Before the
Federal Communications Commission
Washington, D.C. 20554

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

COMMENTS OF COMPETITIVE LOCAL EXCHANGE CARRIERS

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SUMMARY

After the Commission instituted broad sweeping reforms to the access stimulation regime via its November 2011 *Connect America Fund Order*, the Competitive Local Exchange Carriers ("CLECs") represented by these comments made the difficult choice of accepting substantially reduced access charge rates, determining that doing so would present the best opportunity to continue to provide enhanced broadband and telecommunication service offerings to their rural end users and to provide the telecommunications services that facilitate free conference calling services to all Americans. Like all important decisions, the CLECs made their determination after an extensive, evidence-based review of their respective networks and after analyzing the pros and cons each approach would have on their employees, communities, industry colleagues, and even the nation as a whole. Today, however, CLECs are facing backlash for their thoughtful, analytic approach, and, ironically enough, it is an assumption-based, factually unsupported attack by the nation's most profitable IXCs that are (once again) leading the charge.

Engaging in their typical fearmongering and making unsupported claims of economic harm to consumers nationwide, the IXCs ask the Commission to once again review its regulations pertaining to access stimulation. It seems that the Commission obliged, issuing a Notice of Proposed Rulemaking (hereinafter the "Access Stimulation NPRM") proposing rules that the agency claims will prevent access-stimulating CLECs from "circumvent[ing] the Commission's rules." In reality, though, what the Commission is proposing is an alternative form of regulatory arbitrage that rewards IXCs, while forcing decreased revenues and increased costs on CLECs and, worse yet, rural American end users.

Certainly, the Commission's proposal is, in and of itself, a death warrant for access-stimulating CLECs, but what makes the proposal particularly troubling is the fact that it is not

based on a substantiated record, empirical evidence, or factual statements. Instead, the proposal is largely premised on assumptions, unsupported claims, and vague statements of both law and fact. And, as the Commission has recognized in numerous other proceedings, this is not the way in which the agency was designed to make major policy decisions.

By the CLECs' count, the Commission and, by extension, the IXCs, have failed to present evidence relating to *eight* core issues and concerns that the Access Stimulation NPRM addresses, including evidence that: (1) IXCs passed on their post-*Connect America Fund Order* savings to consumers; (2) access stimulation actually harmed consumers; (3) the Commission's post-*Connect America Fund Order* rates harmed IXCs; (4) access stimulation deterred IXCs from investing in rural broadband deployment; (5) access stimulation has become more widespread since the *Connect America Fund Order* was adopted; (6) access stimulation involves high switched access rates; (7) access-stimulating CLECs have circumvented Commission rules; or that (8) IXCs actually requested direct interconnections and were denied such connections. Nonetheless, despite missing all this information, the Commission has pressed on, proposing "reforms" that are fraught with discriminatory propositions, vague, unsupported statements, and major gaps.

Indeed, as explained in detail below, the proposals contained in the Access Stimulation NPRM leave the CLECs with a host of concerns. First and foremost, the Commission's individual attack on access-stimulation traffic and access-stimulating CLECs makes the proposed rules unjustly discriminatory and, quite ironically, creates an alternative form of regulatory arbitrage. The proposals are vague with respect to several key terms and policy considerations, including (1) what, exactly, access-stimulating CLECs will be "financially responsible" for in the event they elect to not accept direct connections and (2) what form of "direct connection" the access-stimulating CLECs must actually provide, and whether that includes IP-to-IP interconnections. The Commission's current proposal, if adopted, would be an exemplar of "arbitrary and capricious" agency action and likely exceed the Commission's statutorily prescribed authority.

The evidence also reveals that the Commission's proposed rules fail to analyze or evaluate the apparent point of contention: the appropriate intersection between access-stimulating CLECs and FCC-sanctioned CEA providers. Various policy decisions and issues surrounding this topic have been simmering for years, yet the Commission has left them unresolved, even in light of requests for clarity made as recently as November 2017.

Accordingly, rather than implementing discriminatory rules and engaging in arbitrary and capricious agency action, the Commission should: (1) not move forward unless and until IXCs and CEA providers provide relevant data for all affected parties to review; (2) provide clarity regarding the interplay between access-stimulating CLECs and CEA providers, including clarity as to whether the use of commercial agreements are appropriate; (3) delay any further reforms until the Commission addresses on an industry-wide basis whether it will transition tandem switching and transport charges and whether it intends to impose mandatory IP interconnection requirements; and/or (4) in the alternative, consider adopting a uniform rate for access stimulation traffic that reduces IXC costs without depriving CEA providers or CLECs of the resources they need to continue to provide their services and advance the Commission's goal of expanding access to broadband.

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COMMENTS OF COMPETITIVE LOCAL EXCHANGE CARRIERS

These comments are filed on behalf of Competitive Local Exchange Carriers ("CLECs") that participate in access stimulation as defined by the Commission's rules adopted in the November 2011 *Connect America Fund Order*: BTC, Inc. d/b/a Western Iowa Networks, Goldfield Access Network, Great Lakes Communication Corporation, Northern Valley Communications, LLC, and Louisa Communications. Just a few years ago, due to the FCC's 2011 reforms, most of the CLECs represented in these comments were faced with the difficult choice of accepting a substantial reduction in their access charge rates or discontinuing their relationships with high volume conference calling and audio broadcast providers. These companies decided that the residential and business customers they serve in rural Iowa and South Dakota would be better off if the CLECs accepted the rate reduction and maintained their relationships with the high-volume service providers. That choice was a rational, evidenced-based decision that carefully weighed the pros and cons of complying with the Commission's new access stimulation rules.

None of the CLECs represented by these comments sought to evade the Commission's 2011 rules. To the contrary, they embraced the rules because the rules finally brought clarity and provided a clear path to resolving disputes with IXCs – disputes that had been forcing CLECs to divert resources away from rural broadband and telecommunications investments to fund expensive, time-consuming litigation. And, notably, nearly every carrier complied with the Commission's new rules, either paying the significantly lower tariffed access charges or negotiating a commercial arrangement; every carrier except AT&T, that is.

AT&T was dissatisfied with the policy choice the FCC made in 2011, a choice that expressly acknowledged that the Commission would reduce, but not eliminate, access stimulation. So, AT&T did what it is famous for: it ignored the FCC's rules, engaged in self-help withholding, and sought to use litigation to get what it wanted. But, when it failed to convince a federal court judge to buy a series of erroneous legal arguments, and when the facts did not establish its claims, AT&T finally settled one of those cases.

In the meantime, however, AT&T laid the groundwork for the FCC to provide AT&T with its desired relief in the form of rule modifications. But, as demonstrated below, the allegations that AT&T has peddled to the Commission are not based in fact, and the record does not support the changes proposed by the Access Stimulation NPRM.[1] Further, the proposed rules are seriously flawed, conflating terminology and raising more questions than they answer.

Accordingly, rather than implementing discriminatory rules and engaging in arbitrary and capricious agency decision making, the Commission should: (1) not move forward unless and until IXCs and CEA providers provide relevant data for all affected parties to review; (2) provide clarity regarding the interplay between access-stimulating CLECs and CEA providers, including whether the use of commercial agreements is appropriate; (3) delay any further reforms until the Commission addresses on an industry-wide basis whether it will transition tandem switching and transport charges and whether it intends to impose mandatory IP interconnection requirements; and/or (4) in the alternative, consider adopting a uniform rate for access stimulation traffic that

[1] *In the Matter of Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155 (June 5, 2018) (hereinafter "Access Stimulation NPRM").

reduces IXC costs without depriving CEA providers or CLECs of the resources they need to continue to provide their services and advance the Commission's goal of expanding access to broadband.

I. THE EVIDENCE DOES NOT SUPPORT THE PREMISE OR PROPOSED CONCLUSIONS IN THE ACCESS STIMULATION NPRM

Chairman Pai has promised Congress, carriers, and the American people a principled administration of the nation's communications laws. He has advocated for a Commission that respects the boundaries of its authority.[2] He has repeatedly chastened Commission action that he concluded lacked a sufficient evidentiary record.[3] He has made clear that evidence and analysis

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[2] *See, e.g.*, *Statement of Commissioner Ajit Pai on the Third Circuit's Media Ownership Decision*, 2016 WL 3006739 (F.C.C. 2016) ("Perhaps most importantly, today's decision is yet more evidence that the FCC is now an agency unmoored from the rule of law. It is long past time for the Commission to respect the limits on its authority set by Congress."); *In re Protecting & Promoting the Open Internet*, 30 F.C.C. Rcd. 5601, 5921 (2015) (*Open Internet Order*) (Dissenting Statement of Commissioner Ajit Pai) ("In short, because this *Order* imposes intrusive government regulations that won't work to solve a problem that doesn't exist using legal authority the FCC doesn't have, I dissent.").

[3] *See, e.g.*, *Statement of Commissioner Ajit Pai on the Release of Misleading Incentive Auction Data*, 2015 WL 2456100 (F.C.C. 2015) ("Perhaps more troubling, though, is the Public Notice's explanation for why the FCC is not accounting for interference from any Mexican TV stations. Other parties have attempted to make such estimates. But the Public Notice doesn't do so, it says, '[d]ue to insufficient data.' In other words, we are not including those Mexican stations because, among other things, we do not know where they are located! This admission is astonishing. Even though it has been over three years since Congress passed the Spectrum Act, and even though under the current timeline we're less than a year from the start of the incentive auction, **the FCC still does not have basic information** about the location of TV stations along the U.S.-Mexico border. This is not a great sign.") (emphasis added).

should guide the Commission's decisions,[4] not name-calling.[5] The Chairman has been joined by Commissioners O'Rielly[6] and Carr[7] in taking issue with those parties that call for the Commission to impose regulation based on rhetoric, rather than reality. As a result, the CLECs that have high volume customers were both surprised and profoundly disappointed with the Access Stimulation NPRM, which appears to accept, without inquiry or demand for evidence, the allegations and name-calling made by AT&T and Verizon. The NPRM proposes to create

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4 *See, e.g., In re Rates for Interstate Inmate Calling Services*, 28 F.C.C. Rcd. 14107, 14228 (2013) (Dissenting Statement of Commissioner Ajit Pai) ("Considering all these facts together, I believe that the decision to establish a safe harbor and cap that applies to all correctional institutions, regardless of their size and regardless of their nature, is arbitrary. **I also believe that the specific safe harbor and cap chosen by the Commission are not supported by substantial evidence.** By ignoring the differences between prisons and jails (among other things), the Commission has 'fail[ed] to consider an important aspect of the problem' before us. And by setting a safe harbor and cap that is unreasonably low for jails, especially smaller ones, the Commission has made a decision that 'runs counter to the evidence' in the record.") (emphasis added); *id.* at 14229 ("With this cost information, the Commission could determine how to adequately address the cost variability shown in the present record. But without it, the cart at this point stands in front of the horse."); *Hearing on the Fiscal Year 2019 Funding Request and Budget Justification for the Federal Communications Commission and the Federal Trade Commission Before the Subcomm. on Financial Services and General Government of the S. Comm. on* Appropriations, 115th Cong. (2018) (statement of Chairman Ajit Pai, F.C.C.) ("Additionally, a thorough review of our staffing and organization led us to determine that we must strengthen the role of economics and data analysis at the Commission so that our decisions are driven by evidence and produce benefits that outweigh their costs. Accordingly, the Commission is in the process of creating the Office of Economics and Analytics to coordinate the contributions of economists and data professionals throughout the FCC.")

5 *See, e.g.*, *Open Internet Order*, 30 F.C.C. Rcd. at 5933 (Dissenting Statement of Commissioner Ajit Pai) ("Nevertheless, the Order ominously claims that '[t]hreats to Internet openness remain today,' that broadband providers 'hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don't like,' and that the FCC continues 'to hear concerns about other broadband provider practices involving blocking or degrading third-party applications.' **The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria**.") (emphasis added).

6 *See, e.g.*, *id.* at 5987 (Dissenting Statement of Commissioner Michael O'Rielly) ("*The Findings are Not Supported by Evidence of Actual Harms*. Even after enduring three weeks of spin, it is hard for me to believe that the Commission is establishing an entire Title II/net neutrality regime to protect against hypothetical harms. There is not a shred of evidence that any aspect of this structure is necessary. The D.C. Circuit called the prior, scaled down version a 'prophylactic' approach. I call it guilt by imagination.") (emphasis in original).

7 *See, e.g.*, *In re Access to Telecommunications Equipment and Services by Persons with Disabilities*, 32 F.C.C. Rcd. 9063, 9110 (2017) (Statement of Commissioner Brendan Carr Approving in Part and Dissenting in Part) ("For instance, the Order's cost-benefit analysis does not account for all of the costs associated with this new requirement. This might be because the relevant technical standard is still undergoing development. But in my view, this uncertainty means that we should seek additional comment, rather than proceeding directly to a rule.").

regulatory arbitrage[8] – by adopting discriminatory obligations for access stimulation traffic – while claiming that it desires to eliminate it.

As each of the Republican Commissioners have clearly articulated in other proceedings, when faced with a lack of evidence, the Commission should *not* regulate. Indeed, as the courts have repeatedly observed, the Commission *cannot* regulate when it lacks evidence.[9] As explained more fully below, the evidence that is available suggests that that the IXCs who demand these reforms are misleading the Commission, relying on anecdotes, hypothesis, and hysteria, rather than evidence. For these reasons, the Commission should decline to adopt any of the reforms discussed in the Access Stimulation NPRM unless and until the IXCs open their

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[8] While the Commission refers to regulatory arbitrage in the Access Stimulation NPRM without providing a definition, in the past it has defined it as "businesses making decisions based on regulatory classifications rather than on customers' preferences and innovative and sustainable business plans." *In re Inquiry Concerning High-Speed Access to Internet over Cable & Other Facilities*, 17 F.C.C. Rcd. 4798, 4846 (2002). In another proceeding, the Commission has described it as referring to "profit-seeking behavior that can arise when a regulated firm is required to set different prices for products or services with a similar cost structure." *In re Developing A Unified Intercarrier Compensation Regime*, 16 F.C.C. Rcd. 9610, 9675 (2001) (citing Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime* at 1, ¶ 2 n.3 (Federal Communications Commission, OPP Working Paper No. 33, Dec. 2000)).

[9] Agency action is unlawful if it is "arbitrary [and] capricious." 5 U.S.C. § 706(a)(2). This means that, even when an agency pursues a "legitimate" goal, it still "must do so in some rational way." *Judalang v. Holder*, 565 U.S. 42, 55 (2011). The lines drawn by the agency must reflect "non-arbitrary, relevant factors." *Id.* "Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, **entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency**, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (emphasis added). Thus, courts may "set aside agency action that [fails to show that] the agency has 'examine[d] the relevant data and articulate[d] a satisfactory explanation for its action, including a rational connection between the facts found and the choices made.'" *Business Roundtable v. Sec. and Exch. Comm'n*, 647 F.3d 1144, 1148 (D.C. Cir. 2011) (quoting *State Farm*, 463 U.S. at 43); *see also Nader v. Fed. Commc'ns Comm'n*, 520 F.2d 182, 192 (D.C. Cir. 1975) ("Our function is not to impose our own standards of reasonableness upon the Commission, but rather to ensure that the Commission's order is supported by substantial record evidence and is neither arbitrary, capricious, nor an abuse of discretion."); *See also Fox Television Stations, Inc. v. Fed. Commc'ns Comm'n*, 280 F.3d 1027, 1042-44 (D.C. Cir. 2002) (determining that a lack of evidence rendered the Commission's decision irrational); *Global Tel*Link v. Fed. Commc'ns Comm'n,* 866 F.3d 397, 415 (D.C. Cir. 2017) (finding that the Commission's reliance on average per-minute cost data was arbitrary and capricious because "regional variation, not efficiency, accounts for cost discrepancies among providers").

books and provide the data necessary for the Commission and other commenters to fully address the impact that the 2011 reforms have had – or, more correctly, have not had – on consumers and to permit the Commission to understand and quantify the purported harms of access stimulation.

A. In 2011, the FCC Promised That Consumers Would Benefit from the Reduction in Access Charges, But Available Evidence Suggests That the IXCs are Not Passing on Savings to Consumers

In the 2011 *Connect America Fund Order*, the Commission entirely reformed the access charge regime applicable to long-distance traffic.[10] It established as the "ultimate end state" a bill-and-keep regime in which carriers would no longer pay each other for the delivery of long-distance phone calls to customers on their networks.[11] However, the Commission did not immediately transition all access charges to zero. Rather, it began only by transitioning terminating access end office rates, as well as tandem switching charges in one specific circumstance (tandem switching and transport for calls that terminate via a tandem owned by the terminating LEC), to zero.[12] This transition phased in over a seven-year period.[13] Terminating rates for tandem switching and tandem-switched transport for other carriers remained unchanged.[14] Similarly, originating access rates were unaffected.[15] With regard to these issues,

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

[11] *See, e.g., id.* ¶ 736.

[12] *See, e.g. id.* ¶ 800 ("Balancing these considerations, we set forth our transition path for terminating end office switching and certain transport rate elements and reciprocal compensation charges in Figure 9…. Even so, we do not specify the transition to reduce these rates further at this time. Instead, we seek comment regarding the transition and recovery for such other rate elements in the FNPRM.").

[13] *Id.* ¶ 801 Fig. 9.

[14] *See id.* ¶ 1299 ("Although we specify the implementation of the transition for certain terminating access rates in the Order, we did not do the same for other rate elements, including originating switched access, dedicated transport, tandem switching and tandem transport in some circumstances, and other charges including dedicated transport signaling, and signaling for tandem switching.").

[15] *See id.* ¶ 653 ("Finally, in the Further Notice of Proposed Rulemaking (FNPRM), we seek comment on the transition and recovery mechanism for rate elements not reduced as part of this Order, including originating access and certain common and dedicated transport.").

the Commission initiated a Further Notice of Proposed Rulemaking, which remains open and pending.[16]

At the time of these reforms, the Commission made several bold predictions that were the lynchpins of its rationale for reform. Specifically, the Commission relied on economic theory to justify the reduction and eventual elimination of access charges, claiming that consumers would benefit through reduced charges. This is what the Commission said in 2011:

> Economic theory suggests that carriers will reduce consumers' effective price of calling, through charges and/or improved service quality. We predict that reduced quality-adjusted prices will lead to significant savings on calls made, and to increased calling. . . Those price reductions will be most significant among carriers who, by and large, incur but do not collect termination charges, notably CMRS and long-distance carriers…. Similarly, **IXCs**, calling card and VoIP providers **will be able to offer cheaper long-distance rates and unlimited minutes at a lower price**.[17]

However, as other commenters observed in 2017, when the Commission sought to refresh the record on intercarrier compensation, there is no evidence that the Commission's prediction actually reflects the reality of today's telecommunications landscape. For example, NTCA and WTA implored the Commission to avoid further reforms until it gathered the necessary data:

> [T]o ensure further reform serves its intended purpose, the Commission must evaluate carefully its previous ICC reforms on consumers and carriers before taking any such further actions. In particular, as a matter of sound economic cost-benefit analysis, the Commission look to see whether its reforms have, in fact, resulted in lower wholesale and retail prices, improved service, and/or new and more innovative services for interexchange carriers ("IXC") and commercial mobile radio service ("CMRS") customers, and whether any such price reductions outweigh the increase in prices to local exchange end users – especially rural American consumers and businesses – and other costs associated with the reforms. Otherwise, further ICC reform may give IXCs and CMRS providers windfalls and merely shift the cost of supporting local rural networks from

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[16] *See id.* ¶ 1297 ("First, we seek comment on the transition to bill-and-keep for rate elements that are not specifically addressed in the Order, including origination and transport").

[17] *Id.* ¶ 752 (emphasis added).

> all American consumers onto the backs of the very same rural consumers depending upon such support.[18]

In their joint reply comments, NTCA and WTA observed that the "claims that further reforms are necessary or warranted at this time, should be taken for what they are: self-serving statements of industry participants who stand to reap additional profits from the further shifting of transport costs onto small rural carriers and rural American consumers and businesses."[19] And, while NTCA and WTA stated that the Commission could consider targeted or isolated reforms if the practices alleged by AT&T and Verizon existed, it also rightfully observed that AT&T's and Verizon's claims regarding the prevalence and effects of access stimulation were, and still are, based merely on "anecdotal evidence."[20]

The Pennsylvania Public Utilities Commission agreed with NTCA's and WTA's position, noting that "the Commission should refrain from proposing any further ICC reforms until it carefully evaluates the impact of its prior ICC reforms and collects and analyzes data on current ILEC minutes, rates and revenues."[21] Several carriers also called on the Commission to gather and analyze data before making further changes to the intercarrier compensation regime, including Peerless Network, Inc., West Telecom Services, LLC, Peninsula Fiber Network, LLC, Alpha Connect, LLC, Rural Telephone Service Company, Inc. d/b/a Nex-Tech, Nex-Tech, LLC, and Tennessee Independent Telecommunications Group, LLC d/b/a Iris Networks.[22]

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[18] Joint Comments of NTCA – The Rural Broadband Association and WTA – Advocates for Rural Broadband, at 5, WC Docket No. 10-90 (Oct. 26, 2017) (NTCA/WTA Comments).

[19] Joint Reply Comments of NTCA – The Rural Broadband Association and WTA – Advocates for Rural Broadband, at 9, WC Docket No. 10-90 (Nov. 20, 2017) (NTCA/WTA Reply Comments).

[20] *Id.* at 11-12.

[21] Reply Comments of the Pennsylvania Public Utilities Commission, WC Docket No. 10-90 (Nov. 13, 2017).

