

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

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

**REPLY COMMENTS OF TELIAx, INC.**

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**REPLY COMMENTS OF TELIAX, INC.**

**I. Introduction and Summary**

TeliAx, Inc., d/b/a TeliAx Colorado ("TeliAx"), through counsel, respectfully files its reply comments in response to the Federal Communications Commission's ("FCC" or "Commission") public notice requesting interested parties refresh the record regarding 8YY access charge reform.<sup>1</sup>

The Commission should not take action on 8YY access independently, but only as a part of a broader review of important issues arising from the 2011 access charge reforms. There is insufficient data on the effects of these access rule changes on the market and consumers. Issues that need to be evaluated include: the effects of access changes on all customers, smaller carriers and service providers, rural markets, the Universal Service Fund ("USF") and unwanted telemarketing and robocalls.

If such a proceeding is not opened, the Commission must still institute a broad investigation of the 8YY market. The record is inadequate to support rule changes for 8YY access services. Such an inquiry should include identification of costs incurred by local exchange carriers ("LECs") and other service providers to originate and deliver toll free calls to the correct toll free provider, along with a

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<sup>1</sup> Public Notice, "Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform," DA 17-631 (rel. June 29, 2017).

focus to ensure originating providers can obtain adequate cost recovery for 8YY access services. The FCC should not just look at the 8YY wholesale/exchange access market, but also the state of the 8YY retail market, which is much less competitive today. The retail market inquiry should include a review of the pricing options available to toll free subscribers and an examination of whether and how all access charge savings are being passed through to toll free subscribers.

A number of parties have suggested the FCC should abolish 8YY access charges and have carriers raise rates for local service. That result would constitute the reversal of 50 years of toll free service history and void the expectations of both toll free subscribers and consumers alike. The record before the Commission will not sustain such a radical and harmful change. The Commission would upset longstanding public policy and must not act casually as proposed by the biggest toll free providers.

The Commission must first define and describe toll free arbitrage before it regulates it. And, just like it did for access stimulation, the FCC should set forth what specific facts constitute 8YY stimulation and then regulate it when it exists. Toll free fraud is wrong and must be minimized. However, the Commission lacks sufficient data on the amount and character of toll free fraud.

## **II. The Commission Should Not Take Action on 8YY Access Independently, but Only as a Part of a Broader Review of Post Transformation Order Access Issues**

A number of parties<sup>2</sup> urged the Commission not to take action on 8YY access now, but rather to do so only as a part of a larger proceeding that examines "Post Transformation Order"<sup>3</sup> access issues, including the effects of the earlier rule changes on competition and consumers. Teliix supports this position. The record in the instant dockets, even with the benefit of the July 31, 2017 comments,

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<sup>2</sup> See, e.g., Comments of Windstream Services, LLC, Frontier Communications Corporation and NTCA – The Rural Broadband Association, Inc. in WC Docket No. 10-90, *et al.* (July 31, 2017), at 2.

<sup>3</sup> *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing an Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; and Universal Service Reform - Mobility Fund*, Report & Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663 (2011), *aff'd sub nom.*, *In re: FCC 11-161*, 753 F.3d 1015 (10<sup>th</sup> Cir. 2014) ("*Transformation Order*").

simply does not contain sufficient facts and data about the exchange access and interexchange markets post *Transformation Order*.

Similarly it lacks information about the effects of reducing terminating end office access rates for all but the smallest, rural exchanges to zero. The inquiry must identify the consequences of the changes on: enterprise, small-to-medium size businesses and residential customers; small-to-mid-size LECs, both incumbent and competitive; rural and insular markets; the movement from Time Division Multiplex ("TDM")-based to IP-based networks; the long-term solvency of USF; and, not to be ignored, the increasing number of unwanted telemarketing and robocalls due to the virtual free termination of such calls.<sup>4</sup>

