Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

LEVEL 3 COMMUNICATIONS, LLC ***Complainant,*** ***v.*** **AT&T INC.; BELLSOUTH TELECOMMUNICATIONS, LLC; NEVADA BELL TELEPHONE COMPANY; PACIFIC BELL TELEPHONE COMPANY; SOUTHWESTERN BELL TELEPHONE, L.P.; ILLINOIS BELL TELEPHONE COMPANY; MICHIGAN BELL TELEPHONE COMPANY; OHIO BELL TELEPHONE COMPANY; AND WISCONSIN BELL TELEPHONE COMPANY,** ***Defendants*.**	**EB Docket No. 17-227** **File No. EB-17-MD-003**

AT&T SURREPLY

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AT&T SURREPLY

Pursuant to the Commission's Letter Orders dated August 31, 2017 and September 13, 2017, Defendants Bellsouth Telecommunications, LLC; Nevada Bell Telephone Company; Pacific Bell Telephone Company; Southwestern Bell Telephone, L.P.; Illinois Bell Telephone Company; Indiana Bell Telephone Company; Michigan Bell Telephone Company; Ohio Bell Telephone Company; and Wisconsin Bell Telephone Company (collectively, "AT&T" or "Defendants") hereby provide this surreply in support of its Answer and in opposition to the Formal Complaint filed by Level 3 Communications, LLC ("Level 3") and in response to the Reply

Brief in support of Formal Complaint filed by Level 3 ("Reply").[1]

INTRODUCTION AND SUMMARY

Level 3's Reply, like its Complaint, offers no convincing explanation for its view that all price cap LECs as well as the Commission Staff have improperly implemented Rule 51.907(g) ("the Rule"), which sets forth the initial and partial transition of certain tandem and transport charges to bill-and-keep as the default intercarrier compensation regime. Although it claims that the industry-wide implementation of Rule 51.907(g) benefits only AT&T and Verizon, the more limited reading of Rule 51.907(g) is the only one that is consistent with the Rule's text *and* the Commission's decision deferring the outcome, pending further comments and record evidence, of the network "edge" and of the transition for other tandem and transport services. *See* AT&T Brief in Support of Answer, *Level 3 v. AT&T*, EB Docket No. 17-227, at 7-30 (filed Oct. 10, 2017) ("AT&T Br.").

Level 3's Reply is a model of misdirection. Level 3 does not meaningfully engage with AT&T's showing that Level 3's reading of Rule 51.907(g) makes no grammatical sense and improperly prejudges important intercarrier compensation issues that the Commission is currently considering in the *FNPRM*. As to the text of the Rule, Level 3 never parses the actual language of the Rule or tries to explain how its construction of that language would avoid nonsensical results. Instead, Level 3 continues to insist that "terminating carrier" means "*any* party that performs the function of call termination" (Reply at 10)—even though plugging that definition into the Rule

[1] As set forth herein and in its prior submissions, Defendant AT&T Inc. denies that it acts as a common carrier or that it has filed any of the tariffs at issue, and thus the Commission lacks authority under Sections 201, 202, or 208 to include AT&T Inc. as a defendant or to award the requested relief as to AT&T Inc. No use of the term "AT&T" in this surreply should be deemed to refer to or encompass AT&T Inc. AT&T Inc. is included in this surreply only to deny the claims of Level 3 that AT&T Inc. is a proper defendant.

produces absurd results: under Level 3's reading, the Rule provides that, whenever terminating traffic "travers[es] a tandem switch that [*any* party that performs the function of call termination] or its affiliate owns," each "Price Cap Carrier shall establish" tandem rates of $0.0007 or less. *Cf.* 47 C.F.R. § 51.907(g).

Level 3 also continues to ignore the many passages in the *Transformation Order* explaining the limited ways in which the initial transition would apply to CMRS traffic.[2] Neither the text of Rule 51.907(g) nor any of the Commission's explanations even hint that tandem and transport rates for access traffic terminated by any CMRS carriers would transition to $0.0007 and then to bill-and-keep. If the Commission had intended to apply Rule 51.907(g) in the broad manner now advanced by Level 3 to apply to CMRS/VoIP provider traffic, the Commission both would have drafted a far different rule and would have said so explicitly in the *Transformation Order*. It is Level 3, not AT&T, who wants to "rewrit[e]" the Commission's 2011 rules.