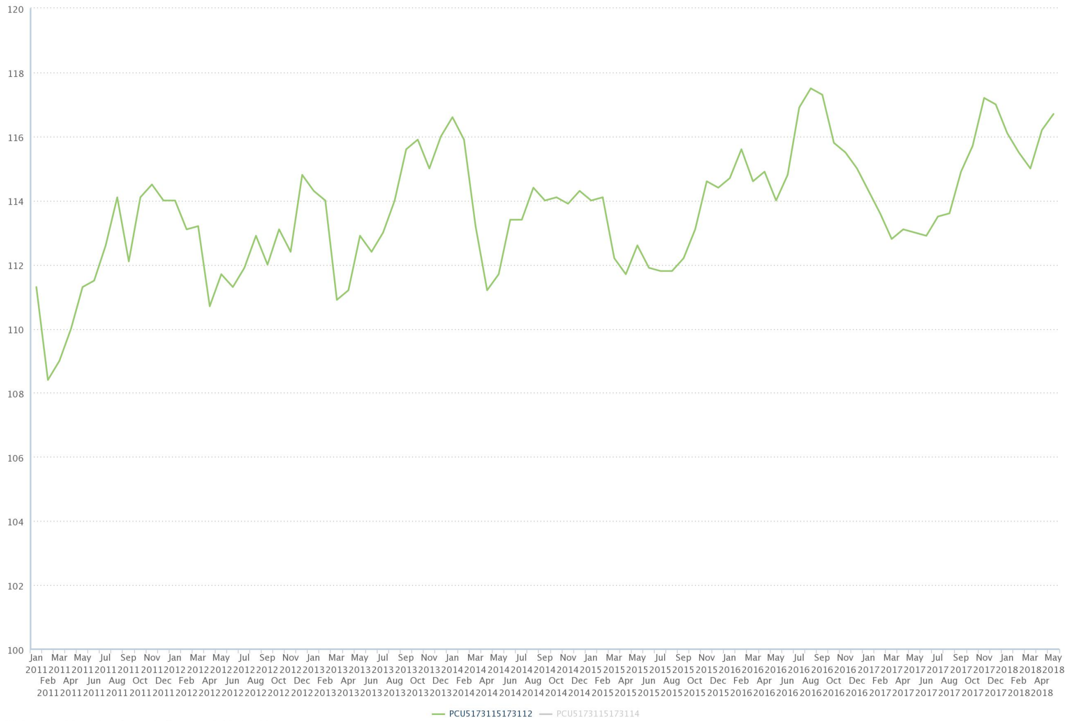
[22] Reply Comments of Peerless Network, Inc., West Telecom Services, LLC, Peninsula Fiber Network, LLC, Alpha Connect, LLC, Rural Telephone Service, Company, Inc. d/b/a Nex-Tech, Nex-Tech, LLC, and Tennessee Independent Telecommunications Group, LLC d/b/a Iris Networks, at 5-7, WC Docket No. 10-90 (Nov. 20, 2017).

Despite these repeated requests for the Commission to undertake no further intercarrier compensation reforms until evaluating whether its predictions and conclusions from 2011 have proven to be accurate, the Commission has decided to push ahead in issuing an NPRM proposing profound changes, but only for a tiny sliver of the intercarrier compensation pie. However, despite its desire to institute "reforms," without the data to substantiate its assumptions, there is simply no rational basis for the Commission to conclude that these reforms will result in any benefit to consumers.

Indeed, the limited evidence that is publicly available strongly suggests that the 2011 predictions of consumer benefit from access charge reduction are not playing out, and that, to the contrary, consumers are paying *more* – not less – for long-distance service in 2018. As Dr. Oliver Grawe of Berkeley Research Group notes in his attached expert opinion, the Producer Price Index ("PPI") reveals rising costs for *both* wireline toll and wireline all distance (local and long-distance combined) services since 2011.[23]

For example, the PPI for wired telecommunications carriers in the category of Public switched toll service has actually risen since 2011.

[23] Expert Report of Oliver Grawe, Ph.D. in Response to the Notice of Proposed Rulemaking Entitled "Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage," at 8-9 (July 20, 2018) (hereinafter, "BRG Report").

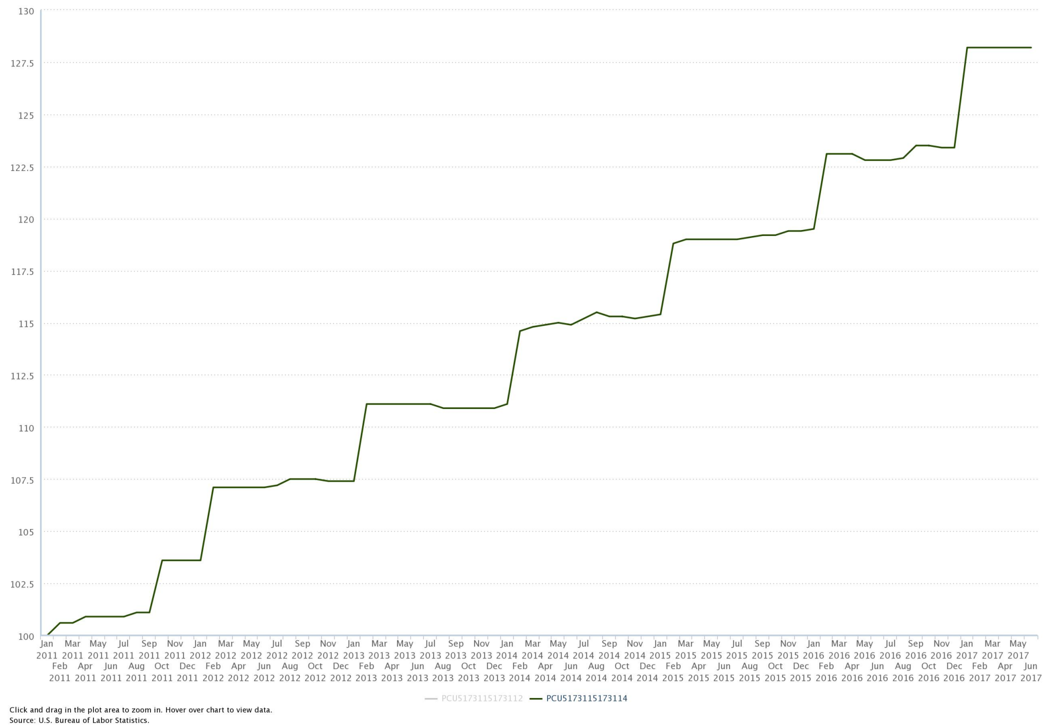


Click and drag in the plot area to zoom in. Hover over chart to view data.
Source: U.S. Bureau of Labor Statistics.

PPI industry data for Wired telecommunications carriers-Public switched toll service, not seasonally adjusted

Series Title	PPI industry data for Wired telecommunications carriers-Public switched toll service, not seasonally adjusted
Series ID	PCU5173115173112
Seasonality	Not Seasonally Adjusted
Survey Name	PPI Industry Data
Measure Data Type	Public switched toll service
Industry	Wired telecommunications carriers
Item	Public switched toll service

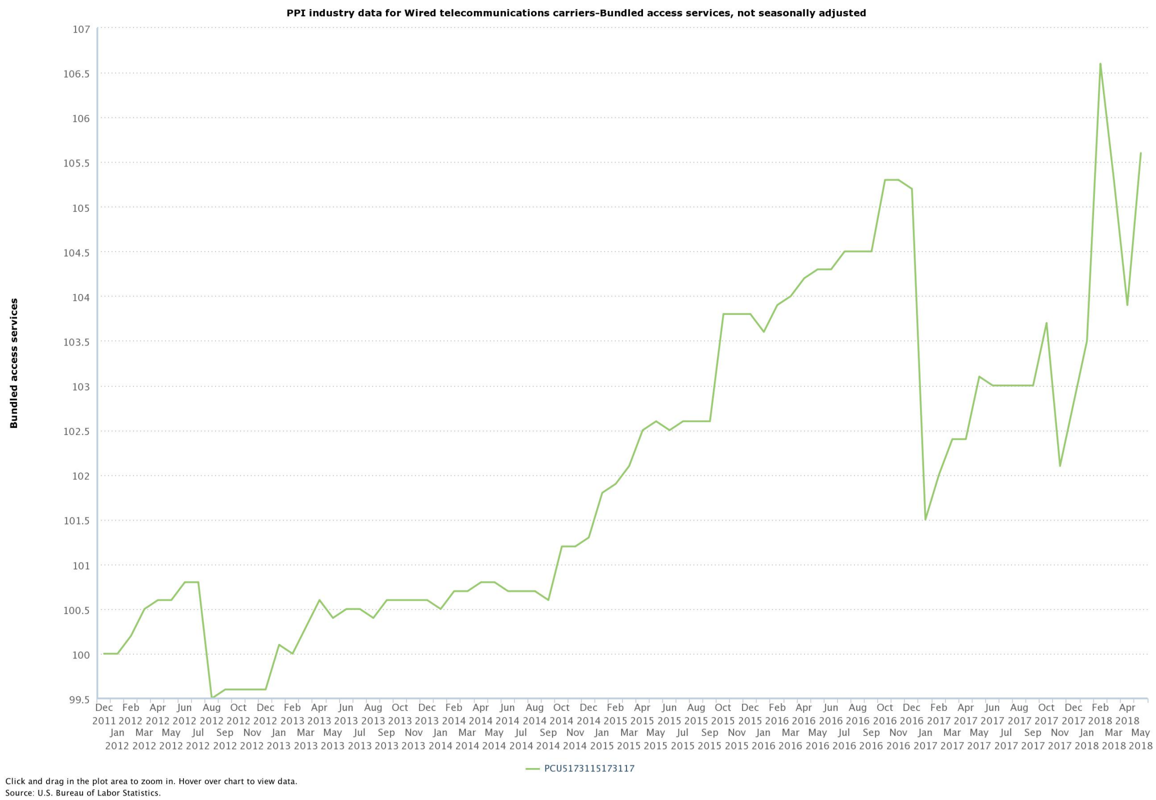
Moreover, the PPI for All Distance service has increased sharply since 2011.



PPI industry data for Wired telecommunications carriers-All-distance telephone service, not seasonally adjusted

Series Title	PPI industry data for Wired telecommunications carriers-All-distance telephone service, not seasonally adjusted
Series ID	PCU5173115173114
Seasonality	Not Seasonally Adjusted
Survey Name	PPI Industry Data
Measure Data Type	All-distance telephone service
Industry	Wired telecommunications carriers
Item	All-distance telephone service

Similarly, bundled access services, which includes long-distance as a component of the overall bundle, is also trending higher since 2011.



PPI industry data for Wired telecommunications carriers-Bundled access services, not seasonally adjusted

Series Title	PPI industry data for Wired telecommunications carriers-Bundled access services, not seasonally adjusted
Series ID	PCU5173115173117
Seasonality	Not Seasonally Adjusted
Survey Name	PPI Industry Data
Measure Data Type	Bundled access services
Industry	Wired telecommunications carriers
Item	Bundled access services

While these results may be surprising at first glance, the FCC's own Urban Rates Surveys corroborate the conclusion that major IXCs are not reducing their rates to consumers despite the cost savings created through the substantial reduction in terminating end office charges that has occurred since 2011. In particular, the rates paid by AT&T consumers have increased substantially. The data suggest that AT&T's consumers have not enjoyed the savings that the

Commission promised them, but rather are actually paying over $16.00 more per month for long-distance service.[24]

As BRG concludes, the available evidence fails to establish that IXCs are passing on their savings from reduced access charges to consumers, as the Commission had anticipated they would when it instituted the reforms in 2011.[25] As a result, consumers are not better off, LECs are faced with reduced revenues, and it is likely that the IXCs have retained those cost savings in order to mitigate the loss of revenues that their wireline divisions were otherwise experiencing as a result of natural attrition as more consumers cut the cord. This result was not all that difficult to predict because so many consumers were already conditioned to pay for unlimited long-distance plans. As a result, it appears that market forces and information signals are insufficient to drive down long-distance prices for consumers who retain a traditional landline telephone.

In sum, the record is devoid of any evidence that a reduction in access charges has produced any benefits for consumers. Instead, it appears that the Commission intends to put more money in the pockets of big carriers and foreclose certain revenue streams for rural telephone companies that have complied with the Commission's 2011 rules, effectively creating a more fragile market and preventing these rural LECs from being able to invest locally in broadband infrastructure improvements.

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24 *See* BRG Report at 9.
25 *Id.* at 10-11.

B. There is No Evidence That Access Stimulation Has Harmed Consumers

A key premise that the Commission relied on for instituting its 2011 access stimulation reforms was that the rates being charged prior to the 2011 reforms were so substantial that they caused the IXCs to charge all consumers higher rates for long-distance.[26] While it is debatable whether the cost of access stimulation in 2011 was actually material enough to impact the rate ultimately paid by IXC consumers, the Commission's 2011 determination was upheld on review and is not being challenged here. However, the CLECs do question whether the Commission's 2018 statement that it "has long recognized that arbitrage opportunities in the intercarrier compensation (ICC) system harm consumers"[27] provides a sufficient justification for the proposed rules in the Access Stimulation NPRM. Indeed, this statement appears to be the underlying justification for the proposed rules, yet the Commission has apparently undertaken no analysis to determine whether, and to what extent, its "comprehensive intercarrier compensation reform"[28] altered or changed any of the data supporting its 2011 conclusions. As Chairman Pai has admonished in the context of other proceedings, a "bedrock principle of good government is that regulations should reflect the marketplace to which they apply," and when there has been "profound transformation," the Commission "can't keep living in the past."[29]

A review of the record reveals not a single instance in which any IXC has provided *evidence* to back up its assertions. No IXC has come forward with evidence of the amounts it actually paid in tariffed access charges related to access stimulation traffic or supported its

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26 *See Connect America Fund Order*, ¶ 9 ("Most concerning, the current ICC system is 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.").

27 Access Stimulation NPRM, ¶ 1.

28 *See generally Connect America Fund Order*, Section XII.

29 *See In re Amendment to the Commission's Rules Concerning Effective Competition*, 30 F.C.C. Rcd. 6574, 6611 (2015) (Statement of Commissioner Ajit Pai).

assertion that these charges are material to the rates its consumers pay for long-distance service. Furthermore, the CLECs are not aware of any evidence that would support the Commission's and IXCs' conclusion that eliminating all access stimulation access charges would result in even a single penny in reduced costs for consumers. And without this evidence, the entire basis for concluding that consumers are "harmed" by access stimulation is nothing more than conjecture and theory.

While the proponents of the rule changes have come forward with no evidence proving that, under the post-*Connect America Fund Order* landscape, access stimulation has harmed consumers, the harm to consumers that would result from the Commission's present rule changes is readily apparent. First, the nonprofit organizations, small businesses, religious institutions, government agencies, and everyday Americans that have come to rely upon the conference calling and audio broadcasting services at the heart of this dispute will undoubtedly suffer if these services are put out of business. These services provide individuals with the opportunity to use the long-distance plans that they purchase from IXCs – plans that the IXCs designed and marketed knowing full well that access charges were a variable cost – without incurring additional out-of-pocket costs. Further, these services permit individuals, political campaigns, and businesses to host large-scale conference calls without incurring a per-person, per-minute fee, as would be required if these groups were to host calls using a traditional 1-800 dial-in number.

The free conferencing service model is popular with consumers because it provides quantifiable value to them. It allows those consumers to use something they have already paid for – *e.g.*, an unlimited long-distance plan – to obtain a service they enjoy without needlessly paying more out of pocket for the phone call. AT&T itself recognizes the value of not having to provide toll-free numbers because it substantially reduces the rate a host pays when participants in a conference call use a toll number, rather than a toll-free number. Ironically, AT&T refers to this as using a "caller-paid" telephone phone number, while seeking to prevent customers from using the long-distance services they have already paid for.[30]

Those CLECs represented by these comments estimate that more than 5 million Americans enjoy the benefits of using their long-distance plans to call into conference calling and audio broadcasting services hosted just by these CLECs on a monthly basis. In the absence of these services, those consumers will still pay for their long-distance service, however, on top of that they would have to pay for a conferencing service. AT&T, for example, charges a rate of $0.043 per minute for each user that participates in a toll-free conference call on their platform and $0.039 per minute when the caller uses his or her long-distance plan to participate in AT&T's conferencing service.[31] Thus, if AT&T puts its competitors out of business, it stands to gain both the reduction in access charges *and* increased revenues due to the rising number of consumers who will be forced to procure its conferencing services.

This means that, under the Commission's proposed rules, American consumers would pay more to obtain conferencing services similar to what they receive today *for free*. Here are two real world examples of what this might mean in practice if AT&T and Verizon get the rule changes they seek:

- A church that simulcasts its 60-minute church service to the elderly and infirm would incur a cost per-user to hear the service. If 500 people listen in, the church could incur additional charges of $1,170 each Sunday.

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30 *See* AT&T Business Service Guide for AT&T Conferencing Services, at 88, available at http://serviceguidenew.att.com.

31 *See id.* Noticeably, AT&T does not seem to be concerned about people using their long-distance plans to call AT&T's conferencing services.

- A political campaign gathers together 10,000 supporters across the country for a 45-minute discussion on "get out the vote" efforts. That campaign could have to pay AT&T $17,550 to host a *single* conference call, even while each of those subscribers still have to pay their own long-distance bills.

Why should this Commission deny millions of Americans the ability to use the unlimited long-distance plans that they already pay for and permit AT&T to charge them for a conferencing service that they can obtain today at no additional cost to them?

The second category of consumers that will no doubt be harmed by the Commission's proposed rules are the local residential and business customers of the rural CLECs that help complete calls to conference calling and radio broadcasting providers. Rural CLECs, just like every other carrier in the country, are attempting to respond to the changing demands for telecommunications services and the shift from traditional TDM networks to an all IP-world. Unlike the ILECs, however, CLECs were not given access to the cost-recovery mechanisms created in the *Connect America Fund Order*. In that order, the Commission told the CLECs to fend for themselves,[32] but in doing so the agency provided much needed clarity regarding the rules governing the collection of tariffed access charges for access stimulation traffic, thus finally

[32] *See Connect America Fund Order*, ¶ 864 ("We decline to provide an explicit recovery mechanism for competitive LECs. Unlike incumbent LECs, because competitive carriers have generally been found to lack market power in the provision of telecommunications services, their end-user charges are not subject to comparable rate regulation, and therefore those carriers are free to recover reduced access revenue through regular end-user charges. Some competitive LECs have argued that their rates are constrained by incumbent LEC rates (as supplemented by regulated end-user charges and CAF support); to the extent this is true, we would expect this competition to constrain incumbent LECs' ability to rely on end-user recovery as well. Moreover, competitive LECs typically have not built out their networks subject to COLR obligations requiring the provision of service when no other provider will do so, and thus typically can elect whether to enter a service area and/or to serve particular classes of customers (such as residential customers) depending upon whether it is profitable to do so without subsidy.").

reducing the litigation and uncertainty regarding the CLECs' ability to collect tariffed access charges for calls made to high volume service providers by IXC customers.[33]

As a result, companies like Northern Valley Communications, which is a wholly-owned subsidiary of a rural cooperative that has served rural South Dakota since 1951, conducted a cost-benefit analysis. Its Board of Directors, drawn from members of the surrounding communities, determined that, while it would result in a substantial reduction in the per-minute access charges that they could bill, the people of Brown and Spink counties would be marginally better off if Northern Valley implemented the rate reductions and continued to serve high volume service provider customers. This decision, however, by no means created a "windfall" of profits for Northern Valley, given the significant rate reduction that came along with it. Of course, AT&T's decision to unilaterally implement self-help withholding of payment to Northern Valley[34] certainly presented a challenge to the CLEC's infrastructure investment plans. If AT&T had not withheld payment, Northern Valley would have been able to more fully implement its plan to invest in fiber and other broadband capacity in order to ensure that rural South Dakotans are not left behind in the digital divide. And now that Northern Valley's and AT&T's dispute has been resolved through settlement, Northern Valley will be able to continue making those investments, that is, unless the Commission moves forward with its proposed rule amendments to benefit AT&T and disrupt the parties' settlement.

Breda Telephone Corp. d/b/a Western Iowa Networks has a similar story. Breda Telephone has been providing phone services in rural Iowa since 1905, and today it offers telephone, Internet, cellular, cable, and many complementary services to over 10,000 customers

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[33] *See generally id.* Section XI.

[34] AT&T withheld payment from Northern Valley starting in March of 2013. It continued to withhold its payments for *five years*, until the parties' litigation was settled in March of 2018.

across Western and Southwestern Iowa, including the cities of Breda, Carroll, Farragut, Glidden, Lidderdale, Macedonia, Pacific Junction, and Westside. The CLEC subsidiary of Breda Telephone was created in 1997. And, like Northern Valley, it had begun providing service to high volume companies prior to the *Connect America Fund Order* and, after careful analysis, decided to accept the reduction in its access rates so that it could continue investing in its networks, continue offering high speed Internet and local phone services to its existing customers in rural Iowa, invest in expanding its service footprint to new customers, and connect with neighboring companies to help them offer similar broadband services to their customers as well. Without revenues from access stimulation, the company reports that most of its investment in fiber-to-the home since 2011 would not have been possible.[35]

Great Lakes Communication's ("GLCC") story is, admittedly, a bit different. When it first entered into the CLEC market, it did not immediately execute on its plan to build a network to provide services to residential and business customers in Iowa, exclusively serving high volume service providers for a period of a few years. It is fair to say that this decision drew the ire of the Iowa Utilities Board, who threatened to revoke GLCC's CPCN if Great Lakes did not begin providing services to local consumers. GLCC took the IUB's warning to heart. Thereafter, it immediately began making investments so that it could provide local phone and broadband Internet access, and today its local phone brand, IGL TeleConnect, provides

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[35] According to the U.S. Department of Agriculture, the fastest Internet service in Iowa has been provided by Western Iowa Networks in Carroll and Crawford Counties. *See* Darin Leach, *Western Iowa Gets Gigabit Internet Service*, U.S. DEPT. AGRICULTURE, available at https://www.rd.usda.gov/newsroom/success-stories/western-iowa-gets-gigabit-internet-service (last visited July 17, 2018) ("'I don't know anyone in the world, let alone the United States that is offering this type of gigabit service to its rural customers, no matter how far outside of town they are located,' said Dave Duncan, chief executive officer, Iowa Communications Alliance."). Western Iowa Networks offered customers 30 megabit broadband speed in March 2010. *See id.* The service is offered to about 13,000 customers currently. *See id.*

broadband access to 2,000 Iowa residences and businesses in three Iowa counties and employs dozens of people in the community. But for the millions of dollars in network investment that GLCC was able to make because of access stimulation, many customers would still be waiting for broadband access in these rural locations. Thus, while GLCC does not deny its pre-2011 rocky start, its post-2011 story is materially different, as GLCC/IGL TeleConnect has since then been repeatedly heralded as a source of innovation and labeled a key economic driver in northwest Iowa.[36]

In sum, on the one hand, the Commission says it wants to see expanded broadband adoption in rural, underserved parts of the country, but, on the other, it is proposing rules that would deny rural CLECs the essential resources they need to ensure that quality access to broadband is provided. This inconsistency makes one wonder if the Commission's real policy position is that it wants Americans to have broadband, but only if that broadband is provided by an incumbent carrier like AT&T or Verizon. Certainly, from a rural CLEC's perspective, the likely "ultimate end state" of the Commission's proposed rules is to deny CLECs the resources necessary to be part of the solution in closing the digital divide across rural America.

