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September 16, 2019

BY ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: WC Docket No. 18-155 – Response to The Commission Draft Rule

Dear Ms. Dortch:

We respectfully submit our comments in response to the Commission's draft order submitted on September 5, 2019 in the above referenced proceeding ("Draft Order"). The Draft Order will not curtail access arbitrage, but instead, will provide a continued financial incentive to maximize transport related charges. Among other unintended consequences, it will steer access stimulation traffic to larger LECs that do not trip the Commission's triggers, rather than eliminate the rate disparities and mileage charges that create arbitrage opportunities. The Draft Order is not a slight pivot from the original Notice of Proposed Rulemaking dated June 5, 2018 ("NPRM"). It is, remarkably, an unrecognizable departure from the Commission's original position and fails to address the problems stated in the NPRM. The Draft Order lacks support in the record and, at times, deviates entirely from the evidence contained in the record. Most alarming is the fact that the Commission has not sought comment or data on the new standalone 6:1 traffic ratio trigger from the industry. If implemented, the Draft Order will likely affect all CLECs regardless of business model. Even more, the trigger will likely cause many CLECs, including Wide Voice, to suffer irreparable harm, should the Commission continue to proceed hastily with its Draft Order.

Accordingly, Wide Voice expresses the following concerns:

1. **The 6:1 ratio in the Draft Order is arbitrary and lacks any support in the record.** The 6:1 ratio is NOT the proposal Inteliquent made in its ex parte submitted on April 18, 2019.[1] Inteliquent's proposal conditioned the 6:1 ratio with two other triggers based on mileage, to address rate disparities and volume, intended to address ensnaring smaller carriers in its access stimulation rules.

2. **The Draft Order does not address the true underlying cause of arbitrage – rate disparities.** Although the Commission claims to be addressing implicit subsidies in the industry with its Draft Order, it has at times permitted implicit subsidies to persist, particularly when it works

[1] Inteliquent *Ex Parte* Presentation, Apr. 18, 2019 at 22.

for the largest of carriers.[2] The Commission should revise its Draft Order to focus on leveling rates across the industry that enable access arbitrage.

3. **The Commission failed to provide any notice period for industry participants to address the implications and business impacts of the access stimulation trigger (concerning the 6:1 ratio) and provide comments in this proceeding.** The Commission has completely failed to appreciate the wide-ranging impact of this trigger, first conveyed to the public in the Draft Order. Since the Draft Order represents a significant departure from the NPRM, and will regulate as access stimulators CLECs and RLECs who previously never considered themselves access stimulators, the Commission should issue a further notice of proposed rulemaking to give the industry notice and an opportunity to comment on the regulations set forth in the Draft Order.

4. **The Commission is providing insufficient time for LECs to address the operational and technical issues associated with its rulemaking.** The burdens to comply with the Draft Order are substantial and the Commission has failed to provide CLECs with the time to deal with the Draft Order's new punitive rules.

A. The Draft Order Impacts Service Providers Who Are Far Removed From Any Activities Typically Regarded As Access Stimulation.

The Draft Order abandons its Prong 2 option, and incorporates a new, untested, undiscussed, standalone 6:1 traffic ratio with its Prong 1 treatment. This ratio alone is **not** the trigger proposal Inteliquent submitted into the record in April of this year (the only place in the record that mentions a 6:1 traffic ratio). It is arbitrary. Inteliquent suggested a conjunctive, three-part test to determine if a LEC is an access stimulator. First, a LEC would have interstate terminating-to-originating traffic ratio of at least 6:1 in one calendar month. Second, that LEC would be billing transport miles in excess of 10 miles. Third, and in addition to the first two requirements, that LEC would have end office traffic volume of at least 1M minutes per month. Only LECs that satisfy all three of these elements are classified as Access Stimulators, subject to Prong 1, under Inteliquent's proposal.[3]

The Draft Order disregards two of those three elements, stating that they unduly complicate the definition, when in fact the discarded elements are the easiest triggers for the industry to identify (and

[2] *Level 3 Commc'ns, LLC v. AT&T Inc.*, 33 FCC Rcd 2388 at ¶ 17 (FCC 2018) ("Applying the [step-down] rule in situations where traffic is terminated by the price cap carrier's CLEC and CMRS affiliates would result in disparate treatment of tandem services depending on affiliation with the tandem owner rather than the regulatory classification of the terminating carrier. Such a rule would create an unlevel playing field, violating the principle of competitive neutrality. Under the construction Level 3 advocates, a LEC such as AT&T that has wireless or VoIP affiliates would be expected to recover its tandem costs from its wireless or VoIP end users, while its wireless or VoIP competitors that have no LEC affiliates would not. This result could also distort competition by creating incentives for price-cap affiliated CLECs and CMRS carriers to use unaffiliated tandem services.").

