Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

REPLY COMMENTS OF WEST TELECOM SERVICES, LLC

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EXECUTIVE SUMMARY

West Telecom Services, LLC ("West") recommends, along with many other commenting parties, that the Commission adopt its proposed rule narrowly targeting access arbitrage by limiting the financial incentives for engaging in such arbitrage. West also recommends that the Commission take the opportunity to clarify a number of open issues that have led to protracted disputes and litigation. In particular, the Commission should expressly prohibit IXCs from engaging in "self-help" by refusing to pay for tariffed access services they have received. The Commission should also provide guidance with respect to the maximum reasonable mileage to be used in setting a transport rate. West's other recommendations include speeding filing and resolution of access stimulation complaints through expedited complaint processing procedures. The Commission should also establish guidelines and policies for traffic volume-based direct connections that are equitable and applicable to both access stimulating LECs and IXCs. Finally, West encourages the Commission to acknowledge that IXC-mandated interconnection restrictions can impose excessive and unnecessary costs on other carriers; and that requiring multiple connections, favoring some types of traffic over others, and relegating disfavored traffic to separate, more costly and less efficient connection routings is an unreasonable practice.

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West Telecom Services, LLC ("West")[1] submits these reply comments ("Reply Comments") in response to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("Commission") in the above-captioned matter.[2] West generally supports adoption of the Commission's proposed rule, which properly takes a limited, targeted approach that is narrowly focused on "eliminat[ing] financial incentives to engage in access stimulation."[3] West also recommends in these Reply Comments some clarifications and procedures that may facilitate the rule's implementation and further reduce incentives for access arbitrage while promoting equitable carrier connection practices.

[1] West Telecom Services, LLC ("West") is a wholly-owned subsidiary of West Corporation, a leading technology enablement company connecting people and businesses around the world.
[2] *In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, WC Docket No. 18-155, FCC 18-68 (rel. June 5, 2018) ("*NPRM*").
[3] *NPRM* at ¶ 3.

I. WEST SUPPORTS THE FCC'S FOCUS ON ELIMINATING BAD PRACTICES.

A. Background

In its earlier rulemaking proceeding addressing access arbitrage,[4] the Commission adopted rules[5] to limit the access charge rates assessed on interexchange carriers ("IXCs").[6] These rules addressed access arbitrage occurring when a content provider or "calling platform" located in a rural area generated substantial amounts of traffic specifically to allow an affiliated or a "partner" local exchange carrier (whether a rate-of-return rural local exchange carrier ("RLEC") or a competitive local exchange carrier ("CLEC") located in a rural area) to obtain substantially increased access charge revenues that would be shared with the content provider.[7] As indicated in the comments filed in this proceeding, those targeted rules have been successful in achieving their objective.[8]

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[4] *See Connect America Fund et al.*, WC Docket No. 10-90 et al., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 at 17904, para. 737 (2011) ("*USF/ICC Transformation Order*" or "*USF/ICC Transformation FNPRM*"), *aff'd*, *FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014).

[5] 47 C.F.R. § 61.26(g). Under the current rules, a competitive local exchange carrier ("CLEC") that has an "access revenue-sharing arrangement" is classified as an "access stimulator" if it has "an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month" or it has "more than a 100 percent growth in interstate originating and/or terminating switched access minutes of use in a month compared to the same month in the preceding year." 47 C.F.R. §§ 61.3(bbb)(1)(i) and (ii). Once classified as an "access stimulator," the CLEC will be so classified so long as it continues to have such a revenue-sharing arrangement. *NPRM* at ¶ 4. Classification as an "access stimulator" subjects the CLEC to specific limitations on its access charge rates.

[6] *See* 47 CFR §§ 61.38, 61.39, 61.26(g)(2).

[7] For purposes of this proceeding, the Commission has defined an "interexchange carrier" or "IXC" as "a telecommunications carrier that uses the exchange access or information access services of another telecommunications carrier for the provision of telecommunications." *NPRM* at Appendix A, Proposed Rule 47 C.F.R. § 51.903(m). This term includes both wireline and Commercial Mobile Radio Service ("CMRS") providers responsible for payment of access charges to local exchange carriers ("LECs"). *NPRM* at ¶ 3 n.7.

