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

In the Matter of	)	
	)	
8YY Access Charge Reform	)	WCB Docket No. 18-156
	)	

COMMENTS OF TELIAX, INC. AND PEERLESS NETWORK, INC.

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Table of Contents

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I. INTRODUCTION AND SUMMARY

Teliax, Inc. ("Teliax") and Peerless Network, Inc. ("Peerless," collectively "T&P") through their counsel, respectfully submit comments to the Federal Communications Commission ("Commission" or "FCC") in response to the Further Notice of Proposed Rulemaking in 8YY Access Charge Reform, WCB Docket No. 18-156, FCC 18-76 (rel. June 5, 2018) ("*FNPRM*").

Before discussing the many important issues raised in the *FNPRM*, T&P commend the Commission for opening a proceeding that takes a comprehensive look at the complex toll free market, both wholesale and retail, rather than simply modifying its rules based on the 2017 Public Notice, DA 17-631, that requested comments refreshing the record. Toll free calling has, since its inception by the Bell System in 1967, become a major tool of business, government and nonprofits for communicating with their customers, clients, residents and the general public. It also provides revenues for telecommunications companies that enable investments in new technology. Accordingly, the Commission needs to take careful consideration of the information that is and will be provided through comments, replies and the *ex parte* process before making decisions that could dramatically change this communications valuable tool.

The constant use of self-help (refusing to pay tariff charges without also challenging the charges before the FCC or in a court) by the large IXCs[1] clearly demonstrates their contempt for

[1] All abbreviations or terms of art are explained in the body of these comments.

Commission rules and United States' regulatory framework, and is inconsistent with the law. The Act and decades of regulation and case law require customers, including other carriers, to file challenges to carrier rates and not just withhold payment. As a result, they lack of credibility and should not be believed by the Commission. Peerless and other carriers have been able to persuade courts to award them damages in the face of IXC self-help. The Commission must make it clear that, in order for a customer to withhold payment of access charges, it must contemporaneously file a complaint against those rates with the FCC or a court of proper jurisdiction.

Both Peerless and Teliax work with the industry and government agencies to identify and investigate unlawful use, access pumping, robocalling and other fraudulent traffic. The large IXCs cry "fraud" as part of their schemes to avoid paying tariff or contract rates, which is, itself, fraud. Verizon makes an extreme claim that all or most of Teliax's traffic is fraudulent but consistently refuses to provide Teliax with the details needed to identify, investigate and, as appropriate, block calls. Indeed, both IXCs have directed Teliax to deliver all traffic absent requests to block specific calls. The Commission must require all carriers to disclose suspected fraudulent calls and call sources, exercising the FCC's ancillary jurisdiction if needed. The FCC should declare clearly and simultaneously that self-help is an unjust and unreasonable act that is inconsistent with the FCC's policy of eliminating fraud in the toll free market, again using ancillary jurisdiction if needed.

The facts before the Commission do not justify an extension of benchmarking, which would likely result in the large IXCs pocketing any savings instead of reducing toll free rates. Existing benchmarking rules are too vague and have been the subject of considerable disruptive litigation. This is especially true as it relates to the issue whether a LEC can be in the wholesale 8YY origination business. Benchmarking would be inconsistent with the 1996 Act, decades of bipartisan FCC policy for fostering more, not less, competition; and likely an unlawful limitation on CLECs' Section 214 authority as interpreted by the courts for decades for prohibit LECs from offering wholesale services.

There is no record evidence that ILEC rates at every location where 8YY calls are dialed are, in fact, lower than the rates where the CLEC hands over the calls to the serving IXC. Commission

precedent is clear: A LEC provides service where it performs the service and not where end users are located when they dial telephone numbers. The Commission has never proposed, much less adopted, restrictions on CLECs' 214 authority to provide wholesale 8YY services or to restrict where a party can interconnect with the nation's network.

The record does not justify restrictions on a carrier's mileage charges. Bad actors should be dealt with through the complaint process. To adopt mileage limits, the FCC must first ask the largest ILECs to provide statistically valid studies, adjusted for seasonality, of how far they transport 8YY originating traffic in both urban and rural markets, as well as invite NECA and CLECs to submit similar information. Mileage limits, if adopted, should vary by the type of market.

The Commission's inquiries about 8YY DBQs are important because DBQs are essential to proper routing of toll free calls. Without the DBQ, there is no toll free call as there is no way to identify the IXC serving the dialed number. Rates for queries vary because carrier costs and demand varies. The failure of the big IXCs to convert their TDM-based 8YY networks to IP forces CLECs to operate otherwise unnecessary TDM facilities. That, in turn, increases their DBQ costs and rates. The Commission cannot lawfully set rates based on nationwide average costs where it also has evidence that carriers have actual costs that exceed calculated average costs and that are reasonable in type and amount. Rather, DBQ rates must be based on actual carrier costs and demand considerations.

Strong evidence shows that the large IXCs failed to reduce their toll and all-distance calling rates to reflect previous access reforms. Hence, the FCC must presume they will do the very same with any access rate reduction for toll free calling. AT&T's and Verizon's claims that they cannot obtain direct connections are often false since, in many instances, they neither ask for them nor accept them when proposed by a CLEC.

The Commission needs to presume the large IXCs will pocket any savings from moving end office, tandem and DBQ access to B&K just like they did with the movement of terminating access to B&K. Without access charges, CLECs and small ILECs have no economic incentive to provide TDM-based 8YY originating service and will most certainly file for Section 214 discontinuance. Using

unregulated information service platforms, these LECs can still provide 8YY service on a RespOrg-by-RespOrg basis, totally bypassing the big IXCs and their outdated networks. The FCC should not adopt any rules or policies designed to protect AT&T's or Verizon's toll free market shares.

Many CLECs, in particular those offering wholesale services, have already built and operate all IP-based networks. It is the need to connect with AT&T and Verizon, as well as many rural markets, that force CLECs to maintain TDM technology as well. If the Commission truly wants to see a nationwide IP network, it will need to establish a schedule for the nation's largest carriers to replace their current network and to operate on an all-IP basis similar to what was done for equal access and number portability.

AT&T and Verizon often operate as if all access had always been moved to B&K and, according to data in the record, have not passed along the cost savings to their customers. Moreover, they often use the war cry of "fraud" to avoid paying access for 8YY calls they demand to be delivered for which they bill their subscribers. In this world, disputes and lawsuits are inevitable. To reduce litigation, the FCC must make it clear that a carrier engaging in self-help by withholding access charges that does not simultaneously challenge the rates either in court or in an FCC complaint commits an unjust and unreasonable act.

While Peerless and Teliax continue to submit the FCC should not benchmark access rates for originating toll free calling or go down a path to B&K, if the Commission moves in this direction, it should ensure any benchmarking and transition plan is simple and easy to administer. A CLEC should not be required to benchmark its rates against multiple price cap LECs. And as discussed herein, the Commission must realize that mandatory B&K will cause CLECs, most especially any publicly held ones, to exit the TDM-based toll free market or face shareholder suits. These CLECs would likely offer toll free services using unregulated information service platforms.

Peerless previously demonstrated that a number of CMRS operators have switched out their direct connections in favor of tandem connections in order to obtain additional revenues. This is an unjust and unreasonable practice. Should the FCC require CLECs to make direct interconnections to

IXCs, it should also require CMRS operators to do the same for both IXCs and CLECs whenever the sending carrier's traffic volumes equal or exceed the capacity of four T-1 circuits.