Level 3's arguments as to the Rule's text and the *Transformation Order* are so tenuous that it spends much of its Reply trying to convince the Commission that Level 3's proposed relief represents the best *policy* result. As AT&T previously explained, those arguments have no place here, because the only question in this case is which scenarios the Commission decided in 2011 to include in the initial transition and which ones it left for the *FNPRM*—a question for which Level 3 has no good answers to support its position. Moreover, since Level 3 filed its Reply, CenturyLink closed on its acquisition of Level 3, and *CenturyLink's* ongoing advocacy in the intercarrier compensation proceeding causes all of Level 3's "policy" arguments to collapse into sand. In

[2] *See, e.g.*, 47 C.F.R. § 51.705; Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund et al.*, 26 FCC Rcd 17663, ¶ 801 & n.1498, ¶ 806 (2011) ("*Transformation Order*" or "*FNPRM*").

response to the *Tandem Refresh Notice*,[3] CenturyLink is arguing that the Commission should establish a network edge for all traffic at the end office or its equivalent—which, if adopted, would allow AT&T to continue to assess intercarrier charges for the tandem and transport services at issue in this case whenever the sending carrier chooses AT&T to provide those services.[4] In light of Level 3-CenturyLink's position on intercarrier compensation reform, Level 3 can no longer argue that its proposed relief is either the preferred or inevitable outcome of the transition to an end-state bill-and-keep regime.

In fact, despite its rhetoric, Level 3 actually is demanding its own highly self-serving version of intercarrier compensation. It wants the Commission to decide, in this complaint proceeding, that for price cap LECs, the "network edge for applicable traffic"—by which Level 3 means all traffic handled by any price cap LEC affiliate—will be "set at the tandem." Reply at 29. Under Level 3's approach, beginning next July, it would pay no terminating access to AT&T or Verizon except on traffic terminating to unaffiliated entities, and AT&T/Verizon would bear all of the costs to switch and transport traffic from a tandem switch to either an affiliated mobile switching center or a VoIP media gateway. However, on calls for which Level 3 provides tandem and transport services—which in Level 3's case is almost always to an unaffiliated VoIP provider and/or wireless carrier—Level 3 could continue to tariff and charge for terminating tandem and

[3] Public Notice, "Parties Asked To Refresh The Record On Intercarrier Compensation Reform Related To The Network Edge, Tandem Switching And Transport, And Transit," 32 FCC Rcd 6856 (2017) ("*Tandem Refresh Notice*").

[4] Ex. A, Comments of CenturyLink, *Connect America Fund*, *et al*., WC Docket No. 10-90, *et al*., at 3 (filed Oct. 26, 2017) ("CenturyLink Comments") (Commission "should find that bill and keep should not be mandated for any tandem switching and transport services whether those services are provided in connection with traffic bound for the tandem providers' own (or affiliated) end users or to a third party (i.e. wholly unaffiliated) end users"); *see also id*. at 7-8 ("an approach whereby all providers are compensated for their tandem services equally will best facilitate the Commission's work to address the broader ICC reform issues that remain pending in the *2011 ICC Transformation FNPRM* and, as part of that, the IP transition").

transport access. Under Level 3's view, its tandem and transport rates are not subject to any step-down, even though Level 3's "policy" view (now disavowed by CenturyLink) is that the costs of these services are "negligible." Reply at 24.[5] In other words, for traffic terminating to wireless or VoIP providers, Level 3 wants some carriers to provide a free tandem and transport service to Level 3, while Level 3 continues to enjoy the right to tariff and collect for that same service.[6] The Commission's 2011 rules do not contemplate any such result, and the proper course is to consider all of these issues holistically in the *FNPRM*.

Because much of Level 3's Reply simply repeats the same meritless claims in its Complaint, AT&T's surreply will not repeat all of its responses from its prior brief. Instead, as set forth below, AT&T's surreply makes the following responses regarding specific claims raised in the Level 3 Reply ("Reply").

ARGUMENT

I. LEVEL 3's CLAIMS HAVE NO BASIS IN THE RULE OR THE *TRANSFORMATION ORDER*.

Level 3's Reply fails to rebut AT&T's showing that Rule 51.907(g) and the *Transformation Order* do not apply to the tandem and transport traffic at issue. Level 3's claims should therefore

[5] As noted, Level 3's view of the end state for tandem and transport services appears to be internally inconsistent with its parent CenturyLink's advocacy. Under the latter's proposal, Level 3-CenturyLink would bear the costs of transporting wireless or VoIP traffic all the way to a mobile switching center or media gateway. Level 3, by contrast, insists the Commission has already set the network edge (for all price cap LEC and affiliated traffic) at the tandem.

[6] *See* Ex. B, Excerpts of Level 3 Commc'ns, LLC, Tariff F.C.C. No. 4, §§ 15.1.3.4.3.2, 15.1.3.4.3 (switched transport rates by "3d Party" and "Company End Office"); *id*. §§ 15.1.3.4.5.2, 15.1.3.4.5.3 (same as to tandem switching). Level 3's argument that its own tariff is "not at issue," *see* Reply at 30-31 & n.95, is off-base. Although AT&T is not asserting a counterclaim, it is clearly appropriate for the Commission to consider the marketplace implications of Level 3's interpretation, which would preserve tariffed tandem and transport charges when a terminating provider is unaffiliated with the tandem owner, both as a rebuttal to Level 3's "policy" arguments and to illustrate the sorts of issues in the *FNPRM* that Level 3's interpretation would effectively pre-judge with no adequate industry record.

be rejected, because (1) Level 3 does not refute AT&T's showing that Level 3's reading of the Rule is grammatically nonsensical and at odds with the *Transformation Order*; (2) Level 3's "policy" arguments are irrelevant, incorrect, and superseded in all events by CenturyLink's contrary positions; (3) Level 3's claims that AT&T is relying on "extra record" or "secret" proceedings are meritless; and (4) Level 3 provides no response to AT&T's refutation of its Section 202 claim.