### **III. The Commission Should Institute a Broad Investigation of the 8YY Market**

But even if the Commission does not undertake another far-reaching review and analysis of intercarrier access charges, it must not take action on 8YY access reform until it opens a broad investigation of the 8YY market. The record is simply too incomplete. The FCC cannot take action without an adequate record on all the material issues.<sup>5</sup> An inadequate record is often sufficient ground for setting aside final agency action.<sup>6</sup>

There are very few public facts about 8YY service, especially in the record before the FCC. According to SOMOS, Inc., the administrator of toll free numbers and operator of the 8YY database

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<sup>4</sup> A good argument can be made that, despite all the efforts of the FCC, the Federal Trade Commission ("FTC"), state attorneys general, other federal and state law enforcement agencies, as well as the work of the Industry, the FCC's decision to zero-rate terminating end office services for interstate, international and intrastate, interexchange calls in all but the smallest markets has resulted in financial incentives for scofflaws and fraudsters to make even more robocalls than they would have made had the FCC not prohibited LECs from charging for the termination of interexchange calls. The FCC should investigate this issue and make the results public before it makes further changes to its intercarrier compensation rules set forth in Parts 61 and 69.

<sup>5</sup> *Establishment of Policies and Procedures for Consideration of Application to Provide Specialized Common Carrier Services in the Domestic Public Point-to-Point Microwave Radio Service and Proposed Amendments to Parts 21, 43, and 61 of the Commission's Rules*, First Report & Order, 29 FCC2d 870, ¶ 159 (1971). After concluding its record on identifying which radio frequencies might be used by specialized common carriers to provide services, the Commission ordered further hearings.

<sup>6</sup> *Aviators for Safe & Fairer Reg. v. FAA*, 221 F.3d 222 (1<sup>st</sup> Cir. 2000); *Tanners' Council v. Train*, 540 F.2d 1188, 1194 (4<sup>th</sup> Cir. 1976).

that associates such numbers with the serving toll free service provider's Carrier Identification Code ("CIC"), there are more than 41,000,000 toll free numbers administered in the area covered by the North American Numbering Plan ("NANP").<sup>7</sup>

However, there is no public information as to how many toll free calls are made annually and the associated number of call minutes. While the FCC published total interstate minutes of use for all reporting LECs in 2016 (approximately 102.04 billion),<sup>8</sup> the published report and record is silent as to how many toll free calls and associated minutes were recorded during 2016. Nor does anyone know the trend of the numbers of toll free calls and minutes of use. Also necessary for the Commission to make sound public policy decisions are the 8YY mode splits between wireless, wireline and I-VoIP callers and the associated trends over time. Sound public policy cannot be made when the facts are hidden from interested parties.

With toll free number usage continuing to grow, as explained above, one would assume total 8YY minutes of use are growing as well. Why would businesses, nonprofits and government agencies subscribe to a service that they do not use and that consumers do not call? To the contrary, 8YY is America's Area Code. It gives businesses a regional or national presence and makes it easier for customers to make contact without the need to find and remember local telephone numbers. Toll free service also allows subscribers to manage their customer contact activities in ways that are transparent to consumers and not available to the subscriber when the consumer makes an ordinary long distance call. Where is the public information on the number of 8YY calls and associated minutes of use? Clearly it is missing.

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<sup>7</sup> Somos, Inc. homepage "We are SOMOS, Administering 41 million toll free numbers." <https://www.somos.com/>. Indeed, the Commission has recently authorized Somos, Inc. to open the 833 Service Access Code ("SAC") to ensure North America, including the United States and its territories, Canada, Bermuda, and most Caribbean nations, have sufficient access to toll free numbers. *Toll Free Service Access Codes*, Order, CC Docket No. 95-155, DA 17-382 (rel. April 21, 2017).

<sup>8</sup> See Common Carrier Line Access Minutes of Use, NECA & USAC Data, FCC (01/16-12/16), <https://www.fcc.gov/general/carrier-common-line-access-minutes-use>. Only incumbent LECs ("ILECs") report minutes of use. CLECs' and wireless carriers' minutes of use are not included in these reports.

