Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS OF CENTURYLINK

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CenturyLink, Inc.[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in the above-referenced matter regarding 8YY access charge reform (*8YY Access Reform NPRM* or *NPRM*).[2]

I. INTRODUCTION AND SUMMARY.

The *8YY Access Reform NPRM* correctly recognizes the prevalence of a variety of different forms of arbitrage and fraud in the intercarrier compensation (ICC) regime currently applicable to telephone calls made to toll-free (8YY) numbers. Although, as discussed more fully below, the phenomenon of 8YY aggregation, which the *NPRM* labels a "benchmarking abuse," is more nuanced than the other examples of mileage pumping, traffic pumping (robo-calling), and excessively high database query charges.

CenturyLink also concurs in the fundamental conclusion of the *NPRM* that the Commission can make significant strides to address problems in this area by implementing a significant reform of that ICC regime for 8YY traffic.

At the same time, some caution is called-for to ensure that the underlying economics of 8YY traffic and important related policy issues are adequately attended-to.

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[1] This submission is made by and on behalf of CenturyLink, Inc. and its wholly owned subsidiaries.

[2] *8YY Access Charge Reform*, WC Docket No. 18-156, Further Notice of Proposed Rulemaking, FCC 18-76 (rel. June 8, 2018) (*8YY Access Reform NPRM* or *NPRM*).

Viewed in this light, the Commission should adopt the proposed bill-and-keep framework for interstate and intrastate end office access charges for 8YY traffic and should take more limited steps to address tandem charges for 8YY traffic. Additionally, the Commission should address 8YY database query charges by imposing a nationwide $0.0015/query-cap as an end state and prohibiting the imposition of more than one query charge per-call. However, the Commission should also adopt a reasonable transition to that end state by establishing an immediate cap of $0.0043/query and mandating a three-year transition to $0.0015/query.

The *NPRM*'s tentative proposal to go further and adopt a bill-and-keep regime for tandem switching and transport should not be adopted. As acknowledged in the *NPRM* itself and as discussed more fully below, tandem services stand on a different footing and the Commission must be careful to not take steps that would unnecessarily harm investment and competition for such services.

To address tandem services, the Commission should establish a rule that tandem services remain equally compensable for all types of carriers – and should establish that as the rule for both originating 8YY traffic and terminating traffic. It should also impose a flat 10-mile mileage cap instead of the *NPRM*'s proposal to base the mileage cap on the number of miles between the originating end office and the nearest tandem in the same local access and transport area (LATA). And, it should impose a flat nationwide overall tandem switching cap instead of the *NPRM*'s proposal for an overall cap to tandem switching rates for 8YY traffic based on the rates charged by the incumbent LEC serving the LATA in which the call originates. In both instances, the *NPRM*'s proposals are unnecessarily complex.

CenturyLink's proposed reforms to end office and tandem charges can be implemented in a straight-forward manner. The Commission should take the overall approach tentatively proposed in the *NPRM* for the mechanics of a conversion to bill-and-keep of end office rates. That is, it should: (1) adopt a three-year transition period; (2) require carriers to convert their to-be-reduced originating 8YY end office access charges to a single composite per-minute rate for each of the categories of services being transitioned; (3) require carriers to calculate their baseline rates by dividing their baseline revenues from each category by the corresponding minutes of use for that category; and (4) require carriers to make three proportional rate reductions as necessary to get to bill-and-keep from that base line level in three years. The Commission should also adopt its tentative conclusion in the *NPRM* to exclude fixed originating charges from this bill-and-keep conversion. Implementation of a mileage cap/overall rate cap approach to reform for tandem rates will likely have to work somewhat differently than what is described above for a bill-and-keep conversion, but a reasonable implementation approach can easily be crafted.

And, in all events, and regardless of what access charge reductions are ultimately adopted, the Commission must ensure that carriers have the ability to recover, via their end user charges, revenues lost to any access charge reductions ultimately adopted. The *NPRM* is correct to conclude that, in the current competitive landscape, all LECs *should* be able to recover revenues they may lose as a result of this proceeding directly from their end users – subject only to the discipline of the market. However, as discussed more fully below, the Commission's current rules preclude ILECs from doing do. Thus, if the Commission is to take this approach, it will need to modify its rules to permit ILECs flexibility when it comes to interstate end user charges and should explore further steps that would eliminate any continuing state law restrictions on local service charges. Alternatively, if the Commission is unwilling to take this step, it will need to adopt a similar eligible recovery/access recovery charge methodology to that established for the *Transformation Order* transition and modify its current rules accordingly.

Finally, as discussed more fully below, the Commission clearly possesses ample legal authority to take the action suggested in these comments. But, it should, in any action it takes, remain cognizant of certain limitations to its legal authority in this area.