[3] Inteliquent *Ex Parte* Presentation, Apr. 18, 2019 at 22.

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necessary to identify access arbitrage.)[4] Removing any one of these elements dramatically changes the entities that would satisfy the trigger and be subject to Prong 1. In fact, upon Wide Voice's preliminary investigation, **ALL CLECs** will trip the 6:1 trigger because originating access is rarely billed or even recorded as access, with the primary exception of outbound 8YY traffic.[5] The Commission is not utilizing a scalpel, but rather a sledgehammer on CLECs to "solve" a problem that has been reduced by more than 90% since the Commission issued its original Access Stimulation regulations.[6]

As Wide Voice stated in its original ex parte filing,[7] most carriers route their outbound traffic via least cost router under negotiated billing arrangements outside of the access regime. Furthermore, LEC wholesale customers typically make their inbound and outbound call decisions separately. The result of using a stand-alone 6:1 ratio is, therefore, that every CLEC or rate of return carrier will be pegged an "access stimulator," or be forced to move originating traffic back to the access billing regime, and wholesale providers will need to require their customer to route inbound and outbound traffic together to the same LEC. This will create huge market inefficiencies that will surely be passed onto consumers. Such a result surely cannot be the intention of the Commission. However, the Commission's failure to properly consider, seek comment and evidence, and study the implications of its Draft Order, will have this far-reaching impact.

Wide Voice has spoken with two national CABs billing companies that highlighted the broad, unintended consequences of the Commission's arbitrary Draft Order. These companies report that their overall CLEC and RLEC customer portfolio has an average terminating to originating traffic profile of 10:1 and 20:1, respectively. This is not surprising or unusual, as the industry has largely been transitioning away from the access regime since the Commissions 2011 CAF order.

Moreover, considering most CLECs and many small incumbent LECs bill little to no originating access, there is a high likelihood that the new trigger identifies CLECs unaware of this proceeding, as they have never considered themselves an access stimulator. However, the Draft Order has greatly broadened the definition of "access stimulator" to potentially every single CLEC in the country. In fact, according to data filed by the price cap LECs, they often have terminating to originating ratios that exceed 4:1 right now.[8] However, it appears that price cap LECs are not subject to the Draft Order. Furthermore, the record is devoid of data on a single-element trigger for Prong 1 treatment. The Commission only recently shared its new strategy on September 5, 2019, providing very little time for industry participants to become aware of this tact and evaluate the Draft Order's impact on its business, let alone enough time to provide the Commission a considered response with evidence. As such, the total lack of support in the record should raise great concerns with the Commission as to whether this trigger is rational or reasonable.

NTCA, one of the commenters in this proceeding, warned about creating any new definitions that might cast too wide a net, but their concerns were dismissed in the Draft Order with the observation that

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[4] Report & Order & Modification Of Section 214 Authorizations, WC Docket No. 18-155 ¶ 45.

[5] *See* https://www.inteserra.com/blog/draft-access-stimulation-order-big-net-with-big-consequences regarding a further discussion of unintended consequences of the single-element trigger.

[6] Wide Voice *Ex Parte* Presentation, Jan, 14, 2019, Ex. A, Audio Conferencing Access Rate Study.

[7] Wide Voice *Ex Parte* Presentation, Jan. 14, 2019.

[8] *See e.g.,* Verizon 2018 Mid-Year Exogenous Cost Filing, TML 1383, Sept. 24, 2018 at 52.