Yet, despite the recent opening of the 833 SAC (to join the 800, 888, 877, 866, 855 and 844 SACs), USTelecom, a trade association for big incumbent LECs ("ILECs"), claims "8YY minutes and revenues supporting these networks appear to be continually falling."<sup>9</sup> This seems intuitively wrong. The facts supporting this conclusion need to be in the public record before the FCC can make any decision on 8YY access reform.<sup>10</sup>

A reasoned decision made after fair opportunity for public comment requires more record information than just the number of toll free calls and associated minutes of use. Before decisions can be made, the Commission needs to consider other topics and related facts, including: A) the costs of providing 8YY originating access service, including the costs of end office switching, tandem or direct connection and database query ("DBQ"); B) a mechanism for LECs and interconnected VoIP ("I-VoIP") providers to recover their costs for delivering 8YY traffic to the serving IXC;<sup>11</sup> C) the state of the retail 8YY market; D) how toll free providers (i.e., IXCs) price their service and whether and how they pass along reductions in access charges to their subscribers; E) the public policy aspects of charging end user customers for making toll free calls, as suggested by the Ad Hoc

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<sup>9</sup> Comments of USTelecom filed in WC Docket No. 10-90, *et al.* (July 31, 2017).

<sup>10</sup> See *supra* nn.5 & 6 and accompanying text. While it is questionable whether nationwide aggregate minutes of use can be a trade secret for any provider on the ground that other parties can estimate which interexchange carrier ("IXC") has what share of the market, the Commission can craft protections to the extent needed to protect the information. *Providing Eligible Entities Access to Aggregate Form 477 Data, Implementation of the Broadband Data Improvement Act of 2008 and A National Broadband Plan for our Future*, Order, 25 FCC Rcd 5059, at ¶¶ 31 et seq. (2010).

<sup>11</sup> *Global Tel\*Link v. FCC*, 66 Comm. Reg. (P&F) 1356 (D.C. Cir. 2017). Further given congressional concern about the size and growth of the USF, a plan to replace 8YY access charges with USF support does not seem feasible.

Telecommunications Users Committee ("Ad Hoc")<sup>12</sup>; and F) a review of alleged toll free arbitrage<sup>13</sup> and fraud.<sup>14</sup>

*A. Costs for Providing 8YY Access Services*

The record is simply devoid of any information about the costs incurred by competitive LECs ("CLECs") to provide originating toll free service. Just as with rural LECs, costs for providing service are likely to vary considerably from CLEC to CLEC and from I-VoIP provider to I-VoIP provider. The Commission cannot just take a cost estimate developed by very large companies with huge economies of scale, such as AT&T or Verizon (who also compete with CLECs for these services). Rather, the FCC must allow carriers to file evidence of their actual costs as confidential material.

Alternatively, the Commission must conduct a cost study that properly reflects CLEC costs. The FCC could examine costs from similarly situated ILECs; establish a rate or range of rates that are

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<sup>12</sup> Ad Hoc ex parte filing in WC Docket No. 10-90, *et al.* (filed May 19, 2017) ("*Ad Hoc Letter*").

<sup>13</sup> Interestingly, in the past Verizon has argued to the federal courts "Global NAPs' VNXX system was a way to provide toll-free services to Verizon customers (so that Verizon would not get any fees from those customers), deprive Verizon of the access fees it would normally get for toll-free calls, and instead require Verizon to pay Global NAPs reciprocal compensation." *Global NAPs, Inc. v. Verizon New England, Inc.*, 444 F.3d 59, 66 (1<sup>st</sup> Cir. 2006).

<sup>14</sup> The Commission, in the context of issuing an order to show cause as to why a group of affiliated carriers' operating authority should not be revoked, stated "that the use of an autodialer in order to generate payphone compensation by calling toll free numbers billed to the called party would not only be a violation of the Act and Commission's rules, but could also constitute wire fraud." *Publix Network Corporation; Customer Attendants, LLC; Revenue Controls Corporation; SignTel, Inc.; and Focus Group, LLC*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, at ¶ 33 (2002). *See also, Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report & Order, 11 FCC Rcd 20541 (1996).

