LECs' end office, and to provide notice to the

[7] Letter from Jeffrey S. Lanning, Vice President – Federal Regulatory Affairs, CenturyLink to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92 (May 24, 2018).

IXC of these locations. This approach should help to minimize industry disruption, as LECs are already equipped to directly interconnect at these locations. Alternatively, if the access-stimulating LEC declines to accept direct interconnection, it is at that point that the second prong of the rule would apply and the process for acceptance of defined elements of financial responsibility by the access-stimulating LEC would be triggered.

In addition, to ensure proper incentives for direct interconnection, the Commission should prohibit an access-stimulating LEC from electing to directly interconnect with an IXC and then, after the IXC has already invested in the infrastructure necessary to connect to the LEC's network, terminating its election. Rather, once again to promote the integrity of the system, once an access-stimulating LEC has elected direct interconnection, it should be required to continue to maintain that direct connection so long as the LEC continues to engage in "access stimulation." If the LEC subsequently ceases to engage in access stimulation, it should *then* be allowed to end its election of direct interconnection and return to billing the IXC charges for the cost of transporting the IXC's traffic from the point of indirect interconnection to the LEC's end office. We note, however, that, as a practical matter, the LEC would have a strong incentive not to withdraw from the arrangement having already spent the money to directly interconnect in the first place.

II. THE COMMISSION SHOULD RETAIN THE EXISTING DEFINITION OF ACCESS STIMULATION.

In the NPRM, the Commission seeks comment on whether to revise the definition of access stimulation to more accurately and effectively target harmful access stimulation practices.[8] Under the current definition, which was adopted in 2011, two conditions must be met for a LEC to be engaged in "access stimulation." First, the LEC must have a "revenue sharing agreement, whether

[8] *NPRM* ¶ 26.

express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment" by the LEC is "based on the billing or collection of access charges from interexchange carriers or wireless carriers."[9] Second, the LEC must meet one of two traffic tests. It must "[h]a[ve] either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month," or it must "ha[ve] had more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year."[10]

The existing definition continues to strike the right, carefully considered balance between over-inclusiveness and under-inclusiveness. As the Commission recognized in its 2011 *USF/ICC Transformation Order*, using access revenue sharing alone to determine whether a LEC is engaged in access stimulation could be overly broad and result in LECs who enter into revenue sharing agreements for legitimate (*i.e.*, non-access stimulating) purposes being unfairly punished for engaging in economically reasonable conduct.[11] Likewise, "[a] terminating-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing LECs that had realized access traffic growth through general economic development, unaided by revenue sharing."[12] This could occur, for instance, if a customer support center decided to relocate to the LEC's service area without any revenue sharing arrangement, or if a new competitive LEC experiences substantial growth from a small base.[13] The current definition's net payment

[9] 47 C.F.R. § 61.3(bbb)(1)(i).

[10] *Id.* § 61.3(bbb)(1)(ii).

[11] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17,879 ¶ 672; *see also* NTCA 2011 Comments at 33-34 (providing examples of legitimate transactions, such as use of affiliated long distance services, that could be deemed "revenue sharing" if not thoughtfully defined).

[12] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17,881-82 ¶ 677.

[13] *Id.*

language, combined with the traffic tests, avoids these unfair results and "best identifies the revenue sharing agreements likely to be associated with access stimulation."[14]

Crucially, the *NPRM* cites no evidence whatsoever to suggest that the current definition is not working—*i.e.*, that it has failed to identify LECs engaged in access stimulation. Rather, as a basis for proposing to revisit the definition of "access stimulation," the Commission points to a handful of statements from the major IXCs, which according to the Commission, shows that access stimulation schemes have continued despite the Commission's access stimulation rules.[15] But just because some entities continue to engage in such practices does not mean the rule has been ineffective in *identifying* them. The practices, for better or worse, are not barred—the rules are intended to identify such practices, and then to establish certain consequences for engagement in them. In this regard, all indications (including the IXCs' own claims) are that the "identification rule" is working well, with the only relevant question being whether and to what degree the consequences of such practices should be altered.

As explained above, NTCA supports requiring access-stimulating LECs either to offer direct interconnection to IXCs or to bear the cost of transporting terminating access traffic to eliminate incentives to engage in such access arbitrage schemes. However, there is no reason to reopen a tricky definitional issue. Indeed, reopening the definition could have unintended consequences. For example, a definition that modifies either the revenue sharing condition or traffic tests could inadvertently capture carriers not engaged in access stimulation if they have unexpected new growth or increase in minutes. In short, when it comes to defining access stimulation for purposes of implementing any terminating transport reforms, the Commission is

[14] *Id.* at 18,878 ¶ 670.