"NTCA offers no data or examples to demonstrate that there are LECs not involved in access stimulation that have traffic imbalances so extreme as to meet or even come close to the 6:1 ratio."[9] After the Draft Order was issued, NTCA submitted data that 4% of rural LECs – LECs that have no involvement with access stimulation practices -- would trip the new trigger and be defined as access stimulators.[10]

The Commission should also be concerned and request comments on whether a single element trigger coupled with such punitive treatment could be influenced and weaponized by IXCs. Previously, the Commission utilized an access stimulation trigger that is within a CLECs control, i.e., whether to share revenue. The Draft Order's single element 6:1 ratio trigger is not within complete control of the CLECs and can be manipulated by IXCs, forcing CLECs to trip the triggers. This should raise concerns and require public comment, as it has not been explored. The Draft Order is providing IXCs with great financial incentive to manipulate traffic ratios for CLECs. Wide Voice believes that without enough explicit protections against such conduct, IXCs could easily influence CLECs' compliance and impose Prong 1 treatment.

B. The Draft Order Fails To Properly Address Rate Disparities.

Aside from the very pressing issue that the Commission has expanded its definition of "access stimulation" to include nearly all CLECs, the Commission has also failed to address the true underlying driver of the Draft rulemaking on access arbitrage—rate disparities. By removing the mileage component of Inteliquent's recommendation, the Commission fails to address disparate rates across LECs. <u>This will allow a real access arbitrage issue to persist.</u> In fact, by willfully ignoring the rate differences caused by LECs with high transport charges, the Commission is sanctioning the rate differences, mostly caused by mileage, and permitting arbitrage to continue and likely thrive.[11]

As a practical matter, over the past 15 months that this proceeding has been active, not a single commenter has suggested addressing mileage is insufficient for this proceeding. As AT&T claims, the 8.2B minutes per year that amounts to approximately $60M - $80M of increased access charges the Commission seeks to address is mostly comprised of billed mileage found in rural locations.[12] The Commission in fact states this in its original NPRM. However, it is imperative for the Commission to understand that the remaining rate after mileage is removed is comprised of the same access rates that price cap LECs charge for the exact same services on their networks.

While the Commission allegedly seeks to remove the "implicit subsidies" in the intercarrier compensation system, in other circumstances, like the *AT&T v. Level 3* Order, the Commission *preserved*

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[9] Report & Order & Modification Of Section 214 Authorizations, WC Docket No. 18-155 ¶ 46.
[10] NTCA *Ex Parte* Presentation, Sept. 11, 2019 at 2.
[11] In fact, according to the Commission, the very definition of access stimulation concerns rate disparity: "Access stimulation (also known as traffic pumping) occurs when a local exchange carrier (LEC) with relatively ***high switched access rates*** enters into an arrangement to terminate calls—often in a remote area—for an entity with a high call volume operation, such as a chat line, adult entertainment calls, and "free" conference calls, collectively high call volume services." *Notice of Proposed Rulemaking,* WC Docket 18-155, June 5, 2018 at ¶ 2.
[12] AT&T *Ex Parte* Presentation, February 5, 2019 at 4.

implicit access subsidies. In that order, AT&T successfully convinced the Commission to permit it to charge non-step down rates for terminating access traffic destined for its wireless business, despite being a bill and keep network so that its wireless business could remain competitive.[13] As such, the Commission's policy in the draft order is inconsistent with previous Commission orders. The Commission should be focused on the purpose of this proceeding and leveling rates across the industry that enable access arbitrage and then follow with a subsequent uniform industry transition to bill and keep.

The Commission expressed concerns in the discussion of its Draft Order about data in the record supporting that mileage is the primary contributor to the access arbitrage issue it is seeking to address. As such, we would like to point to the access rate study submitted into the record on January 14, 2019 ("Access Rate Study").[14] That study highlighted that the 2011 CAF Order reduced access rates by 92%.[15] In the pre-CAF Order NPRM proceeding, Verizon presented access stimulation as an $440M dollar problem. However, the reduction of rates post-CAF Order has shrunk the problem by over 86%, by Verizon's own admission, to $60M. This finding is supported by Verizon's own filings ($440M to $60M-$80M).