It is important to distinguish "toll free fraud" that can occur by use of an autodialer to generate access charges while not connecting a real consumer to the toll free subscriber from the use of a toll free number to commit some other type of criminal fraud. *E.g., U.S. v. Morris*, 80 F.3d 1151 (7<sup>th</sup> Cir. 1996) (use of a toll free number in connection with the fraudulent sale of securities by officers of a savings and loan); *U.S. v. Cornfeld*, 563 F.2d 967 (9<sup>th</sup> Cir. 1977) (use of toll free numbers and a "blue box" to commit toll fraud and not pay for long distance calls).



sufficient to cover those costs; and allow individual CLECs and I-VoIP providers to show that their actual costs are higher, while still reasonable.<sup>15</sup>

It is critical to note that, unlike much of the sent-paid interexchange market, where many calls are transmitted via IP transport and can often avoid the PSTN, each and every CIC-based toll free call must be handled through legacy TDM networks. A DBQ must be made through a Signaling System 7 circuit and then the call must be delivered to the serving IXC through circuit-based switching. Thus, for a CLEC or I-VoIP provider to handle originating toll free calls it must have its own access to TDM network plant or have made arrangements for a wholesale provider, such as Teliix, that has made substantial investments in legacy network plant to handle the calls. Those are real costs that must be recovered through charges to the IXC that both completes the calls and bills the subscriber for such calls. There is no public policy reason to allow AT&T, for example, to bill its 8YY subscribers more for toll free calls than for ordinary toll calls (because the former are more expensive to provide) while, at the very same time, obtaining the underlying access services from CLECs for free.

*B. The FCC Must Provide Service Providers with Adequate Cost Recovery for 8YY Calls*

Under traditional regulation, a carrier is entitled to charge rates to its customers that are sufficient to allow it to recover its costs, including a reasonable profit, under normal circumstances.<sup>16</sup> Even as to non-dominant carriers, the Commission cannot simply establish an average rate without considering actual costs incurred to provide service.<sup>17</sup>

Obviously, if there is no intercarrier compensation for originating 8YY calls, LECs have little incentive to offer the service. Many will seek Section 214 authority to discontinue service. Others will

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<sup>15</sup> For example, for years the FCC allowed carriers to "demonstrate higher costs [for processing Primary Interexchange Carrier change orders] and tariff higher PIC-change charges." *Presubscribed Interexchange Carrier Charges*, Order and Notice of Proposed Rulemaking, 17 FCC Rcd 5568, at ¶ 11 (2002)

<sup>16</sup> *United States Telephone Assoc. v. FCC*, 188 F.3d 521, 524 (D.C. Cir. 1999); *Coalition for Environment, St. Louis Region v. Nuclear Regulatory Com'n*, 795 F.2d 168,173 (D.C. Cir. 1986), *citing* *FPC v. Hope Natural Gas Co.*, 320 U.S. 519 (1944) and *Bluefield Water Works and Improvement Co. v. Public Service Commission of the State of West Virginia*, 262 U.S. 679 (1923).

<sup>17</sup> *Global Tel\*Link v. FCC*.

simply not complete the calls. Even in today's market where many customers have all-calling voice packages that cover local and domestic long distance calls, often without limits, toll free calling has great value to subscribers and their callers. A Commission decision to require free 8YY origination service—both retail and wholesale—would most certainly cause a substantial reduction in the number of consumers who could make toll free calls as fewer and fewer local service providers offer to connect toll free calls. That, in turn, would decrease toll free calls to, and commercial operations for, businesses, nonprofits and government agencies. Reduced commercial activity in the United States is not in the public interest. How much of a decline would occur is, of course, unknown because the current level of toll free calling is unknown. But there is no good reason for the Commission to create a risk of diminished toll free calling—even if it benefits some big carriers' strategic plans to increase their bottom lines by getting free use of other carriers' networks.