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[36] *See Great Lakes Communication Corporation Expands Data Center with New Facility in Lake Park, IA*, KTIV TELEVISION (Aug. 21, 2014), available at http://www.ktiv.com/story/26340453/2014/08/Thursday/great-lakes-communication-corporation-has-expanded-its-data-center-to-a-new-facility-in-lake-park-iowa) (last visited July 17, 2018); *Ruter, GKN Honored by IGL Corridor: Annual Business Recognition Luncheon Held*, ESTHERVILLE NEWS (Nov. 21, 2014), available at: http://www.esthervilledailynews.com/page/content.detail/id/520396/Ruter--GKN-honored-by-IGL-Corridor.html?nav=5003 (last visited July 17, 2018); Hannah Russmann, *Nelson Seeks to Better the Corridor*, DAILY REPORTER (Feb. 4, 2015), available at https://www.spencerdailyreporter.com/story/2163408.html (last visited July 17, 2018); *Great Lakes Communication Corp. Honored with Iowa Venture Award*, GREAT LAKES COMMUNICATION CORP. (Dec. 1, 2016), available at http://www.glccom.com/news/ivaward.html (last visited July 17, 2018).

C. There is No Evidence that IXCs Are Harmed by Paying Access Charges at the Rates Established by the Commission's 2011 Reforms

Beyond having no evidence that access stimulation traffic, or the rates IXCs must pay pursuant to the Commission's 2011 reforms, negatively affect consumers, there is also no evidence that any IXC is actually harmed when their customers use free conference calling services.

In 2011, the Commission relied on a study generated by TEOCO, which "estimated that the total cost of access stimulation to IXCs has been more than $2.3 billion over the past five years."[37] Verizon submitted evidence suggesting that access stimulation cost IXCs between $330 and $440 million per year.[38] Verizon also estimated that it alone would be billed two billion minutes of access stimulation traffic per year, producing a rate of between $0.165 and $0.22 cents per minute.[39] In contrast, the CLECs participating in these comments today have an average composite tariffed rate of less than a half-penny per minute. In other words, if Verizon's and TEOCO's 2011 data was accurate, those 2011 rates are approximately 3,200 percent higher than what these CLECs have in their tariffs today. Even if one added the rate that Iowa Network Services d/b/a Auereon had in its most-recent tariff, which the Commission has since declared to have been too high,[40] it would produce a combined rate of approximately $0.014/mou, putting 2011's rates about 1,200 percent higher than today's tariffed rates (which, it seems, will likely be further reduced following the Commission's investigation of the Aureon tariff).

Of course, the Verizon and TEOCO estimates were created before the Commission wholly modified the access charge regime. The CLECs are aware of no similar data being

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37 *Connect America Fund Order*, ¶ 664.

38 *See id.*

39 BRG Report, at 12; *see also Connect America Fund Order*, ¶ 664.

40 *See, e.g., In re Iowa Network Access Division Tariff F.C.C. No. 1*, Order Designating Issues for Investment, WC Docket No. 18-60, Transmittal No. 36, at ¶ 2 (Apr. 19, 2018).

provided to the Commission before the NPRM was released that quantified the volume of traffic or costs actually paid by IXCs for access stimulation traffic after the Commission's 2011 reforms were implemented. And, as some commenters noted in response to the Commission's request to refresh the record on intercarrier compensation, there is exceptionally good reason for the Commission to be skeptical of any IXC claims asserting that access stimulation is negatively affecting or harming IXCs.[41]

As the Commission has been made aware, Northern Valley was forced to pursue a costly and prolonged collection action against AT&T in federal court to collect its deemed-lawful tariffed access charges. In that federal litigation, AT&T was required to finally turn over revenue and cost data, which allowed Northern Valley to conduct an in-depth analysis of how Northern Valley's involvement in access stimulation actually affects AT&T's bottom line.[42] After years of unsupported complaints by AT&T, Northern Valley was finally able to confirm what it had suspected all along – AT&T makes a great deal of money because of access stimulation. According to the analysis performed by Northern Valley's experts in *Northern Valley Communications, LLC v. AT&T*, for the period of March 2013 (when AT&T stopped paying Northern Valley) to June 2016 (when the analysis was performed), AT&T collected $50 million for Northern Valley-bound traffic, producing a net profit of $30 million for AT&T.[43]

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41 *See, e.g.*, NTCA/WTA Comments at 5; NTCA/WTA Reply Comments at 9.

42 After AT&T failed to convince the United States District Court of the District of South Dakota that it was not legally obligated to pay Northern Valley the access charges it owed, AT&T and Northern Valley were able to resolve their litigation. Immediately thereafter, AT&T demanded that Northern Valley and its experts destroy all of the underlying data that the federal court had ordered AT&T to produce in discovery and which permitted this expert evaluation to be performed. That destruction was completed by Northern Valley. However, it is likely that AT&T would still possess this underlying data and, as discussed more fully below, the Commission should order it to be produced and made available for examination by the Commission and interested parties before the Commission takes any further action in this rulemaking proceeding.

43 *See* Letter from D. Carter to M. Dortch, *In re Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Dip Charges,* WC Docket No. 16-363 (Aug. 4, 2017) (citing *N. Valley Commc'ns, LLC v. AT&T Corp.*,

AT&T generated $8.2 million in revenue from wholesale traffic alone. Indeed, if AT&T paid its bill, rather than engage in self-help withholding, it would have paid Northern Valley approximately $9 million during the same time period. Put differently, AT&T was just shy of being able to pay its switched access bill to Northern Valley from its wholesale traffic revenue *alone*. Thus, when AT&T complains that the rates are inflated but provides no evidence of its own profitmaking activities, the Commission should outright reject its concerns.

The evidence that was available after reviewing actual evidence and financials from AT&T demonstrated that AT&T makes millions of dollars each year delivering traffic to the conference calling and chat line services it complains about. Indeed, in order to claim that it makes virtually nothing on this traffic, AT&T's counsel: (1) ignored entirely the revenues received from wholesale services; and (2) concluded that **none** of the revenues it receives from unlimited long-distance plan subscribers should be apportioned to the calls made by those subscribers. In other words, AT&T's position apparently is that people subscribe to unlimited long-distance plans for the privilege of being associated with AT&T, rather than for the privilege of making long-distance calls.[44] In short, AT&T's assertions that it is harmed by paying for the delivery of traffic to carriers like Northern Valley is entirely contradicted by the evidence and based on absurd and illogical arguments.

Moreover, as the Commission concluded in *AT&T Corp. v. Iowa Network Services*, the increased traffic generated as a result of having high volume service providers located in rural states like South Dakota and Iowa has resulted in a decrease in the rates that carriers pay to

No. 1:14-CV-01018-RAL, Motion Hearing Transcript, at 44:17-49:20 (Jan. 23, 2017)) (attached as Exhibit C to the letter); *see also* Joint Reply Comments of James Valley Cooperative Telephone Co, Northern Valley Communications, LLC , and Great Lakes Communication Corp., at 6, WC Docket No. 10-90 (Nov. 20, 2017) (JVCTC/NVC/GLCC Reply Comments). Despite this evidence being in the record on two separate occasions, the NPRM ignores it without explanation or justification.

44 *See id.*

deliver traffic to these rural locations.[45] Thus, while AT&T and Verizon may pay for more minutes of traffic than they otherwise would, they have also enjoyed the benefits of paying lower rates for delivering all of their Iowa- and South Dakota-bound traffic than otherwise would have been the case. As the Commission concluded:

> AT&T's allegation that CEA networks were intended to carry low traffic volumes is of little weight since, as a Section 61.38 carrier, Aureon's calculated rates should decrease to reflect the increase in the volume of traffic…. Regardless of how access stimulation traffic compares in character and volume to the types of traffic that were originally anticipated for CEA service, we find that Aureon has acted lawfully and consistently with its Tariff in transporting access stimulation traffic.[46]

Indeed, the Commission's assumptions about the negative impact of access stimulation, drawn entirely from its 2011 conclusions in the *Connect America Fund Order*, fail to reflect the actual state of the access stimulation market. As the Commission itself recognized when it granted USTelecom's petition, ILECs are no longer dominant providers of access and the access market has been fundamentally transformed since 2011.[47] Listed below are just a few of the conclusions the Commission chronicled in justifying its decision to relieve ILECs of their dominant carrier status:

- Incumbent LECs today provide interstate switched access services under circumstances that have continued to change dramatically even in the six years since the Commission issued the *Qwest Phoenix Forbearance Order*.[48]

- The regulatory reforms adopted in the 2011 [*Connect America Fund Order*] undermine the distinction between dominant and non-dominant providers of interstate switched access services. That order comprehensively reformed the Commission's intercarrier compensation and

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45 *See AT&T Corp. v. Iowa Network Services*, 32 F.C.C. Rcd. 9677, ¶ 19 (2017).

46 *Id.*

47 *See generally In re USTelecom Petition for Declaratory Ruling that Incumbent Local Exchange Carriers are Non-Dominant in the Provision of Switched Access Services*, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 F.C.C. Rcd. 8283 (2016).

48 *Id.* ¶ 13.

universal service rules to promote broadband availability for all Americans.[49]

- [W]e find that regulatory changes have restructured the marketplace in which incumbent LECs provide interstate switched access services so as to deny them market power. For the reasons stated below, we declare incumbent LECs non-dominant in their provision of interstate switched access services.[50]

- Market power is defined for this purpose as "power to control prices." The ability of a carrier to exercise this power depends, in part, on the structure of the market in which the carrier operates. The market for switched access services has changed dramatically with the Commission's adoption of bill-and-keep as a new methodology for intercarrier compensation. In addition, the overall importance of interstate switched access has continued to decline as consumers have discarded their switched access lines in favor of more advanced technologies. In today's marketplace, incumbent LECs cannot control prices for, and thus lack market power over, interstate switched access.[51]

- Under the reforms adopted in the [*Connect America Fund Order*], the Commission is now phasing out per-minute charges for interstate switched access as it implements bill-and-keep as "the default methodology for all intercarrier compensation traffic." While this transition is occurring over several years, significant regulatory developments have already taken place. Interstate switched access services have been removed from traditional access charge regulation and placed under transitional pricing rules that cap the rates charged for each rate element. The rules specify dates certain for the transition of terminating switched access rate elements to bill-and-keep, with an end date of July 1, 2018, for price cap carriers and July 1, 2020, for rate-of-return carriers.... The rate caps these rules prescribe are "default rates," from which the rules permit carriers to deviate by private agreement. Carriers "who are otherwise required to file tariffs" must "tariff rates no higher than the default transitional rates" set forth in the rules.[52]

- USTelecom argues that adoption of these reforms has rendered concerns about incumbent LEC market power over interstate switched access moot. We agree.[53]

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49 *Id.* ¶ 14.

50 *Id.* ¶ 19.

51 *Id.* ¶ 22 (footnotes omitted).

52 *Id.* ¶ 25 (footnotes omitted).

53 *Id.* ¶ 26.

- This finding is consistent with today's marketplace realities. Interstate switched access was once an indispensable functionality that made long distance communications across multiple networks possible. When every telephone subscriber used a switched access line, every long distance caller relied on interstate switched access by technological necessity. Today, switched access telephone lines are far from "a monopoly platform for the delivery of voice services."[54]

- Today we find that the Commission's intercarrier compensation reforms have placed incumbent LECs on similar footing [as CLECs]. The market for interstate switched access services is no longer structured in a way that permits incumbent LECs to exert market power over these services in a way that is materially different to other (i.e., competitive) LECs.[55]

Having concluded that ILECs no longer possess market power because concerns about market power have been rendered "moot," the Commission's Access Stimulation NPRM fails to substantiate its opposite conclusion that CLECs are abusing their market power and subjecting IXCs to unfair access charges. Based on the evidence presented so far, the only reasonable conclusion is that AT&T and other IXCs would like to eliminate variable costs so that they can retain more of the money paid by American consumers for long-distance service. In other words, the IXCs are using the Commission to (once again) target access stimulation traffic in order to improve their margins. Is the Commission, which is otherwise so focused on evidence-based decision making, suddenly going to ignore the evidence and target free conference calling services that millions of Americans value just because AT&T and Verizon claim, without any supporting evidence, that they are harmed? A rule based on such fearmongering is a rule this Commission should not be interested in adopting.

54 *Id.* ¶ 28.
55 *Id.* ¶ 30.

D. There is No Evidence that Access Stimulation is a Deterrent to Broadband Deployment

As an additional rational for its proposed rules, the Commission again resorts to its 2011 conclusion that access stimulation "undermine[s] broadband deployment."[56] However, once again the Commission and the IXCs fail to offer any evidence to support their blanketed assertion that access stimulation somehow results in a net reduction in broadband investment.

As BRG notes in its accompanying report, there is no credible evidence from which a rational observer could conclude that the payment of access charges by IXCs has resulted in any situation in which an IXC has been unable to invest in broadband.[57]

Moreover, the record shows that, when AT&T and Verizon suddenly had more money at their disposal as a result of recent tax reforms, they gave much of it away in the form of bonuses and charitable contributions. According to news reports, AT&T and Verizon gave away a combined total of $880,000,000 in bonuses, stock, and charitable contributions in 2017.[58] While it is laudable that Verizon and AT&T rewarded their employees and contributed to charity, these are not the actions of companies that are struggling to make the ends meet, nor are they the actions of companies confronting difficult decisions about whether they can afford to make a greater investment in broadband.[59]

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[56] Access Stimulation NPRM, ¶ 1.

[57] BRG Report at 14-18.

[58] *See, e.g.*, Thomas Barrabi, *Tax Reform Windfall; These Companies Are Hiking Pay, Delivering Bonuses*, FOX BUSINESS (Mar. 7, 2018), available at https://www.foxbusiness.com/markets/tax-reform-windfall-these-companies-are-hiking-pay-delivering-bonuses (last visited July 18, 2018); Scott Moritz, *Verizon Using Some Tax Savings to Give Each Employee 50 Shares*, BLOOMBERG (Jan. 23, 2018), available at https://www.bloomberg.com/news/articles/2018-01-23/verizon-using-some-tax-savings-to-give-each-employee-50-shares (last visited July 19, 2018).

[59] Of course, AT&T's CEO faired far better than the average AT&T employee, making a reported $28.7 million in 2017, about 366 times the typical AT&T worker. *See* Jeremy C. Owens, *AT&T CEO Makes 366 Times the Typical AT&T Worker*, MARKET WATCH (Mar. 12, 2018), available at https://www.marketwatch.com/story/att-ceo-makes-366-times-the-average-worker-2018-03-12 (last visited July 19, 2018). Lowell McAdam, Verizon's CEO, meanwhile, took home the relatively paltry sum of $17.9 million, according to the company's filing with the SEC. *See Verizon Says CEO Lowell*

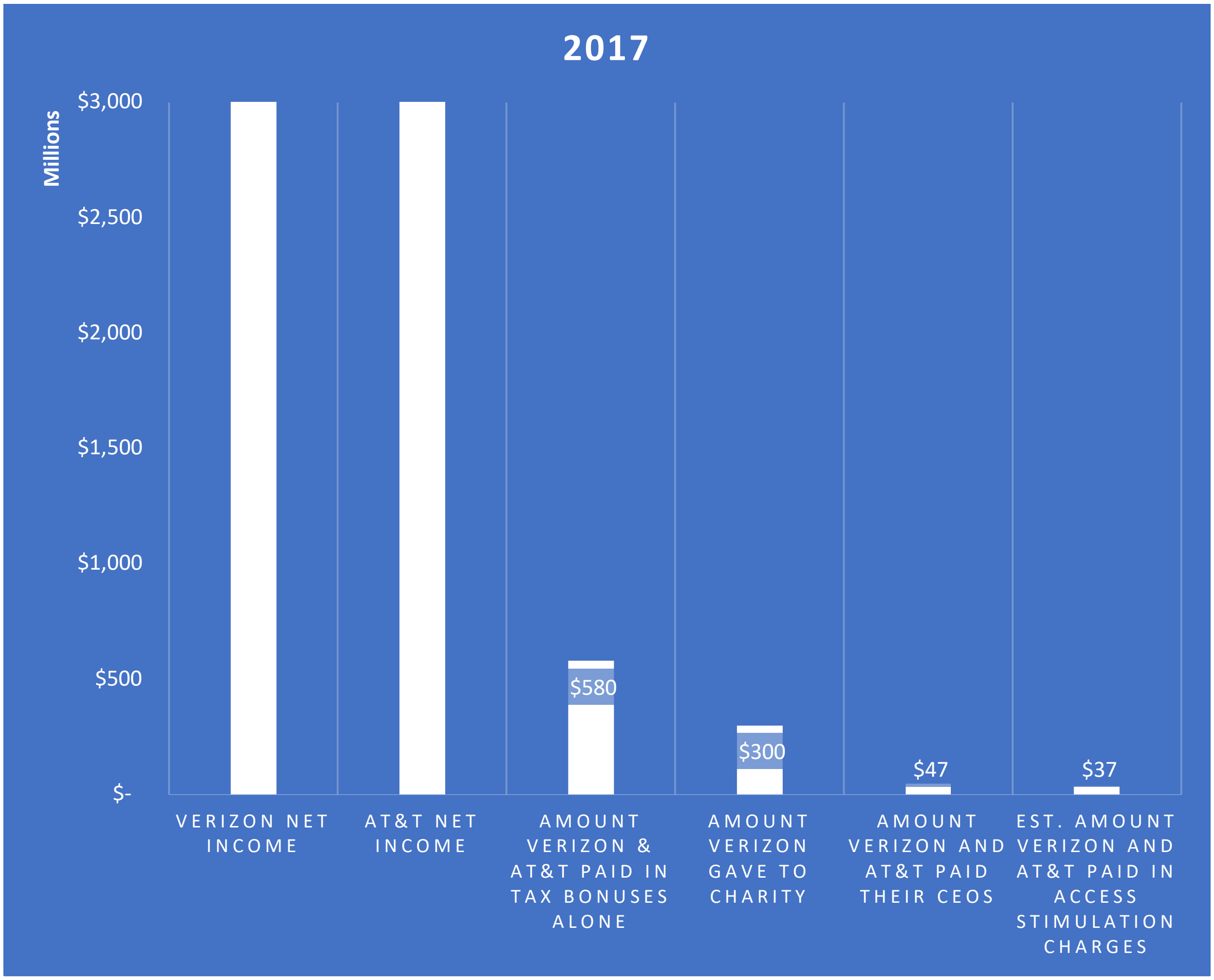
The CLECs estimate that AT&T and Verizon combined likely paid no more than $37 million in access charges related to access stimulation in 2017. This estimate assumes that the volume of access stimulation traffic for Verizon remained unchanged from 2011 at 2 billion minutes, which is the unverified estimate that the Commission credited in 2011.[60] It also assumes that Verizon has about 28 percent market share and that AT&T has 36.4 percent market share – estimates that are derived from these carriers' respective annual reports and FCC subscriber data for wireline and wireless carriers. It also assumes that the average cost per-minute for terminating traffic to the CLECs in Iowa and South Dakota has been reduced to $0.014 cents, including CEA fees.[61] Finally, it assumes, conservatively, that AT&T withheld payment on 75 percent of the access charges it was billed by CEA providers and access-stimulating CLECs in 2017.[62] Therefore, as the chart below makes clear, there is very little reason to conclude that access stimulation charges are material to either AT&T's or Verizon's bottom line, much less to their decisions about whether to invest more in broadband deployment.

McAdam's Total Compensation for 2017 Was $17.9 Million Versus $17.7 Million in 2016 – SEC Filing, REUTERS (Mar. 19, 2018), available at https://www.reuters.com/article/brief-verizon-says-ceo-lowell-mcadams-to/brief-verizon-says-ceo-lowell-mcadams-total-compensation-for-2017-was-17-9-mln-idUSFWN1R10U0 (last visited July 19, 2018). Commenters reading the Access Stimulation NPRM would be led to believe that access stimulation must be the primary reason why Mr. McAdam was undercompensated last year.

[60] *Connect America* Fund, ¶ 664.

[61] *See infra.* Section I.H.

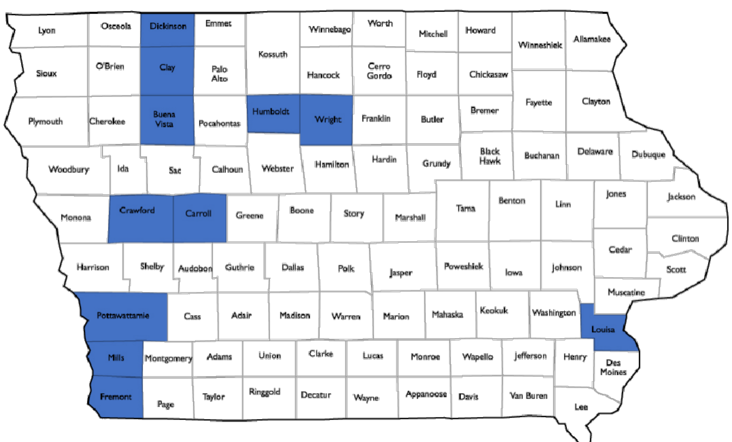
[62] AT&T seems to be withholding for all CEAs and CLECs, but AT&T is in the best position to provide the Commission with accurate information regarding its self-help withholding activities.



On the other hand, there is ample evidence to conclude that rural CLECs engaged in access stimulation *are* investing in broadband and that the revenues these CLECs generated as a result of access stimulation are not only material, but the core means by which they are able to do so. Just the few CLECs represented in these comments have collectively invested about $47 million in broadband infrastructure since the Commission adopted the *Connect America Fund Order* in 2011 (almost exactly the amount that AT&T and Verizon paid their CEOs in a single year). And, of course, this number could have been higher if AT&T had paid its bills, rather than defy the Commission's 2011 rules.

In the face of the Commission's decision to reduce access charges and deny CLECs the ability to obtain the explicit subsidies that the Commission provided to their incumbent competitors, each of these carriers understand that, if it was not for the customer relationships they formed with high volume services providers, these carriers would lack the resources to expand broadband services to the rural areas that need it most.

As the maps below reflect, many rural counties in Iowa and South Dakota have been able to close the digital divide in substantial part because of access stimulation. On the other hand, there is not a single piece of evidence supporting the assertion that, if the IXCs had not paid those charges, they would have used those funds to deploy broadband in some underserved or unserved area.