[8] *See*, *e.g.*, *Comments of Inteliquent, Inc.* ("*Inteliquent Comments*") at 1. (All comments cited in these Reply Comments are initial comments filed in this proceeding, WC Docket No.18-155, and will be cited for convenience only as the Comments of the identified filing party.)

In this docket, the Commission addresses additional types of "access arbitrage" that have continued or have developed as the previous rules took effect. In particular, the Commission now addresses situations in which the mileage used to compute transport charges is claimed to be excessive (so-called "mileage pumping")[9] and situations in which a LEC serving one or more customers that receive substantial amounts of inbound traffic requires IXCs to interconnect through an "intermediate access provider"[10] with high rates and with which the LEC has a relationship such as affiliation or a revenue sharing agreement.[11]

B. West Supports Adoption of the Proposed Rule.

West supports the Commission's proposed rule[12] as being a targeted solution that will reduce access arbitrage by focusing on "bad actors."[13] The proposed rule's self-effecting cost-

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[9] *See NPRM* at ¶ 31. *See also Comments of AT&T* ("*AT&T Comments*") at 8 - 10 (describing instances of "mileage pumping").

[10] In contrast to LECs and IXCs, for purposes of this proceeding, the Commission has proposed to define an "intermediate provider" as "any entity that carries or processes traffic at any point between the final Interexchange Carrier in a call path and the carrier providing End Office Access Service." *NPRM* at Appendix A, Proposed Rule 47.C.F.R. § 51.903(l); *see also NPRM* at ¶ 2 n.5 (applying the definition to entities "currently billing for terminating switched access service"). The NPRM noted that such intermediate providers are not themselves within the definition of "access stimulators" and thus are not directly covered by the current access stimulation rules. *NPRM at* ¶ 6. In the *NPRM*, the Commission defined access stimulation as occurring "when a local exchange carrier (LEC) with relatively-high switched access rates enters into an arrangement to terminate calls—often in a remote area—for an entity with a high call volume operation, such as a chat line, adult entertainment calls, and 'free' conference calls, collectively high call volume services." *NPRM* at ¶ 2.

[11] NTCA and other industry participants support an "industry proposal" that shifts financial responsibility to providers engaged in access stimulation. This proposal lacks the provision that allows the LEC interconnection options, but NTCA also sees merit in the direct connection proposal. *Comments of NTCA – The Rural Broadband Association* ("*NCTA Comments*") at 2 - 3. ITTA prefers the industry proposal because, in ITTA's view, the Commission's two-pronged proposal would have loopholes. *Comments of ITTA – The Voice of America's Broadband Providers* ("*ITTA Comments*") at 1, 3.

[12] Under the Commission's proposal, "First, an access-stimulating LEC can choose to be financially responsible for calls delivered to its network so it, rather than IXCs, pays for the delivery of calls to its end office or the functional equivalent. Or, second, instead of accepting this financial responsibility, an access-stimulating LEC can choose to accept direct connections

shifting requirement is narrowly tailored to avoid an overbroad approach that may have unintended consequences, such as adversely affecting the rates of call completion in rural areas. Both in the Commission's access stimulation dockets and in its rural call completion proceedings,[14] focusing on "bad practices" has been effective in curtailing abuses that threaten effective and efficient call completion in rural areas.

As with its adoption of the current access stimulation rules,[15] the Commission appropriately has not attempted to limit services offered to the public or to prohibit revenue-sharing.[16] Rather, the Commission has proposed interconnection cost-shifting rules that would cause access-stimulating LECs to bear a larger share of interconnection costs and thus minimize their financial incentives to enter into business arrangements primarily to artificially inflate access charge revenues.

As the Commission's proposal implicitly acknowledges, revenue sharing per se is not the concern. The Commission's focus is properly on abusive practices that make sharing of excessively high access charges the provider's goal, rather than efficient, effective call

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either from the IXC or an intermediate access provider of the IXC's choice, allowing IXCs to bypass intermediate access providers selected by the access-stimulating LEC." *NPRM* at ¶ 3; *see NPRM* at ¶¶ 9, 13; *see also* Proposed Rule 47 C.F.R. § 51.914, *NPRM* at Appendix A.

[13] *See NTCA Comments* at 2 - 3 (supporting the FCC proposal and the industry proposal).