*C. The State of the Retail 8YY Market*

Given the lack of traditionally available data about toll free call volumes, the Commission is essentially regulating in the dark and the parties, except for, perhaps, the largest IXC's with considerable staff and consultant resources, are forced to speculate about the retail market as they file pleadings with the Commission.

What is known by all, however, is that the retail market for 8YY service is substantially less competitive than it was several years ago. Carrier mergers have reduced the number of IXC's providing retail 8YY service to basically five carriers. They are Verizon, AT&T, CenturyLink, Level 3 and Sprint. And the players could well be reduced further should the FCC approve the CenturyLink-Level 3 merger.<sup>18</sup> That would leave only four TDM-based toll free carriers—Verizon, AT&T, Sprint and CenturyLink—and with Verizon and AT&T being the largest and most powerful in the market. The retail 8YY market could well become a virtual duopoly and quite soon at that.

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<sup>18</sup> See generally WC Docket 16-403.

Clearly, fewer TDM carriers will mean less competition and a corresponding increase in market control for the producers—the big remaining IXC. Of course, Teliax believes the toll free market is ripe for a shift from the PSTN to the Internet, such as through Teliax's Toll Free Exchange ("TFE").<sup>19</sup> But technology transitions in telecommunications do not occur overnight. Also, incumbent carriers with substantial investments in circuit-based switching and TDM transmission have a financial incentive to keep as much traffic as possible on existing networks, for as long as possible, to ensure full capital recovery of their investments and to maximize earnings and cash flow. Given these facts, the Commission must include the state of the retail 8YY market in any proceeding to consider 8YY access reform. To do otherwise could harm toll free subscribers and their customers.

*D. Toll Free Provider (IXC) Pricing of Retail Toll Free Services*

Unless the Commission is willing to risk having only a few, very large 8YY retail competitors using their increased market power to inflate margins on toll free calls, its 8YY investigation must include a review of IXC pricing for toll free calls. Teliax understands that some toll free providers bill for service with a variety of pricing plans, including a set-rate for a bundle of minutes; flat-rate, including access charges; or interexchange transport plus access charges. The outlines of these plans should be placed in the public record. Detailed prices, if not publicly available, should be provided under confidentiality protection, available to other parties under protective order.

Even more important is whether, and, if so, how, IXCs pass along savings from reduced access charges in their retail prices for toll free calls. While the FCC does not regulate those rates through tariffs, the Commission has held rates for non-dominant carriers must still be just and reasonable.<sup>20</sup> In a truly competitive market, IXCs should be expected to pass along their savings from reduced access charge expenses, including those instances where IXCs engage in self-help by not paying tariff

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<sup>19</sup> See Comments of Teliax, Inc. filed in Docket No. 10-90, *et al.* (July 31, 2017) ("Teliax Comments"), at 5.

<sup>20</sup> *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Second Report & Order, 11 FCC Rcd 20730 (1996).

or contract rates for 8YY calls delivered to their network.<sup>21</sup> If that is not happening, regulatory action may well be needed. As an independent regulatory agency, the FCC must ensure rates for toll free calls are just and reasonable and that the IXC providers are not making windfall profits on the backs of their business, nonprofit and government toll free subscribers.

*E. The Public Policy Aspects of Charging Consumers to Make Toll Free Calls*

AT&T and other commenters favoring the Ad Hoc petition propose to charge end user customers for the costs for providing exchange access services, including DBQ service.<sup>22</sup> They wish to set 8YY service on its ear and redefine toll free service as caller-pays after 50 years being a called-party-pays service. This result simply cannot be made without a public finding that there is a strong market and public policy need to flip 8YY service on its head. Teliix doubts such a showing can be made.

The called-party-pays nature of 8YY service has been firmly established since its introduction as In-WATS in 1967. In 1976, the FCC explained toll free service, then referred to as "In-WATS" service.

