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	)	

REPLY COMMENTS OF COMPETITIVE LOCAL EXCHANGE CARRIERS

INNOVISTA LAW PLLC
G. David Carter
John C. Nelson, Jr.
Ernesto Mendieta
1825 K Street, NW
Suite 508
Washington, DC 20006
(202) 869-1502
(202) 869-1503 (fax)
david.carter@innovistalaw.com
john.nelson@innovistalaw.com
ernesto.mendieta@innovistalaw.com

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SUMMARY

In their initial comments to the Commission, the Competitive Local Exchange Carriers ("CLECs") named herein demonstrated that the available record establishes that certain of the IXCs demanding the reforms proposed by the Commission may well have misled the agency, and, in all events, are relying on anecdotes, hypothesis, and hysteria, rather than current data and evidence to support their positions. The IXCs had the opportunity to correct this major error in their own comments to the Commission by providing evidence supporting their claims. However, a review of the IXCs' comments show more of the same: unsupported and hyperbolic allegations of harm and negative consequences with *no* truthful, reliable, post-2011 data or evidence to support them.

The problem with both the Commission's proposed rules and the IXCs' comments do not end with the lack of evidence. Indeed, as the CLECs (and even the IXCs) also demonstrated, various terms used in the Commission's proposed rules, including the terms "financial responsibility," "intermediate access provider," and "direct connection," are vague and confusing as written. Moreover, the Commission's proposals are not desired by the very carriers that came to the agency asking for relief. Many of the IXCs are dismissive of the value behind the "direct connection" proposal, despite previously claiming that the absence of direct connections required the Commission to implement further reforms (hence why the CLECs believe the Commission has been misled). Accordingly, the Commission should not adopt either proposal at this time.

The Commission should also take a hard look at the new proposals contained in the comments of IXCs like AT&T, and it should reject these as well. The economic theory the Commission relied upon to adopt the 2011 *Connect America Fund Order* makes clear that, even under a bill-and-keep regime, when an IXC uses the LEC's facilities to transport traffic between

the IXC's POP and the LEC's central office, the IXC should *always* have to pay for that service. Today, AT&T and others would like to flip the script and force those costs onto rural CLECs, providing the IXCs with further windfalls by requiring LECs to pay for transport between the IXC POP and the LEC central office. As demonstrated below, the Commission has already reached the end state envisioned for a terminating access bill-and-keep regime; it should go no further.

Finally, as the Commission recognized via its recently released INS Tariff Order, what is really at issue with respect to the access stimulation marketplace is the appropriate intersection between access-stimulating LECs and the rates charged by FCC-sanctioned CEA providers. The Commission largely resolved this issue earlier this week via its INS Tariff Order, which provided IXCs with even more savings relating to their access stimulation traffic. Accordingly, the Commission should not proceed any further with its access stimulation reforms and should close this docket or, at the very least, should carefully review current data and evidence before engaging in additional access stimulation policymaking.

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These reply 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*. The CLECs included are BTC, Inc. d/b/a Western Iowa Networks, Goldfield Access Network, Great Lakes Communication Corporation, Northern Valley Communications, LLC, and Louisa Communications.

As set out below, there is a lack of evidence to support adoption of the proposed reforms. There is no evidence that the IXCs have passed any of the savings generated by the 2011 reforms to consumers or that any additional savings that may result from further rule changes would be at all material to the rates long-distance carriers charge their consumers. Indeed, even if all of the costs of associated with access stimulation were passed directly to consumers, it would result in a fraction of a penny per month/per consumer.

Moreover, there is no evidence that access stimulation has become more widespread following the 2011 reforms, nor is there evidence of consumer harm as a result of access stimulation. However, there is substantial evidence that the CLECs engaged in access stimulation have made significant investments in broadband deployment. The IXCs have invented a "mileage pumping" argument that does not recognize that these CLECs are located in communities they have historically served and have not inflated their charges to evade the *Connect America Fund Order*.

Finally, as evidenced by their comments, the IXCs simply cried wolf when they claimed they were being denied direct connections by access stimulating CLECs. Now that the Commission has offered to grant them the right to a true direct connection, the IXCs have run from it like a "scalded dog," finally acknowledging that they had no intention or desire to incur the costs of installing direct connections in rural Iowa or South Dakota. Based on this history and this record, the most prudent course of action for the Commission is to simply close this docket.

I. MULTIPLE COMMENTERS CONFIRM THE LACK OF EVIDENCE NECESSARY TO JUSTIFY THE PROPOSED RULES

In their initial comments to the Commission, the CLECs demonstrated that the available evidence suggests that the IXCs demanding these reforms are misleading the Commission and relying on anecdotes, hypothesis, and hysteria, rather than evidence. Indeed, the comments submitted in this proceeding confirm that there is not enough evidence to justify implementing the Commission's proposed rules. The comments submitted by the IXCs are either entirely unsupported or premised solely on the conclusions in the Commission's 2011 *Connect America Fund Order*. However, those conclusions have not been reexamined using current data or evidence. This stale data cannot support the proposed reforms, and, without fresh data, the Commission does not have enough evidence to justify its conclusions.

For these reasons, the CLECs urge the Commission to refrain from adopting any of the reforms discussed in the Access Stimulation NPRM unless and until the Commission is able to fully understand the current access stimulation market and support its conclusions with truthful, reliable, post-2011 data and evidence. Consequently, the CLECs request that the Commission require the IXCs to open their books and provide the relevant data to the Commission and other commenters so that the Commission can make a fully-informed decision, rather than one relying on anecdotes and name-calling.

A. Other Commenters also Believe that the Available Evidence Shows That the IXCs are Not Passing on Their Post-2011 Savings to Consumers

As the CLECs observed in their initial comments,[1] and as confirmed in their accompanying expert report,[2] the available record evidence fails to establish that IXCs are passing along any of their savings from reduced access charges to consumers. There is also no evidence from which one could reasonably infer that further reforms or reductions in access charges would lead to a different result. The CLECs were not alone in making this argument. For example, Teliax also found the lack of evidence presented by the Commission concerning, noting that "[t]he Commission does not appear to have data demonstrating whether and by how much IXC savings from access reform (such as zeroing-out terminating end office access) has been actually passed through to customers."[3]

The evidence now demonstrates that any savings that may be generated by this proceeding are so minuscule that the proposed rule modifications can have no direct impact on the prices charged to consumers. AT&T asserts – without support – that "the industry and consumers continue to be burdened by wasteful schemes totaling 8.2 billion minutes-of-use annually, with a resulting cost of almost $80 million annually."[4] Assuming *arguendo* that AT&T's unsubstantiated estimate is otherwise accurate, it appears likely that AT&T has ignored

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1 *See* Comments of Competitive Local Exchange Carriers, at 6-13, WC Docket No. 18-155 (July 20, 2018) (CLEC Comments).

2 *See* 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").

3 Comments of Teliax, Inc., at 17, WC Docket No. 18-155 (July 20, 2018) (Teliax Comments).

4 Comments of AT&T, at 10, WC Docket No. 18-155 (July 20, 2018) (AT&T Comments).

its own self-help withholding. Using the conservative estimate that the CLECs relied on in their opening comments, if AT&T engaged in self-help withholding with regard to 75 percent of its access stimulation traffic bills, then AT&T's estimate should be reduced by $21.84 million.[5] Moreover, the Commission's decision this week clarifying the upper bounds of what INS will be able to tariff for their rate results in additional IXC savings of approximately $5.1 million.[6] Thus, the industry-wide access-stimulation-related expenses are likely $53 million per year.[7]

According to FCC data, the total number of wireline and wireless subscribers at the end of 2016 was 462,683,000.[8] This means that, if **all** of the savings that could be generated by this proceeding were passed on directly to consumers, it would produce less than a penny per month for consumers on their monthly long-distance bills. But, as noted above, the evidence strongly suggests that **none** of those savings are being enjoyed by consumers; instead, the seven years' worth of savings that the Commission has given IXCs since 2011 are instead being pocketed by the long-distance carriers.