II. DISCUSSION

A. The Constant Use of Self-Help by the Large IXCs Clearly Demonstrates Their Lack of Credibility and Contempt for Commission Rules

The Communications Act and the Commission are more than 80 years old. Congress and the President intended for carriers to follow the law and the FCC's rules as interpreted by the Commission and the courts. Carrier rates must be just and reasonable[2] but the Commission and the courts are the appropriate fora to challenge a carrier's rate.[3] By establishing multiple methods for a dissatisfied customer, including other carriers, to challenge rates, Congress did not intend that customers, even big and wealthy ones, could ignore the established procedures for challenging rates and simply not pay them.

The ongoing conduct of the large IXCs, most especially AT&T and Verizon, demonstrates their disrespect for Commission rules and their resultant lack of credibility.[4] A key market and regulatory abuse related to 8YY access charges that the FCC must address is the largest IXCs' use of self-help to "solve" disputes.[5] The filed rate doctrine, still applied by the courts, prohibits carriers from simply refusing to pay tariff rates without also raising a legal challenge to the tariff.[6] Yes, simply refusing to pay remains an oft-used tactic of the IXCs. Until this *modus operandi* of large corporations such as

[2] Section 201(b) of the Act, 47 U.S.C. § 201(b).

[3] *Id*, at Sections 204, 205, 207 and 208, 47 U.S.C. §§ 204, 205, 207 and 208.

[4] Following valid statutes and agency rules (or challenging them in a manner provided by law) demonstrates respect for law and enhances a business's credibility. In contrast, a party that ignores the rules lacks respect for law and demonstrates good reasons why its advocacy should not be viewed as credible. And, as discussed in Sections II.B., F. and H. below, the large IXCs' credibility is further diminished because they pocketed earlier savings from access reform, rather than lower their retail rates as the Commission expected.

[5] *See FNPRM* at ¶ 29.

[6] *Id.*

AT&T and Verizon is halted, unlawful self-help measures will continue to undermine the intercarrier compensation system.

Both Peerless and Teliax have witnessed unlawful self-help first-hand. Teliax filed a lawsuit against AT&T because AT&T stopped compensating Teliax in accordance with Teliax's FCC-filed tariff, and instead began to compensate Teliax at "national average tandem" and "national average DBQ" rates calculated by AT&T.[7] AT&T further deducted these new rates from previous payments it had made to Teliax. AT&T never initiated a tariff complaint against Teliax to question Teliax's rates or filed suit. Instead, AT&T decided to stop paying, knowing full well AT&T's actions would require Teliax to expend resources litigating the matter in federal court.

Similarly, Teliax also filed a lawsuit against Verizon for non-payment of tariffed access charges,[8] as well as a lawsuit based on non-payment of rates guaranteed by a contract entered into between Verizon and Teliax.[9] Verizon has alleged Teliax is engaged in fraud on all calls but has not produced evidence of anything beyond anecdotes of a few calls to support its broad claim.

Peerless too has been forced to sue for collection of its access and other intercarrier compensation charges.[10] In *Peerless I*, even though the court referred several issues to the FCC on the basis of the primary jurisdiction doctrine, it refused to stay the case (and effectively excuse the IXC from paying filed tariff rates for the months or even years that a referral is pending before the FCC or possibly before a court of appeals on judicial review) because, with a stay, the LEC would not be compensated at its legal or lawful rates. Recently, the Illinois federal court awarded Peerless $48.5

[7] *See Teliax, Inc. v. AT&T Corp,* Civil Action No. 1:15-CV-01472 (D. Colo.).

[8] *See Teliax Inc. v. MCI Communications Services, Inc.,* Civil Action No. 1:18-cv-01266 (D. Colo.).

[9] *See Teliax, Inc. v. Verizon Services Corp.*, Civil Action No. 1:18-CV-00104 (D. Colo.).

[10] *Peerless Network, Inc. v. MCI Comm'ns Serv., Inc.,* No. 14 C 7417 N.D. Ill. March 16, 2018) ("*Peerless I*").

million in damages, including late payment fees, for MCI's (Verizon) refusal to pay access charges for multiple years.[11]

Financial realities in the telecommunications industry do not leave room for these unlawful self-help actions. The consequences of withholding payment are particularly dire when a very large corporation – like AT&T or Verizon – withholds compensation from a smaller company. These actions stifle competition, innovation, and network investment.

To be clear, carriers are not permitted to withhold payments when they disagree with valid tariffs filed with the FCC. The "filed rate doctrine" requires all telephone companies and their customers to pay the same non-discriminatory rates contained in FCC-filed tariffs.[12]

The FCC has long recognized that self-help (not paying for calls IXCs accepted and transmitted to their toll free subscribers (and for which they bill their subscribers) without also filing a legal challenge to the rates) is an unlawful telecommunications practice. "[A] customer … is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress … ."[13] "We cannot condone MCI's refusal to pay the tariffed rate for voluntarily ordered services. … [S]elf-help is not an acceptable remedy … ."[14]

Precedent also does not permit the use of a "claw back," whereby an IXC reduces payments to a LEC and then deducts the difference from full tariff rates previously paid. The Fifth Circuit Court of Appeals concluded that a "claw-back" plan executed by Sprint against CenturyLink constituted an

[11] *See Peerless Network, Inc. v. MCI Commc'ns Serv., Inc.*, No. 14 C 7417 (E.D. Ill.), Memorandum Opinion & Order (filed July 27, 2018) ("*Peerless II*").

[12] 47 U.S.C. § 203(c). *See also Louisville & Nashville R.R. Co. v. Maxwell*, 237 U.S. 94, 97 (1915); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 127 (1990).

[13] See, e.g., *In the Matter of Business WATS, Inc.*, 7 FCC Rcd. 7942 (1992).

[14] *In the Matter of MCI Telecommunications Corp.*, 62 FCC 2d 703, 706 (1976).

"unjust and unreasonable act" in violation of Section 201(b) of the Communications Act of 1934, as amended ("Act"), 47 U.S.C. § 201(b).[15]

Despite this precedent, IXCs have used self-help to enrich themselves in the short term while running up legal bills for LECs with the resources to bring the IXCs to court.[16] This self-help scheme is a systematic fraud and it is well past time for the FCC to reign in these practices. The FCC should investigate the use of self-help, and how profits from non-payment of tariffed rates are used by IXCs. And, more importantly, the FCC should make self-help by a carrier withholding payment of tariff charges billed by another carrier an unjust and unreasonable act and, thus, unlawful unless the carrier files a formal complaint with the FCC or a lawsuit in federal court.[17]

B. Benchmarking

The FCC seeks comments on the practice of benchmarking, especially the question of whether a CLEC should be required to benchmark its rates to the tariff rate of the incumbent local exchange carriers ("ILECs") where the call originates (*i.e.*, where the end user dials an 8YY number) or where the call is handed off to the interexchange carrier ("IXC") after a CLEC performs the first point of switching and a toll free database query ("DBQ").[18] Additionally, the Commission asks about situations where the rates of the ILEC are lower where the call originates than the rates of the ILEC where the call is handed over to the IXC.[19]

First, T&P do not believe the facts justify an extension of benchmarking, which would likely result in the large IXCs pocketing any savings instead of reducing toll free rates. However, in the event benchmarking is extended, the rules must be clear and applied fairly. Rather than succumbing

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[15] *CenturyTel of Chatham, LLC v. Sprint Commc'ns Co.*, 856 F.3d 566, 578 (5th Cir. 2017).