Interstate Inward WATS service was introduced by AT&T in 1967. ... Inward WATS calls are dialed by the caller but are paid for by the Inward WATS subscriber. Although both Outward and Inward WATS services utilize the same public switched network they do so in a significantly different manner. While Outward WATS calls are screened and blocked (to determine whether a call is in the authorized Service Area or not) in the originating toll office, such screening and blocking of Inward WATS calls occurs after the call has traversed the telephone network, in a terminating toll office serving the Inward WATS access line. A single access line is precluded by Bell's tariff from both originating Outward WATS and receiving Inward WATS calls. Both Outward and Inward WATS services are used in computer applications, reservation services, credit verification services, store and forward message services, etc.<sup>23</sup>

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<sup>21</sup> In these instances of big carrier self-help, CLECs have often been forced to sue the IXC for payment of tariff and other charges. *See, e.g., Teliix, Inc. d/b/a Teliix Colorado, LLC v. AT&T Corp.*, Civil Action No. 1:15-cv-01472-RBJ (D. Colo.); *O1 Communications, Inc. v. AT&T Corp.*, No. 3:16-cv-01452-VC (N.D. Calif.).

<sup>22</sup> *See* Comments of AT&T Corp. filed in WC Docket No. 10-90, *et al.* (July 31, 2017) ("Comments of AT&T"), at 4-13.

<sup>23</sup> *AT&T Co.*, Final Decision & Order, 59 FCC 2d 671, at ¶ 5 (1976).

Toll free service was part of the 1984 Bell System Divestiture. The late judge Harold H. Greene summarized 800 or In-WATS service as being “a unique interexchange service in which the receiver, rather than the originator of the call, subscribes to and is billed for the calls that are made.”<sup>24</sup>

In a post Bell System Divestiture world, toll free calling started its path to competition among IXCs. The Commission adopted new regulations to reflect changing market and technology.<sup>25</sup> Yet, the called party pays aspects remained. In 1987, the FCC described toll free service to be:

[A]n interexchange service in which the called party, rather than the calling party, subscribes to the service and pays for calls. The service provides businesses and other organizations a means of providing potential customers, or other persons with whom they wish to communicate, a convenient and free method of contacting them. An 800 service subscriber may choose to pay for incoming calls from any telephone in the country or may decide to limit its coverage to telephones in one or more of five concentric geographic bands around the subscriber’s receiving location.<sup>26</sup>

Unlike many telecommunications services, the basic workings of 8YY service are known by all and are an embedded part of American commercial life.

Under an 800 service plan, a consumer calls the 800 number and the party called — that is, the subscriber — is billed a prescribed amount for each minute as toll charges for the call. The 800 service plan, therefore, differs from regular telephone service in that the party called rather than the caller pays for the call.<sup>27</sup>

The Commission may lawfully reverse 50 years of precedent by making consumers pay for part of all of toll free calls, but it cannot do so in an arbitrary and stealthy manner. The Supreme Court, in the *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.* case,<sup>28</sup> has held that, when reversing a rule, a federal agency must supply a reasoned analysis for that change. An agency has

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<sup>24</sup> *U.S. v. AT&T*, 604 F.Supp. 316, 318 (D.D.C. 1985).

<sup>25</sup> See generally, *Provision of Access for 800 Service*, Notice of Proposed Rulemaking, 3 FCC Rcd 721 (1988), Report & Order, 4 FCC Rcd 2824 (1989).

<sup>26</sup> *Provision of Access for 800 Service*, Notice of Proposed Rulemaking, 102 FCC2d 1387, at ¶ 2 (1987).

<sup>27</sup> *Sprint Corp. v. Evans*, 846 F.Supp. 1497, 1500 (M.D. Ala., 1994).