II. DISCUSSION.

A. While A Variety Of 8YY Arbitrage Problems Have Become Prevalent, 8YY Aggregation Is A More Nuanced Phenomenon.

As noted, CenturyLink generally concurs in the fundamental conclusion of the *NPRM* that a variety of different forms of arbitrage and fraud have become prevalent in the ICC regime currently applicable to 8YY traffic.

Paragraphs 23 through 29 of the *NPRM* detail the more prominent examples, which include originating access traffic pumping driven by robo-calling, mileage pumping whereby certain originating carriers inflate their mileage in order to maximize the transport access charges they impose on IXCs, and excessively high database query rates.[3] These practices are inherently unlawful and potentially fraudulent as the *NPRM* suggests.

The phenomenon of 8YY aggregation, which the *NPRM* labels a "benchmarking abuse," is more nuanced. As competitive networks evolve and migrate more and more to IP, it is not surprising that traffic is exchanged more often via tandem facilities that are not located in the area (e.g. the LATA) where a given call originates. There is nothing inherently wrong with this practice and, in fact, it should be encouraged in order to facilitate the investment needed to enable the build-out of the networks of the future. Tandem aggregation is a natural result of this

[3] *NPRM*, ¶¶ 23-29.

network evolution, including the evolution toward IP network architectures. It assists, among other things, in enabling the adoption of session initiation protocol (SIP) networking functionality – a key ingredient to such advanced services as voice over IP (VoIP). Moreover, while tandem aggregation can, in some instances, result in tandem rates being applied to calls that are higher than the rates applicable to tandem services provided in the area where the call originated, this is not always the case. In CenturyLink's experience, any rate variations cut both ways. Depending on the individual call flow, the rates being applied to the relevant calls as a result of 8YY aggregation can also be lower than the rates applicable to tandem services provided in the area where the call originated. Still, experience also suggests that the prospect that higher rates will apply creates too great of a risk that 8YY aggregation can be deployed as part of an arbitrage scheme. In any event, even these rate impacts can result from situations that are not schemes, the potential for rate impacts is not a public policy good. Thus, any reform targeted at 8YY aggregation should be carefully crafted so as to eliminate the opportunity for arbitrage – while also striving to treat all providers equally and giving no carrier cause to complain that it has been unfairly caught up in a rule targeted at schemes when they themselves are innocent.

B. Significant ICC Reform Is Called-For To Address These Problems, But Some Caution Is In Order.

Because of these concerns, CenturyLink concurs in the fundamental conclusion of the *NPRM* that the Commission can make significant strides to reduce arbitrage and other problems by implementing a significant reform of that ICC regime applicable to 8YY traffic. But, at the same time, some caution is called-for – particularly when it comes to the prospect of extending a bill-and-keep framework to the 8YY ICC regime.

To begin with, for the reasons discussed above, the Commission should be careful to not overreach in addressing such potentially legitimate practices as 8YY aggregation.

The Commission must also ensure that the underlying economics of 8YY traffic are adequately attended-to. As CenturyLink and many in the industry have demonstrated in past filings, there are inherent challenges when it comes to assuring efficient economic results for 8YY originating traffic – challenges that were not present, for example, with terminating access charges which were the focus of the *Transformation Order* transition.[4] As the *NPRM* notes, the fact that the carriers who pay these charges (IXCs) do not make the decision regarding which provider performs 8YY originating access services, does create the potential for arbitrage issues within the industry.[5] 8YY database query charges are the best example of this. Given that the originating carrier who hires the 8YY database query service provider does not pay for the query charges, uneconomic hiring decisions and relationships have been established. CenturyLink agrees that these concerns regarding 8YY traffic should be addressed. At the same time, even database query services entail real costs and carriers must be assured of the ability to recover those costs. And, even if it makes sense to accomplish some reform of originating 8YY access charges, the Commission must account for the reality that 8YY originating access functionality *is* distinct from terminating access functionality in some ways. In the *Transformation Order*, the Commission concluded that, for non-8YY access traffic, both the calling and called parties are equal cost causers for the traffic and, therefore, the cost of terminating access services should be

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[4] *See, e.g.*, Comments of CenturyLink, WC Docket Nos. 10-90 & 07-135, CC Docket No. 01-92 (July 31, 2017).

[5] *NPRM*, ¶¶ 36-37.

borne as much as possible by the terminating carrier's end user (i.e. the called party).[6] This finding was critical to the Commission's decision to establish a bill-and-keep ICC regime for such traffic. In contrast, the fundamental purpose of 8YY service is to *relieve* calling parties of the cost of the call.