[16] In instances of self-help, CLECs have often been forced to sue the IXC for payment of tariff and other charges. *See, e.g., Teliax, Inc. v. AT&T Corp.*, Civil Action No. 1:15-cv-01472 (D. Colo.); *O1 Communications, Inc. v. AT&T Corp.*, No. 3:16-cv-01452-VC (N.D. Calif.).

[17] *See generally, Peerless I* and the cases cited therein.

[18] *FNPRM* at ¶ 25.

[19] *Id.*

to the IXCs' view that benchmarking creates opportunities for manipulating access rates, the FCC should focus on clarifying its benchmarking rule to address ambiguities in application of those rules.

The existing benchmarking rule (47 C.F.R. § 61.26) has been the source of countless billing disputes between CLECs and IXCs. It should be more precise so that carriers will not need to argue[20] over the meaning of terms such as "similar services" or "some portion of the switched exchange access services." Similarly, the Commission should state clearly what it means by:

> except if the CLEC is listed in the database of the Number Portability Administration Center as providing the calling party or dialed number, the CLEC may, to the extent permitted by §51.913(b) of this chapter, assess a rate equal to the rate that would be charged by the competing ILEC for all exchange access services required to deliver interstate traffic to the called number.

Many IXCs argue this means CLECs are prohibited from providing wholesale 8YY origination service unless they want to do it for free.[21] Prohibiting CLECs from offering wholesale services is inconsistent with the 1996 Act, decades of bipartisan FCC policy for fostering more, not less, competition; and likely an unlawful limitation on CLECs' Section 214 authority as interpreted by the courts for decades.

Second, absent a situation where a CLEC benchmarks its rates to those of a rural LEC that is or was recently a member of the National Exchange Carrier Association ("NECA") traffic sensitive pool, it is unreasonable to assume that, overall, the ILEC rates at every location where 8YY calls originate are lower than the rates where the serving CLEC hands over the calls to the serving IXC. An IXC desiring to make such an argument would need to calculate the sum of the rates applicable to the originating exchange for every 8YY call originated and compare it to the sum of the rates applicable

[20] 47 C.F.R. § 61.26(f).

[21] *Implementation of the Pay Telephone Reclassification & Compensation Provisions of the Telecommunications Act of f1996,* 13 FCC Rcd 10893, at ¶ 26, n.67 (1998) ("*1998 Payphone Order*"). "We require payors to compute compensation owed to LEC PSPs and independent PSPs based on data for six months, instead of merely the first quarter of per-call compensation, to account for the potential seasonality issues that cause payphone call volumes to fluctuate."

to the exchange where every 8YY call is handed off to the IXC at hand. This evidence is not in the record. Mere "flag-waving" by the IXCs is not sufficient.

Moreover, given factors such as seasonality and changes in the wholesale market,[22] calculation of this comparison for any given month will simply be invalid.[23] The Commission cannot adopt this presumption. Rather, it must require the IXCs making this claim to support it with statistically valid data analyses that are then made subject to review and comment by other parties.

Third, as technology and the market continue to develop it is increasingly difficult to determine where a call originates. This problem will only increase to the extent the Commission adopts rules permitting nationwide telephone number portability such that calling party originating number can be totally unrelated to the exchange where the end user resides.[24]

Finally, Commission precedent is clear: A LEC provides service where it performs the service and not where end users are located when they dial telephone numbers. For decades the FCC has allowed customers to interconnect their equipment to the PSTN "where such use is privately beneficial without being publicly detrimental."[25] Initially, this right was limited to within the customer's premises (e.g., home or business) and local exchange (*e.g.*, Denver or Chicago).

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[22] Teliax Comments in Response to WC Docket No. 18-155 at 10-11; Teliax Reply Comments in Response to WC Docket No. 18-155 at 3-5.

[23] *See, e.g., In re Application of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, 31 FCC Rcd 6327, 6611 App. C ¶¶ 94-96 (2016) ("Based on the above evidence, we conclude that the use of total monthly churn rates–without regard to underlying reasons for churn and without taking into account factors like serial churn and seasonality–likely exaggerates the robustness of competition for broadband services."); *1998 Payphone Order*, 13 FCC Rcd at 10907 n. 67 (requiring PSP payors to use compensation calculation method that accounts for seasonality of call volume fluctuation).

[24] *Nationwide Number Portability,* 2018 Comm. Reg. (P&F) 70 (2018).

[25] *Hush-a-phone Corp. v. U.S.*, 238 F. 2d 266 (D.C. Cir. 1956); *Carterfone*, 13 FCC 2d 420 (1968), *pet. for recon. denied*, 14 FCC 2d 571. Both the *Hush-a-Phone* and *Carterfone* cases involved challenges to Telephone Company tariffs that forbade end user customers from attaching any device to the Telephone Company-provided handset. After losing in court, the FCC concluded that the tariff restrictions were unjust and unreasonable. It declared customers had a right under the Act to attach devices to the network, including handsets, when such use was privately beneficial without being publicly detrimental. The Hush-a-Phone was a device that attached to the handset mouthpiece to reduce outside noise and increase privacy. The Carterfone manually connected a telephone handset to a two-way radio, permitting a three-way conversation.

But as time passed and customer demand evolved, the Commission allowed customers to choose the exchange where, and the carrier with which, they wished to interconnect.[26] For example, the *Arco* orders allowed Atlantic Richfield employees working in Plano, Texas to make and receive long distance calls at their desks but being billed as if they were made in nearby Dallas. Access charges were not billed by GTE that served Plano but, rather by Southwestern Bell that served Dallas.

Likewise, in *Heritage*,[27] a resort located chiefly in South Carolina but with a portion of the property in North Carolina elected to install its PBX telephone system in North Carolina and connect with Southern Bell instead of connecting in South Carolina with the Fort Mill Telephone Company. Under this arrangement all long distance calls dialed by resort guests and employees would be billed by Southern Bell from North Carolina. Under the rules of the day, Southern Bell would get a share of the long distance revenue, even though the overwhelming majority of the calls were dialed in South Carolina. Likewise, the calls appeared to have been dialed from North Carolina even though the caller was sitting in her hotel room in South Carolina. The Fort Mill Company received no money from these long distance calls, which, in turn, caused it to file a complaint with the South Carolina Public Service Commission ("PSC") against Southern Bell. That agency directed Southern Bell to stop providing service in South Carolina and to disconnect the PBX.

The FCC overturned the PSC. It concluded, *inter alia,* that 1) Heritage Village had the right to interconnect its PBX where it wanted to do so even though most of the callers were not located in North Carolina; and 2) Southern Bell was not providing any services in the Fort Mill exchange in South Carolina.