Iowa counties with access-stimulation supported broadband

South Dakota counties with access-stimulation supported broadband

But even if the Commission does not encourage access stimulation and decides to move towards an entire bill-and-keep regime that will cut off this option for CLECs, the record fails to provide a rational, fact-based justification for the Commission's decision to target access stimulation for special adverse treatment now, even while it refrains from implementing further reforms for the rest of the industry. As Chairman Pai recently observed, "only 2% of Americans lack access to high-speed fixed service. In rural areas, 28% go without."[63] As a result, the Commission should not cut off resources to the few rural CLECs that have been able to expand access in underserved and unserved markets. Doing so will only exacerbate the digital divide, as there is absolutely **no evidence** that AT&T and Verizon would be investing in these rural communities if they were not paying access charges.

E. There is No Evidence that Access Stimulation Has Become More "Widespread" After the 2011 Rule Modifications

The Access Stimulation NPRM states that "in 2011, the Commission found access stimulation to be the most widespread access arbitrage scheme. It *appears* that continues to be the case today."[64] Noticeably, the NPRM offers no citation to support its statements concluding that access stimulation *appears* to be the most widespread issue today.

Completely absent from the record is any evidence of (1) the access stimulation traffic volumes for which IXCs actually pay the tariffed access charges; (2) the amount of money IXCs are unilaterally withholding from payment; or (3) the volume of traffic represented by commercially negotiated agreements. The evidence that the CLECs represented in this filing have been able to assemble suggests that there has, in fact, been a substantial decline in the volume of access stimulation traffic billed pursuant to CLECs' tariffs since the FCC's *Connect America Fund Order* was adopted. That data suggests that the volume of traffic terminating to these carriers pursuant to tariff in 2017 was approximately 50% less than the tariffed-traffic volumes in 2017.

This reduction in traffic volumes is do in substantial part to CLECs voluntarily working with IXCs to transition traffic to IP-interconnection. Since 2011, a large percentage of access

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[63] *Remarks of FCC Chairman Ajit Pai at the Symposium on "The Future of Speech Online"* (Sept. 15, 2017).

[64] Access Stimulation NPRM, ¶ 2 (emphasis added).

stimulation traffic has been delivered to carriers via voluntary IP connections, which are not subject to the Commission's tariffing rules but do result in the IXCs being able to avoid tariffed CEA fees. Indeed, the data suggests that as much as 80% of the calls that the IXCs' customers make to rural CLECs reach those rural CLECs through voluntarily negotiated IP-connections, rather than through traditional TDM connections, demonstrating that CLECs have been ready, willing, and able to negotiate agreements with IXCs (at least those that have not engaged in abusive practices). Thus, the evidence does not support the Commission's conclusions determining that it should act now to implement further reforms for the tariffed access charge regime. Rather, the evidence shows that IXCs use alternative commercially-negotiated arrangements, just as the FCC said should occur during the transition to a bill-and-keep regime.[65]

In 2011, the Commission recognized that its new benchmark regime was not intended to "entirely eliminate the potential for access stimulation."[66] For that reason, it chose to benchmark CLEC rates to the largest price cap LEC in the state, which generally had the lowest rates. It also justified this conclusion by expressly concluding that "access stimulating LEC's traffic volumes are more like those of the price cap LEC in the state."[67] At the same time, the Commission assured CLECs that, if their traffic volumes "substantially exceed[ed] the traffic volumes of the price cap LEC to which [they would be] benchmark[ed]," the Commission could "reevaluate the appropriateness of the competitive LEC's rates and … evaluate whether further

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65 *See Connect America Fund Order*, ¶ 828 ("Regulated intercarrier compensation payments among carriers have been imposed in two basic ways: through tariffs and through carrier-to-carrier agreements. The comprehensive intercarrier compensation reforms we adopt supersede the preexisting access charge regime, bringing that traffic in to the section 251(b)(5) reciprocal compensation framework subject to a transition to bill-and-keep. Under that transitional framework, however, we permit carriers to negotiate alternative intercarrier compensation arrangements to the default rates specified in the tariffs.").

66 *Connect American Fund Order*, ¶ 690.

67 *Id.* ¶ 689.

reduction in rates [would be] warranted."[68] Now, however, the Commission seems poised to move ahead, not with "reduction in rates," but a wholesale shifting of costs onto CLECs without collecting or analyzing any data or explaining why its 2011 conclusion that the traffic volumes of price cap LECs and access stimulating CLECs were comparable enough to warrant equitable treatment no longer holds true.

Given the fact that the Commission has not been provided with data necessary to examine traffic volumes, amounts paid by IXCs, and how the traffic has migrated from tariffed to voluntarily negotiated IP-based contracts, the Commission simply cannot substantiate its claim that access stimulation is "widespread" or that it has become more prevalent after the Commission's wholesale transformation of the access charge regime not even seven years ago.

F. There is No Evidence that Access Stimulation Involves High Switched Access Rates

The Access Stimulation NPRM also claims that access stimulation "occurs when a local exchange carrier (LEC) with relatively-high switched access rates enters into an arrangement to terminate calls … for an entity with a high call volume operation."[69] However, the Commission does not explain how its "access stimulation" definition, including its use of the phrase "relatively-high switched access rates," applies in 2018 after the Commission's wholesale reform of access charges and its decision to require CLECs to benchmark their rates to the lowest price cap LEC in the state. Indeed, its express justification for choosing this benchmark in 2011 was that "[b]enchmarking to the lowest price cap LEC interstate switched access rate in the state will reduce rate variance among states and will significantly reduce the rates charged by competitive

68 *Id.* ¶ 690.
69 Access Stimulation NPRM, ¶ 2.

LECs engaging in access stimulation, even if it does not entirely eliminate the potential for access stimulation."[70] The NPRM fails to explain this contradiction.

What the evidence shows is very different than what the Access Stimulation NPRM projects. In reality, the CLECs' benchmarked rates are not high at all. By Commission rule, the CLECs in Iowa and South Dakota benchmark their rates to CenturyLink, the largest price cap LEC in Iowa and South Dakota. CenturyLink's rates are compatible with other large carriers. For example, the largest price cap ILEC in the country is PacBell, an AT&T subsidiary. In 2017, PacBell had 5,966,165,251 minutes of use, putting its traffic volumes far in excess of any prior estimates of access stimulation traffic.[71] As the tables below demonstrates, PacBell's rates are comparable to the rates CenturyLink (and, by FCC rule, the rural CLECs engaged in access stimulation) charge. Indeed, PacBell charges more per-minute, per-mile than the CLECs' and CenturyLink tariff for tandem-switched transport.

Pacific Bell Telephone Company
Tariff FCC No. 1

Rate Element	Direction	Zone	Rate
Transport Termination, Over 0 miles	Term to 3rd Party	Zone 3	0.00024
Transport Facility per Mile, Over 0 miles	Term to 3rd Party	Zone 3	0.000044
Tandem Switching	Term to 3rd Party	Zone 3	0.00175

CenturyLink
Tariff FCC No. 11, Section 6

Rate Element	Direction	Zone	Rate
Transport Termination	Term to 3rd Party	N/A	0.00024
Transport Facility per Mile	Term to 3rd Party	N/A	0.00003
Tandem Switching	Term to 3rd Party	N/A	0.002252

In sum, the evidence shows that the rates charged by CLECs are at or below the rates charged by AT&T's affiliate, which handles far larger volumes of traffic. The record also shows

70 *Connect America Fund Order*, ¶ 690.

71 *See Connect America Fund Order*, ¶ 664 (crediting an estimation of approximately two billion wireline and wireless long-distance minutes to PacBell in 2010). Of course, current data has not been provided to the Commission by the IXCs who advocate these rule changes.

that the Commission has determined that Iowa Network Services has billed rates above those which the Commission determined to be appropriate, but that the Commission is already working to address and resolve that issue through its current tariff proceeding.[72] Accordingly, the Commission's narrative that the CLECs' rates are "high" is unsupported.

G. There is No Evidence that "Access Stimulation LECs Have Adjusted Their Practices" to "Circumvent the Commission's Rules" by "Interposing Intermediate Providers"

The Access Stimulation NPRM impugns access-stimulating CLECs and paints them as defying the Commission and its rules. However, this narrative is patently false; indeed, it is the "anecdote, hypothesis, and hysteria" that Chairman Pai has said are intolerable in evidence-based rulemakings.[73]

Specifically, the Access Stimulation NPRM asserts that the "use of intermediate access providers selected by the terminating LECs" is a "tactic" that "evades existing Commission rules intended to stop access stimulation" and that "much of the post-[*Connect America Fund Order*] access arbitrage activity specifically involves LECS that use centralized equal access (CEA) providers to connect to IXCs."[74]

First, despite what the NPRM implies, the Commission's 2011 *Connect America Fund Order* did not make it a goal to put free conference calling and similar services out of business. To the contrary, the *Connect America Fund Order* sought to reduce access charges and ensure that rates were on parity with other carriers with high traffic volumes. As the FCC expressly

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72 *See supra,* Section I.C.

73 *Open Internet Order*, 30 F.C.C. Rcd. at 5933 (Dissenting Statement of Commissioner Ajit Pai) ("Nevertheless, the Order ominously claims that '[t]hreats to Internet openness remain today,' that broadband providers 'hold all the tools necessary to deceive consumers, degrade content or disfavor the content that they don't like,' and that the FCC continues 'to hear concerns about other broadband provider practices involving blocking or degrading third-party applications.' The evidence of these continuing threats? There is none; it's all anecdote, hypothesis, and hysteria.").

74 Access Stimulation NPRM, ¶ 7.

acknowledged in the *Connect America Fund Order*, its goal was to "reduce rate variance among states" and "significantly reduce the rates charged by competitive LECs," but *not* to "entirely eliminate the potential for access stimulation."[75]

Moreover, while the Access Stimulation NPRM asserts that carriers are using CEA providers to evade the Commission's 2011 rules, its sole support for this is a reference to **three** filings at the Enforcement Bureau.[76] The NPRM offers no explanation as to why those three filings constitute evidence of a widespread evasion of the Commission's rules. In fact, there is no evidence that, after the FCC released its decision in *AT&T Corp. v. Alpine Communications, LLC* – in which the Commission concluded that Alpine, Clear Lake, Mutual Telephone, Preston Telephone, and Winnebago had improperly moved their point of interconnection in order to bill additional mileage[77] – any carrier made changes to their routing in order to increase their tariffed transport charges. The problem, of course, in relying on the *Alpine* decision to justify the Commission's claim that carriers have been modifying their networks to evade the Commission's 2011 rules is that the conduct resulting in the *Alpine* decision occurred "between 2001 and 2005."[78]

Indeed, as best as the CLECs understand, after the *Alpine* decision, what changed is not that carriers began to evade the Commission's rules, but rather that carriers engaged in access stimulation in Iowa **<u>ceased</u>** collecting tariffed charges for mileage from Des Moines and, instead, have billed for mileage from the closest POI on the INS network to their end offices. Thus, rather than being evidence of evasion, the *Alpine* decision underscores the fact that, once the FCC makes a position clear, rural CLECs do their best to abide by those rules.

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75 *Connect America Fund Order*, ¶ 690.

76 *See* Access Stimulation NPRM, ¶ 7 n.17.

77 *See generally AT&T Corp. v. Alpine Communications, LLC,* 27 F.C.C. Rcd. 11511 (2012)

78 *Id.* ¶ 11.

Moreover, AT&T's and Verizon's allegations claiming that Northern Valley "inflated its billed transport miles by structuring its operations to use an inefficient 192-mile transport route"[79] are false. Unlike CEA service in Iowa, CEA service in South Dakota does not include transport mileage. Thus, every single carrier interconnected with SDN in South Dakota uniformly bills for the mileage between the SDN tandem switch and their local exchanges when they provided tariffed access services. Northern Valley has been set up that way from the day it first began exchanging traffic in 1997, long before it began serving high volume customers.[80] The CEA providers in Iowa and South Dakota simply operate in different fashions. Northern Valley is not a carrier that has ***changed*** how tariffed access traffic was routed to it after the *Connect America Fund Order*.[81]

The record does not contain evidence of carriers billing and collecting more mileage after the *Connect America Fund Order* and the *Alpine* decision than they did in 2011 and before. If such carriers exist, the Commission can address that issue just as it did in the *Alpine* decision. But, what it should not do is accept AT&T's and Verizon's false and unsubstantiated allegations and then use those allegations to paint a false narrative for adopting the rules proposed in the Access Stimulation NPRM. Indeed, it is deeply troubling that the Commission entirely ignores the record evidence directly contradicting AT&T's and Verizon's false allegations against Northern Valley, even though that evidence has been presented twice.[82] The Commission offers

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[79] *See* Comments of AT&T Services, Inc., at 14, WC Docket No 10-90 (Oct. 26, 2017) (AT&T Comments); Comments of Verizon, at 7, WC Docket No 10-90 (Oct. 26, 2017) (Verizon Comments).

[80] Indeed, the Commission cannot expect Northern Valley or other competitive local exchange carriers to simply pick up and move their end offices. These carriers can no more change their locations than the Commission can pick up Washington, D.C., and move it to the Midwest.

[81] Indeed, AT&T's complaint against Great Lakes Communication Corporation has been left unresolved by the Enforcement Bureau for over a year. Therefore, the fact that a complaint was filed in no way supports the inference that AT&T has met its burden of proof in that proceeding.

[82] *See* JVCTC/NVC/GLCC Reply Comments at 4.

no rational explanation for why it continues to ignore the evidence that conflicts with its chosen narrative.

H. There is No Evidence that IXCs Requested Actual "Direct Connections" and Were Denied Those Connections

Finally, the Access Stimulation NPRM appears to suggest that the Commission is laboring under the false impression that the IXCs have been denied the ability to install direct connections and, as a result, the Commission must come to the IXCs' defense by strong-arming CLECs until they submit to demands for direct connections. It is not clear where the Commission has attained this perspective, since the record evidence does not support it, but, in any event, this is yet another false narrative created by the IXCs to get the Commission to change the rules.

First, as discussed more fully below, the Access Stimulation NPRM does not acknowledge or address the Commission's lack of clarity and its repeated inconsistencies in addressing whether and how CLECs should (or should not) exchange traffic with CEA providers. Instead, it attempts to paint a false narrative, suggesting that these carriers began sending traffic through CEA providers after the *Connect America Fund Order* as a "tactic" to "evade[ ] existing Commission rules."[83] However, this narrative stands in stark contrast to the Commission's recent decision in *AT&T Corp. v. Iowa Network Services, Inc.*, in which the Commission expressly rejected AT&T's argument that "access stimulation traffic is not CEA traffic under the Tariff,"[84] and that "CEA service 'was approved for the limited purpose of facilitating the provision of equal access service to small, rural LECs carrying very low traffic volumes' and that 'access stimulation traffic has virtually nothing in common with legitimate CEA traffic.'"[85]

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83 Access Stimulation NPRM, ¶ 2.

84 *AT&T Corp. v. Iowa Network Services, Inc.*, 32 FCC Rcd. 9677, ¶ 17 (Nov. 8, 2017).

85 *Id.*

Moreover, as the Commission is aware, South Dakota's CEA provider, South Dakota Network, LLC, sued one of its members, James Valley Cooperative Telephone Company, for allowing its subsidiary, Northern Valley, to accept access stimulation traffic routed through alternative IP connections.[86] Even to this day, SDN's operating agreement imposes an obligation on CLEC-affiliates to route their access traffic through SDN's tandem switch. Thus, it is not the case that CLECs have unilaterally defied requests for direct connections. Rather, CLECs have been left to deal with a difficult situation in which the Commission has not provided clear guidance, and any action accommodating the IXCs' demands may place the CLECs and their parent companies in the crosshairs of the CEA providers that believe (or at least previously believed) that their monopoly extended to CLEC-bound traffic.

Second, the CLECs represented by these comments are not aware of any situation in which an IXC actually offered to install a direct connection at its own expense, and without preconditions, but was denied. This analysis first requires a clear understanding of what a direct connect is. According to *Newtons Telecom Dictionary*, an "indirect connection" is the "interconnection of two carriers' network, which are not directly connected to each other, via a third carrier's network, to which the two carriers are each directly connected."[87] This definition, therefore, leads to the inescapable conclusion that a "direct connection" would be one in which two carriers are "directly connected," rather than "connected to each other, via a third carrier's

[86] Answer, Defenses, Counterclaim and Third Party Complaint of South Dakota Networks, LLC, ¶¶ 46-54, *James Valley Cooperative Telephone Co. et al. v. South Dakota Network, LLC et al.*, No. 06CIV15-000134 (Brown Cnty. Cir. Ct. July 20, 2015).

[87] *Indirect Connection*, NEWTONS TELECOM DICTIONARY (31st ed. 2018).

network."[88] Accordingly, the discussion that follows examines the question of whether any of the complaining IXCs ever sought to install a "direct connection" but were denied that right.

The United States District for the District of South Dakota examined this question in *Northern Valley Communications, LLC v. AT&T Corp.*[89] There, the Court concluded that AT&T was not entitled to summary judgment on its claim that it had lawfully withheld tariffed access charges from Northern Valley because of Northern Valley's refusal to provide a direct connection. The Court concluded that nothing "mandates that a CLEC install and provide direct trunking to an IXC upon demand of an IXC at the CLEC's cost, or that the failure to do so means that benchmark and functional equivalency standards are unmet."[90] Nevertheless, the Court believed that an earlier FCC decision suggested that a CLEC should permit a direct connection to occur *if* the IXC makes an unconditional offer to design, construct, and install a direct connection at its own cost.[91] The Court, therefore, examined the record evidence that had been assembled during discovery, and, from that evidence, the court concluded that the "record is unclear whether AT&T offered to install a direct trunk at its own expense at Northern Valley, or instead negotiated for or demanded that Northern Valley do so or pay for any costs of doing so."[92] In other words, AT&T had failed to meet its burden of proof to show that it had ever offered to install a direct connection at its own cost, rather than trying to force Northern Valley to bear those costs for AT&T. If, after developing a full evidentiary record, AT&T was unable to

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88 As discussed more fully below, the Access Stimulation NPRM suggests that the Commission either does not understand the meaning of a direct connection or does not agree with this logical conclusion. *See infra* Section V.B.

89 245 F. Supp. 3d 1120 (D.S.D. 2017).

90 *Id.* at 1134.

91 *See id.* The commenters do not necessarily agree with the Court's legal conclusion in this regard, but that issue is not relevant to the current discussion.

92 *Id.* at 1133.

establish that Northern Valley had actually declined its request to install a direct connection, certainly its *ipse dixit* in unverified filings with this Commission are far less sufficient.

Northern Valley had a similar series of events play out recently with another carrier, Inteliquent. Inteliquent began routing traffic to Northern Valley through SDN for the first time in mid-2017, after it voluntarily agreed to be responsible for delivering all of T-Mobile's traffic.[93] Almost immediately, Inteliquent began to withhold payment, expressing an interest in a direct connection. But, when Northern Valley inquired, Inteliquent's Jon Clopton admitted that Inteliquent was withholding payment in order to create bargaining pressure in negotiations for a lower rate. Inteliquent also admitted that it had no intention of installing any facilities in South Dakota and, instead, merely sought a cheaper rate for the indirect interconnection.[94] When Northern Valley called Inteliquent out on this conduct, Inteliquent denied it, but immediately started paying its invoices again.[95] Indeed, Inteliquent paid those invoices without dispute until the Commission released the Access Stimulation NPRM, at which time it again resorted to self-help withholding, apparently concluding that the hostility in the NPRM is indicative of a Commission that is, at best, indifferent as to whether IXCs pay their bills for access stimulation traffic.[96]

Most of the other CLECs participating in these comments have similar stories involving AT&T's and/or Inteliquent's abusive practices and demand for lower rates in the guise of direct connections. As noted above, though, neither carrier is actually seeking to make the investment

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93 *See* Steve Kanaval, *Little Known Telecom Provider Inteliquent +25% Makes Deal with T-Mobile*, EQUITIES.COM (Aug. 18, 2015), available at https://www.equities.com/news/little-known-telecom-provider-inteliquent-25-makes-deal-with-t-mobile (last visited July 19, 2018).

94 *See, e.g.,* Letter from J. Groft to P. Gardner (Oct. 5, 2017), attached hereto as **Exhibit A**; Email from J. Groft to J. Clopton (Nov. 14, 2017), attached hereto as **Exhibit B**.

95 *See id.*

96 Letter from D. Carter to Inteliquent (July 9, 2018), attached hereto as **Exhibit C**.

necessary to create a direct interconnection in rural America. And, consistently in AT&T's case, the demand for a "direct connection" has been made in connection with the withholding of access charges in order to exert economic pressure on CLECs and to create an unlevel playing field so that AT&T could get what it really wants: a cheaper rate than its competitors.

II. THE COMMISSION HAS TOOLS AT ITS DISPOSAL TO OBTAIN RELEVANT INFORMATION, BUT HAS FAILED TO UTILIZE THEM

In requesting the relief proposed in the Access Stimulation NPRM, the IXCs claim that the access stimulation market has negatively affected their businesses, thereby causing harm to consumers. However, as noted throughout these comments, the CLECs know that, once data is actually obtained, it will refute these claims and severely undermine any rationale for further Commission action against access-stimulating CLECs.

Thus, before it takes further action, and to ensure further reforms serve their intended purposes, the Commission must evaluate the impact of its previous access stimulation reforms on consumers and carriers. In particular, and as a matter of sound decision making, the Commission must look to see whether the current access stimulation market has, in fact, negatively affected IXCs, and whether any reforms to the access stimulation regime would actually outweigh the negative impact such reforms would have on rural CLECs and rural consumers. Failing to do so would give IXCs certain windfalls based on unsubstantiated allegations and leave rural CLECs with no other option than to increase consumer bills and decrease innovation.

Accordingly, and in order to avoid making policy "in the dark," the Commission should compel IXCs to make their books and records available to the Commission and interested parties – just as it made ILECs do prior to implementing reforms in the *Connect America Fund Order* and just as it has done in countless other rulemaking proceedings – thereby allowing for a proper inspection and comment period that leads to informed policymaking that is consistent with the goals of the Administrative Procedure Act and various provisions of the Communications Act.