[14] *See WC Docket No. 13-39*.

[15] *See USF Transformation Order*, *supra* note 4, at ¶ 672 ("As proposed in the *USF/ICC Transformation NPRM*, we do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act.") (citations omitted).

[16] Probably all carriers, large and small, engage in some form of revenue sharing, even if the revenue sharing takes the form of discounts on other services, including unregulated services that smaller providers do not offer.

completion that reasonably compensates all parties in the call path for their respective call path activities.[17] The FCC's proposed rule appropriately targets these abusive practices.

II. THE COMMISSION SHOULD TAKE THE OPPORTUNITY TO CLARIFY PERSISTENT IMPLEMENTATION ISSUES.

As other commenting parties have recommended, the Commission should take the opportunity in this proceeding to clarify the Commission's position on several important issues that have led to substantial disputes and litigation with respect to access charges.[18] Unambiguous statements by the Commission here and now would serve the public interest in minimizing litigation and conserving both governmental and service provider resources.

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[17] It should be remembered that access charges were established as a top-down proxy for revenue requirements when the Commission revamped the intercarrier compensation system. *See*, *e.g.*, Order, *Local Exchange Carrier Switched Local Transport Restructure Tariffs*, DA 93-1579 (Acting Chief, Common Carrier Bureau Dec. 29, 1993). ("*LTR Tariffs Order*") at ¶ 2. *See also Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 91-213, 7 FCC Red 7006 (1992); *First Memorandum Opinion and Order on Reconsideration*, 8 FCC Red 5370 (1993); *Second Memorandum Opinion and Order on Reconsideration*, 8 FCC Red 6233 (1993) (collectively, " *Transport Orders*"). Thus, in establishing varying glide paths to an eventual bill-and-keep framework, the Commission recognized that rural LECs ("RLECs") would need more time to move to that approach. A flash-cut to the "default" bill-and-keep framework in this limited docket is neither necessary to remediate the identified practices employed by "bad actors" in the access arbitrage context, nor appropriate in light of the lack of evidence in the record to demonstrate that the Commission's glide path decisions in the *Connect America* proceeding should be re-visited here and now. *Cf. NTCA Comments* at 9 ("The Commission should therefore defer transitioning access-stimulating LECs to bill-and-keep until it has had a chance to consider this and other issues in the context of broader ICC reform."). Even large carriers supporting a flash cut to bill-and-keep as the best means of reducing access arbitrage provide no evidence to support the overall merits of a flash cut to bill-and-keep over those of the current Commission transition glide path. *See Comments of Sprint Corporation* at 1; *Comments of Verizon* ("*Verizon Comments")* at 3; *AT&T Comments* at 9. As the Commission has previously recognized the bill-and-keep framework is not a solution to all problems. *See*, *e.g.*, *USF Transformation Order*, *supra* note 4, at ¶ 747 ("To the extent carriers in costly-to-serve areas are unable to recover their costs from their end users while maintaining service and rates that are reasonably comparable to those in urban areas, universal service support, rather than intercarrier compensation should make up the difference."). While large carriers may be able to cross-subsidize costs that are moved to a bill-and-keep compensation system, small LECs are unlikely to have the same flexibility.

[18] *See Comments of Wide Voice LLC* ("*Wide Voice Comments*") at 2; *AT&T Comments* at 21 – 23.

A. The FCC Should Unambiguously Prohibit IXC "Self-Help."

Participating carriers and the public will all benefit by the avoidance of protracted disputes lasting for years.[19] To address this serious problem, the Commission should first expressly prohibit IXCs from attempting to exercise "self-help" by refusing to pay charges assessed under legal tariffs.[20] Under the "filed rate doctrine," access rate tariffs filed in accordance with legal requirements and that have taken effect are the only rates that may be charged to IXCs, absent individually negotiated commercial arrangements.[21] As the court in the recent *Peerless* decision recognized, this doctrine, among other things, "protects public utilities and other regulated entities from civil actions attacking rates that are subject to federal agency approval and disapproval, prevents courts from becoming 'enmeshed in rate-making,' and preserves 'the agency's primary jurisdiction over reasonableness of rates.'"[22] There is no exception to the doctrine that allows IXCs the option of engaging in "self-help" outside the Commission's established procedures for challenging rates a customer believes to be set at

[19] In *Peerless II*, among other reasons for awarding damages to the LEC while counter-claims are stayed, the court noted that Verizon had withheld payment to Peerless for over six years without challenging the tariffs before the FCC or in court. *Peerless Network, Inc. v. MCI Communications Services, Inc.,* No. 14 C 7417, Memorandum Opinion and Order, 2018 WL 3608559 (N.D.Ill. Jul. 29, 2018) (decision awarding damages) ("*Peerless II*") at 11.