Additionally, while there is the potential for problems with ICC rates and practices related to tandem switching and transport, there is also an even more acute need there to ensure that LECs providing such services are assured of the ability to recover their costs. When it comes to these intermediary services, not all carriers are created alike. Whereas all types of carriers (ILEC, CLEC, CMRS providers) possess the functional equivalent of end office network functionality, only some carriers have made the investment necessary to build-out intermediate network facilities. As a result, the underlying rationale for bill-and-keep (i.e. that a provider's end users should ultimately bear the network costs) does not carry-over cleanly to intermediate services. These intermediate network services will remain critical in IP networks of the future. In order to facilitate the necessary investment in such services and avoid competitive harm, the Commission must allow tandem providers (and providers of functionally equivalent intermediate IP network services) to exist and to compete equally. As the *NPRM* itself acknowledges, there are also unique factors at play when it comes to tandem services arrangements in the 8YY

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[6] *See 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; Universal Service Reform - Mobility Fund*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, CC Docket Nos. 01-92, 96-45, GN Docket No. 09-51, WT Docket No. 10-208, Report and Order and Further Notice of Proposed Rulemaking, FCC 11-161, 26 FCC Rcd 17663, 17907 ¶ 744 (2011) (*Transformation Order*), *aff'd sub nom., Direct Communs. Cedar Valley, LLC v. FCC and In re: FCC 11-161*, Nos. 11-9900, *et al.*, 753 F.3d 1015 (10th Cir. 2014), *petitions for rehearing en banc denied*, Orders, Aug. 27, 2014, *cert. denied*, 135 S. Ct. 2072, May 4, 2015 (Nos. 14-610, *et al.*).

context which argue against imposing the costs of such services on originating carriers or forcing providers to bear those costs themselves.[7]

All of the above suggests that, while the Commission can make significant strides to address the legitimate problems at issue in the *NPRM b*y implementing a significant reform of that ICC regime, a balanced approach is called-for.

C. The Commission Should Adopt A Bill-And-Keep Framework For 8YY End Office Originating Access Charges.

A core element of such a balanced approach can and should be to mandate the proposed bill-and-keep framework for interstate and intrastate end office access charges for 8YY traffic. This step will place originating end office access charges for 8YY traffic in an equivalent status as currently applies to terminating end office access charges and will go a long way to eliminate the incentives that are driving the arbitrage issues flagged in the *NPRM*. And, by limiting the bill-and-keep mandate to end office access charges, this reform step will be competitively neutral, treating all carriers equally – since it will impose bill-and-keep solely on the types of network services that all carriers provide.

D. The Commission Should Take More Limited Steps To Address Tandem Charges.

The Commission should take more limited steps to address tandem charges and it should not adopt the *NPRM*'s tentative proposal to impose a bill-and-keep ICC regime on tandem switching and transport.[8] Nor should the Commission adopt the *NPRM*'s alternative proposal to address tandem services.[9] Rather, a framework whereby all tandem services are equally

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[7] *NPRM*, ¶ 34.

[8] *NPRM*, ¶ 34.

[9] *NPRM*, ¶¶ 49-50.

compensable and are offered subject to a distance cap for mileage charges and an overall rate cap will strike the right reform balance for tandem services.

The Commission should not adopt the *NPRM*'s alternative proposal to address tandem services. Under that alternative proposal, the Commission would impose bill-and-keep on originating 8YY tandem switching and transport in just one scenario – where the originating carrier owns the tandem – and would otherwise allow carriers to seek compensation from IXCs for tandem services.[10] The alternative proposal would also impose a cap on mileage charges and an overall cap for tandem switching and transport rates.[11] In concept, the mileage cap and overall rate cap components of this proposal make good policy sense – though they can and should be simplified consistent with the discussions below. But, the Commission should not adopt an ICC rule for tandem services that allows some such services to be compensable while prohibiting compensation for other, equivalent, services. This type of disparity in ICC treatment inevitably leads to competitive distortions and arbitrage opportunities.

If, despite these concerns, the Commission does adopt a bill-and-keep rule for tandem services only where the originating carrier owns the tandem, and in response to the specific question teed-up in Paragraph 50 of the *NPRM*,[12] common ownership of the end office and tandem should be determined at the holding company level. In this way, the Commission can avoid the result created in the Year 6/2017 stage of the *Transformation Order* transition[13] when a

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[10] *Id.*

[11] *Id.*

[12] *NPRM*, ¶ 50.

[13] *See* Comments of CenturyLink, WC Docket No. 10-90, CC Docket No. 01-92, at 5-8 (Oct. 26, 2017) (discusses in detail both existing asymmetry for the treatment of tandem charges for terminating traffic and how the Commission can adopt rules to address asymmetrical

different *de facto* approach was established for terminating traffic. Under that approach, terminating access tandem switching and transport in only certain price cap ILEC and CLEC tandem/end office combinations was subjected to bill-and-keep – while all other tandem switching and transport services providing equivalent functionality and with other types of common ownership remains compensable.[14] As CenturyLink and other parties have previously demonstrated, this approach lacks good policy and legal grounding and should be avoided here.[15]

But, the better approach for an ICC framework for originating 8YY tandem services (and for all tandem services[16]) is one whereby equivalent tandem services remain equally compensable for all types of carriers. Where a carrier's tandem/end office combinations are subjected to bill-and-keep, the tandem becomes the network edge and the carrier's end user effectively assumes the cost of these services. The IXC is, in turn, relieved of the cost of tandem services. Where a carrier's end office services, alone, are subjected to bill-and-keep, the end office becomes the network edge and the carrier's end user only assumes the cost of end office services. The IXC, turn, must pay for the tandem services. A framework that produces one result for some tandem services and another result for other, equivalent, services is fundamentally flawed from a policy perspective. It is unfair to consumers (since some end users would incur the cost of tandem services for traffic delivered to them – but others would not). It

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categories of tandem switching and transport services to encourage investment in network facilities).