Moreover, the Access Rate Study demonstrates that when one removes CEA price anomalies and caps mileage, there is an overall rate disparity reduction of 98% from pre-CAF Order days.[16] The result is approximately a $16M access stimulation problem, which could be further reduced by capping mileage at a lower amount than 15 miles. <u>The results are clear: CEA costs above the competing ILEC plus billed miles in excess of 15 miles account for approximately 75% of the access arbitrage issue the Commission seeks to address.</u> Not a single commenter has disagreed that mileage is the root cause of access arbitrage and many agree with Wide Voice.[17]

Calculated another way, using AT&T's estimation of 8.2B minutes of access stimulation traffic, resulting in $80M in access cost[18], implies an average rate of $0.009756, or $0.006531 greater than the composite benchmark rate in Century Link ILEC markets of Iowa and South Dakota of $0.0032247 (*Tandem Switching + DTTP + TST-T + TST-F + CMUX = $0.002252 + $0.0006667 + 0.00024 + $0.00003 + $0.000036).* Consequently, billed mileage accounts for 67% ($0.006531/$0.009756) of AT&T's claimed access stimulation costs or $54M of the $80M AT&T claims as the size of the problem. Therefore, the Commission can quite simply address the great majority of the stated arbitrage problem by capping mileage and avoid industry wide fallout from most, if not all, CLECs.[19]

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[13] *Level 3 Commc'ns, LLC v. AT&T Inc.*, 33 FCC Rcd 2388 at ¶ 17 (FCC 2018).

[14] Wide Voice *Ex Parte* Presentation, Jan, 14, 2019, Ex. A, Audio Conferencing Access Rate Study.

[15] *Id.* at 15.

[16] Wide Voice *Ex Parte* Presentation, January 14, 2019, Ex. A, Audio Conferencing Access Rate Study at 15.

[17] AT&T *Ex Parte* Presentation June 12, 2019 at 5 ("it appears that the access stimulator may have simply ported telephone numbers from the first two LECs to the other two LECs, possibly to take advantage of significant mileage increases between the intermediate provider's network and the LECs' end offices"); Sprint *Ex Parte* Presentation Sept. 3, 2019 at 2 (calling out "mileage pumping" disputes as a problem); Inteliquent *Ex Parte* Presentation, Nov. 16, 2018 at 1 & 3.

[18] Comments of AT&T, July 20, 2018 at 10.

[19] In the Draft Order, the Commission raised issue with consistency in our mileage limitation proposals—i.e., first 15 miles and then 10 miles. From Wide Voice's perspective either could work, as could an even

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C. The Timing In The Draft Proposal Is Overly Burdensome.

Finally, the Commission has proposed very a compressed timeline for carriers deemed access stimulators to transition. Considering the information presented above, it is almost certain that many LECs who are unaware of this proceeding will be deemed access stimulators. Even if they are aware of this proceeding, the periods for LECs to adjust their network to accommodate the new rules are simply not achievable. LERG updates require 66 days to take effect and before that can happen carriers will need time to identify new network providers, agree on business terms, provision enough transport capacity and augment switch capacity, not to mention accommodations third party CABs billing companies will be required to make, for which the Commission has no feasibility information in the record. All of this can be extremely time consuming, especially if TDM augments are involved. This will likely take longer than 180 days for matters that are within the LEC's control, and if the Commission provides less time, call completion issues will certainly occur.

D. Conclusion.

In conclusion, the Administrative Procedures Act and fundamental notions of fairness require that the Commission issue a Further Notice of Proposed Rulemaking to properly vet the rule proposed for the first time in the Draft Order. Such a Further Notice should also seek comment on other proposals submitted by participating parties, including Wide Voice's mileage-based proposal. The Commission should also seek the submission of data regarding any proposed standards. At present, there is absolutely no support in the record on utilizing a 6:1 traffic single element trigger for Prong 1 treatment. This trigger has potential wide-ranging, industry changing impact to carriers that have not participated in this proceeding; and there is no meaningful time for the industry to prepare for such a change. In the alternative, there is sufficient evidence and support in the record for the Commission to act upon a mileage trigger. The record is clear and consistent that mileage enables access arbitrage. Mileage is a clearly identifiable trigger available to the entire industry. Such certainly in rulemaking should be something for which the Commission strives. Wide Voice supports Inteliquent's proposal **as drafted.** Even simpler, Wide Voice advocates for the Commission to replace the revenue share trigger with a billed mileage trigger of 10 miles, along with the industry tested and previously vetted triggers in the CAF Order.[20]

Sincerely,
Andrew Nickerson
Chief Executive Officer
Wide Voice, LLC

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lower threshold. Wide Voice does not bill mileage. However, there is evidence in the record to suggest 10 miles as the limit for other carriers, which seems reasonable.

[20] Inteliquent agreed with this proposal as well. *See* Inteliquent *Ex Parte* Presentation, April 18, 2019 at 4.