[20] Many carriers (particularly CLECs) participating in this docket objected to IXC self-help activities. See *Teliax, Inc. Comments* at 3 - 4, 16 - 18; *Wide Voice Comments* at 2, 6; *Comments of Peerless Network, Inc. and Affinity Network, Inc. d/b/a ANI Networks* ("*Peerless Comments*") at 4; *Comments of HD Tandem* ("*HD Tandem Comments*") at 9, 16, 17. *Comments of Competitive Local Exchange Carriers Comments* at 24, 29, 59. *See also Peerless Network, Inc. v. MCI Communications Services, Inc.,* No. 14 C 7417, Memorandum Opinion and Order, 2018 WL 1378347 (N.D.Ill. Mar. 16, 2018) (decision on cross-motions for summary judgment) ("*Peerless I*") at 35 (discussing Verizon use of self-help).

[21] *See*, *e.g.*, *Peerless I*, *supra* note 20, at 5.

[22] *Peerless I*, *supra* note 20, at 36 (citations omitted). Certain issues raised in the Peerless/Verizon litigation in the U.S. District Court remain outstanding while a primary jurisdiction referral to the Commission is pending.

unlawful levels. An IXC challenging a tariff that has taken effect must pay the tariffed charges first, and then it may file a complaint seeking a refund.[23]

It is apparently not enough, however, that the Commission has "cautioned" IXCs about their payment obligations.[24] In the absence of an unambiguous prohibition, IXCs, which generally have substantial market power, have continued to employ unauthorized "self-help" in the form of non-payment. IXCs are not without material remedies. They may challenge tariffs when they are filed, or they may file complaints of excessive rates with the Commission. An IXC receiving services under a legal tariff is not, however, entitled unilaterally to declare a service provider to be an access stimulator and then refuse to pay tariffed rates, and it is now time for the Commission to expressly prohibit such self-help.

Significantly, the Commission's proposed rule addressing access arbitrage requires a local exchange carrier that meets the definition of an "access stimulator" to self-identify as such and notify relevant IXCs of the connection option it is electing.[25] The Commission is not looking to the IXCs to make that determination for themselves. IXCs may file complaints with the Commission if they believe a LEC has failed to appropriately make this self-identification.[26]

To speed resolution of disputes in which an IXC believes access charges are excessive under the rule, but for which there has been no self-identification by the LEC, the Commission could implement a simplified, expedited enforcement mechanism that may lead to rapid resolution of those disputes that turn on whether access stimulation is in fact occurring. For

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[23] *USF Transformation Order*, *supra* note 4, 26 FCC Rcd. 17663 (2011), at ¶ 659.
[24] *See id*. at ¶ 700.
[25] *NPRM* at ¶ 18.
[26] Under the Commission's existing procedures governing such complaints, an IXC may shift the burden of proof as to whether a LEC is engaging in access stimulation by demonstrating in the IXC's filing that the IXC's own traffic records indicate that the LEC's interstate terminating-to-originating traffic ratio is greater than 3:1. *See USF Transformation Order*, *supra* note 4, 26 FCC Rcd. 17663, ¶ 659.

example, the FCC could simplify the complaint process by developing special complaint forms that would elicit the specific information necessary for the Commission's preliminary determination that the rule may be applicable to a particular LEC. If an IXC presents information demonstrating that its own ratio of traffic with a LEC meets the standard required to shift the burden of proof to the LEC,[27] the Commission could then send a simple response form to the LEC, requiring it either to acknowledge that it is engaged in access stimulation and issue new tariffs and appropriate bill adjustments by a specified date, or to provide the necessary complete traffic information to rebut the IXC data. Burdens to both IXCs and accused LECs would be minimized through such an approach, both would receive due process, and the Commission and the courts would be much less likely to later have to commit substantial resources in a litigation environment, thereby furthering the public interest.