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[26] *Atlantic Richfield Co.,* 59 Rad. Reg. 2d (P&F) 417 (Common Carrier Bureau 1985), *app. for rev. denied*, 3 FCC Rcd 3089 at ¶ 22 (1988) (affirming Atlantic Richfield's ("ARCO") right to interconnect at any point it deems beneficial so long as there is no technical harm to the telephone system and/or economic impact which adversely affects the ability of a carrier adequately to serve the public.). *Arco* was affirmed in *Public Utility Comm'n of Texas v. FCC*, 886 F2d 1325 (D.C. Cir. 1989). *See also, Expanded Interconnection with Local Telephone Company Facilities*, 9 FCC Rcd 5154, at ¶ 19, n.41 (1994).

[27] *Petition of Heritage Village Church and Missionary Fellowship, Inc.; For emergency relief with respect to PBX interconnection to telephone service of Southern Bell Tel. & Tel. Co.*, 88 FCC 2d 1436 at ¶¶ 14-15 (1982 ("*Heritage Village*"), *aff'd Fort Mill Telephone Co. v. FCC*. 719 F.2d 89, 91-92 (4th Cir. 1983.)

The FCC has not altered this longstanding rule in the VoIP context. Indeed, the FCC permits consumers to use VoIP services "with a broadband internet connection anywhere in the universe to place a call" (so-called "nomadic VoIP service").[28] Thus, in T&P's cases, their CLEC and VoIP service provider partners have the uncontestable right to deliver 8YY traffic to either Teliax or Peerless for ultimate delivery to the serving IXC's toll free subscribers. And T&P's services are provided in the state where the CLEC provides the first point of switching and performs a database query. This is just like the situation where the FCC confirmed Southern Bell provided service in North Carolina where it performed the first point of switching and not in South Carolina where end users dialed calls.

An agency can change its position or policy,[29] but when it does so, it must demonstrate a clear intention to change positions/policy and not leave a court wondering whether the change occurred inadvertently. The agency must also provide sufficient justification for the change.[30] There also needs to be sufficient notice of the agency's proposed action.[31] A notice of proposed rulemaking is "sufficient if it provides a description of the subjects and issues involved."[32] The Commission has never proposed revoking a customer or carrier's right to interconnect with the public network only in the state where the customer is located. It has never released a notice of proposed rulemaking that would revoke the right to interconnect at any point deemed beneficial not shown to be harmful to the public. Similarly, it has never released a notice of proposed rulemaking that proposed to amend the ability of carriers

[28] *Minnesota Public Utilities Comm'n v. FCC*, 483 F.3d 570, 575 (8th Cir. 2005).

[29] *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 863 (1984). An initial agency interpretation is not instantly carved in stone."

[30] *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971), *National Black Media Coalition v. FCC*, 775 F.2d 342, 356, n.17 (D.C. Cir. 1985) ("[A]n agency may not repudiate precedent simply to conform with a shifting political mood.").

[31] *California Citizens Band Ass'n v. United States*, 375 F.2d 43 (9th Cir. 1967); *Citizens Telecomm'ns Co. of Minnesota, LLC. V. FCC*, No. 17-2296 (8th Cir. Aug. 28, 2018) (reversing the FCC's decision to deregulate certain Business Data Services *ex ante* because the Commission's public notice "failed to provide adequate notice of its ending of *ex ante* regulation of transport services." *Slip op.* at 18.)

[32] *Id.* 375 F.2d at 49.

to offer wholesale 8YY origination services using their existing domestic Section 214 authority. Ergo, no such restrictions exist.

C. Mileage Pumping

The FCC asks numerous questions about so-called "mileage pumping," where LECs allegedly transport calls farther than efficient networking suggests to bill additional transport mileage access charges.[33] The FCC's questions appear to be based on allegations by AT&T and Verizon; however, Teliax's and Peerless's experience with these carriers is strikingly different than what is portrayed in the *FNPRM*. Teliax's points of interconnection ("POIs") in both Denver and Colorado Springs are located within a mile of the toll switches of the largest two IXCs. However, only one of those carriers has implemented a direct connection with Teliax (at its tandem switch and not its end office switch) and then only recently and for just its lowest volume carrier identification code ("CIC").

Similarly, T&P submit the record does not justify the imposition of transport mileage limits as there are no statistically valid traffic studies, adjusted for seasonality, that show excessive mileage is charged on the bulk of calls, rather than anecdotal evidence that some LECs may route calls inefficiently in some circumstances.[34] However, in the event that the Commission decides to move in this direction, it must not adopt a rule including mileage limits unless those limits are based on both sound engineering and economics. The Commission should require the largest ILECs to provide statistically valid studies, adjusted for seasonality, of how far they transport 8YY originating traffic in both urban and rural markets, as well as invite NECA and CLECs to submit similar information. Mileage limits should vary by the type of market.

[33] *FNPRM* at ¶ 26.

[34] The record does not justify restrictions on a carrier's mileage charges. Bad actors should be dealt with through the compliant process.

D. Traffic Pumping

The *FNPRM* seeks comment on the complex subject of traffic pumping.[35] Clearly, the use of autodialers and other devices to dial toll free numbers, not to communicate or complete a transaction with the toll free subscriber, but to generate revenue or commit other fraud, is an unjust and unreasonable act under the Communications Act. It could violate other state and federal laws as well. However, traffic pumping should not be used by IXCs as an excuse not to pay valid access charges. Any rules the FCC implements to address traffic pumping must ensure that all carriers involved in a call cooperate and share information to identify and block fraudulent traffic.

Both Peerless and Teliax are committed to work with the industry, the Commission and law enforcement to identify and block fraudulent calling. Indeed, both companies are regular participants in weekly anti-fraud calls sponsored by SOMOS which include many in the industry including government agencies. However, Teliax has experienced conduct by large IXCs that make it virtually impossible to identify, investigate and take appropriate action, including disconnecting repeated violators from using its network. On numerous occasions, both AT&T and Verizon have complained to Teliax that it is allegedly delivering fraudulent calls or the product of traffic pumping but, at the very same time, refuse to provide any call identifying information directly to Teliax such that it could use while working with others to identify and cause blocking of this traffic if it is, indeed, "bad traffic."

Given those carriers' ongoing schemes of self-help, it seems quite evident that much of the AT&T and Verizon claims of traffic pumping are simply part of their efforts to defraud CLECs of tariff charges. If the FCC truly wants to prevent traffic pumping, it must declare that every carrier, even when it is in the role of a purchaser of access services, must provide other carriers with call identification information associated with traffic the first carrier claims to be pumped or fraudulent. The Commission should also declare that the carrier receiving such call information has a duty to conduct a reasonable inquiry into the possibility of fraud.

[35] *Id.* at ¶ 27.

E. Database Queries and Limiting DBQ Charges

The Commission's inquiries about 8YY database queries ("DBQs")[36] are important because DBQs are essential to proper routing of toll free calls. Without the DBQ, there is no toll free call as there is no way to identify the IXC serving the dialed number.[37] For example, the FCC asks why rates for DBQ vary considerably among LECs. Rates for DBQ vary among LECs because their fixed and variable costs and demand vary from carrier to carrier.