[15] *NPRM* ¶¶ 6 & n.13, 26.

best served by observing the well-worn adage, "If it ain't broke, don't fix it." The Commission should focus on what may be "broke."

III. THE COMMISSION SHOULD DEFER BROADER QUESTIONS RELATED TO BILL-AND-KEEP AND DIRECT INTERCONNECTION TO BROADER ICC REFORM.

The Commission seeks comment on whether to reduce all terminating tandem switching, common transport, and tandem-switched transport rate elements for access stimulators to bill-and-keep if it decides not to require access-stimulating LECs either to choose to accept financial responsibility for the delivery of calls or to accept direct connections.[16] The Commission should defer any decision on whether to transition to bill-and-keep to broader ICC reform.

Moving all access-stimulating LECs' traffic to bill-and-keep would effectively require the Commission to define the network edge—*i.e.*, "the point where bill-and-keep applies."[17] As the Commission has acknowledged, this is no easy task. In its 2011 *Transformation Order and NPRM* the Commission identified no fewer than five possible network edges and several different methodologies for determining which edge should apply. The Commission sought comment on each of these different approaches to defining the network edge, as well as on state establishment of the network edge pursuant to Commission guidance.[18]

In 2017, the Commission requested that interested parties submit comments to refresh the record on this and other issues.[19] In response to that request, NTCA submitted comments

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[16] *Id.* ¶ 24.

[17] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 18,117 ¶ 1320.

[18] *Id.* at 18,117-18 ¶¶ 1320-1321. The FCC also relied on the fact that, under Section 252(d)(2), states "*must* arbitrate the 'edge' of carrier's networks," in defending its bill-and-keep methodology for terminating access rates against a challenge that it unlawfully intruded on state rate-setting authority. *In re FCC 11-161*, 753 F.3d 1015, 1126 (10th Cir. 2014) (emphasis added).

[19] Public Notice, *Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit*, 32 FCC Rcd 6856 (2017).

explaining the unique challenges faced by rural carriers and urging the Commission to take these challenges into account when providing guidance to states on defining the network edge in the context of broader ICC reform.[20]

While the Commission could in theory adopt a network edge solely for the purpose of implementing bill-and-keep for access stimulating LECs, doing so risks prejudging the network edge for non-access stimulating LECs as well. In other words, once the Commission adopts a network edge, even if for a narrow purpose here, it sets a precedent that will be difficult for the Commission and the states to ignore, even if the evidence suggests that a different edge should apply to non-access stimulating LECs. The Commission should therefore defer transitioning access-stimulating LECs to bill-and-keep until it has had a chance to consider this and other issues in the context of broader ICC reform.

The Commission also seeks comment on CenturyLink's even broader proposal to shift financial responsibility for terminating transport costs to *any* LEC (access-stimulating or otherwise) that declines to accept a request for direct interconnection for the purpose of terminating access traffic.[21] While as described above there is merit as the Commission suggests in allowing *access-stimulating* LECs to directly interconnect instead of requiring them to bear the cost of transporting terminating access traffic, it is premature to consider broader rules regarding direct interconnection. Such a discussion once again risks prejudging the network edge which, as explained above, is complicated and should be tackled as part of comprehensive reform—and

[20] Comments of NTCA–The Rural Broadband Association and WTA – Advocates for Rural Broadband, WC Docket No. 10-90 (Oct. 26, 2017); Joint Reply Comments of NTCA–The Rural Broadband Association and WTA – Advocates for Rural Broadband, WC Docket No. 10-90 (Nov. 20, 2017).

[21] *NPRM* ¶ 23.

changes to fundamental interconnection arrangements could have substantial negative unintended consequences for LECs of all kinds in serving small customer bases in rural areas.

IV. CONCLUSION.

For the foregoing reasons, NTCA supports targeted efforts to address access stimulation. However, the record before the agency does not support taking broader actions to reform the intercarrier compensation system or to wander into more far-ranging debates with respect to interconnection that do not relate specifically to access arbitrage, as such actions could have unintended adverse consequences for rural consumers and ultimately undermine the Commission's universal service goals.

Respectfully submitted,

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