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5 Yesterday the Commission released its Order on Reconsideration in *AT&T Corp. v. Iowa Network Services, Inc.*, Case No. EB-17-MD-001, FCC 18-116. In that Order, the Commission acknowledged "AT&T had paid . . . less than a quarter of the billed amount." *See id* at n.7.

6 *In re: Iowa Network Access Division Tariff F.C.C. No. 1*, Memorandum Opinion and Order, WC Docket No. 18-60, FCC 18-105, ¶ 2 (July 31, 2018) (hereinafter "INS Tariff Order") (assuming that other CEA providers will also implement an average rate reduction of $0.002556/mou and that traffic volumes remain at approximately 2 billion minutes per year – the estimate the Commission relied upon in 2011 - produces a savings of over $5.1 million)

7 In their opening comments, the CLECs estimated that Verizon and AT&T, combined, probably paid no more than $37 million in access-stimulation related charges and represented a combined 64.4% of the industry. *See* CLEC Comments at 28. Extrapolating from this estimate, the total cost for the industry as a whole would be approximately $57.4 million. Reducing this estimate to account for the savings resulting from the INS Tariff Order yields an estimate of $52.3 million. Thus, both methodologies produce a nearly identical result.

8 *See generally Voice Telephone Services: Status as of December 31, 2016,* 2018 WL 802379 (F.C.C.). According to the FCC, in December 2016 there were 341,352,000 mobile line and 121,331,000 wireline end user switched access lines and interconnected VoIP subscriptions. If this number is used as a rough estimate for the total number of wireless and wireline subscribers, the total number of subscribers is, approximately, 462,683,000. Verizon serves 27.9 percent of this subscriber number, while AT&T serves 36.4 percent.

Given the minimal effect access stimulation has on the financial well-being of IXCs and the rates they charge their long-distance subscribers, the Commission should be wondering what all the fuss is actually about. Are we really fighting about less than a penny per month? As the BRG report pointed out:

> An article by Pearce and Barrett claimed, in 2010, that the regulatory dispute raised by integrated IXC/conference call companies was that they did not like the competition from entrants using a different business model because the entry resulted in lower conference-call rates and lower margins for incumbents. According to those authors:
>
> > *The IXCs' position as to the profitability of calls made to free conference calling services necessarily implies that there is another motive behind the IXCs' attacks on free conference calling services. This report searches for and uncovers the IXCs' hidden motive, which stems from the fact that many IXCs have had to reduce the price of their own conference calling services and have had to develop and introduce new services in response to new entrants in the market. Generally, this is exactly how the competitive market should work; new entrants launch new, more innovative services in what has been an entrenched market dominated by a few large companies, thereby spurring competition and driving down prices.*[9]

The Commission should not proceed with its proposed reforms unless and until it has a full and complete record that confirms there will be actual "benefits" that the IXCs will pass on to their customers as a result of the Commission's reforms. Indeed, if the Commission does not take this approach, it would be cutting off resources to the few rural CLECs that have been able to expand access in underserved and unserved markets, further exacerbating the digital divide. Moreover, the proposed reforms will simply increase the margins of the IXCs at the expense of the CLEC's with no guarantee that these major carriers would actually pass on the savings to their customers or to improve the nation's rural telecommunications infrastructure.

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[9] BRG Report at 20 (citing to Alan Pearce & W. Brian Barrett, *The Economic Impact of Free Conference Calling Services*, 19 MEDIA L. & POL'Y, 202, 207-08 (2010)).

B. No Commenters Have Presented Evidence Proving that Access Stimulation Has Harmed Consumers

While the Commission claimed in the Access Stimulation NPRM that it "has long recognized that arbitrage opportunities in the intercarrier compensation (ICC) system harm consumers,"[10] the CLECs noted that the agency failed to provide support for how this assertion is true after the FCC's 2011 reforms and its 2016 conclusion that access providers no longer had market power. As the CLECs made clear in their comments, the Commission has apparently undertaken *no analysis* to determine whether, and to what extent, its "comprehensive intercarrier compensation reform"[11] altered or changed any of the data supporting its 2011 conclusions. And the initial comments submitted by other carriers provide no further evidence to support the Commission's allegations.

A review of the record and initial comments reveals not a single instance in which *any* IXC has provided evidence to back up its allegations of consumer harm. For example, in AT&T's comments, it claimed that "by artificially inflating the cost of service, these [access stimulation] schemes ultimately hit the pocketbooks of ordinary consumers."[12] Yet, AT&T's support for this allegation is not based on current evidence, but rather in the 2011 *Connect America Fund Order*.[13] Similarly, Verizon asserted that, despite the Commission's efforts, arbitrage schemes still persist and "harm consumers, undermine broadband deployment, and

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10 *In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, ¶ 1 (June 5, 2018) (Access Stimulation NPRM).

11 *See generally In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 F.C.C. Rcd. 17663, Section XII (2011) (*Connect America Fund Order*).

12 AT&T Comments at 2.

13 *See Id.* at 2 n.3 and accompanying text.

distort competition."[14] Like AT&T, Verizon's allegation is not premised on actual evidence, but rather on a citation to the Access Stimulation NPRM itself.[15]

Consequently, without new, current evidence, the Commission's (and IXCs') entire basis for concluding that consumers are "harmed" by access stimulation continues to be nothing more than baseless fearmongering, unverified hyperbole and self-serving statements. And this means that The Commission should ignore these comments and instead embrace the reality that the NPRM's proposal would harm small, rural carriers and rural consumers by eliminating competition and undermining the financial viability of a key sector of America's telecommunications landscape.[16]

C. No Commenters Have Presented Evidence Proving that IXCs Are Harmed by Paying Access Charges at the Rates Established by the Commission's 2011 *Order*

IXCs continue to represent that they are "harmed by excessive transport mileage and high usage-based rates associated with access-stimulating LECs and their intermediary tandem providers."[17] But, again, their statements (along with those made by the Commission) are drawn entirely from conclusions reached in the 2011 *Connect America Fund Order* and do not

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14 Comments of Verizon Communications, Inc., at 2, WC Docket No. 18-155 (July 20, 2018) (Verizon Comments).

15 *See id.* at 2 n. 8 and accompanying text.

16 *See, e.g.* CLEC Comments at 16 ("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."); Comments of Iowa Network Services, Inc. d/b/a/ Aureon Network Services, at 13, WC Docket No. 18-155 (July 20, 2018) (Aureon Comments) ("Allowing the major IXCs (CenturyLink and AT&T) to remove their terminating traffic from the CEA network would undermine the financial viability of the CEA network and seriously harm competition and the availability of modern information services in rural Iowa."); *see also* Aureon Comments at 4 ("Absent Aureon's network, hundreds of small towns and rural areas of Iowa would struggle to receive the same modern service offerings and technologies that are available in urban areas.").

17 Comments of CenturyLink, Inc., at 5, WC Docket No. 18-155 (July 20, 2018) (CenturyLink Comments).

reference or use as support any current facts, data, or documents that reveal how access stimulation has not only conformed to the 2011 Order but has not caused the problems this NPRM claims. Furthermore, as presented by the CLECs in their initial comments to the Commission, the evidence that was available in the *Northern Valley Communications, LLC v. AT&T* litigation demonstrates that, rather than *harming* them, IXCs make millions of dollars each year delivering traffic to the conference calling and chat line services they complain about.[18]

In sum, then, based on the evidence presented so far, the only reasonable conclusion is that AT&T and other IXCs would like to eliminate these costs so that they can retain more of the money paid by American consumers for long-distance service. Until the IXCs open their books for analysis and conclusively prove that they are being harmed, the Commission should refuse to impose regulation based on this faulty assumption.