As Teliax explained in its July 2017 comments in response to the Commission's June 29, 2017 public notice asking parties to update the record on 8YY access reform:[38]

> Teliax has incurred considerable costs to grow its 8YY origination business and to provide excellent service to customers and end users alike. It is the smallest owner-operator of the SOMOS toll free database. Teliax makes this expensive monthly investment to provide both better service to existing wholesale customers and to have access to advanced features and functions desired by the market. Teliax has also invested heavily in the development of software to integrate the SOMOS capabilities into Teliax's network.[39]

Both Peerless and Teliax, along with many other CLECs, operate networks that are largely all IP-based to serve wholesale and retail customers. However, because most IXCs, especially the largest two, continue to operate TDM-based toll free networks that can be accessed only with a Signaling System 7 ("SS7") connection, CLECs must also invest in significant TDM facilities. Without this "looking-backwards" network investment, toll free calls destined to AT&T's and Verizon's 8YY subscribers could not be completed. Yet these companies "wonder" why facilities-based CLECs, such as Peerless, often have higher DBQ rates. They do not wonder in good faith; their failure to convert their toll free networks to IP is a significant factor in higher DBQ prices.

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[36] *Id*. at ¶ 28.

[37] *See, e.g., Provision of Access for 800 Service*, 11 FCC Rcd 2014 (1995).

[38] Public Notice, "Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform," DA 17-631 (rel. June 29, 2017) ("*8YY PN*").

[39] Teliax Comments in Response to DA 17-631 at 5.

Further, the Commission cannot lawfully set rates based on nationwide average costs where it also has evidence that carriers have actual costs that exceeded calculated average costs and that were reasonable in type and amount.[40] Similarly, it would be equally wrong to set maximum DBQ rates based on price cap-derived DBQ rates in face of the record that demonstrates such rates do not adequately capture the full cost of providing DBQs. Rather, to the extent it wishes to set maximum DBQ rates, the Commission should look at the rates of LECs that offer facilities-based DBQs and use them as caps.[41] Also, the FCC should allow any carrier that has additional costs that are reasonable and prudent to obtain permission to impose a higher, cost-related rate.

F. Proposed Changes to 8YY Access Charges, Including Those Levied by Intermediate Providers

In the *FNPRM*, the Commission proposes to move originating end office and tandem access to mandatory bill and keep ("B&K") absent an agreement between carriers to the contrary.[42] Given the strong evidence presented in WC Docket No. 15-155[43] by the Competitive Local Exchange Carriers ("CompLECs")[44] that the movement of terminating end office rates to B&K failed to produce the long distance rate reductions for consumers predicted in the *2011 Transformation Order*,[45] but that consumers have actually experienced rate increases.[46] Indeed, based on an analysis by CompLECs' expert, Dr. Oliver Grawe, CompLECs states: "[T]he Producer Price Index ('PPI') reveals rising costs

[40] *Global Tel*Link v. FCC*, 859 F.3d 39 (D.C. Cir. 2017). Here the court rejected an FCC order setting maximum rates for prison inmate calling based on national average costs.

[41] If and when large carriers, such as AT&T and Verizon convert their toll free networks to all IP-based technology such that CLECs no longer need to maintain duplicative TDM based networks to deliver toll free calls to the big carriers, it would be appropriate for the Commission to evaluate any DBQ rate caps with an eye to reducing them to reflect the CLECs' reduced costs.

[42] *See FNPRM* at ¶ 30.

[43] *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, WCB Docket No. 18-155, FCC 18-68 (rel. June 5, 2018)

[44] CompLECs Comments in WC Docket No. 15-155 at 6-13.

[45] *Connect America Fund*, Report & Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663 (2011) (subsequent history omitted) ("*2011 Transformation Order*").

[46] *See* Teliax Reply Comments in WC Docket No. 15-155 at 5-6.

for both wireline toll and wireline all distance (local and long-distance combined) services since 2011."[47]

Since the IXCs simply swallowed their savings from the reduction of terminating end office access rates to zero (in all but the most rural exchanges), the Commission must also conclude that they would most likely swallow most, if not all, of the savings from moving originating end office on 8YY calls to B&K. Toll free subscribers, most especially smaller ones, will not receive rate cuts unless the FCC were to reinstate rate regulation for interstate, interexchange toll free services.[48] Any savings will instead go to the IXCs' bottom line or, if invested, to unregulated businesses. In light of this, the FCC should not adopt any rules that would move originating access for 8YY traffic to B&K until the Commission opens and resolves an investigation in to the reasons why IXCs pocketed the cost savings from moving terminating end office access to B&K. Further, should the Commission ever adopt regulations that would move originating access for 8YY traffic to B&K, it should include a rule that would require the IXCs to pass along the associated cost savings to 8YY ratepayers dollar for dollar and cent for cent.[49]

Additionally, the Commission suggests[50] that, because the IXC does not control the call path on toll free traffic, the carriers (read LECs) making that selection should be responsible for the costs of routing the calls. When one examines the facts, any perceived fairness of this proposal fades.

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[47] CompLECs Comments in WC Docket No. 15-155 at 9 (emphasis is original, footnote omitted). *See also,* Northern Valley Communications, LLC, BTC, Inc. d/b/a Western Iowa Networks *ex parte* filing and Exhibit A thereto at 4-7 (August 18, 2018).

[48] Since the big IXCs still operate TDM-based toll free networks, it is crystal clear that AT&T and Verizon did not use their access savings derived from the *2011 Transformation Order* to replace old technology with new IP technology.

[49] Given the IXCs' behavior of retaining access charge savings, instead of passing them along to customers as the FCC expected, there are no good reasons for tandem operators to move to B&K and recover their costs from their own end users. *See FNPRM* at ¶ 30.

[50] *FNPRM* at ¶ 34.

Teliax has repeatedly informed the Commission[51] that it has offered direct interconnections, which are less than one mile in distance, to both AT&T and Verizon multiple times. Yet with the exception of one IXC's secondary CIC, which has been recently connected directly to Teliax's Denver POI, Teliax's offers have been either ignored or rejected. Further, even though Teliax normally routes 8YY traffic bound for AT&T and Verizon through Colorado-based, third-party-operated tandems, the IXCs could avoid all tandem access charges, except in the case of overflow traffic or network disruption, by requesting direct interconnection with Teliax for all 8YY calls bound for their subscribers. In the event an IXC has evidence one or more intermediate carriers is operating unreasonably, the affected IXC should file a complaint against the intermediate carrier involved.[52]

Finally, T&P commend the Commission for requesting data about the volumes and growth of 8YY traffic over recent years.[53] As described in Teliax's Comments in WCB Docket No. 15-155[54], the increased use of toll free numbers strongly suggests rapid growth in toll free calling. However, in order for the Commission to accurately evaluate the scope of 8YY traffic, actual numbers and billed minutes of use should be in the record.[55]

[51] *See, e.g*. Teliax Comments in WCB Docket No. 18-155, at 6.

[52] When CLECs operate similar to Teliax by delivering 8YY calls to local tandem switches, there is no need for the Commission to address the Network Edge Issue (*FNPRM* at ¶ 85). To the extent an IXC has evidence that a CLEC is regularly routing 8YY calls in an uncontestably unreasonable manner, the IXC can simply file a complaint with the Commission or a lawsuit in court.

[53] *FNPRM* at ¶¶ 94, *et seq*.

[54] Teliax Comments in WC Docket No. 15-155 at 8-9.

[55] Any data that is specific to an individual IXC should not be disclosed. Only aggregate data needs to be in the record.