B. The Commission Should Provide Guidance on a Maximum Reasonable Mileage to be Used in Setting Transport Charges.

The Commission can further reduce protracted access tariff disputes by unambiguously resolving some of the other open issues that recur in many of these extended disputes.[28] When there is clear guidance on appropriate methodologies for setting tariff rates, any disputes about the lawfulness of tariffed rates may be readily resolved with a limited focus on rate calculations, not on what approach should be taken in making the calculations.[29]

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[27] *See USF Transformation Order*, *supra* note 4, 26 FCC Rcd. 17663, ¶ 659.

[28] Some of these issues are now before the Commission. *See*, *e.g., Verizon Petition for Declaratory Ruling Regarding Two-Stage Traffic,* WC Docket No. 18-221 (filed Jun. 15, 2018).

[29] Thus, in the Peerless/Verizon dispute, once the court had resolved several key issues in *Peerless I*, the parties were able to agree on the calculation of potential damages, subject to additional court resolution of outstanding issues involving the applicability of the statute of limitations and the appropriateness of an award of compound interest. *See Peerless II*, *supra* note 20, at 1.

For example, to the extent that the Commission addresses transport rates in this proceeding, the Commission should provide guidance on a maximum reasonable mileage to be used in setting a transport rate. A common IXC complaint is that LECs are basing transport charges on excessive transport mileage, or "mileage pumping."[30]

Some commenting parties have advocated that the Commission set a cap such as ten miles on the mileage used to calculate transport charges.[31] West is supportive of such an approach; however, West believes that the number of miles used as a cap should be determined by the Commission through the use of empirical data that justify the reasonableness of such a cap. If such empirical data show ten miles as an appropriate cap, then the Commission should use ten miles. Otherwise, the Commission should use whatever number of miles that the Commission's calculations reflect as reasonable and supportable for such a cap.

This will also promote rapid resolution of disputes should they arise. To minimize the likelihood of prolonged disputes or protracted litigation on this point, however, it is critical that the Commission provide clear, unambiguous guidance that is based on record evidence and the Commission's expert analysis of that evidence.[32] If the Commission so acts, it will have taken another significant step toward minimizing access charge disputes.

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[30] *AT&T Comments* at 8 – 9; Comments of *T-Mobile USA, Inc.* at 9.

[31] *Inteliquent Comments* at 2. Inteliquent also recommends limiting tandem terminations to 2. *Id.* at 7.

[32] *See*, *e.g.*, *Global Star, Inc. v. FCC*, 564 F.3d 476, 480 (D.C. Cir. 2009) (agency decision a product of reasoned decision making that satisfies narrow scope of review under arbitrary and capricious standard); *Nat'l Tel, Co-op. Ass'n v. FCC.*, 563 F.3d 536, 540 (D.C. Cir. 2009) (judicial review under arbitrary and capricious standard requires assessment of whether agency decision was based on consideration of relevant factors).

C. FCC Guidelines Will Facilitate Equitable Direct Connection Arrangements.

The Commission can also provide clarification that would be helpful in connection with other issues raised in this proceeding. The NPRM recognizes the cost savings that may result from establishment of traffic-justified direct connections,[33] but some carriers have expressed concern about "stranded investment" if they participate in direct connections.[34] Others have complained that IXCs (which, under the Commission's proposed rule, would be able to elect to connect to "access stimulators" via direct connections or use of an intermediate provider of the IXC's choice) do not make good faith direct connection offers but exert their market power to force LECs to interconnect through an intermediate the IXC favors for some reason.[35] Here too, clear-cut Commission standards for equitable direct connections can minimize disputes.