[14] *See id.*, at 6.

[15] *See id*., at 3, 5-8; 12-15; *see also*, *e.g.*, Comments of ITTA, WC Docket No. 10-90, CC Docket No. 01-92, at 14-15 (Oct. 26, 2017).

[16] The Commission also has yet another opportunity, in this proceeding, to fix the problems created by the Year 6/2017 *Transformation Order* transition stage result for terminating tandem services.

also distorts competition (since some tandem providers get compensated for their investment and others do not). It also inevitably incentivizes arbitrage. Nor is it necessary to target the problems with 8YY traffic addressed in the *NPRM*. Indeed, those problems are more effectively targeted by adopting a cap on mileage transport charges and a cap for tandem rates for 8YY traffic overall.

As noted, in adopting a mileage transport charge cap, the Commission should not adopt the model proposed in the *NPRM*. The *NPRM* proposes a mileage cap based on the number of miles between the originating end office and the nearest tandem in the same LATA.[17] But, such an approach would be costly and unnecessarily complex to implement. To do so, carriers would be required to complete complex mileage calculations and corresponding tariff changes for a large number of facilities. And, once completed, there are likely to be a high number of disputes about whether the requirement was implemented correctly. In contrast, a 10-mile flat cap will eliminate mileage pumping and is easy to implement and will result in no such disputes.[18]

A single, uniform national rate cap would also be preferable when it comes to establishing an overall 8YY traffic originating tandem rate cap. The *NPRM* proposes an overall rate cap based on the rates charged by the incumbent LEC serving the LATA in which the call originates.[19] However, this approach could also be unnecessarily complex for many carriers to implement. As the Commission itself has acknowledged on many occasions, it is self-evident that there is, across the industry, a consistent migration to services (e.g. wireless and VoIP) that

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[17] *NPRM*, ¶ 49.

[18] *See also* Ex parte letter from Gerard J. Waldron, Counsel for Inteliquent, to Marlene H. Dortch, FCC, WC Docket Nos. 10-90 & 07-135, CC Docket No. 01-92 (Dec. 21, 2017) (Inteliquent December 2017 Ex parte letter).

[19] *NPRM*, ¶ 49.

are inherently nomadic in nature.[20] In this context, current carrier billing systems are simply not capable of tracking origination area rates on a per-call basis. Given this, it does not make good policy sense to adopt the *NPRM*'s proposed overall cap methodology. Instead, the Commission should establish a uniform nationwide cap. One possible approach would be to calculate a reasonable industry average and establish that as a nationwide cap; other approaches may also produce a reasonable result.

E. The Commission Should Adopt The *NPRM* Proposal For 8YY Database Query Charges, But Should Also Adopt A Reasonable Transition.

The Commission should adopt the *NPRM* proposal for limiting 8YY database query charges to address the problems regarding current, excessively high, charges being billed by some carriers. Specifically, it should adopt, as an ultimate end state, a uniform nationwide cap at \$0.0015/query (the level of the lowest rate currently charged by any price cap LEC) and prohibit the imposition of more than one database query charge per-call.[21] However, the Commission should also adopt a reasonable transition to that end state by establishing an immediate cap of \$0.0043/query and mandating a three-year transition to \$0.0015/query.

Adopting a cap of \$0.0043/query would immediately address the excessive rates being billed by some carriers in the industry and mitigate this form of arbitrage, while providing a transition and glidepath to \$0.0015/query over three years.

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[20] *See, e.g.*, *Numbering Policies for Modern Communications*, WC Docket Nos. 13-97, *et al.*, Notice of Proposed Rulemaking, Order and Notice of Inquiry, 28 FCC Rcd 5842, 5844 ¶ 4 (2013). *See also* Public Notice, *Technology Transitions Policy Task Force Seeks Comment on Potential Trials*, GN Docket No. 13-5, 28 FCC Rcd 6346, 6347, 6351-52 (2013); *Numbering Policies for Modern Communications*, WC Docket Nos. 13-97, *et al.*, Report and Order, 30 FCC Rcd 6839, 6868 n. 206 (2015).

[21] *NPRM*, ¶ 28.

Whatever in the past may have led to disparate rates charged by different carriers, CenturyLink agrees that the current significant disparity among the database query charges billed by ILECs and CLECs within the industry today is not appropriate. And there is good persuasive policy justification for bringing uniformity to these rates to curb current abuses.