<sup>28</sup> *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 42 (1983).

a duty to “explain its departure from prior norms.”<sup>29</sup> A key reason to hold the agency’s feet to the fire is to protect the expectations of private parties from arbitrary agency action.<sup>30</sup>

Countless businesses, nonprofits and government agencies rely on their ability to attract calls from their “public” by offering to pay toll charges with 8YY service. And virtually every American over the age of 10 knows about toll free calls. The FCC may not rely on arcane intercarrier compensation proceedings<sup>31</sup> to change the nature of 8YY calls and 50 years of public understanding and reliance. Rather, the Commission must set forth the proposed change of the fundamental nature of toll free calling and its supporting rationale in “neon lights accompanied by a brass band.” By no sense of one’s imagination can the Commission claim it has a sufficient record to justify turning toll free calling service upside down. At a minimum, more proceedings and adequate public notice are required in the event the Commission intends to travel down the path of public harm.

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<sup>29</sup> *Atchison, Topeka & Santa Fe Ry. Co. v. Wichita Bd. of Trade*, 412 U.S. 800, 808 (1973).

<sup>30</sup> *City of Anaheim v. FERC*, 723 F.2d 656, 659 (9<sup>th</sup> Cir. 1984) (noting that, in an adjudication, “agencies may not impose undue hardship by suddenly changing direction, to the detriment of those who have relied on past policy”).

<sup>31</sup> *See, e.g., Transformation Order*, at ¶ 738. There, the Commission stated that bill and keep for exchange access costs had significant public policy advantages because it “ensure[s] that consumers pay only for services that they choose and receive.” This logic fails when one considers toll free calls where the consumer has no choice in the selection of the IXC providing 8YY service and does not even know the identity of the IXC providing service. All these decisions are made by the toll free subscriber, who only wants to be reached via the 8YY number and is the sole beneficiary of the access services, including DBQ.

Moreover, the idea that bill and keep is necessary because the consumer has no incentive to select an originating carrier with low access charges (*See* AT&T Comments at 5) simply makes no sense. The vast majority of individual and small business end users do not consider their local service provider’s interstate access charges because they have never even heard about access charges. Indeed, if the FCC were to make a data request seeking each ILEC’s, CLEC’s or I-VoIP provider’s consumer marketing materials, it would be a safe bet not one of them would tout the seller’s access charges. Bill and keep in this instance is yet one more play by big carriers to get free access services—to use another’s capital investments and employee’s labor for free.

*F. What Is Toll Free Arbitrage and Fraud?*

*a. Toll Free Arbitrage*

Various parties, including AT&T and Verizon, have complained about “toll free arbitrage” and “toll free fraud.”<sup>32</sup> The Commission has never defined “toll free arbitrage” or even “regulatory arbitrage” in any clear and precise terms.<sup>33</sup> It has characterized “regulatory arbitrage” in several ways, including “businesses making decisions based on regulatory classifications rather than on customers' preferences and innovative and sustainable business plans.”<sup>34</sup> The FCC has also described the phenomenon as “profit-seeking behavior that can arise when a regulated firm is required to set different prices for products or services with a similar cost structure.”<sup>35</sup>

These definitions provide some guidance, but before the Commission adopts rules or takes other actions with respect to so-called “toll free arbitrage,” it should provide a definition and specify what types of facts must be shown to demonstrate “toll free arbitrage” exists. This should occur in a manner that is similar to how the FCC has defined “access stimulation” and specified what a party must demonstrate to trigger application of the FCC’s rules regulating this behavior.<sup>36</sup>

Moreover, the Commission must consider the impact of arbitrage on toll free subscribers. While Ad Hoc suggests its members pay “unreasonably high rates” for subscribing to, and receiving, toll free calls,<sup>37</sup> the record evidence does not support this. Ad Hoc’s statements are just bald

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<sup>32</sup> See, e.g., Comments of AT&T, *supra* n.22; *In re Connect America Fund; Establishing Just and Reasonable Rates for Local Exchange Carriers; Developing a Unified Intercarrier Compensation Regime*, WC Docket Nos. 10-90, 07-135; CC Docket No. 01-92, Comments of Verizon (July 31, 2017).

<sup>33</sup> R. Freiden, “Regulatory Arbitrage Strategies and Tactics in Telecommunications,” 5 N.C.J.L. & Tech. 227, 228, n.5 (2004).

<sup>34</sup> *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities, Internet Over Cable Declaratory Ruling*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, at ¶ 90 (2002).