D. No Commenters Have Presented Evidence Proving that Access Stimulation is a Deterrent to Broadband Deployment

As BRG noted in its report, there is no credible evidence from which it could be concluded that the payment of access charges by IXCs has prevented them from investing in broadband.[19] And, even after the initial round of comments, there is still a lack of credible evidence supporting this assertion.

As noted above, AT&T's unsubstantiated estimate is that access stimulation results in costs of "$80 million annually,"[20] and that, but for access stimulation, it – along with other IXCs – would be able to accomplish two objectives: (1) reduce the cost of long-distance plans; and (2) invest in broadband deployment. As demonstrated above, the costs associated with access

18 *See* CLEC Comments at 22-23.
19 *See* BRG Report at 14-18.
20 AT&T Comments at 10.

stimulation today are not material enough to accomplish the first goal, much less also provide the IXCs with the funds necessary to invest in broadband deployment.

As other commenters observed, the rules proposed in the Access Stimulation NPRM would *negatively impact* broadband deployment, as they would deprive CLECs of the ability to generate revenues by providing telecommunications services to high volume conference calling providers. For example, Iowa Network Services, Inc. d/b/a/ Aureon Network Services ("Aureon") acknowledged that "[l]arge legacy carriers, such as AT&T, have stated that there is no business case for serving rural areas because the costs to provide service in rural areas far exceed the revenues received from rural subscribers."[21] Consequently, the major IXC's would have no incentive to deploy new broadband services in these areas despite the relief this proceeding affords them, as they simply see these areas of the country as afterthoughts that they need not bother with.

Unlike IXCs, however, access-stimulating CLECs do invest in broadband, and the access stimulation marketplace has been the key motivator in allowing these CLECs to make these investments. As the CLECs previously noted, the evidence shows that just the few CLECs represented in these comments have collectively invested about $47 million in rural broadband infrastructure since the Commission adopted the *Connect America Fund Order* in 2011. And, of course, this number could have been higher if AT&T had paid its bills, rather than defy the Commission's 2011 rules.

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[21] Comments of Iowa Network Services, Inc. d/b/a Aureon Network Services, at 18, WC Docket No. 18-155 (July 20, 2018) (Aureon Comments); *see also id*. at 4 ("Absent Aureon's network, hundreds of small towns and rural areas of Iowa would struggle to receive the same modern service offerings and technologies that are available in urban areas."); *id.* at 19 ("Without the aggregation of CEA traffic by Aureon's network, smaller providers of advanced services trying to compete with AT&T in rural Iowa will find it uneconomical to build new infrastructure to each of the rural LECs' service areas.").

In sum, the Commission should continue promoting its own policy of broadband deployment in rural and underserved parts of the country by recognizing, rather than attacking, the valuable role that access-stimulating CLECs have played in closing the digital divide. Moving forward with the Access Stimulation NPRM would prevent CLECs from further investing in broadband deployment in the areas where it is needed most and thereby negatively affect rural consumers across the nation.

E. No Commenters Have Presented Evidence Proving 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."[22] Noticeably, the NPRM offers no citation to support its statement, and the opening comments in response to the NPRM add no further evidence to support it either. Indeed, despite echoing this contention,[23] the IXCs still provide no updated data, and instead simply continue to rely on the flawed conclusions contained in the Access Stimulation NPRM and/or the outdated statements made in the Commission's 2011 *Connect America Fund Order*.

Contrary to what the IXCs claim, since the FCC's *Connect America Fund Order* was adopted in 2011, there has been a substantial decline in the volume of access stimulation traffic

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22 Access Stimulation NPRM, ¶ 2 (emphasis added).

23 *See e.g.* AT&T Comments at 7 ("Despite the Commission's efforts, the carriers engaged in access arbitrage have found ways to get around the rules … resulting in billions in terminating minutes of use and causing IXCs and consumers to incur many millions in expenses caused by access arbitrage."); *see also* Verizon Comments at 2 ("These schemes have shifted to the areas where positive intercarrier compensation rates remain, including terminating tandem and transport charges."); Comments of Sprint Corporation, at 1, WC Docket No. 18-155 (July 20, 2018) (Sprint Comments) ("While previously adopted measures have addressed these schemes [of access arbitrage] to some degree, none has eliminated traffic pumping, and pumpers have proven adept at devising new forms of arbitrage to skirt the rules."); Comments of South Dakota Network, LLC., at 2, WC Docket No. 18-155 (July 20, 2018) (SDN Comments) ("The Commission's proposed rules appear to be an attempt to "plug the holes", at least to some extent, that have continued to arise regarding access arbitrage.").

billed pursuant to CLECs' tariffs. This reduction is the result of CLECs voluntarily working with IXCs to transition traffic to IP-interconnections.[24] Thus, the record is devoid of any evidence that access stimulation is "widespread" or that it became more prevalent after the Commission's wholesale transformation of the access charge regime, which occurred not even seven years ago.

F. Commenters Have Failed to Explain How Access Stimulation Involves High Switched Access Rates

The Access Stimulation NPRM fails to explain how its "access stimulation" definition, including its use of the phrase "relatively-high switched access rates," applies in 2018 after the Commission's 2011 wholesale reform of access charges that require CLECs to benchmark their rates to the lowest price-cap LEC in the state.

Despite these reforms, Verizon falsely claims that, "[u]nder the Commission's rules, CLECs typically benchmark their rates to the prevailing ILEC rate. But to maximize margin above incremental cost, some CLECs seek to benchmark to a high-priced incumbent LEC."[25] Not only does Verizon fail to identify who the "some LECs" actually are, it simply retreats to old canards, hyperbole and innuendo in lieu of evidence.

Likewise, in describing access stimulation "schemes," T-Mobile claimed that a "Terminating LEC locates itself in a rural area where the maximum permissible terminating access rate is high or the Terminating LEC may also designate points of interconnection with the IXC that are located far away and then charge for transport on an expensive per mile basis."[26] However, the CLECs represented in these comments did not "locate[] [themselves]" in these

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24 *See* CLEC Comments at 31-32.

25 Verizon Comments at 3.

26 Comments of T-Mobile USA, Inc., at 11, WC Docket No. 18-155 (July 20, 2018) (T-Mobile Comments).

rural communities, they live there! The CLECs that exist in these rural areas are complying with the access stimulation rules and making rational business decisions about how to provide advanced services and consumer choices in areas that would otherwise be left behind. The access rates charged by these CLECs comply with FCC policy, and, as demonstrated in the CLECs' initial comments, are lower than those tariffed by AT&T's affiliate.[27]

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

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 LEC's that use centralized equal access (CEA) providers to connect to IXCs."[28] The Commission provides no evidence to support this attack and, once again, the IXCs have failed to come forward with evidence to substantiate this claim.

As an example of the types of unverified and outdated comments the IXCs present in the hopes of establishing the above-referenced allegation, the Commission should look to the comments submitted by AT&T and Inteliquent. In AT&T's comments, it claims that "the [access stimulation] problem has only worsened since 2011 … [as] LECs and intermediate providers receive greater compensation from IXCs the further the LEC or intermediate access provider carries the traffic,"[29] yet it never provides a citation or evidence to support this proposition. More specifically, it never explains how LECs are billing more mileage today than they were before the Commission adopted the *Connect America Fund Order*.

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27 *See* CLEC Comments at 34-35.
28 Access Stimulation NPRM, ¶ 7.
29 AT&T Comments at 8.