Equally sensible from a policy standpoint is a rule mandating only one database query charge per-call. To answer the question raised in the *NPRM*,[22] there is no legitimate reason why an IXC should be expected to pay for multiple database queries with a single 8YY call.[23] If industry standards and practices are followed, there should only be a need once in an originating 8YY call path to associate the 8YY number dialed with the responsible IXC.

While the above approach is the preferred end state for database query charges, the Commission should also adopt a reasonable transition to the $0.0015/query end state. As with any other 8YY originating access charges being reduced in this proceeding, it is equally true for database query rates that the "standard tool" of a gradual transition should be used.[24] The proposed cap and resulting rate reductions will have an impact on a large number of parties across the industry and carriers should have time to adjust their pricing, etc. to the new regime. Accordingly, as with other aspects of the rate reductions being considered, the Commission should establish an initial, higher immediate cap for database query charges – based on the

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[22] *NPRM*, ¶¶ 73, 77.

[23] *NPRM*, ¶ 77.

[24] *NPRM*, ¶ 81.

current industry average rate of $0.0043[25] – and then mandate a three-year transition to the end state cap of $0.0015/query.

F. The Commission Can Adopt A Straight-Forward Transition For CenturyLink's Proposed Reforms To End Office And Tandem Charges.

The Commission can also adopt a straight-forward transition for CenturyLink's proposed reforms to end office and tandem charges. To begin with, it can and should take the overall approach tentatively proposed in the *NPRM* for the mechanics of a reform transition for a conversion of end office rates to bill-and-keep.[26] That is, for such a conversion, it should adopt a three-year transition period and adopt an approach similar to that utilized in the *Transformation Order* whereby carriers are required to initially convert relevant rates to a single composite per-minute rate and are required to calculate a baseline rate and to make proportional rate reductions from the baseline to get to bill-and-keep.[27] The Commission should also adopt its tentative conclusion in the *NPRM* to exclude fixed originating end office charges from the conversion.[28] Notably, implementation of a mileage cap/overall rate cap approach to reform for tandem rates will likely have to work somewhat differently than what is described above for a bill-and-keep conversion, but a reasonable implementation approach can easily be crafted.

For a bill-and-keep rate conversion for end office rates, a three-year transition makes good policy sense. It will avoid the disruption that would follow from a flash-cut approach.

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[25] *See* Inteliquent December 2017 Ex parte letter, at 2. In the *NPRM*, the Commission references information that suggests 8YY database query charges range between $0.0015 and $0.015. *NPRM*, ¶ 72.

[26] *NPRM*, ¶¶ 51-60.

[27] *NPRM*, ¶ 53.

[28] *NPRM*, ¶ 57.

And, it would track with the approach followed in the recent *Transformation Order* transition.[29] That transition ultimately mandated the first bill-and-keep transition (for terminating end office access charges) in Year 5 via an initial two-year period in which intrastate and interstate rates were brought to parity followed by a three-year transition from that level to bill-and-keep.[30] Given this recent experience, a three-year transition is reasonable for this next reform – particularly, as it comes seven years after the Commission, in the *Transformation Order*, ruled that bill-and-keep should be the eventual end state for origination charges.[31]

Similarly, it makes good policy sense to adopt a bill-and-keep transition methodology for end office rates that utilize composite rates and rate reductions from a baseline state – as was utilized with the *Transformation Order* transition.[32] Accordingly, the Commission should adopt the *NPRM* tentative proposal that would first require carriers to convert their to-be-reduced originating 8YY access charges to a single composite per-minute rate for each of the categories of services being transitioned.[33] Carriers would then be required to calculate their baseline rates by dividing their baseline revenues from each category by the corresponding minutes of use for that category.[34] Finally, carriers would be required to make three proportional rate reductions as

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[29] *NPRM*, ¶ 52.

[30] *Transformation Order*, 26 FCC Rcd at 18170, 18173 (Appendix A, Final Rules); *see also*, 47 C.F.R. § 51.907.

[31] *Transformation Order*, 26 FCC Rcd at 17905 ¶ 741; *see also* 26 FCC Rcd at 17923 ¶ 777, 18109-110 ¶¶ 1298-99.

[32] *See, e.g.*, *Transformation Order*, 26 FCC Rcd at 17956 ¶ 847; *see also*, 47 C.F.R. §§ 51.907 and 51.915.

[33] *NPRM*, ¶ 55.

[34] *Id.*

necessary to get to bill-and-keep from that base line level in three years.[35] This same basic approach worked well for the *Transformation Order* transition without significant complication or problem.

The Commission should also adopt its tentative conclusion in the *NPRM* to exclude fixed originating charges from any bill-and-keep conversion.[36] The *NPRM* is correct in concluding that the more prudent move is to defer action on fixed charges until the Commission addresses originating access charges more broadly outside of the toll-free context.[37]

G. For Any Access Charge Reductions Ultimately Adopted, The Commission Must Ensure That Carriers Have The Ability To Recover Lost Revenues.