<sup>35</sup> *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, at ¶ 11, n.18 (2001).

<sup>36</sup> 47 C.F.R. §§ 61.3(bbb) and 61.26(g).

<sup>37</sup> *Ad Hoc Letter*, *supra* note 12.

allegations. Also there is no evidence that IXCs pass along savings in access charges to toll free subscribers. We do not know the size of this market nor how toll free subscribers purchase services that exclude rural and small town markets. The FCC needs answers to these questions before it makes decisions on 8YY access reform.

b. Toll Free Fraud

The FCC has not clearly defined “toll free fraud.” However, there is more common understanding of the term as it applies to the 8YY access charge regime.<sup>38</sup> It is generally regarded as the use of an autodialer or other scheme to dial toll free numbers without the purpose of conversing with the called party or providing or receiving information from such party solely for the purpose of generating access revenue. Such action might well constitute “wire fraud,” as defined in the U.S. Criminal Code. Section 1343 reads in applicable part:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice.<sup>39</sup>

As stated in its initial comments<sup>40</sup> and also in these reply comments, Teliix strongly opposes toll free fraud as reasonably defined and works with its customers and other service providers to stop and prevent it.

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<sup>38</sup> See nn.13, 14, *supra*.

<sup>39</sup> 18 U.S.C. § 1343. See also, U.S. Attorneys Manual, “941. 18 U.S.C. 1343 Elements of Wire Fraud.” Available at <https://www.justice.gov/usam/criminal-resource-manual-941-18-usc-1343-elements-wire-fraud>. Further, most states have similar criminal laws prohibiting fraud and also provide for civil remedies for victims to recover damages. See also, *U.S. v. Henny*, 527 F.2d 479 (9<sup>th</sup> Cir.), *cert. denied* 425 U.S. 991 (1976), sustaining a conviction for wire fraud when a “carrier attempted deliberately to inflate payments from a long distance toll settlement pool by, among other things, misreporting length of calls, inflating the number of calls, and reporting free employee calls as compensable revenue generating toll calls.” *Quoted in Publix Network Corporation; Customer Attendants, LLC; Revenue Controls Corporation; SignTel, Inc.; and Focus Group, Inc.*, Order to Show Cause and Notice of Opportunity for Hearing, 17 FCC Rcd 11487, at ¶ 36, n.77 (2002).

<sup>40</sup> See Teliix Comments, *supra* n.19.



However, what is necessary is an examination of how IXCs define "toll free fraud" for subscriber billing purposes and whether and how they refund charges for "fraudulent calls."<sup>41</sup> One would think regulatory fairness requires IXCs to pass along any and all refunds of 8YY access charges received by the IXC from the serving LEC for calls deemed fraudulent. The FCC should require those IXCs providing 8YY service to provide the number of toll free calls and associated minutes of use for which they made billing refunds or adjustments for 8YY subscribers and the total number of toll free calls and associated minutes of use.

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<sup>41</sup> Since, at least for now, toll free subscribers pay for all toll free calls, toll free call fraud would require them to pay for calls that do not result in a connection from a caller, not because of a technical failure, but because the originating party had no intention of communicating with the subscriber, but only to generate access revenues.

#### **IV. Conclusion**

For the reasons set forth herein, the Commission should not grant the relief requested by Ad Hoc. Before taking any action on 8YY access reform, the Commission should first do so only as a part of a larger proceeding that examines "Post Transformation Order" access issues, including the effects of the earlier changes on competition and consumers. And before changing any rules affecting 8YY access, the Commission must open and complete a broad investigation of the 8YY market. The record herein is nowhere near sufficient for any Commission action whatsoever. It would better for the 8YY subscribers, consumers and the public interest for the Commission to maintain the status quo, while fighting true fraud, while the market transitions from TDM-based toll free calling to IP-based toll free calling.

Respectfully submitted,  
Teliix, Inc.

By \_\_\_\_\_ /s/ Robert H Jackson \_\_\_\_\_

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