G. Curtailing Abuses

In describing real or perceived abuses in 8YY traffic, parties toss the term "fraud" around like a catchy slogan in a presidential campaign – "Tippecanoe and Tyler Too" or "Happy Days Are Here Again." And generally, the term "fraud" is no more well defined than these and other campaign slogans. Are there calls to toll free numbers that are designed to generate carrier revenue, harm a toll free subscriber's business or scheme to take money from consumers? Yes, there are. And T&P agree that they, the rest of the industry, toll free subscribers, regulatory agencies and law enforcement must work together to reduce and try to eliminate these misuses of toll free service and, even, help bring bad actors to justice under our criminal laws.

But at the very same time, the term "fraud" is being used by many IXCs to avoid paying tariff or contract rates, which is, itself, fraud. Peerless processes billions of minutes of 8YY traffic each month and participates in the industry-government calls designed to identify and stop true fraud. Both Teliax and Peerless work diligently to identify, investigate and stop sources of fraud. Yet, Teliax, for example, has been regularly denied access to information necessary to do this work by the parties alleging fraud – the big IXCs. Teliax often hear claims from AT&T and Verizon that "all" or "virtually all" of the 8YY calls it delivers is "fraud." Verizon goes so far as to refuse to pay any tariff charges because all traffic is fraudulent while reluctantly admitting it bills its toll free subscribers for all of the calls. The FCC needs to open an investigation into why IXCs bill toll free subscribers for calls the IXCs have declared to be fraudulent in nature.

Both Peerless's and Teliax's wholesale 8YY origination contracts require their partners to comply with FCC rules, not send calls that are robodialed or are fraudulent in nature and to cooperate in investigating "bad traffic." Also, since both CLECs do not bill access to any IXC for known fraudulent traffic that is delivered, there is no revenue to share with their partners. Thus, they too have an incentive, just like Teliax and Peerless, to cooperate to reduce "bad traffic." Each CLEC and its partners have worked together to block sources of "bad traffic" and in those few instances where a partner

failed to work with Teliax or Peerless, they have canceled the associated contract and blocked all traffic from the non-cooperating entity.

The Commission must require all carriers to disclose suspected fraudulent calls and call sources, exercising the FCC's ancillary jurisdiction if needed.[56] Mandating carrier cooperation for the benefit of toll free subscribers and callers could be strengthened at the same time if the Commission were to declare clearly and simultaneously that self-help (refusing to pay tariff charges without also challenging the charges before the FCC or in a court) is an unjust and unreasonable act that is inconsistent with the FCC's policy of eliminating fraud in the toll free market. Again, if appropriate, the Commission should use its ancillary jurisdiction to the extent necessary to require cooperation from the IXCs.

H. Effects on Consumers and 8YY Subscribers

As explained in section II.F. above, there is a strong likelihood that any savings IXCs experience from the reduction or elimination of access charges on originating toll free calls will be largely retained by the IXCs and not passed along to toll free subscribers. Until the Commission understands why, in the face of reducing virtually all terminating end office access to zero, toll rates and all distance calling plans have actually increased in price, it should suspend any serious consideration of expanding mandatory B&K.

Moving originating end office and DBQ to B&K will end TDM-based toll free service. LECs incur significant costs for originating, querying and delivering toll free calls and need to recover those costs to remain in business. Moreover, the Act does not contain a section that limits the ability to earn a profit to AT&T and Verizon despite what their executives seem to believe. Without the ability to recover reasonable access charges from IXCs rather than end users no LEC that is not affiliated with AT&T and Verizon will have an incentive to continue to provide TDM-based toll free origination services

[56] Section 4(i) of the Act, 47 U.S.C. § 154(i).

and many will file applications to discontinue those services. Indeed, any publicly held LEC could have a fiduciary duty to its shareowners to file discontinuance applications or fear shareholder suits.

Any LEC that is a RespOrg can still offer all IP-based 8YY calling through platforms such as Teliax's Toll Free Exchange that totally exclude IXCs and any direct Title II regulation for the LEC.[57] Toll free subscribers can simply move their 8YY numbers from AT&T or Verizon to a RespOrg that can access IP-based platforms. Yet some (many) toll free subscribers may not be able to move easily from the large IXCs that use TDM-based networks to other all IP-based toll free providers and, in any event, there will be disruption to the market.

The Commission cannot make smaller carriers operate duplicate toll free networks for free or charge end users higher rates just to protect AT&T's and Verizon's market share. Congress and public opinion would not stand for it. And if the Commission were to take any action that maintained TDM technology as the basic framework for toll free traffic, it would send a strong signal for LECs to form alliances to become major toll free carriers and order TDM access from the AT&T and Verizon LECs on a B&K basis. LEC consortia could offer lower prices by passing on the costs for access to Verizon and AT&T. Before proceeding down this path the Commission needs to ask itself: How does perpetuating the current 8YY market and outdated technology serve the public interest any more than preserving the old Bell System monopoly with legacy electro-mechanical switches would have served the public interest?

I. Encouraging the Transition to All IP Services

Most, if not all, of the CLECs in the wholesale toll free origination market have IP-based networks. As explained in sections II.D. and H. above, it is the big ILECs/IXCs that maintain TDM-based toll free networks. It is the continued existence of the incumbents' TDM networks that force CLECs to maintain both IP- and TDM-based network facilities. Big companies, including AT&T and Verizon, seem to have switched their investments from the telecommunications network to content.

[57] The Toll-Free Exchange, https://tollfree.exchange/ (last visited Aug. 28, 2018).

They are certainly not investing their telecommunications profits back into their regulated networks. Before implementing a transition plan designed around perceived concerns raised by facilities-based IXCs, the Commission should require develop a robust record on the failure of large carriers to replace their TDM-based networks, especially for toll free calls and including through the additional investigations suggested in these comments.

If the FCC wants to see America's toll free network all IP-based, the Commission should consider adopting requirements similar to those for equal access imposed on the RBOCs and GTE by the federal district court[58] and the FCC's own local number portability rules.[59] As all should remember, those "regulations" set forth time schedules for the RBOCs and GTE to convert their switches first to equal access and then to local number portability. The FCC should adopt a schedule for facilities-based IXCs to convert their toll free network to IP-based technology.[60] They are the ones still using carts and horses while the CLECs are using driverless cars.

The Commission states: "There is no obvious justification for using tandem switches in an IP environment" and ponders whether some carriers are reluctant to invest in IP networks because of their fear of losing intercarrier compensation generated by TDM investments.[61] This point is totally speculative as the large IXCs continue to operate TDM-based 8YY networks and, despite their advocacy rhetoric about their intense desire for direct end office connections, regularly maintain tandem connections because they are likely more efficient for the IXCs. [62]

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[58] *United States v. AT&T*, 552 F. Supp. 131, 226 (D.D.C. 1982), *aff'd mem. sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) ("Modification of Final Judgment"); *United States v. GTE*, 603 F. Supp. 730, 743-46 (D.D.C. 1984) ("GTE Consent Decree").

[59] Part 52, subpart C and Appendix to Part 52 of the Commission's rules, 47 C.F.R., Part 52, subpart C and Appendix.

[60] As an incentive for IXCs to convert their TDM-based toll free networks to IP, a Commission-prescribed roll-out schedule should freeze any transition to B&K for an additional year for any IXC that fails to make a cut-over date.