Regardless of what reductions in access charges the Commission ultimately adopts, the Commission must also ensure that carriers have the ability to recover their lost revenues via their end user charges. Ideally, this would be accomplished by having the Commission make the necessary changes in the law to give ILECs flexibility to impose unregulated end user charges subject only to the discipline of the market. But, if this is not done, the Commission will need to adopt a similar eligible recovery/access recovery charge methodology to that established for the *Transformation Order* transition and modify its current rules as appropriate.[38]

The Commission is correct to conclude that, in the current competitive landscape, all LECs *should* be able to recover revenues they may lose as a result of this proceeding directly

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[35] *NPRM*, ¶ 56.

[36] *NPRM*, ¶ 57.

[37] *Id.*

[38] *Transformation Order*, 26 FCC Rcd at 17956-18002 ¶¶ 847-932; *see also* 47 C.F.R. §§ 51.915 and 51.917.

from their end users – subject only to the discipline of the market.[39] As the Commission has found in numerous proceedings now, wireless substitution and the emergence of VoIP services have translated to a dramatically different competitive landscape wherein many of the asymmetric aspects of the Commission's legacy regulatory framework applicable to ILECs no longer make sense.[40] Because of this, for example, the Commission ruled in the *Technology Transitions Order* that ILECs are "non-dominant in their provision of interstate switched access services."[41] Based on that determination, the Commission relieved ILECs of obligations attaching due to their status as dominant carriers when providing switched access.[42] And, the Commission described that relief as being limited to permitting switched access tariff filings pursuant to the Commission's distinct non-dominant carrier procedures and rules and permitting ILECs to utilize the non-dominant carrier discontinuance process.[43]

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[39] *NPRM*, ¶ 63.

[40] *Technology Transitions; USTelecom Petition for Declaratory Ruling That Incumbent Local Exchange Carriers Are Non-Dominant in the Provision of Switched Access Services; Policies and Rules Governing Retirement Of Copper Loops by Incumbent Local Exchange Carriers,* GN Docket No. 13-5; WC Docket No. 13-3; RM-11358, Declaratory Ruling, Second Report and Order, and Order on Reconsideration, 31 FCC Rcd 8283, 8289 ¶ 16 (2016) (*Technology Transitions Order*); *Petition of USTelecom for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61, Memorandum Opinion and Order and Report and Order and Further Notice of Proposed Rulemaking and Second Further Notice of Proposed Rulemaking, 28 FCC Rcd 7627, 7731 ¶¶ 233-34, 7740 ¶ 259 (2013), *aff'd sub nom. Verizon v. FCC*, 770 F.3d 961 (D.C. Cir. 2014).

[41] *Technology Transitions Order*, 31 FCC Rcd at 8285 ¶ 4.

[42] *Technology Transitions Order*, 31 FCC Rcd at 8297 ¶ 41.

[43] *Technology Transitions Order*, 31 FCC Rcd at 8298 ¶ 44.

However, the Commission has also indicated that its current rules strictly limiting the ability of price cap ILECs to impose interstate end user charges for voice services remain in place.[44]

And, of course any interstate charges seeking recovery for intrastate costs are governed by state law.[45]

Thus, if the Commission is to take this approach of now granting ILECs the flexibility to recover lost revenues via unregulated interstate end user charges, it will need to modify its rules to permit this flexibility. As noted above, this result would make great policy sense. Like CLECs, ILECs fundamentally lack market power for the provision of these services and, therefore, ILECs should have the same flexibility to recover reduced access revenue through regular end-user charges.[46] And, like CLECs, the Commission can now, as the *NPRM* indicates, rely on the competitive market to determine whether, and how much, price cap ILECs can increase their rates to recover any revenues lost due to the transition to bill-and-keep.[47] But, at bottom, to accomplish this, the Commission must now modify its current rules to permit this new flexibility. The Commission's rules currently restrict price cap ILECs, when it comes to end user charges, to those charges specified in the Commission's rules (i.e. SLC and ARC charges).[48] And, those rules currently subject the imposition of even those limited end user charges to the

[44] *Technology Transitions Order*, 31 FCC Rcd at 8295 ¶ 36.

[45] *Technology Transitions Order*, 31 FCC Rcd at 8302 ¶ 56.

[46] *NPRM*, ¶ 63.

[47] *Id.*

[48] 47 C.F.R. §§ 69.1, 69.4, 69.152, 51.915(e).

conditions contained in the Commission's rules (e.g. underlying eligible revenue calculations and SLC and ARC caps).[49]

If the Commission takes this approach, it should also explore, and encourage the states to explore, the prospect of enabling complete flexibility that would place price cap ILECs fully on equal footing with CLECs when it comes to end user pricing. Just as Commission regulation of price cap carrier end user rates no longer makes sense, it also makes no policy sense to have restrictions in any jurisdiction that prevent price cap carriers from utilizing simplified pricing. Thus, the time has also come to eliminate any remaining state or local regulations that might limit price cap ILEC flexibility as to their end-user rates.[50] Such limitations have been eliminated in many jurisdictions, but still remain to some extent. The Commission might even have some ability to exercise preemption in this area.