A. The Commission Has the Authority to Compel the Production of Documents by Interested Parties in Informal Rulemaking Proceedings

Although the Commission's rules normally contemplate discovery procedures only in adjudicatory proceedings,[97] the Commission plainly has the discretion to engage in such procedures and compel third parties to produce documents in informal rulemaking proceedings. The notice-and-comment procedure for rulemaking as described in the Administrative Procedure Act represents only the minimum procedural rights that agencies must grant in rulemakings. Indeed, "[a]gencies are free to grant additional procedural rights in the exercise of their discretion."[98] Thus, the Supreme Court has held that the Commission and other administrative agencies may use additional procedures "adapted to the peculiarities of the industry and the tasks of the agency involved," to "pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[99] And the agencies can therefore seek discovery themselves or allow interested parties to engage in third-party discovery, so long as that discovery pertains to the issues/problems being resolved in the rulemaking proceeding at hand.

Moreover, the power to allow for discovery and to compel the production of certain documents is reflected within various sections of the Communications Act. For example, Section 4(j) empowers the Commission to "conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[100] Furthermore, Section

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[97] *See* 47 C.F.R. § 1.311.

[98] *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council*, 435 U.S. 519, 524 (1978).

[99] *Fed. Commc'ns Comm'n v. Shreiber*, 381 U.S. 279, 290 (1965); *see also Fed. Commc'ns Comm'n v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

[100] 47 U.S.C. § 154(j). The Supreme Court has held that this provision gives the Commission "broad discretion to prescribe rules for specific investigations" and "to make *ad hoc* procedural rulings in

4(i) empowers the Commission to "perform any and all acts … and issue such orders … as may be necessary in the execution of its functions,"[101] and Section 201(b) authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act.[102] Various other provisions have given the FCC broad discretionary powers to compel the production of useful information on matters ranging from contracts,[103] carrier property valuation,[104] service and equipment transactions,[105] financial information,[106] general management practices,[107] and any other information of interest to the Commission,[108] and, as explained below, the Commission has often relied on these various provisions in requesting/compelling the production of data, information, and documents from regulated parties.

Indeed, the Commission has taken advantage of its investigatory powers in previous rulemaking proceedings, including the proceedings related to the 2011 *Connect America Fund Order*, and at times the agency has gone so far as to issue subpoenas to ensure the Commission has the necessary data and information to make informed policy decisions.

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specific instances." *Schreiber*, 381 U.S. at 289; *see also, e.g.*, *City of Angels Broadcasting, Inc. v. Fed. Commc'ns Comm'n*, 745 F.2d 656, 664 (D.C. Cir. 1984) (noting that the Commission "enjoys wide discretion in fashioning its own procedures"); *Bell Telephone Co. of Pennsylvania v. Fed. Commc'ns Comm'n*, 503 F.2d 1250, 1265 (3d Cir. 1974), *cert. denied*, 422 U.S. 1026 (1975) (finding that Section 4(j) "leaves to the agency the determination of the type of procedure to be employed in a particular case").

101 47 U.S.C. § 154(i).

102 *Id.* § 201(b).

103 *See id*. § 211.

104 *See id*. § 213.

105 *See id*. § 215.

106 *See id*. § 220(c) (affording the Commission "access to and the right of inspection and examination of all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers").

107 *See id*. § 218 (providing that the Commission "may inquire into the management of the business of all carriers … [and] may obtain from such carriers and from persons directly or indirectly controlling or controlled by … such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created").

108 *See id*. § 219.

As noted above, in the 2011 *Connect America Fund Order*, the Commission collected extensive data from NECA and ILECs, including data on minutes, revenues, and local retail rates, through information requests,[109] acknowledging that the parties were "uniquely situated to provide the Commission with key data to evaluate proposed universal service and intercarrier compensation reforms."[110] In requesting such data, the Commission did not appear to rely on any provisions of the Communications Act or the Administrative Procedure Act, but when the parties provided "insufficient data," the Commission pressed on in its quest for more detailed

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109 *Connect America Fund Order*, ¶¶ 851 n.1641, and 852 n. 1646.

110 Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau, to Regina McNeil, Vice President of Legal, General Counsel and Corporate Secretary, NECA, at 1 (Mar. 29, 2011), available at https://prodnet.www. neca.org/publicationsdocs/wwpdf/da11575.pdf (FCC Data Request Letter to NECA); *see also* Letter from Karen Brinkmann, Counsel to Alaska Communications Systems, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (Sept. 7, 2011); Letter from Karen Brinkmann, Counsel to Hawaiian Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (June 24, 2011); Letter from Karen Brinkmann, Counsel to Fairpoint, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (Apr. 19, 2011); Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at 2 (Apr. 14, 2011); Letter from Christopher Heimann, General Attorney, AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (Apr. 8, 2011); Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Ex. 1 (Mar. 24, 2011); Letter from Maggie McCready, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Ex. 1 (Mar. 14, 2011); Letter from Melissa Newman, Vice President-Federal Relations, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (Jan. 18, 2011); CenturyLink, Response to FCC Data Request, WC Docket Nos. 10-90, 07-135, 05-337 (Jan. 13, 2011); Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (Dec. 16, 2010); Letter from Malena Barzilai, Regulatory Counsel & Director -- Federal Regulatory Affairs, Windstream, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (Oct. 15, 2010) (collectively *ILEC Data Filings*); *see also*, Letter from Regina McNeil, Vice President of Legal, General Counsel and Corporate Secretary, NECA, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (May 25, 2011); Letter from Regina McNeil, Vice President of Legal, General Counsel and Corporate Secretary, NECA, to Marlene H. Dortch, Secretary, FCC, and Lynne Hewitt Engledow, Pricing Policy Division, Wireline Competition Bureau, FCC, WC Docket Nos. 10-90, 07-135, 05-337, at Attach. (May 11, 2011); Letter from Joe A. Douglas, Vice President, Government Relations, NECA, to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92, 80-286, at Attach. (Dec. 29, 2010).

information. For example, after receiving only limited, general data from NECA, the Commission wrote to the association to explain that it was now "formally request[ing]" six categories of data, which it asked NECA to provide by a prescribed due date and "in the level of granularity and specificity requested."[111] It also explained to NECA that the commercially sensitive data would be protected by protective orders already adopted in the proceedings, and that the Commission and its staff would be "available to assist NECA as necessary to ensure the complete and timely submission of the data."[112]

Of course, other examples showing that the Commission knows how to request data abound, and in other proceedings the agency has gone into more detail about where its production power is derived from and how expansive that power actually is. For example, the Commission also requested documents and data from carriers in 2012, where, after receiving complaints contending that the Commission's 1999 pricing flexibility rules for special access service were no longer working as intended, the Commission made the conscious decision to compel regulated parties, including providers of special access service, to submit certain data so that the Commission could conduct a comprehensive analysis of the special access market before determining how exactly its rules should be revised.[113] In that proceeding many carriers were asked to hand over confidential, proprietary data so that the Commission could make its policy determinations.

But unlike its information requests in the *Connect America Fund Order* proceedings, the Commission here took the time to describe the source of its power to compel the production of documents, explaining that:

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111 FCC Data Request Letter to NECA, at 1.
112 *Id.* at 4.
113 *See In re Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 F.C.C. Rcd. 16318, ¶¶ 49-51 (2012) (*Data Collection Order*).

> Several provisions of the Communications Act and the Telecommunications Act give the Commission authority to adopt this data collection. Under section 218 of the Communications Act, we may "obtain from [common] carriers and from persons directly or indirectly controlling or controlled by, or under direct or indirect common control with, such carriers full and complete information necessary to enable the Commission to perform the duties and carry out the objects for which it was created." As such, section 218 empowers us to collect data….
>
> The Communications Act [also] provides us authority to carry out these duties [of ensuring the pricing flexibility rates and terms for special access service are just and reasonable]—all of which will be aided by today's data collection—in section 4(i), which empowers the Commission to "perform any and all acts … and issue such orders … as may be necessary in the execution of [our] functions," and section 201(b), which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act. These authorities, along with our subject matter jurisdiction, … allow us to extend the data collection [to the regulated parties named]. We note that there is widespread accord in the record on the Commission's authority to require the collection of the data and information it needs to inform our future actions.[114]

However, despite the Commission's detailed explanation, certain providers protested the agency's data requests, claiming that some of the information requested would disclose private customer data and was outside the scope of the Commission's authority.[115] The Commission thereafter doubled-down on its production power, noting that "providers are obligated to comply with the Commission's mandatory data collection" and that "data can be requested and must be produced, pursuant to the Commission's prior orders and its investigative authority under the Communications Act."[116] The Commission thus issued administrative subpoenas[117] so that it could obtain "data … necessary for an analysis of the special access market to better target relief where warranted, promote competition, and increase consumer welfare."[118]

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114 *Id.* ¶¶ 149-50 (footnotes omitted).

115 *See Wireline Competition Bureau Issues Subpoena for Providers in Special Access Data Collection*, Public Notice, 30 F.C.C. Rcd. 219, 219-20 (2015) (*Data Collection Order Subpoena Public Notice*).

116 *Id.*

117 *Id.*

118 *Id.* at 219.

In both proceedings described above, the Commission did not simply conclude that reforms were necessary based on the allegations made by the petitioning parties. Rather, it used its production power to compel interested parties to provide relevant information and documents so that it could engage in informed decision-making processes and ensure that change was warranted before proceeding further. Certainly, the Commission should engage in the same approach here so that it can ensure the relief requested by the IXCs is actually necessary and in the best interests of targeting relief where warranted, promoting competition, and protecting the welfare of consumers everywhere.

B. The Commission Has the Authority to Implement Protective Orders to Ensure Data Received Remains Confidential

In connection with this production power, the Commission may also, by either its own motion or the motion of any of its bureaus, adopt protective orders to "ensure that any confidential or proprietary documents submitted by a party are afforded adequate protection"[119] and to "strike an appropriate balance by protecting competitively sensitive information while still allowing interested parties to review the data collected and participate in the underlying rulemaking proceeding."[120] Indeed, the Commission and its bureaus have adopted such orders in many other proceedings, including those proceedings described below, and in doing so have relied on authority granted through either the Communications Act or the Commission's rules.

While not expressly provided within any provision of the Communications Act or the Administrative Procedure Act, the Commission's (and its bureaus') authority to adopt protective orders can be found in the same provisions that provide the Commission with its production

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119 *In re Developing a Unified Intercarrier Compensation Regime*, Protective Order, 27 F.C.C. Rcd. 13160, ¶ 1 (2010) (*First ICC/USF Protective Order*).

120 *In re Special Access for Price Cap Local Exchange Carriers*, Order and Data Collection Protective Order, 29 F.C.C. Rcd. 11657, ¶ 29 (2014).

power. For example, in adopting protective orders, the FCC and its bureaus have often cited to Section 4(i), which, again, states that the Commission "may perform any and all acts, make such rules and regulations, and *issue such orders* … as may be necessary in the execution of its functions."[121] The Commission and its bureaus have similarly cited to Section 201(b), which authorizes the Commission to "prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions" of the Communications Act.[122]

The Commission and its bureaus have also previously adopted protected orders upon requesting/compelling the production of data in informal rulemaking proceedings. For example, in requesting data from ILECs during the 2011 *Connect America Fund Order* proceedings, the Wireline Competition Bureau, on its own motion, adopted several protective orders between September 16, 2010, and August 30, 2012, in order to properly "seek or receive from parties documents or other materials [relevant to] the above-captioned dockets"[123] and "give appropriate access to the public while protecting proprietary and confidential information from improper disclosure."[124] In each of the orders, the Bureau cited to its delegated powers under 47 U.S.C. § 155(c) and sections 0.91[125] and 0.291[126] of the Commission's rules.[127] It thereafter proclaimed its authority to issue the protective orders through Sections 4(i) and 4(j),[128] which were cited

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121 47 U.S.C. § 154(i) (emphasis added).
122 *Id.* § 201(b).
123 *First ICC/USF Protective Order*, 27 F.C.C. Rcd. at 13160, ¶ 1.
124 *In the Matter of Connect America Fund*, Third Protective Order, 27 F.C.C. Rcd. 10276, ¶ 1 (2012) (*Third ICC/USF Protective Order*).
125 *See* 47 C.F.R. § 0.91.
126 *See id.* § 0.291.
127 *See First ICC/USF Protective Order*, 27 F.C.C. Rcd. at 13165, ¶ 19; *Third ICC/USF Protective Order*, 27 F.C.C. Rcd. at 10282, ¶ 19.
128 *See First ICC/USF Protective Order*, 27 F.C.C. Rcd. at 13165, ¶ 19; *Third ICC/USF Protective Order*, 27 F.C.C. Rcd. at 10282, ¶ 19.

above to also support the Commission's authority to compel the production of documents relevant to the proceedings.

Similarly, in issuing subpoenas to obtain relevant data and documents from carriers in the Commission's special access service data collection proceedings, the Wireline Competition Bureau sought comment on "the procedures for designating, handling, submitting and accessing the confidential and highly confidential data and information sought in the collection"[129] and subsequently issued a protective order similar to the ones issued in the 2011 *Connect America Fund Order* proceedings.[130] There, too, the Bureau relied on the various provisions of the Communications Act cited in the *Connect America Fund Order* proceedings and also upon Sections 215 and 218, which, as noted below, have been cited as relevant authority with respect to the Commission's Access Stimulation NPRM.[131]

C. The Commission Should Compel IXCs and CEA Providers to Provide Data Necessary to Complete an Informed Assessment of the Request for Relief

The Commission has long recognized that authorizing discovery and compelling the production of documents in rulemaking proceedings is within its "broad discretion in formulating appropriate procedures," particularly when doing so allows for the "effective and expeditious resolution of the issues" and "ensure[s] that the record contains information essential to rulemaking decision."[132] Additionally, the Commission has noted that the ability to make

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129 *Wireline Competition Bureau Seeks Comment on Protective Order for Special Access Data Collection*, Public Notice, 28 F.C.C. Rcd. 9170, 9170 (2013).

130 *See generally In the Matter of Special Access for Price Cap Local Exchange Carriers*, Order and Data Collection Protective Order, 29 F.C.C. Rcd. 11657 (2014).

131 *See id.* ¶ 30.

132 *In re California Water and Telephone Co.*, 23 F.C.C. 2d 840, ¶ 7 (1970); *see also, e.g.*, *In re Representing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 8 F.C.C. Rcd. 3533, ¶ 30 (1990); *In re International Record Carrier's Scope of Operations in the Continental United States, Including Possible Revisions to the Formula Prescribed Under Section 222 of the Communications Act*, 68 F.C.C. 2d 1045, ¶ 11 (1978); *In re Petition of Offshore Telephone Co., as Amended, for Establishment of Charges For Through Interstate Communications Service and Division of*

informed policy choices that promote the goals of Congress and the agency depend on access to accurate information, and its ability to compel the production of information is one of its most potent means by which to ensure consumers are protected and that a fair marketplace is in operation.[133] Accordingly, the Commission should use its authority to require IXCs and CEA providers to make relevant books and records available for inspection by the Commission and interested parties. Doing so will ensure that the Commission's proposed reforms are evidenced-based, actually necessary, and in the best interest of all parties effected.

To assist the Commission, the commenters propose a list of data that the Commission should request the IXCs and CEA Providers to turn. The list is attached hereto as **Exhibit D**.

III. THE PROPOSED RULES ARE UNJUSTLY AND UNREASONABLY DISCRIMINATORY AND AMOUNT TO REGULATORY ARBITRAGE

According to the Commission, regulatory arbitrage is "profit-seeking behavior that can arise when a regulated firm is required to set different prices for products or services with a similar cost structure."[134] Here, the IXCs that seek these rule changes, including AT&T and Verizon, are themselves engaged in regulatory arbitrage. They seek to increase the profits they make on long-distance subscribers – and particularly on those that subscribe to unlimited long-distance plans – by having the Commission adopt different prices for the delivery of access stimulation traffic through CEA providers, even though those CEA providers have a similar cost

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Such Charges With South Central Bell Telephone Co. and American Telephone and Telegraph Co., 68 F.C.C. 2d 63, ¶ 8 (1978).

133 *See, e.g.*, *Data Collection Order Subpoena Public Notice*, 30 F.C.C. Rcd. at 221 ("In light of the Commission's authority to require information to assess whether the rates, terms, and conditions for special access service are just and reasonable, and the Commission's adopted rule requiring the mandatory reporting of such information, the Bureau takes the position that it can compel the disclosure of … information in the data collection.").

134 *In re Developing A Unified Intercarrier Compensation Regime*, 16 F.C.C. Rcd. 9610, 9675 (2001) (citing Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime*, at 1, ¶ 2 n.3 (Federal Communications Commission, OPP Working Paper No. 33, Dec. 2000)).

structure for the delivery of traffic to residential subscribers in South Dakota as the CEA providers have for delivery of traffic to CLECs engaged in access stimulation.

In fact, these IXCs ask the Commission not only to create regulatory arbitrage in the guise of reducing it, but also to discriminate against rural CLECs engaged in access stimulation and against conference calling and other services providers that choose to do business in rural areas.

In the Access Stimulation NPRM, the Commission proposes rules that would give access-stimulating LECs two choices about how they connect to IXCs: (i) to be financially responsible for calls delivered to their networks; or (ii) to accept direct connections either from the IXC or an intermediate access provider of the IXC's choice.[135] In the alternative, the Commission seeks comment on moving all traffic bound for an access-stimulating LEC to bill-and-keep.[136] It is clear that these proposed rules are intended to discriminate against one specific type of traffic, and the Commission seems ready to treat this traffic differently than other "like" traffic despite the fact that it has previously refused to do so and even though there is not enough evidence in the record to justify this discrimination.

A. The Commission Has Previously Rejected Discriminatory Treatment to Access Stimulation Traffic

The Commission has previously considered proposals to treat access stimulation traffic in a discriminatory manner, but on each occasion has resisted these requests. For example, when AT&T and Sprint argued in favor of complete detariffing in 2011, the Commission elected to "reject the suggestion that we detariff competitive LEC access charges if they meet the access stimulation definition."[137] Instead, the FCC decided to establish the current benchmark

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135 *See* Access Stimulation NPRM, ¶¶ 10-17.

136 *See id.* ¶¶ 24-25.

137 *Connect America Fund Order,* ¶ 692.

regulatory framework, concluding that the traffic volumes for access-stimulating CLECs and price cap ILECs were most comparable.

Nevertheless, when AT&T did not get its way, it defied the Commission's 2011 reforms by engaging in self-help withholding, which it continues to do today to the detriment of many CLECs. And if AT&T's failure to abide by the Commission's rules is not bad enough, the Commission now appears poised to reward AT&T by changing course on its prior determination without the proper evidence and reasonable analysis that agency action requires. As federal courts have consistently recognized, an agency's actions will be set aside as "arbitrary and capricious" if the agency fails to provide a "reasoned explanation" for its decision to change course.[138] Moreover, the Commission's obligation to supply a reasoned analysis for a policy departure requires an affirmative showing on record, since, pursuant to Supreme Court precedent, agencies "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'"[139] Considering the complete lack of evidence provided by the IXCs, the Commission is not able to meet the standard necessary for such a dramatic and historic change of direction.

B. No Rational Justification Exists on the NPRM's Record to Impose Discriminatory Rules on Access Stimulation Traffic

In the Access Stimulation NPRM, the Commission expressly proposes FCC-sanctioned discrimination against rural CLECs that serve high-volume customers, and, based on this language, it is clear that the Commission intends to treat end users differently depending on the

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138 *See, e.g.*, *CBS Corp. v. Fed. Commc'ns Comm'n*, 663 F.3d 122, 145 (3d Cir. 2011).

139 *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Auto Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting, in part, *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)).

type and volume of traffic they receive.[140] No rational justification exists on the NPRM's record to begin to impose discriminatory rules on this type of traffic.

Under the Administrative Procedure Act, agency actions that are arbitrary and capricious are to be overturned, and, pursuant to the Act, courts have the power to "determine whether the Commission's actions were 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,'" and to thereby strike them down.[141] In *Orloff v. FCC*, the D.C. Circuit discussed the interplay between the Communication Act's prohibition against "unjust and unreasonable discrimination" and the Administrative Procedure Act's arbitrary and capricious standard.[142] In that decision, the D.C. Circuit rejected the petitioner's argument claiming that the Commission was permitting Verizon to engage in unjust and unreasonable discrimination by letting consumers haggle for a better price on their mobile phone service:

> [T]he Commission emphasizes that § 202 prohibits only *unjust* and *unreasonable* discrimination in charges and service. Orloff is therefore not entitled to prevail merely by showing that she did not receive all the sales concessions Verizon gave to some other customers - that, in

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[140] Sections 201(b) and 202(a) of the Communications Act regulate discrimination and preferential practices for communications services. Section 201(b) provides that:

> All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful.

47 U.S.C. § 201(b). While Section 202(a) provides that:

> It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

Id. § 202(a).

[141] *Verizon v. Fed. Commc'ns Comm'n,* 740 F.3d 623, 635 (D.C. Cir. 2014) (quoting 5 U.S.C. § 706(2)(A), which states that courts will uphold "findings of fact so long as they are supported by substantial evidence on the record as a whole").

[142] *See Orloff v. Fed. Commc'ns Comm'n*, 352 F.3d 415, 420-21 (D.C. Cir. 2003).

> other words, Verizon engaged in discrimination. Verizon may still show that the difference in treatment was reasonable.
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> With respect to the Commission's interpretation of § 202 as applied to CMRS, the "generality of these terms" - unjust, unreasonable - "opens a rather large area for the free play of agency discretion, limited of course by the familiar 'arbitrary' and 'capricious' standard in the Administrative Procedure Act, 5 U.S.C. § 706(2)(A)." In Orloff's view the Commission acted arbitrarily and capriciously because it departed from precedent without giving an adequate explanation. She points out that the Commission and this court have allowed common carriers to charge customer-specific rates only if they offered the same terms to other, similarly situated customers. Yet here the Commission allowed Verizon to offer concessions to some customers and not others, even though there is no discernible difference between the two groups.
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> Once again, the cases on which Orloff relies deal with dominant carriers whose charges were regulated through § 203's tariff-filing requirement. Allowing those carriers to grant discriminatory concessions would have undermined the regulatory scheme then in effect. Filed tariffs are pointless if the carrier can depart from them at will. Permitting a dominant carrier to discriminate would give it the power to control its customers' economic fates, thus defeating one of the main purposes of common carrier regulation. But as the Commission reasoned, the situation in the Cleveland-area mobile phone market is distinguishable. Not only are there no filed rates, but also neither Verizon nor any other CMRS provider is dominant.[143]

Here, the Commission is proposing to not only permit, but *require*, discrimination against access stimulation traffic flowing through a CEA provider's network. This discrimination would be required even though CEA providers remain "dominant carriers whose charges [are] regulated through § 203's tariff-filing requirement."[144] The Access Stimulation NPRM fails to acknowledge or address how this outcome would necessarily produce negative consequences for CEA providers in light of the Commission's acknowledgment in *Iowa Network Services* that "as a Section 61.38 carrier, [a CEA provider's] calculated rates should decrease to reflect the increase in the volume of traffic."[145] Nor does the NPRM recognize the corresponding reality

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143 *Id.* at 420-21 (citations omitted).
144 *Id.* at 421.
145 *AT&T Corp. v. Iowa Network Services, Inc.*, 32 F.C.C. Rcd. 9677, ¶ 19 (2017).

that a decrease in traffic volumes will require either an increase in rates or leave CEAs without the resources necessary to run their networks.[146]

As described in detail above, the record does not support the assumptions or allegations that the Commission uses to justify the proposed rules. The Commission also fails to consider what the net impact of its proposed rules will be if it removes substantial traffic volumes from the rate studies of CEA providers, particularly Aureon and SDN, by adopting rules that promote discrimination against access stimulation traffic. As such, the Commission's proposal is not the product of reasoned decision making, but rather the quintessential example of arbitrary and capricious rulemaking. This means that, if the Commission moves forward on the NPRM's current record, the reforms will likely be challenged in court and tossed out, making all the time, money, and effort put in up to this point worthless.