Similarly, Inteliquent fails to provide citations and uses outdated Commission precedent when it claims that "[m]ileage pumping adds substantial unwarranted costs to completing calls. As the Commission recognized in the Alpine decision, the practice of moving POIs, with no corresponding benefits to customers, are 'sham arrangements'. Nevertheless, mileage pumping persists because it can be quite lucrative for arbitrageurs."[30] As the CLECs already observed in their initial comments, the conduct resulting in the *Alpine* decision occurred "between 2001 and 2005" and is not relevant to the present access stimulation market.[31]

H. Commenters Have Failed to Present Evidence Proving that IXCs Requested Actual "Direct Connections" and Were Denied Those Connections

As the CLECs explained in their opening comments, one of the most troubling aspects of the Access Stimulation NPRM is that it suggests that the Commission believes the IXCs have been denied the ability to install direct connections. This is a false narrative that AT&T has used to mislead the Commission into its tentative conclusion that it must rush to take action against access stimulation before it has evidence to support this claim and then carefully weighs the substantial policy issues that are necessarily intertwined into this issue. For example, what is the proper definition of the network "edge" and should the Commission mandate IP-interconnections.

Other commenters also expressed concern with this portion of the Access Stimulation NPRM. For example, according to HD Tandem:

> When one gets underneath the concerns of originating carriers you are left with the feeling that, in spite of their protests to the contrary, they simply would rather not have to bother with direct connect relationships that, to them are 'out in the middle of nowhere.'… In HD Tandem's experience, the instances of direct access denials by terminating LECs is not common. What is commons is that originating carriers

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30 Comments of Inteliquent, Inc. at 5, WC Docket No. 18-155 (July 20, 2018) (Inteliquent Comments).

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

use the prospect of direct connections as a negotiation tool – not an actual plan to implement direction connections.[32]

Indeed, it is noteworthy that none of the IXCs offered evidence that they have been denied direct connections, despite repeatedly making this claim. Instead, the IXCs seem to now make clear what the CLECs' have said all along – they do not really want direct connections. For example, despite repeatedly asserting the efficiency and cost savings that come with direct connections, AT&T now says the Commission should "eliminate the second prong in the final rule it adopts [the direct connection proposal] unless the Commission takes the additional step of placing the financial responsibility for those direct connect costs on access stimulating LECs."[33] And while Verizon and other IXCs claim they support the Commission's direct connection proposal, what they really are in support of is an indirect interconnection where "the IXC chooses to use an intermediate provider,"[34] rather than a true direct connection where the IXC builds out its network to the access-stimulating LEC.

Now that the Commission has actually considered implementing a direct connection rule, AT&T and Verizon reveal that they are not interested in a true "direct connection" because they find the cost of building out facilities in rural states to be too significant and unimportant for their respective businesses.

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32 Comments of HD Tandem, at 10, WC Docket No. 18-155 (July 20, 2018) (HD Tandem Comments).

33 AT&T Comments at 12-13.

34 Verizon Comments at 5; *see also* CenturyLink Comments at 3 ("[T]he Commission should, instead, address the access stimulation issues by adopting the NTCA et al. proposal that is also discussed in the *NPRM*. Under this proposal, access-stimulating LECs would … assume financial responsibility for third party intermediate switched access provider services."); Sprint Comments at 2 ("The other proposal raised in the instant NPRM [the direct connection proposal] … will not be as effective as a system of bill-and-keep.").

II. MANY OTHER COMMENTERS ARE ALSO CONCERNED THAT THE COMMISSION'S PROPOSED RULES ARE VAGUE

As the CLECs noted extensively in their opening comments, the proposals contained in the Access Stimulation NPRM are so vague that, if they are adopted, they are likely to foster more rather than fewer unwanted disputes. Of particular relevance is how the NPRM defines (or rather, fails to define) the terms "financial responsibility," "intermediate access provider," and "direct connection" and how the NPRM characterizes the specific proposals related thereto.[35] As other commenters have shown, the lack of clarity presented in these proposals create a host of additional concerns and implementation issues that will likely lead to further litigation (and thus the need for further reform) down the road.

More importantly, though, beyond simply being vague, the proposals also do not seem to be desired by the very carriers that came to the Commission asking for relief. Indeed, it is telling that even the IXCs who first requested these specific forms of relief are now questioning whether the Commission should implement them. The Commission should take particular note of the fact that the IXCs expressly dismissed the idea of mandating a direct connection, even though they (mis)led the Commission to believe that this post-2011 dispute was about CLECs being unwilling to provide direct interconnection.

Accordingly, the Commission should take a step back before proceeding any further and analyze its proposals to ensure their implementation will result in clear policies, rather than unintended consequences.

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35 *See generally* CLEC Comments at 56-68.

A. Other Commenters Recognize that the NPRM's Discussion Regarding "Financial Responsibility" is Vague

It is not often the case that CLECs, intermediate access providers, and IXCs see eye-to-eye when it comes to reforming the FCC's access stimulation regime, but all of these groups agree that the Commission's proposal to provide access-stimulating CLECs with the option of bearing "financial responsibility" for the delivery of terminating traffic to their end office is vague and filled with gaps that will likely create more problems than it solves.

As the CLECs emphasized in their opening comments,[36] the Commission's cost-shifting proposal is vague because it does not specify what charges would be specifically shifted to the CLECs, instead simply stating that it would be the "applicable intermediate access provider terminating charges normally assessed to an IXC."[37] The proposal does not adequately define the term "intermediate access provider" and assumes that (1) there is a single intermediate access provider delivering traffic to any particular access-stimulating CLEC; and (2) this intermediate access provider has a single rate that it uniformly assesses on IXCs for delivering traffic to access-stimulating CLECs.[38]

The CLECs' concern regarding the vagueness of the term "intermediate access provider" and the assumptions the term takes for granted, are recognized by the IXCs as well. For example, as AT&T acknowledged in its comments to the Commission, it too finds "the definition of the phrase 'intermediate access provider' [to be] vague," as the definition in turn fails to actually define several key terms, including the term "final interexchange carrier," and does not explain whether wholesale-trafficking IXCs also fall within this definition.[39] And as Verizon

36 *See* CLEC Comments at 56.
37 Access Stimulation NPRM, ¶ 9.
38 *See* CLEC Comments at 56-57.
39 *See* AT&T Comments at 11.

recognized, even if the "intermediate access provider" definition was not vague, any proposal implementing it would be plagued by assumptions and regulatory gaps, as "[c]urrently, there are no established mechanisms for intermediate access providers to bill terminating tandem and transit charges to terminating LECs instead of billing IXCs," meaning that these additional "implementation issues" would need to be analyzed before the Commission could even think about following through with this proposal.[40]

Other commenters identified additional policy and regulatory concerns and open-ended issues that could result in a windfall for IXCs and wholesale carriers. For example, in SDN's comments, it recognized that "the Commission's proposal to require intermediate carriers to bill access stimulators for terminating access charges will place an undue burden on intermediate carriers like SDN and raises a number of unresolved issues."[41] Likewise, as Inteliquent recognized it its comments:

> In Inteliquent's experience, wireless and other terminating carriers often elect not to connect directly with wholesale carriers. Under the current rules, the originating wholesale carrier pays the regulated tandem charges. This approach prevents the wholesale carrier from imposing the full costs of sending unlawful robocalls or other fraudulent traffic into the terminating carrier's network. Given that the wholesale carrier must bear these costs, it has at least some incentive to attempt to ferret out unlawful traffic and to impose acceptable use policies on its upstream consumers. If, instead, the wholesale provider were allowed to deliver the traffic to the tandem "for free" (i.e., at the cost of the terminating carrier), the wholesale carrier would have no incentive to limit its carriage of unlawful traffic. The result would be increased unlawful robocalls and other harmful traffic on the network, ultimately causing consumer harm.[42]

Thus, beyond simply leaving key terms undefined and major problems unaddressed, it appears that the Commission's proposal will result in unintended negative consequences on America's

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40 *See* Verizon Comments at 6.