Alternatively, if the Commission is unwilling to take this step of granting ILECs the flexibility to recover lost revenues via unregulated end user charges, it will need to adopt a similar eligible recovery/access recovery charge methodology to that established for the *Transformation Order* transition and modify its current rules appropriately. If it takes this alternative approach, the Commission would need to, as it did in the *Transformation Order*, adopt rules defining an additional "Eligible Recovery" amount establishing the amount of revenue that ILECs are permitted to recover as a result of this 8YY reform.[51] This definition, in this context, would need to account for all revenue reductions – whether caused by conversion of

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[49] 47 C.F.R. §§ 51.915(e), 51.917(e).

[50] *NPRM*, ¶ 64.

[51] *Transformation Order,* 26 FCC Rcd at 17956-18002 ¶¶ 847-932; *see also*, 47 C.F.R. §§ 51.915 and 51.917.

rates to bill-and-keep, reductions in mileage charges, or reductions to meet rate caps. Additionally, the Commission would need to adopt rules expressly permitting ILECs to recover such lost revenue through existing interstate regulated end user charges. To accomplish this, the Commission need only make clear that the current Access Recovery Charge (ARC) mechanism can be utilized subject to the current caps and adjust the current ARC caps to adequate levels to assure adequate recovery.[52] As with the *Transformation Order* reform transition, price cap carriers should also have access to support from an ICC CAF or equivalent subsidy program as needed to ensure adequate recovery.[53] For all the reasons discussed above justifying total de-regulation of price cap ILEC end user rates, it also makes sense to now eliminate the overall $30.00 rate cap established in the *Transformation Order*.[54]

H. The Commission Should Remain Cognizant Of Certain Limitations To Its Legal Authority In This Area.

The Commission clearly possesses ample legal authority to take the action suggested in these comments. In this regard, the *NPRM* correctly notes that its general legal authority to establish a bill-and-keep ICC methodology in certain circumstances under Sections 201(b) and 251(b)(5) have been sustained on appeal.[55] However, the Commission must still be cognizant, in any action it takes, of certain limitations to its legal authority in this area.

Answering the questions teed-up in the *NPRM* regarding the appropriate treatment of ICC rates for originating 8YY end office charges, originating 8YY tandem switching and transport charges, and 8YY database query charges inherently entails asking the underlying question of

[52] *See id.*

[53] *See Transformation Order*, 26 FCC Rcd at 17961 ¶ 853; *see also*, 47 C.F.R. § 51.915.

[54] *Transformation Order*, 26 FCC Rcd at 17958-961 ¶ 852; *see also*, 47 C.F.R. § 51.915(a)(12).

[55] *NPRM*, ¶ 79.

whether bill-and-keep or zero rate treatment should apply to different categories of switched access charges and/or whether other ICC methodologies (e.g. rate caps and the like) should apply to these charges. Answering these questions and related questions, in turn, requires application of the "just and reasonable rates" standards imposed by Sections 201 and 332[56] as well as the "mutual and reciprocal recovery of costs" standard of Section 252(d)(2)[57] and requires that the Commission navigate the usual prescriptions that its conduct not contravene requirements that agencies avoid arbitrary and capricious rulings.[58]

While the Commission's authority to impose bill-and-keep on certain aspects of access and non-access ICC components has been sustained,[59] the *NPRM* contemplates transition of new components such as certain tandem switching and transport functionality that the *Transformation Order* reform did not yet address.[60] The Commission's rationale for the *Transformation Order* transition to-date is encapsulated in the following language from Paragraph 757 of the Order:

> Although a bill-and-keep approach will not provide for the recovery of certain costs via *intercarrier* compensation, it will still allow for cost recovery via end-user compensation and, where necessary, explicit universal service support….We find that although the statute provides that each carrier will have the opportunity to recover its costs, it does not entitle each carrier to recover those costs from

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[56] 47 U.S.C. §§ 201, 332.

[57] 47 U.S.C. § 252(d)(2)(A)(requiring that compensation terms and conditions "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier[]").

[58] *See generally* 5 U.S.C. §§ 553(b), (c), (e); *see also Transformation Order*, 26 FCC Rcd at 17914-25 ¶¶ 760-781. As with the issues resolved in the *Transformation Order* transition, the issues teed-up in the *NPRM* and the proposals herein are subject to these various standards because they implicate all types of carriers – e.g. ILECs, CLECs, and CMRS providers.

[59] *E.g*., *Direct Communs. Cedar Valley, LLC v. FCC*, note 6, *supra*, 753 F.3d at 1109.