IV. THE NPRM'S DISCUSSION REGARDING "FINANCIAL RESPONSIBILITY" IS FLAWED

The Access Stimulation NPRM proposes providing access-stimulating CLECs with the option of bearing financial responsibility for the delivery of terminating traffic to their end office or accepting direct connections.[147] The NPRM does not specify what charges would be specifically shifted to the CLEC, instead simply stating that it would be the "applicable intermediate access provider terminating charges *normally* assessed to an IXC."[148] Beyond being extraordinarily vague, this statement also relies on two assumptions: (1) that there is a

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146 *See* Comments of South Dakota Network, LLC, at 7, WC Docket No. 10-90 (Oct. 26, 2017) (SDN Comments) ("Changes to intercarrier compensation for tandem switching and transport provided by a CEA provider would lead to inadequate revenues for this service."); Reply Comments of Iowa Network Services, Inc. d/b/a Aureon Network Services to Refresh the Record, at 11, WC Docket No 10-90 (Nov. 20, 2017) (Aureon Reply Comments) (noting that a decrease in traffic volumes or revenues due to bill-and-keep or similar regulatory policies will "destroy the economic viability of Aureon's network, causing competitive carriers to abandon rural areas, and reducing rural competition and consumer choice").

147 Access Stimulation NPRM, ¶ 9.

148 *Id.* ¶ 10 (emphasis added).

single intermediate access provider delivering traffic to any particular access-stimulating CLEC; and (2) that this intermediate access provider has a single rate that it uniformly assesses on IXCs for delivering traffic to access-stimulating CLECs. Both assumptions, however, are wrong.

Each of the access-stimulating CLECs responding to these comments have in place more than one intermediate provider that delivers long-distance traffic to it and are connected to the FCC-sanctioned CEA provider for the delivery of tariffed TDM traffic. Additionally, each CLEC has one – and in many cases more than one – connection to an IP provider that delivers traffic on commercially-negotiated terms. These contracts are not regulated by the Commission, but rather are negotiated with intermediate providers based on a variety of factors, including: (1) the IXC's preference; (2) the IXC's payment history (including self-help withholding and efforts to exert financial pressure on the CLEC); (3) the rate that that intermediate provider is willing to pay; (4) the reliability of the intermediate provider to actually pay the contracted rate; (5) the quality of service and the intermediate provider's history with rural call completion complaints; and (6) the CLEC's tariffed rate.[149]

Thus, first and foremost, the Commission's proposed rules are vague – because the Commission does not acknowledge that more than one carrier may qualify as the intermediate provider – and incomplete – as the Commission has failed to address which provider is relevant to the issue of financial responsibility. The Commission has also failed to specify in its proposed rules whether a CLEC that has multiple interconnecting carriers in place is entitled to specify

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[149] Indeed, one of the most attractive features of a competitive marketplace, which this Commission has repeatedly claimed to support, is that it allows carriers to take into consideration issues of cost, and a host of other issues relevant to their business, when deciding who to do business with. Thus, a carrier has the freedom and flexibility to work with companies that are committed to rural economic development and rural call quality and that treat the carriers' vendors with respect. A competitive marketplace does not force a carrier to do business with companies like AT&T and Inteliquent, who abuse the carriers' vendors by withholding payment, ginning up baseless claims, and increasing the cost of doing business by requiring CLECs to pursue collection actions in federal court.

which of those carriers will carry the traffic if the CLEC is taking on financial responsibility for the delivery of traffic. Clearly, if the Commission is going to require CLECs to accept financial responsibility for a portion of the transport, the CLEC should be able to require the IXC to use the carrier of the CLECs' choosing.

Second, the Commission does not address how financial responsibility should be split when an intermediate provider provides the functional equivalent of tandem switching and tandem-switched transport and also provides additional services in the delivery of the call for the IXC. Certainly, an intermediate provider that provides services beyond traditional terminating access should not be denied the opportunity to bill the IXC for those additional services. Thus, if the Commission proceeds with its misguided proposal, it should address this ambiguity in order to avoid IXCs demanding more than the Commission intended to provide them.

Third, the Commission's proposed rules do not address the issue of whether some CEA providers should be allowed to charge different IXCs different rates for the delivery of traffic to access stimulating LECs. As discussed more fully below, the Commission's failure to clarify how CLEC-bound traffic should be treated by CEA providers has left unresolved many questions that must be clarified before the Commission's proposal can be effectively implemented. For example, the Commission needs to clarify whether CEA providers are required to include all minutes in the cost study from which their tariffed rate is derived or whether CEA providers can enter into off-tariff contracts. To the extent that a CEA provider is required to ensure all minutes going through its switch are incorporated into its rate base, a CLEC should have the same right as an IXC to bring claims against a CEA provider for price discrimination or to challenge its tariffed rate. Alternatively, if a CEA provider is not required to include all of its traffic in its rate base, then the Commission should address whether CLECs are entitled to pay the lowest rate the CEA provider makes or has made available to an IXC or to negotiate an even better rate. Right now, the rules of the road are unclear, and the Access Stimulation NPRM does nothing to address this issue, which is central to understanding what "financial responsibility" would mean in practice.

Finally, the Commission fails to address the issue of wholesale traffic and, specifically, whether an IXC can demand a direct connection in order to market the route to carriers on a wholesale basis. In other words, can carriers like AT&T and Inteliquent, who routinely voluntarily contract to carry traffic for other parties, collect money from those carriers and force the CLEC to accept that traffic through a direct connection? As noted above, after collecting millions of dollars in revenue to deliver wholesale traffic to access stimulators, both of these carriers have refused to pay those CLECs' charges. There is no rational reason why the Commission should adopt rules that result in certain IXCs, like AT&T and Inteliquent, being the only carriers allowed to profit from access stimulation.

V. THE NPRM'S PROPOSED REQUIREMENT FOR CLECs TO PROVIDE IXCs WITH A "DIRECT CONNECTION" IS EQUALLY FLAWED

The Access Stimulation NPRM also proposes requiring CLECs to provide IXCs with direct connections in order to avoid becoming financially responsible for the delivery of traffic by the IXCs to the CLECs. However, the NPRM fails to address or consider whether imposing such a requirement on CLECs is consistent with the Telecommunications Act of 1996. As demonstrated below, it is not. Moreover, the NPRM is internally inconsistent in its discussion of "direct connections," and the lack of clarity is likely to increase disputes between CLECs and IXCs as IXCs demand more than the proposed rules require. Further, the Commission's proposed rules cannot be practically implemented unless and until the Commission resolves the industry-wide issue regarding a carrier's duty to provide IP interconnection.

A. The Commission's Proposal to Require CLECs to Provide a "Direct Connection" is Beyond the Commission's Scope of Authority

Both Congress and this Commission have previously recognized that CLECs have no obligation to provide direct interconnection. In the *Local Competition Order*, the Commission examined the text and legislative history of the Telecommunications Act of 1996 and concluded that Congress did not intend to impose direct interconnection obligations on CLECs.[150] To arrive at such a conclusion, the Commission examined the distinction between the requirements Congress imposed on ILECs in Section 251(c), which requires ILECs to accept direct or indirect interconnection, and determined that the "clear language" of Section 251(a) permitted CLECs to choose "indirect connection" if they so desired.[151] In short, in 1996, the Commission recognized that "clear language of the statute" left the decision of whether to have direct or indirect interconnections in the hands of CLECs. In the Access Stimulation NPRM, the Commission proposes to effectively strip a small class of CLECs of the choice Congress gave them without acknowledging or addressing this statutory conflict.

What's worse, though, is the fact that, in proposing to require access-stimulating CLECs to provide direct connections, the Commission may be violating Congress's intent in enacting the Telecommunications Act and thereby acting outside of its statutorily prescribed authority. As the Commission is almost certainly aware, the first question a court will answer in determining whether an agency has acted outside the bounds of its authority "is the question whether Congress has directly spoken to the precise question at issue."[152] If, in answering that question, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency,

150 *In re: Implementation of the Local Competition Provisions of the Telecommunication Act of 1996*, First Report and Order, 11 FCC Rcd. 15499, 15991, ¶ 997 (1996) (*Local Competition Order*).

151 *See id.*

152 *Chevron v. Natural Resources Defense Council*, 467 U.S. 837, 842 (1984).

must give effect to the unambiguously expressed intent of Congress" and not act contrary to what the statute says.[153]

As noted above, the Commission has previously determined that the language of Section 251(a) is "clear," and that, pursuant to this language, CLECs may *choose* whether to have direct or indirect interconnections.[154] Indeed, if this language is "clear," then it is also clear that the Commission cannot impose any rules or requirements that are to the contrary. Based on the language used in the Access Stimulation NPRM, and the lack of choice provided to CLECs in determining whether IXCs should interconnect directly or indirectly, the Commission's rules likely violate the Communications Act and are being proposed despite the Commission's scope of authority being limited by Congress.

B. The NPRM's Discussion Regarding A "Direct Connection" is Internally Inconsistent and Vague

The Commission's discussion in the Access Stimulation NPRM regarding what IXCs should be entitled to obtain from access-stimulating CLECs is vague and internally inconsistent. First, the Commission suggests that "direct connections do not pass through intermediate switches and are offered on a capacity basis at monthly-recurring rates, as opposed to a per-MOU rate."[155] But, as noted above, what characterizes a direct connection is not just that it does not pass through intermediate switches, but that it also does not pass through intermediate carriers. According to *Newtons Telecom Dictionary*, an "indirect connection" is the "interconnection of two carriers' network, which are not directly connected to each other, via a third carrier's network, to which the two carriers are each directly connected."[156] This definition

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153 *Id.* at 842-43.
154 *See Local Competition Order*, 11 FCC Rcd. at 15991, ¶ 997.
155 Access Stimulation NPRM, ¶ 13.
156 *Indirect Connection*, NEWTONS TELECOM DICTIONARY (31st ed. 2018).

necessarily yields the conclusion that a "direct connection" would be a connection in which two carriers are "directly connected," rather than being "connected to each other, via a third carrier's network."[157] Indeed, this is where the Commission's inconsistency arises, as it goes on to say that the proposal will "provide access-stimulating LECs the option to offer to connect directly to the IXC *or an intermediate access provider of the IXC's choice.*"[158] But, of course, as soon as the Commission inserts the words "an intermediate access provider," it is no longer discussing a direct connection. As the expert regulatory agency, the Commission's imprecise use of language is surprising and will likely to lead to more, not less, disputes.

Moreover, if the Commission proceeds with its misguided proposal, it must clarify what obligations a CLEC does, and does not, have to abide by in facilitating a direct connection for the IXC's benefit. That clarification should start with a clear statement that a CLEC is only required to facilitate the direct connection or assume financial responsibility for the delivery of terminating traffic *after* an IXC *has committed in writing* to "designing, installing, and implementing it at [the IXC's] cost without conditions."[159] The Commission should also make clear that: (1) the IXC has to specifically enumerate the manner in which it will deliver the traffic to the CLEC's end office without using the CLEC's facilities, including the specific route the traffic will take and whether any of the facilitates that will be used are shared facilities, rather than dedicated facilities; (2) any agreement in which the IXC's traffic continues to be switched

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157 As discussed more fully below, the language used in the Access Stimulation NPRM suggests that the Commission either does not understand the meaning of the term "direct connection" or does not agree with the logical conclusions that can be derived from it.

158 Access Stimulation NPRM, ¶ 13 (emphasis added).

159 *See, Northern Valley Communications, L.L.C. v. AT&T Corp.*, 245 F. Supp. 3d 1120, 1134 (D.S.D. 2017) (holding that, pursuant to federal law, access-stimulating CLECs "do[] not have to *provide* [an IXC] with a direct trunk connection, but [] may be required to *accept* a direct trunk connect, contingent on [the IXC] designing, installing, and implementing it at [the IXC's] cost without conditions").

by a CEA provider's tandem switch is not a "direct connect," even if the CEA provider and the IXC have an agreement to refer to it as a "direct connect"; (3) if the IXC needs to place equipment in a CLEC end office, it must pay commercial rates for such placement and/or for such equipment; (4) the IXC is responsible for obtaining all necessary construction permits and land access necessary to install its facilities before the CLEC is required to facilitate the direct connection; (5) if the IXC cannot obtain the necessary permits or land rights, the IXC is required to continue paying the CLEC's tariffed access charges; (6) the CLEC has no obligation to allow the IXC to use any of its transport facilities to deliver traffic to the CLEC end office; and (7) if the IXC is not current on its outstanding access charge invoices, but rather has been engaging in self-help withholding, the CLEC has no obligation to facilitate a direct connection or assume financial responsibility for the delivery of terminating traffic. These rules are necessary and practical to ensure that IXCs like AT&T and Inteliquent do not make sham requests for a direct connection when they have neither the intention or ability to install or obtain the facilities for a direct connection and, instead, just want to shift their costs to CLECs.

C. To the Extent the Commission Intends to Require an IP-Based Connection Requirement, It Has Failed to Identify or Explain Its Authority to Do So

Finally, even if the Commission continues to believe that an IXC can accomplish direct connection in an indirect manner by using a third-party "intermediate access provider," the Commission's proposed rule requiring CLECs to accept traffic from "an intermediate access provider of the IXC's choice" creates additional ambiguities and legal concerns because the Commission does not explain the extent to which CLECs would be required to accept an IP interconnection, as compared to a TDM interconnection. Moreover, the Commission does not directly address the "virtual direct connection" concept that IXCs have been trying to rely on, in which the IXCs deliver traffic to a location in a distant state and then have the LECs absorb the costs of hauling the traffic back to rural America. Because the CLECs know that carriers like AT&T and Inteliquent will, without a doubt, request "direct connections" without actually wanting to incur the costs that come with building such a route – just so that they may obtain the windfall that the Commission proposes to provide them – it is essential that the Commission clearly announce its policies on this important issue, rather than leave so many ambiguities to be argued over later before the FCC and in court.

1. The Commission Has Previously Expressed Interest in A Complete Transition to IP-to-IP Interconnection, But Has Never Mandated Such Connections

In the 2011 *Connect America Fund Order*, the Commission recognized that "[t]he voice communications marketplace is currently transitioning from traditional circuit-switched telephone service to the use of IP services,"[160] and that "[a]s such, we agree with commenters that, as the industry transitions to all IP networks, carriers should begin planning for the transition to IP-to-IP interconnection, and that such a transition will likely be appropriate before the completion of the intercarrier compensation phase down."[161] However, in issuing these statements, the Commission elected to *not* mandate IP-to-IP interconnections, noting that "section 251 of the [Communications] Act is one of the key provisions specifying interconnection requirements," and that its interconnection requirements "are technology neutral—they do not vary based on whether one or both of the interconnection providers is using TDM, IP, or another technology in their underlying networks."[162]

Thus, instead of issuing an IP interconnection mandate, the Commission chose to issue a Further Notice of Proposed Rulemaking, seeking comment on "proposals to require IP-to-IP

160 *Connect America Fund Order*, ¶ 1009.
161 *Id.* ¶ 1010.
162 *Id.* ¶ 1342.

interconnection in particular circumstances under different policy frameworks."[163] The FNPRM sought comment on many open issues regarding IP-to-IP interconnection, including (1) who would bear the costs in the event "a carrier that has deployed an IP network receives a request to interconnect in IP, but instead requires TDM interconnection";[164] (2) whether to "leave IP-to-IP interconnection to unregulated commercial agreements";[165] (3) what scope of traffic exchange "should be encompassed by any IP-to-IP interconnection policy framework";[166] and (4) what specific terms and conditions "would need to be subject to the policy framework, and which could be left entirely to marketplace negotiations."[167] These issues remain to be decided, and to date the Commission has not made a determination that IP-to-IP interconnection could be mandated upon CLECs.

2. Given the Lack of a Mandate from the Commission Regarding IP-to-IP Interconnections, the Access Stimulation NPRM Raises a Host of Concerns

The Commission's proposal in the Access Stimulation NPRM requiring CLECs to permit direct connections via "an intermediate access provider of the IXC's choice,"[168] necessarily

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163 *Id.*

164 *See id.* ¶ 1341.

165 *See id.* ¶ 1343.

166 *See id.* ¶ 1342.

167 *See id.* ¶ 1366. Granted, the Commission concluded by stating that, "even while our FNPRM is pending, we expect all carriers to negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic." *Id.* ¶ 1011. And since the 2011 *Connect America Fund Order* was issued, the Commission has continued to express such expectations. For example, in Recommendation 4.10 to the National Broadband Plan, the Commission noted that it "should clarify interconnection rights and obligations and encourage the shift to IP-to-IP interconnection where efficient." FEDERAL COMMUNICATIONS COMMISSION, CONNECTING AMERICA: THE NATIONAL BROADBAND PLAN 36 (2010), available at https://transition.fcc.gov/national-broadband-plan/national-broadband-plan.pdf. Similarly, on June 18, 2015, the Commission adopted the *VoIP Direct Access to Numbering Report and Order*, in which Chairman Wheeler issued a statement listing the benefits of allowing VoIP providers to access numbering, including "enhanced reliability," "facilitate[ing] IP-to-IP interconnection," and an "increase the transparency of call routing." *In the Matter of Numbering Policies for Modern Communications*, Report and Order, 30 F.C.C. Rcd. 6839, 6911 (2015) (Statement of Chairman Tom Wheeler).

168 Access Stimulation NPRM, ¶ 13.

requires the resolution of the above-mentioned thorny, yet unresolved, issues regarding IP-to-IP interconnection, or, in the alternative, a revised proposal stating that an IXC's choice of intermediate access provider can be limited by a CLEC's choice to accept direct interconnection traffic only in TDM. But even if the Commission were to revise its proposal to provide CLECs with such a basic right, a host of other issues would still follow. For example, does the Commission intend to impose an obligation on CLECs to accept traffic from IP carriers that claim to be unregulated and that operate on a contractual, rather than tariffed, basis? Or do these carriers fall outside of the "intermediate access provider" term because they contend their services are not regulated by the Commission? And if the Commission is attempting to impose an obligation on CLECs not simply to accept a direct connection, but to accept an IXC's or intermediate provider's IP-based connection request, such a requirement would raise a host of legal issues and will undoubtedly lead to further litigation.[169] For example, given the Commission's recent reversal of the Obama Administration's decision to classify Internet access as being subject to Title II regulation,[170] the agency has yet to clarify what authority and to what degree it can impose IP-to-IP interconnection on carriers. This would certainly need to be resolved before the Commission's proposal is instituted.

Setting aside the Commission's authority to compel such interconnections, it is important to also note that the lack of specificity in the Access Stimulation NPRM will have real world consequences for the parties the NPRM intends to regulate. Indeed, if the Commission decides that CLECs have an obligation to permit "direct connections" through IP connections, then the

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169 Of course, such an imposition would also be concerning because of the Commission's failure to develop a substantial, documented record from which it could possibly justify its conclusions. *See supra* Section I.

170 *See In re Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, 33 F.C.C. Rcd. 311, 312 ¶ 2 (2018) (*Internet Freedom Order*).

Commission is *sub silentio* requiring CLECs to ensure they have enough capacity to handle any and all IP traffic they may receive. The Commission would be requiring CLECs to reconfigure their networks to add such additional capacity and to incur further expenses to upgrade their systems to satisfy IP-to-IP interconnection requirements. These expenses would have to be borne by CLECs who are receiving no compensation from the IXCs that would benefit from the CLECs' investment. (And, indeed, in many instances the costs would be borne by carriers that certain IXCs, like AT&T and Inteliquent, have been withholding payment from for several years as part of the IXCs' self-help tactics.)

Moreover, network changes would take time to resolve; they would not happen overnight. So, what would IXCs be required to pay during the period between when the parties start the process of implementing a direct connection and when that process is completed?

Finally, as the Commission should be aware, under IP-to-IP interconnection, many IXCs seek to install "virtual direct connections" by commercial contract, in which the IXCs and CLECs negotiate commercial rates for traffic to be handed off in a distant state and the CLECs incur the expense of hauling the traffic back to their locations. With respect to this issue, the Commission should make clear three things: (1) a CLEC has no duty to facilitate the delivery of its traffic at any point outside of its end office; (2) if it voluntarily chooses to facilitate the delivery, it is entitled to negotiate a commercial rate for doing so; and (3) any existing commercial contracts in which the traffic is already being delivered outside of the CLEC's end office will not be invalidated or modified in any way by any rules the Commission may adopt. There is absolutely no reason for the Commission to disrupt existing, commercially-negotiated agreements in light of the Commission's plain statement in the *Connect America Fund Order* that such negotiated agreements are appropriate during the transition period.[171]

VI. THE REAL ISSUE SEEMS TO BE THE COMMISSION'S FAILURE TO CLARIFY THE RULES FOR CEA PROVIDERS WHO SWITCH AND TRANSPORT ACCESS STIMULATION TRAFFIC

Rather than seeking to evade the Commission's 2011 rules governing access stimulation, the real point of disagreement seems to be about the appropriate intersection between CLECs and FCC-sanctioned CEA providers. As a matter of policy, should CLECs send their traffic through CEA providers? As a matter of policy, should CEA providers continue to enjoy FCC-sanctioned monopoly status? What will happen to CEA providers if IXCs can pick and choose which traffic to send on the CEA providers' networks and which traffic to send through other routes? Should CEA providers be able to take traffic out of their tariffed rate by engaging in off-tariff side contracts? Should CEA providers contractually obligate ILEC-owned CLECs to send all traffic through the CEA network? These and a host of other issues have been simmering for years, however, the Commission has left them unresolved, even in light of requests for clarity. And even now, despite having the opportunity to confront these issues head on in the Access Stimulation NPRM, the Commission has decided to instead create a false narrative to justify a patchwork solution that will appease AT&T and Verizon, and to once again gloss over the complexities and differences of opinion that plague the situation.