41 Comments of South Dakota Networks, LLC, at 1 WC Docket No. 18-155 (July 20, 2018) (SDN Comments).

42 Inteliquent Comments at 12.

citizens. As the CLECs have already informed the Commission, any proposal that harms end users, whether financially or in another manner, is not a proposal that the Commission should adopt, and because this proposal will ultimately do just that, the Commission should think long and hard before it decides to proceed any further.

In sum, as written, the Commission's proposal providing access-stimulating CLECs with the option of bearing "financial responsibility" for the delivery of terminating traffic to their end office is vague and incomplete. Thus, the probable result of adopting the proposed rules will be an increase in disputes that will needlessly consume carrier and Commission resources. For this reason, and the others provided by the CLECs, the Commission should decline to adopt any rule that shifts financial responsibility to CLECs.

B. The Comments Confirm That the Proposed Rules Erroneously Ignore the Distinction Between "Direct Connections" and "Indirect Interconnections"

Commenters also share the CLECs' concerns that the Commission's proposal requiring access-stimulating CLECs to provide IXCs with direct connections is vague and internally inconsistent. More importantly, however, the record reveals that the IXCs are vehemently opposed to this prong of the Commission's proposed rules – facts that demonstrate how the IXCs have misled the Commission into believing that CLECs were inserting intermediate carriers in an effort to "evade" the Commission's 2011 reforms. The fact is that the IXCs never sought true direct connections, rather they have used this argument as a bargaining chip to negotiate lower off-tariff rates or otherwise justify their self-help withholding tactics.

In their opening comments to the Commission, the CLECs demonstrated that "direct connections" are arrangements where two carriers are *connected to each other*.[43] Moreover, the CLECs noted that the Access Stimulation NPRM's "direct connection" rules fail to properly

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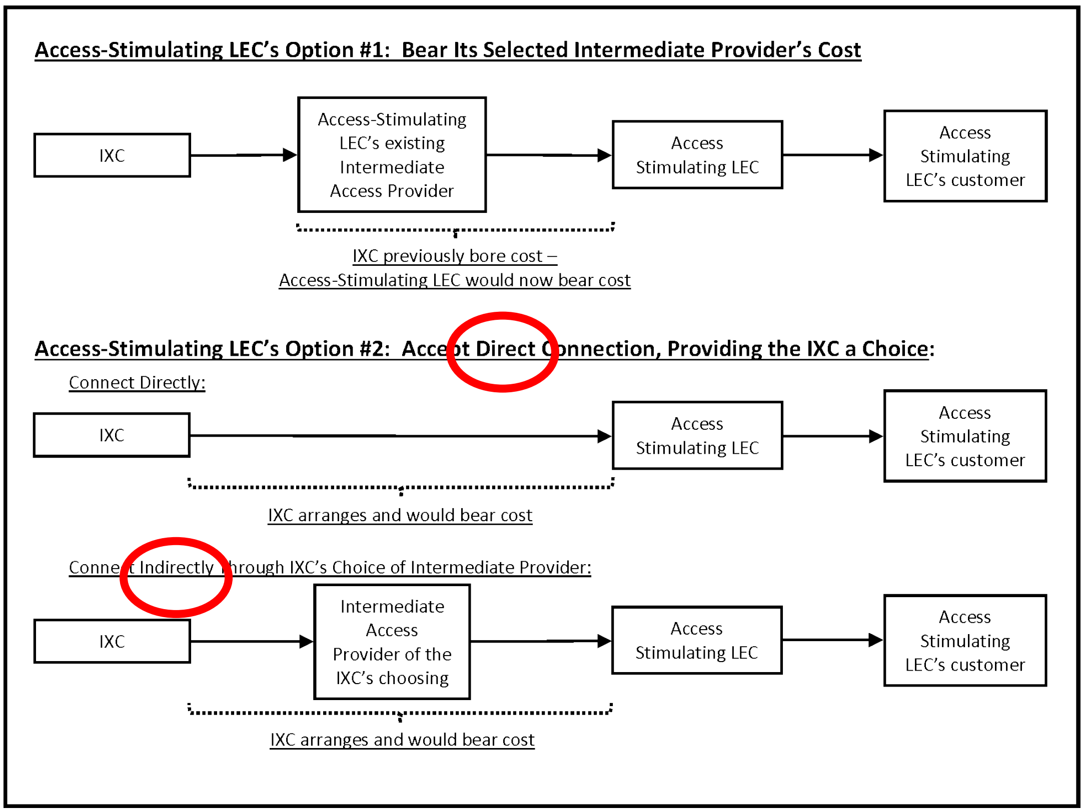
[43] CLEC Comments at 61-62.

apply the term "direct connection," erroneously concluding that "direct connections" can include arrangements where two carriers are connected via a third carrier's network.[44] Indeed, after a more detailed review of the Commission's NPRM, it would appear that even the Commission understands the difference between the "direct" and "indirect" terms, as the diagram it uses to explain the direct connection proposal expressly acknowledges that connections through an intermediate provider would require the IXC to "[c]onnect *indirectly*" to the access-stimulating LEC.[45]



AT&T's comments also reflect that it understands that a direct connection would require AT&T, not a third party, to install the necessary facilities to reach the CLECs' end offices. For example, AT&T complains that the Commission's direct connection proposal would require

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44 *Id.*

45 *See* Access Stimulation NPRM, ¶¶ 13-14 (diagram) (emphasis added).

IXCs to "build direct connections into some rural areas in order to directly terminate traffic," which would "only [be made] available at an exorbitant price."[46] AT&T's argument that it would have to "build direct connections" makes it clear that the term "direct connection" is properly understood in the industry to mean what the CLECs have said it means: a connection in which the IXC's facilities connect directly to the CLEC's facilities, with no "intermediate" provider involved.

Of course, because the Commission has failed to properly apply and clarify the terms used in the proposed rules, other IXCs have seized on the NPRM's imprecision to suggest that a direct connection should be able to be obtained through an intermediate provider. For example, in supporting the Commission's proposal, Verizon claims that it is interested in an interconnection arrangement through an "intermediate provider" whom "the IXC would pay … according to tariff or commercial contract."[47] In other words, Verizon supports the NPRM's proposal that a CLEC can decide to directly connect with an IXC but, inexplicably, that direct connections between Verizon and the CLECs' end offices can be achieved through "an intermediate provider it chooses."[48] As explained in the CLECs' initial comments, 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.[49] Verizon's understanding of the Commission's direct connection proposal highlights the vagueness and inconsistencies in the NPRM.

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46 AT&T Comments at 13.

47 Verizon Comments at 4-5. Of course, this is exactly what Verizon has access to now: it can either pay the cost-based rate for the CEA providers, Aureon and SDN, or it can negotiate a separate contract. Thus, the Commission need not take any further action, Verizon already has what it seeks.

48 *Id.*

49 *See* CLEC comments at 61.