The Commission can clarify its rule to place conditions on direct connections offered by LECs engaged in access stimulation. For example, the Commission could specify a minimum period for retention of such connections, with stranded investment issues precluded by requiring the LEC to pay additional costs incurred if it relocates an interconnection point, as in the case of relocation of a "calling platform." In other proceedings, West has recommended adoption of a 4 T-1 standard to be applied in cases where a service provider seeks direct interconnection with a rural local exchange carrier and state commissions must adjudicate the reasonableness of the request.[36] The Commission could also establish in this docket traffic-based standards for

[33] *NPRM* at ¶ 13.
[34] *HD Tandem Comments* at 5.
[35] *See Wide Voice Comments* at 3 - 4; Comments of *01 Communications, Inc.* at 5.
[36] *See*, *e.g.*, *Reply Comments of West Telecom Services, LLC in Response to Third Further Notice of Proposed Rulemaking*, WC Docket No. 13-39 et al. (filed Jun. 19, 2018) at 8 n.32.

requiring direct connections if the connecting carrier desires them,[37] as well as for the reasonableness of proposed interconnection points and cost-sharing.

Again, a clear statement by the Commission of activities that it thinks constitute unreasonable practices, and establishment of objective standards for direct connections, would pre-empt many of the concerns raised in this docket and facilitate efficient carrier interconnection. The Commission would not be embroiled in micromanagement of carrier interconnections if it made its expectations known from the start. Especially as the Commission is moving the regulatory environment toward bill-and-keep, and the industry is increasingly transitioning to an IP interconnection technical environment, the Commission should ensure that carriers and their customers are not subjected to unnecessary facilities investments and avoidable excessive costs.

III. IXC TERMINATION REQUIREMENTS BASED ON ERRONEOUS TRAFFIC DISTINCTIONS MAY MIRROR LEC ACCESS ARBITRAGE PRACTICES AND ALSO INHIBIT EFFICIENT CALL COMPLETION.

The Commission is proposing rules to further limit the financial incentives of rural LECs to engage in access arbitrage because such arbitrage imposes excessive costs on connecting carriers. Similarly, it should consider adopting rules that would discourage IXC practices

[37] The Commission recognized the logical nature of direct connects when justified by the volume of traffic being exchange, in the late 1980s and early 1990s, when it implemented Local Transport Restructure ("LTR") in the switched access regulatory environment. *See LTR Tariffs Order*; *see also Transport Orders*. *Cf. Wide Voice Comments* at 9, 3 (advocating direct connects for high-volume application traffic on reciprocal terms). *See also HD Tandem Comments* at 2, 11 (supporting negotiation of direct connections in accordance with an FCC-designed framework); *HD Tandem Comments* at 6 (complaining that its requests for direct connectivity with reciprocity have been refused); *Verizon Comments* at 6 (describing LEC direct connect refusals). AT&T has a direct connect proposal of its own to offer. *AT&T Comments* at 21 – 22. NTCA recommends that direct connection proposals, if adopted, require LECs electing direct interconnection "should be required to accept direct connections at current points of interconnection with intermediate access providers, as well as at the LECs' end office," *NTCA Comments* at 4, but that requiring all LECs to agree to direct connects is premature. *Id*. at 9.

whereby an IXC arbitrarily disfavors particular types of calls at will and unreasonably requires a connecting intermediate provider or LEC to bear the cost of multiple termination routes.[38] Such practices rely on the IXC's market power as the sole gateway to its subscribers to permit a "direct" connect route for one arbitrarily-designated class of traffic while mandating use of a designated intermediate provider's tandem – which may have atypically high costs (or even increased costs) for another category of traffic.

Such practices closely resemble those practices, described in the Rural Call Completion proceedings, whereby a LEC rejects attempts to complete calls other than through its preferred intermediate provider.[39] Like those bad practices, the IXC traffic practices impose excessive costs on connecting carriers with disfavored traffic.[40] As in other situations where direct connections may be desired by a connecting carrier, an objective traffic volume-based standard should be imposed, and connecting carriers should not be required to establish an indirect connection route selected by the IXC when a direct connection route already exists or is traffic-justified, or when alternative competing indirect routings are available. As in the case of the cost-shifting rule for LECs engaged in access arbitrage, if the IXC desires to impose a routing on the interconnecting carrier, it must be made responsible for the resulting excessive costs.[41]

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[38] *Cf. NPRM* at ¶ 27 (querying whether "access stimulation itself is unjust and unreasonable because of the imposition of excess charges on IXCs, wireless carriers, and their customers"). *See NPRM* at ¶ 30 (reporting carrier complaints).