[60] *Transformation Order*, 26 FCC Rcd at 18109 ¶ 1297, 18112-114 ¶¶ 1306-1310 (leaving issues relating to tandem switching and transport for resolution in further notice).

> another carrier, so long as it can recover those costs from its own end users and explicit universal service support where necessary.[61]

In other words, it was founded on the premise that carriers can and should recover the costs for certain services from their own end users.

Consistent with the discussion above, it has not been established, for example, that the rationale for bill-and-keep extends to access tandem switching and transport provided in connection with 8YY traffic or that such a reform can satisfy these legal standards. Since only some carriers have invested to construct such facilities, the result of such a rule would be that, for some types of traffic, calling or called party end users will incur the costs of these services, while, for others, IXCs (and ultimately their end users) will incur the costs of these services. Such a result would be arbitrary and capricious as it would treat carriers in equivalent circumstances differently without any justifying rationale. In such circumstances, current, vibrant levels of competition would likely prevent carriers subject to bill-and-keep from realizing any greater recovery from their end users. Thus, an ICC framework that, at the same time, denied them the ability to recover the costs of their services from other carriers would also not satisfy either the Sections 201/332 "just and reasonable rates" standard or the Section 252(d)(2) "mutual and reciprocal recovery of costs" standard.

For similar reasons, a rule requiring that 8YY tandem switching and transport charges be moved to bill-and-keep in a single scenario – where the originating carrier also owns the tandem – would have these same flaws.

And, finally, the Commission remains subject to these legal requirements – as well as other legal requirements – when it comes to its efforts to ensure adequate opportunity to ILECs

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[61] *Transformation Order*, 26 FCC Rcd at 17913-14 ¶ 757 (emphasis in original; citation omitted).

to recover lost revenue as a result of any access reforms adopted herein. To begin with, the Commission clearly has the authority to accomplish the required recovery mechanism consistent with the principles discussed above regardless of the precise rate reform it chooses and regardless of the jurisdictional path it chooses. That is, consistent with the discussion above, the Commission has authority to either: (1) grant ILECs the flexibility to recover lost revenues via unregulated end user charges granting ILECs end-user charge increases; or (2) modify its existing *Transformation Order* revenue recovery rules to ensure that carriers can recover their costs. For either approach, the Commission can rely on (*inter alia*) Sections 4(i) and 201 through 205 of the Act, which together afford the Commission broad discretion in establishing carrier rates.[62] To the extent the Commission implements a new explicit support mechanism to spread costs beyond a specific carrier's consumers, this action would be warranted by Section 254 of the Act, which directs the Commission to ensure that rates paid by customers in high-cost areas are "just, reasonable, … affordable," and "reasonably comparable to rates charged … in urban areas."[63] This is the authority the Commission has relied upon in the past, among other things to create the *Transformation Order* recovery mechanism and to justify prior reform actions.[64]

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[62] 47 U.S.C. §§ 154(i), 201-205.

[63] 47 U.S.C. § 254(b)(1), (3).

[64] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 91-4, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000)(subsequent history omitted) (*CALLS Order*); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers; Federal-State Joint Board on Universal Service; Access Charge Reform for Incumbent Local Exchange Carriers Subject to Rate-of-Return Regulation; Prescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers,* Second Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 00-256, Fifteenth Report and Order in

And, should it choose a different approach to revenue recovery, the Commission must satisfy applicable legal standards. This includes the long-standing general obligation to ensure that carriers have a reasonable opportunity to recover their costs.[65] Additionally, regardless of the path it takes, the "just and reasonable rates" standards imposed by Sections 201 and 332,[66] Section 251(b)(5) and the corresponding pricing standards set forth in Section 252(d)(2)(A)(i) will likely continue to be applicable to at least some portion of the traffic subject to that reform. Section 251(b)(5) directs LECs "to establish reciprocal compensation arrangements for the transport and termination of telecommunications."[67] The associated pricing provision, Section 252(d)(2)(A)(i)-(ii), asserts that rates for reciprocal compensation must "provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier," and must reflect "a reasonable approximation of the additional costs of terminating such calls."[68] Without adequate recovery of any ICC revenue displaced through a revenue mechanism, no reform of 8YY originating access ICC rates can satisfy these standards.

CC Docket No. 96-45, and Report and Order in CC Docket Nos. 98-77 and 98-166, 16 FCC Rcd 19613 (2001) (*MAG Order*). Nor is it a material distinction that, in this case, the Commission might be increasing rates for an interstate service to make up, in part, for a decrease in rates for intrastate services. It is enough that the SLC increases and new explicit support mechanism, standing alone, fall within the Commission's broad authority under Sections 201 through 205 and they clearly do.

[65] *See Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

[66] 47 U.S.C. §§ 201, 332.

[67] 47 U.S.C. § 251(b)(5).

[68] 47 U.S.C. § 252(d)(2)(A).

III. CONCLUSION.

For the reasons stated above, the Commission should take the action described herein.

Respectfully submitted,

CENTURYLINK

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