When it comes to the Commission's direct connection proposal, it appears that the IXCs now do not even want the Commission to provide a direct connection option. It seems that their prior complaints about being denied direct interconnection were a ruse. The CLECs are not surprised that the IXCs would reject the Commission's offer of assistance. As noted in the CLECs' opening comments, the parties are already familiar with AT&T's direct connection mischaracterization because AT&T tried, but failed, to convince a federal judge that they had offered to install a direct connection at Northern Valley's end office.[50]

The fact that AT&T has misled the Commission is evident in the record. For example, let us compare what AT&T told the FCC yesterday (*e.g.,* less than a year ago in its complaint in *AT&T Corp. v. Iowa Network Services* and what it told the FCC in in its 2017 "refresh the record" comments), with what it is telling the FCC today:

AT&T Yesterday	**AT&T Today**
AT&T Corp. v. Iowa Network Services: [T]he evidence clearly shows that other methods of routing access stimulation traffic to the access stimulating CLEC's end office switch are much more efficient … and therefore more beneficial to long distance carriers and their customers. **Perhaps the most efficient method of routing such traffic (given the enormous call volumes at issue) would be via a direct trunking arrangement from the IXC to the access stimulating CLEC's end office switch**.[51]	The second prong of the Commission's proposed rule gives the *access stimulating LEC* the option to avoid responsibility for the costs of transporting the access stimulation traffic by offering interexchange carriers the ability to directly connect to the LEC's network. **This prong will . . . make the current situation even worse**. . . . [T]he access stimulating LEC would be able to . . . locat[e] the POI where a direct connection is either not available or is only available at an exorbitant price. . . . **It is extremely burdensome to build direct connections into some rural areas to directly terminating traffic**. In some case, AT&T has had to install and engineer the equivalent of 10 DS3 circuits in locations with populations *less*

50 *See* CLEC Comments at 40-41.

51 Formal Complaint of AT&T Corp., ¶ 77, *AT&T Corp. v. Iowa Network Services, Inc. d/b/a Aureon Network Services*, No. 17-56 (F.C.C. June 8, 2017) (emphasis added).

***AT&T Refresh the Record Comments*:** The access stimulation schemes that have endured often involve situations in which carriers have **refused direct connections**.... [Tto resolve this issue, the Commission should] issue rules making clear that the sending carrier, which has the financial responsibility to carry the traffic to the network edge, has the right to select how to transport the traffic to the edge, *i.e.*, which route to take, and **whether to do so with its own facilities**.[52]	than 1000 people.... These locations are not intensely urban areas like downtown Chicago, where the facilities could be reconfigured and repurposed. Rather, in these remote areas, the facilities will lay fallow once the access stimulator moves the traffic elsewhere to avoid the direct connection and again force the delivery of traffic through an intermediate provider. Further, this direct connect option offers no protection in situations where the end office housing the conference and chat equipment is located in a remote area that is not readily accessible via any network other than either the network controlled by the access stimulating LEC or an intermediate access provider working with the access stimulating LEC. **In fact, this proposal would . . . mak[e] the current situation even worse**.[53]

Given the comments filed by AT&T and other IXCs, it is apparent that the complaints about being unable to obtain direct connections were, at best, misleading. At least now, AT&T has finally acknowledged to this Commission the simple fact that it does not actually want to install a direct connection in rural South Dakota or Iowa because doing so is "exorbitant[ly]" expensive and would be "extremely burdensome."[54]

Other IXCs made statements of a similar vein in their own comments, noting that they would either not take advantage of the Commission's direct connection proposal because of the

52 Comments of AT&T Services Inc. to Refresh the Record, at 9, 13, WC Docket No. 10-90 (Oct. 26, 2017) (AT&T Refresh the Record Comments) (emphasis added).

53 AT&T Comments at 12-13 (emphasis added).

54 Of course, the Commission has been aware of this reality for years, which is why it created Centralized Equal Access providers in the first instance. CEAs, whose rates go down as volumes go up, are the perfect solution to AT&T's concerns about the costs of installing direct connection in rural America. AT&T can – and should – avoid the exorbitant expense of installing facilities in remote areas by simply paying the CEA's cost-based rate.

high costs involved[55] or that the Commission should totally scrap the proposal because it will not totally prevent the IXCs from having to pay *any* of the costs associated with the transportation of access stimulation traffic to the LECs' end offices.[56] This hypocrisy is unbearable.

It is evident that IXCs never really wanted the Commission to adopt – or even propose – the direct connection proposal contained in the Access Stimulation NPRM, and instead wanted the direct connection argument available so they could further their self-help withholding practices and use it as a stepping stone to completely rid themselves of *any* costs associated with the transport of access stimulation traffic. As HD Tandem made clear in its comments, IXCs "use the prospect of direct connections as a negotiation tool – not an actual plan to implement direct connections,"[57] and, despite what they say, "simply would rather not have to bother with direct connect relationships that, to them are 'out in the middle of nowhere.'"[58] Accordingly, the Commission should take note of the contradictory arguments made by the IXCs and refuse to become part of AT&T's and Verizon's efforts to engage in "regulatory capitalism."[59]

Simply put, the direct connection proposal was drafted by the Commission to appease the fearmongering, unverified allegations, and repeated requests of the IXCs, but it appears that the IXCs do not actually desire such a proposal *at all*. Why should the Commission waste its time, energy, and resources on a proposal that the IXCs do not even want and that they will only use

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55 *See, e.g.*, CenturyLink Comments at 2-3 ("In most cases, the end offices associated with access stimulation are in remote/rural areas, [and] it is very likely that the cost to provision or lease dedicated transport to establish the direct connection would also be high.").

56 *See, e.g.*, Sprint Comments at 2 ("Requiring an access stimulating LEC to accept direct connections from the IXC or an intermediate access provider of the IXCs choice … will not be as effective as a system of bill-and-keep at addressing traffic pumping schemes; will not eliminate costly transport expenses associated with interconnection at a distant LEC end office; and may be of only limited feasibility in rural areas.").

57 HD Tandem Comments at 12.

58 *Id.* at 10.

59 BRG Report at 27.

later on as an excuse for adopting a new proposal that provides them with greater windfalls? Clearly, the Commission should not.

However, to the extent the Commission nevertheless decides to move forward with its direct connection proposal, the record makes clear that it must establish clear rules that prevent AT&T and other IXCs from nominally demanding a direct connection that it has no intention of installing just as a tool to shift its costs to CLECs. As the CLECs articulated in their opening comments, those rules should 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 facilities that will be used are shared facilities, rather than dedicated facilities;
2. Any agreement in which the IXC's traffic continues to be switched by a CEA provider's tandem switch is not a "direct connection," even if the CEA provider and the IXC have an agreement to refer to it as a "direct connection";
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's 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.

If the Commission decides to act, these rules will be 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. Moreover, the Commission should make clear that an IXC that seeks to install a direct connection is only permitted to carry traffic originated by its own end users. The Commission should not allow AT&T, Inteliquent, and Verizon to change the rules in order to create a new profit center as they compete with the CEA providers in South Dakota and Iowa.

III. AT&T'S PROPOSAL IS INCONSISTENT WITH THE FCC'S 2011 BILL-AND-KEEP FRAMEWORK

When the Commission adopted the *Connect America Fund Order* in 2011, it justified moving away from the traditional access charge regime by relying upon economic theory that a bill-and-keep regime would produce more efficient results because both the calling and the called parties benefited from the telephone call.[60] One of the economists whose work the Commission relied heavily upon was Patrick DeGraba,[61] who posited that central office bill-and-keep, or "COBAK," should be a "unified approach to interconnection pricing" that "would apply to interconnecting arrangements between all types of carriers that interconnect with the local circuit-switched network."[62] According to DeGraba, COBAK would result in more efficient

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60 *Connect America Fund Order*, ¶ 744.

61 *See generally id.* at ¶¶ 741-759 (explaining the policy reasons for adopting a bill-and-keep framework and citing, on multiple occasions, to Patrick DeGraba, *Central Office Bill and Keep as a Unified Intercarrier Compensation Regime*, 19 YALE J. REG. 37 (2002)).