Certainly, the complexities and difference of opinions that must be resolved are evident in the record. For example, in October and November of 2017, the Commission sought comments refreshing the record on intercarrier compensation, and pursuant to this request the

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171 *See Connect America Fund Order*, ¶ 812 ("[C]arriers remain free to enter into negotiated agreements that differ from the default rates established above, consistent with the negotiated agreement framework that Congress envisioned for the 251(b)(5) regime to which access traffic is transitioned.").

CEA providers and certain access-stimulating CLECs provided their perspectives regarding what the future of the ICC and access stimulation regimes should look like.[172] In their respective comments, two of the nation's three CEA providers, South Dakota Network, LLC ("SDN") and Iowa Network Services, Inc. d/b/a/ Aureon Network Services ("Aureon"), noted how unique the CEA provider-structure is and how America's rural population relies on the important, innovative communications and informational services they provide via their connections with subtending LECs.[173] As the CEA providers explained, taking away these revenues via an application of the Commission's bill-and-keep regulations would lead to inadequate revenues and thus an increase in fees charged to subtending LECs, which would likely be passed on to consumers.[174] Even worse, though, is the fact that such regulation could "destroy the economic viability of [the CEA providers'] network[s], causing competitive carriers to abandon rural areas, and reducing rural competition and consumer choice."[175]

Accordingly, the CEA providers requested that, in updating its ICC regime and accompanying regulations, the Commission treat CEA providers differently and protect them from further bill-and-keep revenue reforms at the IXC-CEA provider level, so as to ensure their

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172 *See generally Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport and Transit*, Public Notice, 32 F.C.C. Rcd. 6856 (2017).

173 *See* SDN Comments at 5-7; Aureon Reply Comments at 5-8.

174 *See* SDN Comments at 3, 7 (noting that "CEA has reduced the overall costs for the telecommunications industry, which have been borne by IXCs and ultimately end users," and that "[c]hanges to intercarrier compensation for tandem switching and transport provided by a CEA provider would lead to inadequate revenues for this service"); Aureon Reply Comments at 7 ("By centralizing traffic, Aureon makes it economical for multiple, competitive broadband providers to make their advanced services available to the customers in the service areas of the 200 LECs connected to the CEA network, and promotes investment in broadband services in rural areas so that rural customers do not fall victims of the 'digital divide.' Therefore, the competitive advanced service and broadband carriers that benefit from the use of the CEA network to extend the provision of their services into rural areas (rather than the subtending LECs) should compensate Aureon for transporting traffic over the CEA network.").

175 Aureon Reply Comments at 11.

financial stability.[176] Moreover, and in accordance with the above proposal, the CEA providers also requested that the Commission enforce its mandatory use policy, requiring all subtending LECs to route all of their traffic over the CEA network, so as to reduce the rate charged to IXCs and keep all parties happy.[177]

In addition to failing to fully examine what affect the proposed rules would have on the overall cost of telecommunication services in rural states, like Iowa and South Dakota, the Access Stimulation NPRM also does not address the fundamental differences in how the CEA providers appear to interpret the benefits and obligations of being an FCC-approved monopoly. The Commission has also failed to provide clear guidance on this issue despite its reforms of the access market in 2011 and despite the fact that the relationship between CLECs and CEA providers is central to the issues about which AT&T and other IXCs now complain.

Notably, the CEA providers themselves offer very different perspectives on whether, as a FCC-sanctioned monopoly, they should be party to syphoning off traffic from their regulated services. For example, Aureon has previously argued that the FCC-sanctioned monopoly should be enforced and that *no carrier*, either the CEA provider itself or a CLEC, should enable any IXC to bypass the tandem switch.[178] In explaining its reasoning, Aureon noted, and the Commission agreed, that higher traffic volumes produce lower rates and that, if traffic is removed from the tandem switch, higher rates must necessarily follow.[179]

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[176] *See* SDN Comments at 4-8; Aureon Reply Comments at 5-8.

[177] *See* Aureon Reply Comments at 11-17.

[178] *See id.* at 12 ("Despite the mandatory requirement to use Aureon's CEA network to transport traffic if a LEC chooses to connect to the CEA network, a substantial volume of the traffic to a few LECs connected to the CEA network is being diverted off the CEA network pursuant to revenue sharing agreements with alternative transport providers…. [E]nforcing the mandatory CEA use policy is one part of the solution.").

[179] *See id.* at 6 ("Aureon's CEA rate under Section 61.38 is inversely related to the amount of traffic carried – i.e., as traffic volumes increase, the CEA rate decreases, and vice versa."); *see also AT&T Corp.*

SDN, however, seems to be somewhere near the other end of the spectrum on this issue. On the one hand, it has sued its member, Northern Valley, for permitting IP connections,[180] but, on the other hand, it has espoused the view that it should be able to provide "transit" services on a competitive, contractual basis.[181] Thus, at least in one respect, SDN seems to be of the view that it can facilitate the removal of traffic from its rate base, even if doing so results in higher tariffed rates for some carriers.

Let us assume that these different perspectives are the result of legitimate differences in interpreting the results of the *Connect America Fund Order*, the decision in *AT&T v. Iowa Network Services,* and the Commission's continued delay in addressing whether IP interconnection is mandated. In short, then, different carriers have different perspectives about how a CEA provider can be both a CLEC and a "dominant carrier" and what that means in today's market. The CLECs respectfully suggest that this is where the Commission should focus its time and energy, rather than on AT&T's name-calling and unsubstantiated claims. Accordingly, the CLECs encourage the Commission to investigate the differing business practices of the CEA providers, not for the purpose of placing blame, but rather so that it can have the information necessary to provide the industry with the clarity that it so desperately needs. Indeed, once the Commission engages in such an approach, all carriers – CEA providers,

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v. Iowa Network Services, Inc., 32 FCC Rcd. 9677, ¶ 19 ("[A]s a Section 61.38 carrier, Aureon's calculated rates should decrease to reflect the increase in the volume of traffic.").

180 Answer, Defenses, Counterclaim and Third Party Complaint of South Dakota Networks, LLC, ¶¶ 46-54, *James Valley Cooperative Telephone Co. et al. v. South Dakota Network, LLC et al.*, No. 06CIV15-000134 (Brown Cnty. Cir. Ct. July 20, 2015).

181 *See* SDN Comments at 9 ("SDN provides transit services pursuant to contract. The transit market is a competitive market and transit services are offered competitively. Accordingly, transit service should remain unregulated."); *see also* Petition for Declaratory Ruling of South Dakota Network, LLC (WC Docket No. 18-41); Letter of G. David Carter to Marlene H. Dortch, WC Docket No. 18-41 (Feb. 27, 2018).

CLECs, and IXCs – will be better off and much more capable of complying with the Commission's clear rules.

VII. THE ALTERNATIVE PROPOSAL REQUIRING ONLY ACCESS-STIMULATING CLECs TO TRANSITION TO BILL-AND-KEEP IS INCONSISTENT WITH THE FUNDAMENTAL PREMISE OF THE BILL-AND-KEEP REGIME

To support its assertion that shifting only access-stimulating CLECs to bill-and-keep, the Commission falsely asserts that, in the *Connect America Fund Order*, it concluded that "with respect to terminating traffic, the LEC's end user is the cost causer."[182] The Commission made no such finding in paragraph 746 or in any other part of the *Connect America Fund Order*. However, in that *Order*, the Commission did "reject the notion that only the calling party benefits from a call and therefore should bear the entire cost of originating, transporting, and terminating a call," and, as a result, the Commission also "abandon[ed] the calling-party-network-pays model that dominated ICC regimes of the last century."[183] Indeed, the Commission expressly justified this conclusion by noting that "recent analyses have recognized that **both parties generally benefit from participating in a call**, and therefore, that **both parties should split the cost of the call**."[184]

While the distinction is subtle, it is material. As the Tenth Circuit recognized in affirming the Commission's plan to move to bill-and-keep, "[o]nce bill-and-keep is fully

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182 Access Stimulation NPRM, ¶ 24 (citing *Connect America Fund Order*, ¶ 746).

183 *Connect America Fund Order,* ¶ 34.

184 *Id.* ¶ 744 (citing to Benjamin E. Hermalin and Michael L. Katz, *Network Interconnection with Two-Sided User Benefits*, Walter A. Haas School of Business, University of California, Berkeley (2001); *see also* DeGraba at 37-84; Doh-Shin Jeon, Jean-Jacque Laffont and Jean Tirole, *On the "Receiver Pays" Principle*, 35 RAND J. OF ECON., 85 (2004). *See generally*, Wilko Bolt and Alexander F. Tieman, *Social Welfare and Cost Recovery in Two-Sided Markets*, IMF Working Paper, at 103-117, *www.imf.org/external/pubs/ft/wp/2005/wp05194.pdf* (2005); E. Glen Weyl, *A Price Theory of Multi-Sided Platforms*, 100 AM. ECON. REV., 1642 (2010); Alexander White, and E. Glen Weyl, *Imperfect Platform Competition: A General Framework*, http://alex-white.net/Home/Research_files/WWIPC.pdf (2011)).

implemented for all traffic exchanged with an LEC, the calling party and the called party will divide the costs."[185] Furthermore, as noted above, the Commission promised that a reduction in long-distance charges would result from the transition to bill-and-keep, so that consumers who had to pay more for local service would have a reduction in long-distance charges to offset that increase.[186] But, moving only one side of the access charge equation to bill-and-keep without those corresponding reductions is fundamentally unfair to the rural residential and business customers served by CLECs. Those customers will be the only customers in the country under the Commission's proposal whose carrier is being forced to absorb the full costs of transporting IXC traffic without compensation. Moreover, those customers will receive no benefit in exchange because the IXCs' rates have not been decreased and because the IXCs will continue to pay originating access charges for the very same calls. As a result, the Commission's proposal to proceed with one-sided bill-and-keep conflicts with 47 U.S.C. § 252(d)(2)(B), which permits "bill-and-keep arrangements" only where they afford the "mutual recovery of costs" through the "offsetting of reciprocal obligations."

Importantly, when commenters began to assert that, contrary to decades of precedent, bill-and-keep would not result in unconstitutional takings, they relied on the notion that, since both the caller and called party benefit from a call, a bill-and-keep regime would benefit both of the local phone companies equally because "both networks get larger calling universes."[187] Thus, the Commission's proposal to implement bill-and-keep just for one category of carrier, and to thereby deny those carriers' customers the reciprocal benefit on the other end of the call,

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185 *In re FCC 11-161*, 753 F.3d 1015, 1113 (10th Cir. 2014) (citing *Connect America Fund Order*, ¶¶ 741, 744, 756).

186 *See supra* Section I.A.

187 Adam Candeub, *Network Interconnections and Takings*, 54 SYRACUSE L. REV. 369, 405 (2004).

undermines a central premise of the reforms it adopted in the *Connect America Fund Order* and is inconsistent with the plain language of Section 252(b).[188]

Similarly, the Commission has previously asserted that bill-and-keep should be "technologically" and "competitively neutral."[189] However, all of the Commission's proposals, including its proposal to move only rural access-stimulating CLECs to bill-and-keep, are neither technologically nor competitively neutral. As an initial matter, these proposals are discriminatory because they target access-stimulating CLECs' end users for disparate treatment due to the end users' affiliation with services such as "a chat line, adult entertainment calls, and 'free' conference calls."[190] Moreover, the proposals are not competitively neutral, as some carriers will be barred from collecting and sharing access fees on traffic going to chat lines, adult entertainment calls, and 'free' conference calls, while other carriers will not. Thus, the Commission's proposals benefit larger carriers who can absorb more access stimulation traffic without triggering the access stimulation definition (usually those LECs affiliated with the large IXCs that will also avoid paying access charges), while harming smaller rural carriers.

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[188] It is worth noting that, to the extent the Commission requires CLECs to open their end offices to IXCs for direct connection installations and the CLECs are not adequately compensated, such a requirement could result in a *per se* taking. *See, e.g., Internet Freedom Order,* 33 F.C.C. Rcd. at 340, ¶ 567 (asserting that there could be no taking in that instance because "[w]e do not require the permanent installation of any third-party equipment at broadband providers' network facilities").

[189] *In re Developing A Unified Intercarrier Compensation Regime*, 20 F.C.C. Rcd. 4685, 4787 (2005).

[190] Access Stimulation NPRM, ¶ 2.

VIII. THE COMMISSION COULD CONSIDER ADOPTING A UNIFORM NATIONAL BENCHMARK

Rather than imposing a discriminatory regime onto access-stimulating CLECs and harming consumers in the process, the Commission could instead consider adopting a uniform rate for access stimulating traffic. Such an approach would have a few distinct advantages over those contained in the Access Stimulation NPRM, including:

- Avoiding the discriminatory effects that the Commission's proposed rules would create;
- Not depriving CEA providers or CLECs of the resources they need to continue to provide their services and help them advance the Commission's goal of expanding access to broadband;
- Leaving open the possibility for CLECs (but not CEA providers) to negotiate alternative arrangements, including direct connections and "virtual direct connections," without giving the IXCs unfair bargaining power; and
- Most importantly, ensuring that consumers who value free conferencing services are not required to confront both rising long-distance charges *and* the added burden of having to pay for a service that they used to be able to obtain for free when they paid their long-distance bill.

IX. CONCLUSION

For the reasons set forth above, the CLECs represented by these comments respectfully urge the Commission to take the time necessary to fully and clearly analyze the issues raised by the Access Stimulation NPRM, rather than implement discriminatory rules and engage in arbitrary and capricious agency action. Accordingly, the Commission should: (1) not move forward unless and until IXCs and CEA providers provide relevant data for all affected parties to review; (2) provide clarity regarding the interplay between access-stimulating CLECs and CEA providers, including clarity as to whether the use of commercial agreements are appropriate; (3) delay any further reforms until the Commission addresses on an industry-wide basis whether it will transition tandem switching and transport charges and whether it intends to impose mandatory IP interconnection requirements; and/or (4) in the alternative, consider adopting a uniform rate for access stimulation traffic that reduces IXC costs without depriving CEA providers or CLECs of the resources they need to continue to provide their services and advance the Commission's goal of expanding access to broadband.

Dated: July 20, 2018

Respectfully submitted,

G. David Carter

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Exhibit A

Letter from J. Groft to P. Gardner
Oct. 5, 2017

NVC

2211 8th Ave NE
Suite 1101
Aberdeen, SD 57401

605.725.1000
888.919.8945
605.725.1050 fax

October 5th, 2017

VIA EMAIL & CERTIFIED MAIL
Patricia Gardner
Inteliquent, Inc.
550 W. Adams Street
Chicago, IL 60661
patricia.gardner@inteliquent.com

Re: Inteliquent, Inc.'s Request for Direct End Office Trunking to CLLI GRTNSDXADS0

Dear Ms. Gardner:

I write to follow up on your recent undated letter, which I received on September 25, 2017; your email of September 12, 2017; and our brief telephonic conversation of that same day, inquiring about the potential for installing a direct connect. As I attempted to discuss with you when we spoke on September 12, 2017, I have several questions regarding Inteliquent's inquiry that have gone unanswered, but which are critical to me being able to evaluate the request. You will recall that, when we spoke, you were unwilling to address my questions, instead offering to send me a letter "composed by someone else," all of which has made it difficult for me to respond to Inteliquent's inquiry.

Your recent letter indicates Inteliquent's desire to establish direct end office trunking between "James Valley Cooperative Telephone Company/Northern Valley" and Inteliquent. Your September 12, 2017 email, however, requested a direct connect to James Valley Cooperative Telephone Company, with no mention of Northern Valley. James Valley Cooperative Telephone Company ("James Valley") and Northern Valley Communications, LLC ("NVC") are separate and distinct entities. James Valley Cooperative Telephone Company ("James Valley") is an ILEC that operates in fourteen exchanges in northeastern South Dakota; it provides its access services to long-distance carriers exclusively through its concurrence in the NECA and LECA tariffs for interstate and intrastate traffic, respectively. NVC, on the other hand, is a CLEC that provides service in the Aberdeen and Redfield exchanges in South Dakota (exchanges that James Valley does not serve). NVC provides its interstate and intrastate access service pursuant to its Tariff F.C.C. No. 3 and South Dakota Public Utilities Commission Tariff No. 1, respectively, or, alternatively, through a mutually acceptable commercial arrangement. As such, my first question is: from which entity is Inteliquent seeking a direct connect?

The bolded statement in your letter that "Inteliquent will be financially responsible for the charges associated with the direct connection per the lawful charges in carrier's [*sic*] tariff" also raises unanswered questions. Although your letter does not acknowledge it, NVC sent

NVC

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Inteliquent a disconnect notice on September 15, 2017 because of Inteliquent's failure and refusal to pay *any* of NVC's tariffed charges since Inteliquent recently began using NVC's tariffed transport and termination services for the first time by routing its NVC-bound traffic through South Dakota Network's tandem switch. Thus, while your letter indicates Inteliquent's understanding of what it "will be financially responsible for," your letter, which may be seeking a voluntary, contractual service from NVC, comes at a time in which Inteliquent is already failing to pay NVC what Inteliquent is "financially responsible for." (Inteliquent's Mr. Clopton, Vice President of Carrier Relations, has told me that Inteliquent is purposefully taking NVC's tariffed services for free in an effort to coerce NVC into offering Inteliquent a direct connect on terms favorable to Inteliquent; suffice it to say, Inteliquent's knowing breach of NVC's tariff is an impediment to the parties forming a voluntary contractual relationship.) Will Inteliquent pay its outstanding bill rather than conditioning its request for a direct connect on NVC incurring the expenses of a collection action against Inteliquent?

The bolded sentence is also confusing because it is premised on Inteliquent paying "for the charges associated with the direct connection per the lawful charges in carrier's [*sic*] tariff." James Valley and NVC are unaware of any "carrier's tariff" through which Inteliquent can purchase direct end office trunking to CLLI GRTNSDXADS0. Which tariff are you referring to?

In addition, as I attempted to discuss with you, I am not aware of what facilities Inteliquent has in the area of Groton, South Dakota that it can use to get its traffic to Groton if a direct connect is arranged. Does Inteliquent have such facilities? If not, how, specifically, would it intend to deliver its traffic to Groton or any other relevant end office?

In short, I am unable to respond to your letter soliciting a tariffed direct end office trunking service from either James Valley or NVC because Inteliquent has not provided sufficient information, and you refused to talk with me when I attempted to raise these questions with you. Please respond in writing with the requested information, which will allow me to better understand Inteliquent's request, and then we can continue our discussions.

Sincerely,

James Groft

James Groft
James Valley Cooperative Telephone Company, CEO
Northern Valley Communications, LLC, CEO

Exhibit B

Email from J. Groft to J. Clopton
Nov. 14, 2017

Subject: RE: DEOT Request
Date: Tuesday, November 14, 2017 at 10:28:02 AM Eastern Standard Time
From: James Groft
To: 'Jon Clopton'
Attachments: image001.png, image002.gif, image003.jpg, image004.gif

Jon,

I am writing to follow up on your email of October 12, 2017, which responded to my letter of October 5, 2017. Your letter required us to solicit certain assurances from South Dakota Network, LLC ("SDN"), which accounts for the additional time it has taken us to respond to your letter.

As an initial matter, I find your letter troubling insofar as you attempt to discredit the history of our telephone call during which we discussed Inteliquent's non-payment. Contrary to your representation, at no time did you inform me that Inteliquent was planning to pay its outstanding balance. Rather, you made it perfectly clear to me that Inteliquent was prepared to continue withholding payment in an effort to apply financial pressure to Northern Valley and extract a compromise rate for a direct connect. Nevertheless, we are grateful that after receiving my letter, Inteliquent reconsidered its misguided course of action and has tendered payment for its outstanding balance.

With regard to the other matters in your email, Inteliquent's lack of facilities in South Dakota does impact Northern Valley's ability to provide direct connect services to Inteliquent at this time. Northern Valley does not have a TDM direct connect service in its tariff and does not lease its existing TDM capacity, which is all tandem-switched, to other carriers as though it were a direct connect. If Inteliquent had its own facilities in place, instead of intending to rely on Northern Valley's tandem-switched TDM facilities, that would have been material to determining how to proceed.

With regard to an IP connection, while Northern Valley believes that it has the discretion to provide such services and would otherwise be willing to discuss the terms under which it would do so for Inteliquent, SDN, the centralized equal access service provider in South Dakota, has brought claims against Northern Valley to stop it from doing so. Those claims allege that Northern Valley's provision of IP connection services is a violation of SDN's operating agreement and that Northern Valley must terminate all such agreements. SDN is seeking to collect substantial damages from Northern Valley. As such, under the circumstances, it is not practical for Northern Valley to enter into negotiations for an IP direct connect without assurance from SDN that it will not pursue additional claims against Northern Valley, which it has declined to provide.

Accordingly, I must direct Inteliquent to SDN before we can have any further discussions regarding an IP connection. If SDN is amenable to releasing any potential claims against Northern Valley for doing so, Northern Valley would, of course, be glad to explore whether a commercially negotiated agreement may be possible.

From: Jon Clopton [mailto:Jon.Clopton@inteliquent.com]
Sent: Wednesday, November 1, 2017 9:36 AM
To: James Groft <jgroft@nvc.net>
Subject: RE: DEOT Request

James, We haven't seen a response to this. We would like to have a discussion on setting up a DEOT. Please let me know your availability to discuss this week or Monday next week.

Thanks.

From: Jon Clopton
Sent: Thursday, October 12, 2017 9:51 AM
To: 'James Groft' <jgroft@nvc.net>
Subject: DEOT Request

We are in receipt of your formal letter dated October 5, 2017. At the outset, let me clear up any misunderstanding you may have regarding our request for a direct interconnection facility. We are seeking to establish direct end office trunking (a "direct connect") with any entity that is receiving traffic terminating to bridging platforms (whether it be a platform used for conference calls, radio streaming, chat lines or similar). To the extent that Northern Valley Communications, LLC ("NVC") is the entity to which this type of traffic is terminating, then our request is to NVC. If this type of traffic also terminates to James Valley Cooperative Telephone Company ("James Valley"), then we also seek a direct connect with James Valley.