[61] *FNPRM* at ¶ 46.

[62] T&P believe switching is more likely than not to move closer to the network edge where, under the present rules, responsibility for transport changes from the IXC to the LEC and vice versa. Of course, in an all IP-based network with even heavier usage of the Internet, there may not be a need for IXCs. As

Further, just like regulation had to accommodate electro-mechanical switches[63] it must also accommodate the IXC's TDM-based toll free networks, and the costs that CLECs and their partners incur to operate in the IXCs' TDM environment. Unless and until these networks are replaced, probably only through FCC mandates on the IXCs, there is an undisputable need for intermediate carriers and tandem switching. Carriers providing end office and tandem services are legally entitled to charge just and reasonable rates for their use.

Moreover, even in the event AT&T and Verizon were to replace their existing (and likely fully depreciated) TDM toll free networks with all-IP technology, it is still impossible to say with certainty they will not want any tandem connections whatsoever. To conclude no carriers will want tandem connections has no basis in fact and constitutes pure idle speculation.

Also, it is way past time for AT&T and Verizon to "put up" or "shut up" with respect to their ongoing claims that they request, but cannot obtain, direct end office connections from CLECs. The FCC should require both AT&T and Verizon to document their actual requests for direct connections with CLECs as well as their response to CLEC offers of direct interconnection. Unless and until the Commission receives hard evidence from existing IXC business records that they have requested direct interconnections with CLECs for 8YY traffic and have been turned down, the FCC should put its investigation into intermediate carriers and consideration of rule changes limiting intermediate carriers' ability to recover lawful charges on hold.

Long-term, if the Commission moves towards B&K on 8YY traffic, it should do so only when the same carrier, measured at the holding company level owns both the tandem and the end office switch in a call path. Otherwise, the FCC will effectively put intermediate carriers out of business, which, given the general refusal of the big IXCs to interconnect directly with CLECs, could present risks of network failure and large volumes of uncompleted 8YY calls.

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demonstrated by the Teliax Toll Free Exchange, LECs can use common platform peering to send traffic directly to each other via Internet transport.

[63] *See* n.58 *supra*.

J. Reducing Intercarrier Compensation Disputes

The Commission's sincere hope of reducing intercarrier compensation disputes through access reform and the transition of terminating access to B&K as expressed in the *2011 Transformation Order*[64] never came to fruition. CLECs, their uncollected access accounts growing in size, are still waiting for Godot to arrive. However, Godot has been kidnapped and held hostage by AT&T and Verizon. Not content to await the multi-year FCC-mandated transition to B&K for terminating end office access, AT&T and Verizon have each operated as if the transition plan started at the end point ("free use" of other carriers' networks). They purposely challenge the application of access charges to calls that they insist be delivered. And they have gone so far as to claim that all 8YY traffic delivered by a CLEC is fraudulent in nature. They do this at the very same time that they bill their toll free subscribers for the same "bad traffic." For example, a call from a consumer to an airline's reservation center is fraudulent and not subject to compensation when it is received by the IXC from a CLEC, but not fraudulent and subject to compensation when delivered to the airline reservation center.

The Commission needs to reaffirm that a carrier engaging in self-help by withholding access charges that does not simultaneously challenge the rates, either in court or in an FCC complaint, commits an unjust and unreasonable act. This action does not force the Commission to exceed its jurisdiction by adjudicating collection actions against carrier-customers. Rather, it properly regulates interstate telecommunications by ensuring the FCC's regulatory framework is followed. A finding by the Commission that an IXC (or any other carrier for that matter) violated the Act by engaging in self-help can be taken by the CLEC to court where it must still prove damages.

K. Alternative Proposals, Transition Period and Revenue Recovery

The Commission asks whether any benchmark transition plan should be from a CLEC's "originating 8YY access charges to single composite per-minute rates for each of the four categories of services being transitioned (interstate originating end office access, intrastate originating end office

[64] *2011 Transformation Order*, 26 FCC Rcd at 17923, ¶ 777.

access, interstate originating tandem switched transport access, and intrastate originating tandem switched transport access)."[65] Alternatively, the Commission proposes to "require LECs to reduce all rate elements for originating end office and tandem switching and transport for toll free calls by one-third the first year, by an additional one-third the second year, and to bill-and-keep the third year?"[66]

Any benchmarking and transition plan needs to be simple and easy to administer. A CLEC should not be required to benchmark its rates against multiple price cap LECs. This structure would create more opportunities for inconsistency and lead to more billing disputes as carriers argue over which rate should apply. Once a CLEC determines which ILEC is the proper price cap LEC for a state, the CLEC should be able to benchmark all of its access rates (both originating and terminating usage-based switched access rates) to that LEC.

Any proposal that moves originating end office for 8YY calls to B&K means the LEC providing the first point of switching loses the incentive to offer the service both on a wholesale and retail business. As noted in section II.H. above, the only financially prudent course at that point is for LECs to file Section 214 discontinuance applications, especially since LECs can continue to serve customers (that is, calling parties or other service provider's calling parties) through all IP platforms such as the Toll Free Exchange. Any transition period would likely be used for IP-based LECs to file and receive Commission approval for discontinuance authority, as well as to move their traffic from the TDM-based IXCs' obsolete networks.

Since all IP-based toll free platforms, such as the Toll Free Exchange, are unregulated Information Services, where parties (RespOrgs) agree to exchange traffic on a commercially agreed to basis (which generally includes intercarrier compensation), there is no revenue loss to be compensated. Similarly, when the LECs can exit the TDM-based toll free market, they will not need

[65] *Id.* at ¶ 55.

[66] *Id.* at¶ 56.

to switch, perform a DBQ and transport 8YY calls to the old-school IXCs, and will not incur "regulated costs" and, as such, will not experience revenue loss.

L. CMRS Providers

In discussing the relationship of CMRS providers, intermediate carriers and toll free calling, the Commission notes "that [some] CMRS providers collect revenue for originating 8YY calls pursuant to revenue sharing arrangements with intermediate providers."[67] It then asks, "Are there wireless carriers that refuse to connect directly with other providers in order to facilitate revenue sharing arrangements" and how this practice affects access charges.[68] Peerless has found that, in numerous geographic markets, some CMRS operators refuse requests for direct interconnection and that forces Peerless to pay additional TDM-related rates.[69] Further, Peerless found "many carriers that previously sent terminating traffic to the Wireless Carriers over direct connections (for which there were no MOU charges) are now forced to pay unjust and unreasonable per-MOU rates to the Wireless Carriers' unilaterally-chosen intermediate carrier partners."[70] One reason these CMRS providers' refuse to connect directly is likely to facilitate revenue sharing arrangements.[71] Regardless of the rationale, the practice increases LECs costs and likely violates Sections 201, 202 and 251(a) of the Act.[72]

Should the FCC require CLECs to make direct interconnections to IXCs, it should also require CMRS operators to do the same for both IXCs and CLECs. As suggested in the Peerless Network Edge

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[67] *Id.* at ¶ 89.

[68] *Id.*

[69] Comments of Peerless Network, Inc.; West Telecom Services, LLC; Peninsula Fiber Network, LLC; Alpha Connect, LLC; Rural Telephone Service Company, Inc. d/b/a Nex-Tech; Nex-Tech, LLC; And Tennessee Independent Telecommunications Group, LLC d/b/a Iris Networks, filed in WC Docket No. 10-90 & CC Docket No. 01-92 (Oct. 27, 2017) at 13-15 and the cases cited therein ("Peerless Network Edge Comments").