62 DeGraba at 40.

interconnection, an argument that the Commission echoed in justifying its elimination of terminating end office access charges in the 2011 *Connect America Fund Order*.[63]

Importantly, however, as DeGraba explained, an efficient and unified approach to intercarrier compensation does "not … eliminate access charges for terminating transport if the IXC uses the LEC's terminating transport facilities."[64] Thus, while bill-and-keep is intended to eliminate access charges for terminating traffic associated with end office switches and the local loop, it is *not* intended to eliminate access charges when an IXC uses the LEC's (or a CEA provider's) facilities to carry traffic some or all of the way from the IXC's point of presence ("POP") to the LEC's central office. Indeed, DeGraba laid out two clear rules for how COBAK should work in the long-distance marketplace:[65]

> *Rule 1: No carrier may recover any costs of its customers' local access facilities from an interconnecting carrier.*

> *Rule 2A: For interexchange calls, the calling party's local network is responsible for delivering the call to the POP of the calling party's IXC; the calling party's IXC is then responsible for delivering the call to the called party's central office.*

The CLECs observe that the current state of regulation for access-stimulation traffic already complies with DeGraba's two rules, at least with regard to the termination of that traffic. First, through the *Connect America Fund Order*, the Commission has entirely eliminated end office access charges.[66] Thus, access-stimulating CLECs do not "recover any costs of its customers' local access facilities from an interconnecting carrier." However, the Commission has not yet instituted its reduction of originating access charges. As such, IXCs continue to

63 *See generally Connect America Fund Order* at ¶¶ 741-759

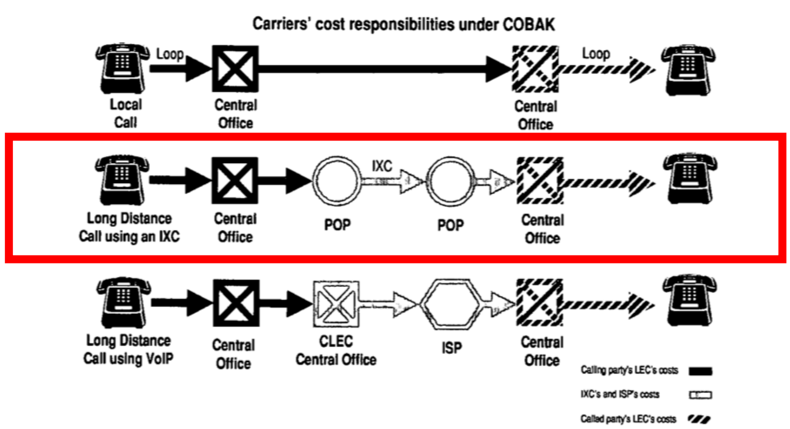
64 DeGraba at 51.

65 *Id.* at 50-51.

66 *See Connect America Fund Order*, ¶ 801.

compensate "the calling party's local network" for "delivering the call to the POP of the calling party's IXC." Thus, the Commission has not taken the steps to implement the first component of Rule 2A. However, the other component of Rule 2A, which provides that "the calling party's IXC is then responsible for delivering the call to the called party's central office," is consistent with today's access charge regime. That is, when the CLECs or the CEA providers carry traffic from the IXCs' POPs to the CLECs' central offices, it is the responsibility of the IXCs to compensate the CLECs and CEA providers for that service. And, according to DeGraba, those costs should continue to be borne by the IXC, because ***it is what long-distance customers pay their long-distance carriers to do***.[67]

As DeGraba's depiction of the desired end state for COBAK makes clear, the IXC is responsible for the costs of delivering the call *all the way* to the LEC's Central Office, not merely to the IXC's POP.[68]



In response to the Access Stimulation NPRM, AT&T and other IXCs ask the Commission to deviate from COBAK in two materials ways. First, those carriers ask the Commission to implement changes that target one class of carriers, deviating from the "unified"

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67 *See* DeGraba at 54-55.

68 *See id.* at 56.

approach that is at the core of COBAK. Second, they ask the Commission to deviate from the ultimate end state that DeGraba envisioned for America's intercarrier compensation regime by "requiring the access stimulating LEC to bear the costs of transporting [access stimulation] calls from the IXC's network to the LEC's end office switch."[69] As discussed more fully below, the Commission should reject AT&T's request for both of these reasons.

First, AT&T's preferred approach of requiring CLECs to pay for transport from the IXC's POP to the CLEC's central office should be rejected because this is not a "unified" approach. The Commission has never required a terminating carrier to bear the expense of transporting long-distance traffic from the edge of the IXC's network and it should not start now. Singling out rural CLECs for this disparate treatment would set a dangerous precedent that every LEC should be concerned about because it would shift far more costs onto LECs than DeGraba and the Commission intended. Rather than creating a "unified" intercarrier compensation regime, this approach would codify a divided and patchwork regime of intercarrier compensation, an outcome that would be directly contrary to the Commission's stated policy objectives.

Just this week, the Commission reiterated that one of the central goals of its approach to CLEC access charges is to "eliminate disparate regulatory treatment between different classes of carriers."[70] The Commission accomplished this by creating the "CLEC benchmark rule."[71] It is irrational for the Commission to undo decades of work to eliminate "disparate regulatory treatment" by instead codifying disparate treatment of rural CLECs. As BRG noted in its expert report, the FCC's access stimulation rules allow large LECs to serve high volume service

69 AT&T Comments at 11.
70 INS Tariff Order, ¶ 6.
71 *Id.* ¶¶ 6-7.

providers without becoming a target for adverse treatment. Rural CLECs should have the same ability as the ILECs they compete with to attract and serve high volume service providers.[72]

Second, AT&T's preferred outcome is contrary to COBAK's underlying premise, which has concluded that "[i]t is **always** the responsibility of the calling party to cover the costs of transporting the call to the called party's central office."[73] In AT&T's comments, it asks the Commission to ignore the core economic theory behind the bill-and-keep model and, instead, "require[e] the access stimulating LEC to bear the costs of transporting [access stimulation] calls from the IXC's network to the LEC's end office switch."[74] In proposing such a solution, the IXC explicitly acknowledged that it would transfer the POP-to-central office costs from the IXC to the terminating LEC:

> [U]nder this prong, an access stimulating LEC would be bound either to carry the traffic itself via a direct connection, or to obtain an indirect connection **and pay an intermediate access provider to carry the traffic from the IXC's point of presence to access stimulation LEC's facility**…. To the extent that, under the first prong, an access stimulating LEC seeks to avoid its obligation to pay for transport by blocking calls, **nothing in the Act or Commission's rules requires the IXC to ensure completion of the calls beyond tendering them at its point of presence**.[75]

This proposal is flatly inconsistent the Commission's 2011 goal of establishing bill-and-keep as the "end point for reform"[76] and flies in the face of DeGraba's central proposition that, under the ideal bill-and-keep arrangement, "the calling party's IXC is [] responsible for delivering the call to the called party's central office."[77] Indeed, as the FCC just this week concluded, "[t]he Commission has never required that the mileage component of competitive LEC transport rates

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72 *See* BRG Report, 25-26.
73 DeGraba at 66 (emphasis added).
74 AT&T Comments at 11.
75 *Id.* n.24 (emphasis added).
76 *See Connect America Fund Order*, ¶ 741.
77 DeGraba at 51.

reflect something other than the actual network used, which is what AT&T would have us [the Commission] do here."[78] Having just rejected AT&T's request to avoid paying for the services it uses, the Commission should do it again.

Indeed, AT&T's argument seems to be that because implementing a direct interconnection in rural Iowa or South Dakota would be an expensive undertaking, the Commission should gift AT&T the use of the CLEC or CEA's transport service. This is an absurd request, no economic justification exists to support it, and as the Commission confirmed this week it would deviate from its long-standing policy that CLECs' "mileage component" should reflect "the actual network used." Indeed, to economically justify its desired outcome, AT&T would have to demonstrate that its customers, who voluntarily pick up the phone and dial the numbers to participate in conference calls, receive little or no value for being able to do so. As the CLECs demonstrated, however, in their opening comments, the ability of consumers to both utilize the unlimited long-distance plans they already purchase and avoid the added burden of expensive conferencing services like AT&T, means that each consumer receives significant value each time they call into one of the services hosted by the rural CLECs.[79] There is simply no justification for AT&T not to pay for the use of the CEA and/or CLEC transport facilities when it uses those facilities to connect from its POP to the CLEC central office.