With respect to the third paragraph in your letter, frankly, we are confused. At no time did I suggest that we are seeking free services from NVC. To separate the issues, NVC may charge for (1) a direct connect; and (2) terminating switched access services. Our statement with respect to being "financially responsible" related to the direct connect. We committed to being financially responsible for its costs.

With respect to your statement that I told you that Inteliquent is taking NVC's terminating switched access services for free in an effort to coerce NVC into offering Inteliquent a direct connect on terms favorable to Inteliquent, that statement is wrong on its face. What I actually said is that Inteliquent was paying NVC's terminating access charges, subject to a reservation of its rights to dispute the charges. I would not have stated that Inteliquent was not going to pay NVC while Inteliquent was in the process of paying NVC. Indeed, Inteliquent has already issued a check to NVC in the amount of $259,767.63. In any event, given this correction of the factual record, Inteliquent will assume your statements of Inteliquent's "knowing breach" were simply a mistake, and neither NVC nor James Valley, as applicable, will condition its willingness to negotiate the terms to establish a direct connect on incorrect facts.

With respect to your questions regarding the facilities Inteliquent has in South Dakota, we don't know understand how this would affect James Valley's or NVC's willingness to direct connect (at Inteliquent's cost). Regardless, Inteliquent does not have its own facilities in South Dakota. Accordingly, Inteliquent will obtain transport facilities from a third party provider in order to direct connect (the third party provider from which we purchase the facility might be James Valley). We can direct connect on either a TMD or IP basis. We understand NVC or James Valley, or both, have established such a direct connect with a third party IXC today.

Now that we have responded to the items raised in your letter so you can "better understand them," we look forward to continuing our discussion. As noted in a separate communication, we are willing to offer favorable terms to establish a direct connect. We are even willing to agree to a term that will extend beyond any FCC regulatory ruling eliminating or reducing NVC's rights to charge for access stimulation traffic (as we are sure you know, the FCC is reviewing the legality of the existing access stimulation regime at both the wireline and enforcement bureaus). I look forward to speaking with you. Please let me know if you are available to speak on Friday, Oct 13th , 19th or 20th. If not, please suggest times that work for you.

We believe we can establish a mutually beneficial arrangement. I look forward to speaking.

Jon Clopton
VP Carrier Relations and Network Cost, Inteliquent
o: 312.384.8035 m: 312.371.1941
550 W. Adams, Suite #900, Chicago, IL 60661
www.inteliquent.com e: jon.clopton@inteliquent.com

Exhibit C

Letter from D. Carter to Inteliquent
July 9, 2018, 2017

G. David Carter | Member
david.carter@innovistalaw.com
RICHMOND: 804.729.0052
WASHINGTON: 202.869.1502

July 9, 2018

VIA EMAIL
Inteliquent
c/o Yogesh R., Synchronoss
yogesh.r_nt_claims@synchronoss.com

Re: Denial of Inteliquent Disputes to Northern Valley Communications, LLC and Notice of Intent to Disconnect Service for Nonpayment

Claim Numbers:
0000000000106513, 0000000000124004, 0000000000128099, 0000000000131779, 0000000000142172, 0000000000153463, 0000000000108105, 0000000000110824, 0000000000108103, 0000000000109497, 0000000000112464, 0000000000124943, 0000000000132437, 0000000000142233, 0000000000108106, 0000000000160719

To Whom It May Concern:

I am counsel to Northern Valley Communications, LLC ("NVC"). On NVCs behalf, I hereby respond to the myriad dispute notifications identified above which were submitted by Synchronoss on behalf of Inteliquent.

NVC has investigated each dispute notification and, as explained more fully below, denies the disputes in their entirety. In accordance with NVC's FCC Tariff, Inteliquent's unilateral withholding of the invoiced amounts is not consistent with a "good faith" dispute notice. Accordingly, Inteliquent must promptly remit payment for all withheld amounts. If payment of the outstanding balance of $130,318.32 is not received on or before July 24, 2018, NVC will initiate disconnect processes in accordance with its deemed lawful tariff. *See* NVC's Tariff FCC No. 3, Section 3.1.6 and 3.2.3; NVC South Dakota Tariff No. 1; Local Exchange Carrier Association, Inc. Tariff No. 1, Section 2.1.8.

The disputes identified below regarding late payment charges are denied in full. These disputes are denied because the description of the dispute is factually inaccurate or missing entirely. To the extent any explanation is provided, it states that "Late Payment Charges are invalid because the invoice was paid on time **per terms of the MSA**." (emphasis added). NVC and Inteliquent do not have an "MSA" in place. Rather, their relationship is governed by tariffs on file with the Federal Communications Commission and South Dakota Public Utilities Commission. Those tariffs require payment within 30 days. Accordingly, the basis for the dispute is factually inaccurate and/or Inteliquent has provided insufficient information to understand the basis for the dispute.

Moreover, as explained below, in each instance the late fees are appropriate because Inteliquent failed to remit payment in a timely manner.

Claim # 0000000000106513 / Invoice # 20010604:
Late fees of $2,937.57 and $8.97 were charged on the October 2017 invoice for unpaid amounts incurred in July and August 2017. These amounts were not paid until October 10th, 2017, which was after the tariffed due date.

Claim # 0000000000108105 / Invoice # 20010518:
Late fees of $1119.33 were charged on the September 2017 invoice for unpaid amounts incurred in July 2017. These amounts were not paid until October 10th, 2017, which was after the tariffed due date.

Claim # 0000000000124004 / Invoice # 20010863
Late fees of $8.01 were charged on an unpaid balance of $541.39 from November 2017. NVC has responded to this unpaid balance by sending CDR's to Phil Becker in November 2017. There has been no follow up from Mr. Becker or anyone else at Inteliquent in the months since the CDRs were sent.

Claim # 0000000000128099 / Invoice # 20010950
Late fees of $8.28 were charged on an unpaid balance of $541.39 from November 2017. NVC has responded to this unpaid balance by sending CDR's to Phil Becker in November 2017. There has been no follow up from Mr. Becker or anyone else at Inteliquent in the months since the CDRs were sent.

Claim # 0000000000131779 / Invoice # 20011036
Late fees of $.11 and $7.48 were charged on an unpaid balance of $541.39 from November 2017. NVC has responded to this unpaid balance by sending CDRs to Phil Becker in November 2017. There has been no follow up from Mr. Becker or anyone else at Inteliquent in the months since the CDR were sent.

Claim # 0000000000142172 / Invoice # 20011122
Late fees of $9.48 and $.14 were charged on an unpaid balance of $541.39 from November 2017. NVC has responded to this unpaid balance by sending CDRs to Phil Becker in November 2017. There has been no follow up from Mr. Becker or anyone else at Inteliquent in the months since the CDR were sent.

Claim # 0000000000153463 / Invoice # 20011209
Late fees of $7.70 and $0.12 were charged on an unpaid balance of $541.39 from November 2017. NVC has responded to this unpaid balance by sending CDRs to Phil Becker in November 2017. There has been no follow up from Mr. Becker or anyone else at Inteliquent in the months since the CDR were sent.

Claim # 0000000000110824 / Invoice # 20010691 is also denied in full. The explanation for this dispute states that "[t]he # of minutes on the invoice is higher than the # verified by INTQ. There is a 90,232 minute variance between the invoice (551,801) and the # minutes found in Qlikview (461,569). Average rate per minute .006." NVC has reviewed its records and confirmed that the MOUs have been accurately recorded and billed. On December 13, 2017, Tanya Berndt at NVC sent a full set of CDRs to Phil Becker. Since that time no one from Inteliquent has responded to the content of the CDRs to indicate any disagreement with their accuracy. Accordingly, Inteliquent's claim has not been substantiated and is denied.

The following disputes are denied in full:

Claim # 0000000000108103 / Invoice # 20010604
Claim # 0000000000109497 / Invoice # 20010691
Claim # 0000000000112464 / Invoice # 20010777
Claim # 0000000000124943 / Invoice # 20010863
Claim # 0000000000132437 / Invoice # 20011036
Claim # 0000000000142233 / Invoice # 20011122
Claim # 0000000000108106 / Invoice # 20010518

These disputes all relate to NVC's charge for "Tandem Switching Multiplexing". The dispute descriptions state: "We are filing paid disputes for the 'Tandem Switching Multiplexing' charges as that is a tandem element and Inteliquent believes Northern Valley Communications are not the tandem provider." Inteliquent's dispute is denied because NVC provides "Tandem Switching Multiplexing" as defined by its tariff when it connects to its tandem switching provider, South Dakota Network, LLC, in Sioux Falls, South Dakota. Thus, NVC bills this element, just as it always has, pursuant to its deemed-lawful tariff. Inteliquent's assumption that a carrier must provide the tandem switching element in order to provide and bill for tandem switching multiplexing has no basis in either law or fact.

Finally, **Claim # 0000000000160719 / Invoice # 20011209** is denied in full. As part of this claim, Inteliquent has withheld payment of the invoice date May 5, 2018, in an amount totaling $71,532.28. The stated basis for this withholding is: "Inteliquent is disputing all transport and transport related charges invoiced by your company. Inteliquent unconditionally requested a direct connection and your entity refused to provide it. Among other provisions of the Telecommunications Act and applicable laws, rules and regulations, these charges are not just and reasonable under Section 201 (excessive mileage, daisy-chaining and related charges for access stimulation traffic)." Inteliquent's claim is both factually and legally defective.

First, the claim lacks legal merit. The assertion that NVC's rates are unjust and unreasonable in violation of Section 201 of the Communications Act ignores that NVC's FCC Tariff No. 3 was filed on 15-days' notice. After certain long-distance carriers asked the tariff to be suspended or rejected, the FCC reviewed their arguments and concluded that they provided no sufficient basis for finding the tariff to be unlawful, and thus the FCC allowed the tariff to receive "deemed lawful" protections in accordance with 47 U.S.C. § 204(a)(3). Moreover, the rates contained in NVC's tariff are benchmarked to the rates of CenturyLink, the lowest-price cap LEC in South Dakota, in accordance with FCC rules governing access stimulation. *See* 47 C.F.R. 61.26(g). This has also been confirmed by a United States District Court for the District of South Dakota, which concluded that NVC's deemed lawful tariff applied to access stimulation traffic. *See Northern Valley Communications, LLC v. AT&T Corp.*, 245 F.Supp.3d 1120, 1131 ("Notwithstanding AT&T's arguments to the contrary, NVC's Tariff is deemed lawful"). Since the FCC and a federal court have both expressly considered and rejected arguments regarding the lawful nature of NVC's tariff, there appears to be no foundation for Inteliquent's unsubstantiated assertion that the rates contained in the tariff are unjust and unreasonable.

The claim also is not supported by the facts. The assertion that "Inteliquent unconditionally requested a direct connection and your entity refused to provide it," appears to be a reference to a portion of the Court's order in *NVC v. AT&T* wherein Judge Lange stated that NVC "NVC does not have to provide AT&T with a direct trunk connection, may be required to accept a direct trunk connect, contingent on AT&T designing, installing, and implementing it at AT&T's cost without conditions." *Id.* at 1134 (emphasis in original). There, the Court denied AT&T's motion for summary judgment because it concluded that the "record is unclear whether AT&T offered to install a direct trunk at its own expense at NVC, or instead negotiated for or demanded that NVC do so or pay for any costs of doing so."

Here, the record is clear that Inteliquent did not make an unconditional offer to design, install, and implement a direct connect at its own expense. The record is also clear that NVC never rejected any such unconditional offer. As NVC has previously explained, when Inteliquent first attempted to engage in unlawful withholding in mid-2017 (which was just after Inteliquent began sending traffic to NVC through SDN), Jon Clopton, Inteliquent's VP Carrier Relations and Network Cost, had a phone conservation with NVC's CEO James Groft in which Mr. Clopton indicated that Inteliquent was prepared to continue withholding payment in an effort to apply financial pressure to NVC and extract a compromise rate for terminating traffic on NVC's network. Using self-help withholdings to extort a below-market rate is not an "unconditional" offer to design and install a direct connect. When NVC pointed this out to Inteliquent, Inteliquent immediately changed its position, began paying again, and denied ever having claimed that its withholding was for the purposes of exerting economic pressure. It appears that Inteliquent is once again reversing course and deciding to try its withholding scheme once again. Its decision is just as meritless and unlawful today as it was last year.

Moreover, Inteliquent expressly disclaimed interest in designing, installing, and implementing a *direct connect*. Specifically, Inteliquent stated that it "does not have its own facilities in South Dakota." Email from J. Clopton to J. Groft (Oct. 12, 2017). Inteliquent stated that it would have to obtain facilities from "a third party provider" and suggested that the provider might be "James Valley." *Id.* By acknowledging that it would be using "third party provier" facilities (including ones owned by NVC's parent company), Inteliquent necessarily acknowledged that it was not seeking a "direct connection," but rather actually sought an "*in*direct interconnection." Moreover, Inteliquent has offered no evidence that it actually had any plan to deliver its traffic, either directly or indirectly, in a manner that was different than its existing indirect interconnection through SDN, the FCC-sanctioned CEA provider in South Dakota. Under these circumstances, there was no unconditional *offer* of any type made by Inteliquent, much less an unconditional offer to design, install, and implement a direct connect, because Inteliquent never provided sufficient information for NVC to understand or evaluate the material terms of any such offer.

Despite the fact that it had, and continues to have, no legal obligation to do so, NVC nevertheless indicated that it "would otherwise be willing to discuss the terms" under which it would provide Inteliquent with an IP interconnection (which, it bears noting, would not be a "direct connect" under FCC jurisprudence). However, to engage in those conversations, in light of SDN's operating agreement and its status as the FCC-sanctioned CEA provider, NVC noted that it was necessary to gain assurance from SDN that SDN would not pursue claims against NVC for providing Inteliquent with this unregulated alternative service. NVC attempted to gain those assurances from SDN, but could not. As a result, it invited and encouraged Inteliquent to do so. To the best of our knowledge, Inteliquent made no effort to gain those assurances from SDN and, instead, abandoned all effort to obtain an alternative connection to NVC, resumed payment of NVC's tariffed access charges and continued utilizing NVC's tariffed switched access services. Having chosen to abandon its efforts to obtain an alternative connection and instead continuing to utilize those tariffed switched access services, Inteliquent must pay for the services it has already consumed.

Finally, NVC denies the dispute for one additional reason. Inteliquent is not a traditional long-distance carrier that has an obligation to deliver its customers' long-distance traffic to its intended destination. Rather, Inteliquent is in the business of providing services to other long-distance carriers on an unregulated, contractual basis. As Inteliquent describes itself on the front page of its website, "Inteliquent is a premier communications enabler focused on delivering high quality, reliable and robust voice and messaging services. The foundation of our services is our industry leading communications network, which is used by the largest wireless, cable, IXC and cloud communication service providers. Every month the Inteliquent network carries over 25 billion voice minutes and text messages." As such, Inteliquent has no federally-imposed regulatory obligation to carry traffic for other carriers, such as T-Mobile. It carriers this traffic on a voluntarily contractual basis because it sees an opportunity to make a profit. Under this scenario, it is particularly galling that Inteliquent voluntarily collects those funds from "the largest wireless, cable, IXC and cloud communication service providers," including, T-Mobile, and then turns around and refuses to pay NVC's tariffed access rates. Thus, Inteliquent's dispute is denied because the false statements Inteliquent has made as justification for withholding payment constitute attempted fraud and Inteliquent is unjustly enriching itself at the expense of NVC by accepting payment for carriers for the delivery of traffic to NVC while refusing to pay NVC's tariffed access charges.

Inteliquent has until July 24, 2018 to pay its outstanding balance in full or it will be disconnected. Please consider this notice that if Inteliquent ever files a factually inaccurate and legally baseless excuse for withholding payments from NVC in the future its connection will immediately be terminated.

Sincerely,

G. David Carter

G. David Carter

Counsel to Northern Valley Communications, LLC

Exhibit D

IXC-CEA Data Requests

Exhibit D

Data/Document Requests from IXCs

1. Produce all documents relating to access-stimulating CLEC invoices submitted to you, including all documents relating to your analysis, investigation, verification, payment, or dispute of such invoices, including, without limitation, documents sufficient to show which traffic was paid for in cases of partial payments of invoices. Include your definition of "access-stimulating" used to identify CLEC invoices.

2. Produce all documents that evidence, refer, or relate to any rate or price that the IXC has quoted and/or charged to any wholesale long distance customer in connection with delivering traffic to any access-stimulating CLEC from January 2012 to present.

3. Produce all documents that evidence, refer, or relate to any deposition, trial testimony, or written regulatory testimony that any employee or representative has given in any proceeding related to a claim by you that you did not owe access charges because a LEC was engaged in "access stimulation," "mileage pumping" or "traffic pumping", including any exhibits referenced in the testimony.

4. Produce documents sufficient to show the monthly volumes of the traffic delivered to an access-stimulating CLEC for each month from January 2011 to present. As in Question 1, provide your definition of "access-stimulating CLEC" used to identify this data. Provide the data in a manner that distinguishes between traffic originating from one of your affiliates and traffic carried by you on behalf of unaffiliated companies (*i.e.,* wholesale traffic).

5. Produce documents sufficient to show the revenue you earned from the monthly volumes of the traffic at issue that you carried as retail traffic; to the extent any such retail customers subscribed to an unlimited plan while making the calls at issue, produce documents sufficient to determine the average revenue per minute you have earned on a monthly basis from January 1, 2012 to present.

6. Produce documents sufficient to show the revenue you earned from the monthly volumes of the traffic at issue that you carried as wholesale traffic. Provide data sufficient to identify revenues paid by a wholesale customer, including the identity of the wholesale customer.

7. Produce documents sufficient to demonstrate the average monthly volume of domestic long-distance calls (in Minutes of Use) that subscribers to any unlimited long-distance plan have made from January 2012 to present.

8. Produce documents sufficient to demonstrate the total revenue you have received from any unlimited long-distance plan subscribers on a monthly basis, and the total number of subscribers of such unlimited long-distance plan for each such month, from January 2012 to present.

9. Produce any contracts or agreements between you and any CEA provider that has been in effect at any time since January 2012. Specifically with regard to AT&T, this request includes, but is not limited to, to the contract referred to in an email from Bob Hayes to Chris Burckhardt on November 12, 2014, which AT&T described as a September 14, 2014, Service Agreement with SDN for the purchase of Switched Access Transport – Terminating Service whereby AT&T purports to have obtained "High Volume Switching and Transport Service" ("HVSTS") to transport switched access traffic from AT&T's Point of Presence through SDN's network for handoff to Northern Valley in Groton, S.D.

10. Produce all invoices from a CEA provider for the provision of transport services for traffic to/from an access-stimulating CLEC.

11. Identify each type of "access-stimulation" termination fee you assert you are or been charged by CLECs in 2009, 2010, 2011 and 2016, 2017. Provide data sufficient to show the average value of each category of termination fee you assert you are or have been charged in 2010 and 2016, 2017 and 2018.

12. Produce a list of all CLECs that you are currently withholding payment from based on allegations of access stimulation, including the unpaid balance. In addition, provide the date when you first began withholding payment based on allegations of access stimulation and the identity of the CLEC from whom you withheld payment.

13. Produce documents reflecting all long-distance plans offered between 2011 and 2018 and the cost consumers were charged for those plans. To the extent the offering is a bundled offering, include documents disclosing how much of the bundled price was attributed to long-distance service.

14. Produce any documents or evidence showing that, between 2011 and 2018, access stimulation was a factor in in how you set long distance rates. In addition, provide any public filings with, but not limited to, the U.S. Securities & Exchange Commission where you identify access-stimulation as adversely impacting your business or creating business risk.

15. Provide data on your investment in broadband deployment, by year, from 2010-2018. Provide separately all funding received from agencies of the U.S. government to subsidize or otherwise underwrite the cost of broadband deployment.

16. Provide documents sufficient to show planned investment in broadband, both 4G and 5G, from 2018-2020.

17. Provide data as to the number of minutes of service you handled each year from 2010-2018 by (a) fixed wireline origination, (b) wireless origination, (c) VoIP origination, (d) fixed wireline termination, (e) wireless termination, and (f) VoIP termination.

Data/Document Requests from CEA Providers

1. Produce documents sufficient to show the revenue you earned from IXCs for switching and/or transporting traffic to access-stimulating CLECs for the period January 1, 2012 to present.

2. Produce documents sufficient to show the monthly volumes of the traffic destined for access-stimulating CLECs that you switched with your tandem switch for the period January 1, 2012 to present. To the extent that some of the traffic was billed pursuant to contract and other of it was billed pursuant to tariff, provide the data in a manner that distinguishes the volumes by carrier and identifies whether the traffic was billed pursuant to contract or tariff.

3. Produce all documents exchanged between you and any member of affiliate regarding your position on whether CLECs should accept traffic from long-distance carriers through a direct IP interconnection.

4. Produce all Operating Agreements or other governing documents that relate to the duty of members and/or affiliates with regard to the routing of traffic that have been effective at any time after January 2012.

5. Produce any contracts or agreements between you and an IXC that were executed or amended in or after January 2012 that relate to the delivery of traffic to any access-stimulating CLEC on a contractual basis.

6. Produce all invoices from sent to any IXC as a result of a contract or agreement identified in response to the previous request from September 2012 forward.

7. Produce documents sufficient to identify the points of interconnection established between you and any members or affiliates, including documents showing who chose such points of interconnection and/or how they were chosen.

8. Produce documents sufficient to show how you calculated your access rates for federal tariff filings made in or after 2012, including, but not limited to, materials sufficient to understand whether traffic volumes destined for access-stimulating CLECs were included in those calculations.

9. Produce all documents that evidence, refer, or relate to any deposition, trial testimony, or written regulatory testimony that any employee or representative has given in any proceeding related to "access stimulation," "mileage pumping" or "traffic pumping" or a CLECs' failure to route all traffic through your tandem switch, including any exhibits referenced in the testimony.

10. Produce documents in your custody, possession or control that reflect either ownership or control of any transmission capacity that would be utilized on a call traveling from your tandem switch to an access-stimulating CLEC.

11. Produce copies of all documents that evidence, refer or relate to any changes that any access-stimulating CLEC made in the manner in which interexchange traffic was carried, routed or switched after January 2012.