[39] *See Inteliquent Comments* at 1 – 2, 1 n.2 (describing this as an additional form of arbitrage but distinguishing its own access homing tandem service as not involving access stimulation and recommending adoption of a rule that "covered providers are not responsible for route advancing traffic that is illegally blocked by another party on the regulated path"). *See also Peerless Comments* at 5.

[40] *See ITTA Comments at 6* (urging the Commission to apply the CenturyLink proposal to CMRS providers).

[41] *Cf. NPRM* at ¶ 33 and n. 52 (soliciting comment on a CenturyLink proposal to shift costs to LECs declining to accept direct connections).

In one situation complained of by some commenting parties, so-called "retail" traffic (which may be limited to real-time communications between two parties) is favored with the opportunity for direct connections. Other traffic—so-called "wholesale" traffic (which may include both automated common messages sent to multiple parties and individual messages sent to unique parties through a computer application)—on the other hand is limited to high-cost, and perhaps time-delayed, indirect routings determined by the sole fiat of the IXC.

Such disparate treatment of traffic cannot be justified as intended to protect the IXC's subscribers, because it is both over-inclusive and under-inclusive. The dual routing approach does not prevent calls subscribers may not want to receive from being delivered, but it disfavors and may delay many communications IXC customers very much want to receive.

Many, if not most, consumers are not even clear about the meaning of the term "robocalling," or the distinction between illicit robocalls and the numerous examples of legitimate and desired automatically-initiated calls. They may have little understanding of how these systems are used both legitimately and fraudulently to initiate calls, but the dual routing requirements of some IXCs do little to assist consumers. Imposing on them a common "wholesale" label and uniquely routing all such calls hardly distinguishes illicit communications from the many types of automated messages that called parties very much want to receive.[42]

[42] Highly desired automated calls include, for example, public safety and other governmental alerts sent to multiple recipients, as in the case of notifications from utilities of power outages and safety alerts from public water authorities. They also include notices of emergency weather conditions and unexpected school closings. Other automated calls are sent to individual recipients such as notices of upcoming medical appointments from doctors and hospitals, reminders of the need to refill prescriptions sent by pharmacists, and alerts from financial institutions of transactions or low balances. Similarly, while often "Caller ID spoofing" traffic may be unauthorized and utilized for fraudulent calling, at other times spoofing is legitimate and, as recognized in the Commission's rules, may promote public safety by allowing a resident of a battered women's shelter to make essential calls without revealing her identity or location to someone in a position to cause the caller grave harm.

Hindering timely and cost-efficient delivery of such calls by relegating them to a second-class (but more expensive) traffic delivery route does not protect and may in fact endanger consumers, and it also does nothing to weed out illicit traffic such as calls from scammers.

Better, focused tools exist for consumer protection than simultaneously over-broad and under-inclusive traffic routing mandates. Moreover, rather than promoting consumer protection, it may well be that such forced dual-routing approaches are designed to implement forced revenue sharing. The IXC or its intermediate partner, without providing any special services, or incurring the costs of marketing and promoting these useful automated message delivery services, may impose a "turnpike" toll on the services for its own benefit. This prevents the carrier providing the services from reasonably minimizing its costs through direct connections their traffic levels clearly warrant. To the extent a mandated indirect routing is congested, the IXC practice may also delay completion of important communications.

In a proceeding focused on alleviating excessive access charge payments to "access stimulators," and recommending that the originating provider have the ability to select the intermediate provider, the Commission should recognize the appropriateness of also imposing a similar rule discouraging IXC practices that artificially inflate the costs of other providers in a manner largely indistinguishable from that proscribed by the Commission's proposed rules in this docket. Such unnecessary requirements may also be expressly identified as unacceptable practices, as is, in the context of the rural call completion rules, unacceptable blocking of calls not routed through a preferred intermediate carrier. As in the case of access arbitrage, traffic volume–based objective standards for establishment of direct connections, and shifting increased costs to the provider insisting on them, may be effective means of minimizing incentives for IXCs to implement such practices.

IV. CONCLUSION

For the reasons described above, the Commission should adopt its proposed rule intended to further reduce access arbitrage. Additionally, the Commission should clarify its tariffing and interconnection policies as recommended by West to facilitate implementation of the new rule and promote equitable interconnection practices.

Respectfully submitted,

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