More, as DeGraba made clear, if the concern is that the rates for transport are too high, the appropriate remedy is to "regulate the price … at least until competition renders such regulation unnecessary."[80] This is precisely what the Commission already does. If the transport is provided by the CEA provider, such as in the case Iowa by Iowa Network Services, then the

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78 INS Tariff Order, ¶ 42.
79 *See generally* CLEC Comments at 15-17
80 *Id.* at 81.

CEA provider remains a dominant carrier that is required to set rates that are the lower of its cost or the competing ILEC.[81] If the transport is provided by the rural CLEC, as is the case in South Dakota, the Commission's rules require CLECs to benchmark their rates to the lowest price-cap LEC. In short, whether the transport is provided by the CEA Provider or the rural CLEC, the rates are the same. And, as reflected in the fact that the CenturyLink rates are *lower* than the rates contained in PacBell's tariff, the CLECs in Iowa and South Dakota provide transport services at a bargain.[82]

With all of this in mind, the Commission should recognize that the bill-and-keep arrangement it provided in the 2011 *Connect America Fund Order* is the *farthest* it should go in reforming terminating intercarrier compensation. Terminating LECs no longer receive terminating access charges, and the charges they continue to charge are for services they provide to the benefit of calling party carriers and long-distance providers. Indeed, this present arrangement is an appropriate end-state for the intercarrier compensation regime; it balances the costs that should be placed on the originating and terminating LECs and the nation's IXCs and ensures that the nation's telecommunications market operates in an efficient and unbiased manner. Adopting AT&T's proposal, on the other hand, would unfairly place financial burden on terminating LECs, while providing IXCs with a greater windfall. Accordingly, the Commission should reject AT&T's proposal.

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81 *Id.* at ¶ 1.

82 CLEC Comments at 34.

IV. NOW THAT THE COMMISSION HAS ACTED TO CLARIFY THE APPROPRIATE RATES FOR CEA PROVIDERS, NO FURTHER MARKET CHANGES ARE WARRANTED

In their opening comments, the CLECs observed that the lack of clarity regarding how CEA providers should establish their rates and handle access-stimulation traffic has created an environment of uncertainty that is the likely source for the complaints the Commission has received.[83] With the release of the INS Tariff Order, however, the Commission has taken a significant step towards resolving those issues. As explained more fully below, the INS Tariff Order eliminates the need for the Commission to implement further reforms at this time.

In the INS Tariff Order, the Commission confirmed that CEA providers, like other CLECs, must benchmark their rates to the competing ILEC and do not qualify for the "rural exemption."[84] The Commission also concluded that for INS/Aureon, the competing ILEC is CenturyLink.[85] The Commission's analysis would apply with equal force to SDN, since CenturyLink is the ILEC serving the majority of South Dakota. The Commission also made clear that the CEA provider's rates cannot exceed the lower of: (1) the rate cap instituted in the *Connect America Fund Order*; (2) the rate of the competing ILEC (CenturyLink); or (3) its cost-based rate derived pursuant to Section 61.38 of the Commission's rules.[86] As a result, the parties now know that the INS rate will, at a minimum, be reduced to $0.005634/mou, producing a savings of $0.002556/mou for the IXCs that use tariffed services to deliver traffic in Iowa. Based on the assumption that the volume of traffic remains approximately 2 billion minutes, as the Commission concluded in 2011, this change has the potential to produce over $5 million in additional savings for the IXCs.

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83 *See generally Id.* at 68-72.
84 INS Tariff Order, ¶¶ 21-34.
85 *Id.* ¶¶24-30.
86 *Id.* ¶¶ 1.

Importantly, because the Commission has now clarified that a CEA provider cannot establish a rate above the competing ILEC, even if its cost study would support a higher rate, the Commission should refrain from taking any further action intending to "eliminate" access stimulation. As the Commission has already observed, CEA providers benefit from having higher volumes of traffic on their network because those traffic volumes help to spread out the costs of maintaining state-of-the-art networks in these rural states.[87] Thus, having clarified that CEA providers cannot recover costs above the competing ILEC rates, the Commission could not reasonably then gut the CEA providers' traffic volumes by eliminating access stimulation. Doing so would eviscerate these carriers who have no end users and thus would be left with no alternative way to cover the costs associated with their networks.

Indeed, even before the Commission's INS Tariff Order, Aureon had already argued that the Commission's proposed rules in the Access Stimulation NPRM would likely create a significant operating shortfall.[88] Aureon argued that "capping the CEA tariff rate while severely reducing CEA traffic would seriously threaten the financial viability of the CEA network and put in jeopardy the greater consumer choice of long distance services and advanced technologies that CEA has made available in rural Iowa."[89] Aureon, therefore, asserted that, if the Commission adopted its proposed rules, "[a] higher per minute rate would be needed to recover the fixed costs of providing CEA service if there are fewer minutes-of-use to recover those costs."[90]

Rather than putting CEA providers in jeopardy just to give AT&T and Verizon more savings that consumers will never see, the Commission should recognize the fact that, for rural

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87 *AT&T Corp. v. Iowa Network Services, Inc.*, 32 F.C.C. Rcd. 9677, ¶ 19 (2017) ("as a Section 61.38 carrier, [a CEA provider's] calculated rates should decrease to reflect the increase in the volume of traffic").

88 Aureon Comments, 14-22.

89 *Id.* at 14.

90 *Id.*

America, access stimulation represents perhaps the best way to ensure that revenues are available to defray the costs of advanced telecommunications services. What the citizens of other states are able to receive by virtue of having more densely populated areas can be best replicated in rural parts of the country by attracting and retaining higher volume service providers. This is not a tactic to "evade" the Commission's rules; it is simply a matter of mathematics.

If the Commission is not convinced that the INS Tariff Order provides the IXCs with sufficient relief, then it at least makes clear why the Commission must do more research, rather than rely on the name-calling and unsupported assertions of AT&T. As the INS Tariff Order makes clear, AT&T has taken the position that CEA providers should enforce the "mandatory use policy" by not permitting alternative IP-connections.[91] AT&T's assertion that CEA providers should enforce a "mandatory use policy" makes it even more critical that, before implementing any further reforms, the Commission gather and collect evidence regarding whether and to what extent AT&T and the CEA providers are part of any such bypass arrangements. Fully developing a record on this issue is critical to the Commission's evaluation of whether it should, as it has proposed, eliminate the mandatory use policy with regard to access stimulation traffic.[92]

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91 *Id.* ¶ 113.

92 Access Stimulation NPRM, ¶¶ 16-17.

CONCLUSION

The record does not support the Commission's proposed rule modifications or its efforts to eliminate access stimulation. Moreover, because the proposed rules are vague and provide insufficient guidance, their adoption will likely result in more industry disputes. On the other hand, the clarifications provided by the INS Tariff Order give important new guidance to CEA providers and IXCs regarding the appropriate rates that CEA providers should tariff and provide the IXCs with quantifiable relief. Accordingly, the Commission should allow the INS Tariff Order to be fully implemented by Aureon and similarly-situated CEA providers and assess its impact on all parties. Thus, rather than proceeding with further piecemeal and discriminatory reforms that conflict with the Commission's goal of a unified intercarrier compensation system, the Commission should close this docket.

Dated: August 3, 2018

Respectfully submitted,

G. David Carter

G. David Carter
John C. Nelson, Jr.
Ernesto Mendieta
1825 K Street, NW
Suite 508
Washington, DC 20006
(202) 869-1502
(202) 869-1503 (fax)
david.carter@innovistalaw.com
john.nelson@innovistalaw.com
ernesto.mendieta@innovistalaw.com