[70] *Id.* at 15.

[71] *Id.*

[72] *Id.* at 15-20.

Comments and CenturyLink Petition for Declaratory Ruling, the Commission should consider making it mandatory

> For all wireline and wireless carriers make direct connections available to requesting carriers send or receive at least four (4) T-1s of originating and/or terminating traffic per month (or for IP networks or other modern technology, 200,000 monthly MOUs sustainable average over a 30-day period), ***for all traffic—i.e., all local and long distance traffic along with all wholesale and retail traffic*** (the "Four T1 Standard"), with a zero rate per MOU for all terminating traffic ("Direct Connect Requirement").[73]

The Peerless Network Edge Comments further explained "[f]or IP networks or other modern technology, four T-1s are generally equivalent to approximately 200,000 monthly MOUs, sustainable at the High Water Mark average over 30 days."[74]

M. Traffic Imbalances

The Commission notes that some parties maintain 8YY traffic is inappropriate for B&K because of the unbalanced traffic (traffic always flows to the 8YY subscriber).[75] While most 8YY-dialed calls flow from end users to toll free subscribers, those toll free subscribers using IP-technology can and do place outbound calls from their toll free telephone number. Regardless of the balance of traffic, the main reason not to apply mandatory B&K to originating 8YY calls is because elimination of access, including a DBQ charge, removes all economic incentive for CLECs (and probably most ILECs not affiliated with either AT&T or Verizon) to remain in the TDM-based toll free origination business. Should the Commission move in that direction, most LECs will likely file Section 214 discontinuance applications and concentrate their toll free origination business (retail and wholesale) to unregulated IP platforms where they can negotiate for fair compensation.

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[73] *Id.* at 11 (emphasis in original; footnotes omitted).

[74] *Id.* at 11, n.21. The "High Water Mark" means "the number of active standing calls carrying legitimate traffic to and from end-users of the network that are routed, via indirect interconnection facilities, to the carrier that serves the end-users, as call traffic between two carriers at or above this High Water Mark should be sent over direct connects." *Id.* at 7, n.11.

[75] *FNPRM* at ¶ 86.

N. Unintended Consequences

The *FNPRM* seeks comments[76] on whether moving 8YY calls to B&K could have some unintended consequences, including those related to upsetting consumers' decades of expectations that dialing an 8YY number means the consumer pays absolutely nothing for the call. The Commission has recommended that the exchange access costs associated with toll free calls be recovered from the participating LECs' end users. Several parties, including Teliax, have already outlined for the Commission the potential adverse consequences of requiring consumers to pay for "toll free" calls. In Teliax's Dec. 6, 2017 *Ex Parte* filing, it noted a number of potential negative consequences that could occur in the event consumers were obligated to pay something for what used to be a toll free call.[77] Teliax also suggested that toll free subscribers could suffer negative consequences as well.[78] In response, the *FNPRM* includes the following question: "Is there any merit to claims that transitioning 8YY to bill-and keep would leave providers open to 'false advertising' claims because 'toll free' calls will not be completely free?"[79]

The short answer is "yes." The FTC's rules, which apply to most, if not all, businesses using toll free services to attract potential customers and service existing ones, include a rule on advertising "free" goods and services.[80] The advertising guideline includes subsection (c) that reads:

> When making "Free" or similar offers all the terms, conditions and obligations upon which receipt and retention of the "Free" item are contingent should be set forth clearly and conspicuously at the outset of the offer so as to leave no reasonable probability that the terms of the offer might be misunderstood. Stated differently, all of the terms, conditions and obligations should appear in close conjunction with the offer of "Free" merchandise or service.

[76] *Id.* at ¶¶ 92-93.

[77] Teliax December 6, 2017 *ex parte* filing, *passim.*

[78] *Id*. at 3.

[79] *FNRPM* at ¶ 93.

[80] 16 C.F.R. § 251.1.

T&P are not in a position to predict with certainty whether the FTC would require a business (a toll free subscriber) using "almost" toll free calls to include a statement that the caller may have to pay charges to the caller's local telephone company to place an 8YY call similar to how companies using cellular SMS or texting regularly disclose that responding to an offer by texting a word or phrase to the business may cause the sender to incur charges for text messages and or data. This rule would appear to require some disclosure of potential charges associated with "toll free" calls. How much disclosure is sufficient?

And while the Federal Trade Commission Act ("FTCA") does not provide for a private right of action,[81] a significant number of states have enacted unfair and deceptive trade practice acts ("UDTPAs").[82] Generally, state UDTPAs do permit private causes of action and contain enhanced remedies and low standards of proof. These state laws often do not require a plaintiff to prove the defendant had an intent to deceive,[83] but many require payment of attorney fees, which are sometimes determined by juries[84] and punitive damages.[85] It is unreasonable to eliminate 50 plus years of consumer expectation that toll free calls are totally free to consumers just to push more money into AT&T's and Verizon's bottom lines (which past behavior suggests they will not use to reduce rates). Doing so will also serve to incentivize the plaintiffs' bar to file class actions against deep-pocket toll free subscribers just as the bar has sued companies with deep pockets under the Telephone Consumers Protection Act ("TCPA"). Indeed, it may take years of litigation and multi-million dollar verdicts before judges and juries agree on what level of disclosure a toll free subscriber

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[81] The FTC pursues cases of alleged false advertising and state agencies often incorporate FTC standards into their regulations. They too file actions for improperly advertising "free" goods and services. *See, e.g., Luskin's v. Consumer Protection Div'n*, 726 A.2d 702 (Md. 1999) and the many cases cited therein.

[82] Michael C. Gilleran, "The Rise of Unfair and Deceptive Trade Practice Act Claims," American Bar Ass'n Section of Litigation (October 17, 2011), available online at http://apps.americanbar.org/litigation/committees/businesstorts/articles/fall2011-unfair-deceptive-trade-practice-act-claims.html

[83] *Hangman Ridge Training Stables v. Safeco Title Ins.*, 105 Wash.2d 778 (1986).

[84] *Thorsen v. Durkin Development, LLC*, 129 Conn.App. 68 (2011).

[85] *Kenai Chrysler Center v. Denison*, 167 P. 3d 1240, 1260 (Alaska 2007).

must make to consumers to let them know what telephone company charges are imposed in connection with "almost" toll free calling.

III. CONCLUSION

For the reasons set forth herein, T&P urge the Commission to: 1) make it clear that, in order for a customer to withhold payment of access charges, it must contemporaneously file a complaint against those rates with the FCC or a court of proper jurisdiction; 2) presume large IXCs will pocket any savings from moving 8YY access to B&K; 3) not adopt benchmarking or other rules that would prevent CLECs from recovering their actual costs for providing access; 4) not prevent CLECs from offering profitable wholesale services, including those for 8YY toll origination; and 5) should the FCC require CLECs to make direct interconnections to IXCs, it should also require CMRS operators to do the same for both IXCs and CLECs whenever the sending carrier's traffic volumes equal or exceed the capacity of four T-1 circuits.

Respectfully submitted,
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