A. Level 3's Interpretation of the Rule Is Untenable.

In its answering brief, AT&T demonstrated that Level 3's interpretation of Rule 51.907(g)(2) does not make any grammatical sense.[7] Level 3 never directly answers this argument. Tellingly, Level 3 never tries to parse the rule's actual language. Nor does it offer any coherent explanation of how its interpretation of the key terms in the Rule would avoid nonsensical results. Rather, Level 3 simply asserts, using its own words, that the Rule means what Level 3 wants it to mean.[8] Level 3's failure to engage with AT&T's textual analysis, however, is tantamount to a concession that AT&T is right.

Level 3's argument is that the term "terminating carrier," as used in the Rule, does *not* refer to the Price Cap Carrier. Rather, Level 3 still insists that "terminating carrier" "include[s] *any* party that performs the function of call termination," whether it is a Price Cap Carrier or not. Reply at 10 (emphasis in original). If that is so, the Rule makes no sense. Under that interpretation, the Rule literally says that the Price Cap Carrier may charge $0.0007 for the terminating traffic of "*any*

[7] AT&T Br. At 23-26.

[8] *See*, *e.g.*, Reply at 4. But Level 3's rewordings change the meaning in material ways. For example, the Rule does *not* say that the Price Cap Carrier may charge $0.0007 for tandem-switched transport access services that it provides "when the Price Cap Carrier or one of its affiliates is the 'terminating carrier.'" *Id*. Similarly, the Rule does *not* say that the rate applies "[w]hen a Price Cap Carrier (a) performs a tandem switching function and delivers traffic to a terminating carrier, and (b) the terminating carrier, or an affiliate of the terminating carrier, owns the tandem." *Id*.

party that performs the function of call termination," as long as that party owns the tandem. That is not a remotely tenable result, and Level 3 has made no attempt to reconcile its interpretation of "terminating carrier" with the text and grammar of the sentence (or its context).

Level 3 claims that, under "hornbook canons" of construction, when an agency uses two different terms such as "Price Cap Carrier" and "terminating carrier," such choices are "presumed to be purposeful" and the two "may not be conflated." Reply at 9-10. But mechanical application of these types of "canons" cannot override the obvious grammatical import of a sentence, or the context in which the regulation was drafted.[9] Indeed, Level 3 commits a more cardinal sin of interpretation by insisting that "terminating carrier" means two different things at the same time: *i.e.*, Level 3 argues that "terminating carrier" must be limited to the "Price Cap Carrier" when there is no relevant affiliate (*e.g.*, *id*. at 4) but that it means "any party" performing termination functions when there is such an affiliate (*e.g.*, *id*. at 10).

As AT&T also noted, Level 3 claims that the term "affiliate" must be given its statutory meaning, but Level 3's own interpretation of the rule does not follow the statutory definition. The statute defines "affiliate" as "a person that (directly or indirectly) owns or controls, is owned or controlled by, or is in common ownership or control with, another person." 47 U.S.C. § 153(2).

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[9] *See, e.g.*, *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2441 (2014) (internal quotation marks omitted) (the "fundamental canon of statutory construction [is] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme," and a presumption drawn from other canons of construction "readily yields to context"); *Xilinx, Inc. v. C.I.R.*, 598 F.3d 1191, 1196 (9th Cir. 2010) (internal quotation marks and citations omitted) ("The canons are not mandatory rules. They are guides designed to help judges determine the Legislature's intent. They can be overcome by other circumstances manifesting that intent. The canons are tools designed to help courts better determine what Congress intended, not to lead courts to interpret the law contrary to that intent."). If someone were to say, "The dogs should be brought home, because the animals are so cute," it is obvious from the context that the term "animals" in this sentence refers *only* to the dogs, even though "animals" is a broader term than "dogs." Level 3's "canon" regarding the use of different terms has no application to such a sentence, nor does it here for the same reasons.

This "naked" definition would cover any affiliate, whether or not it is a price cap carrier. Under its interpretation, however, Level 3 limits "affiliate" to only those affiliates that are also the "Price Cap Carrier" (even though the "terminating carrier" can be *any* party that performs terminating functions). Level 3 is effectively reading "affiliate" to mean "*price cap carrier* affiliate," which essentially concedes AT&T's point that the terms in the subordinate phrase make sense only as references back to the Price Cap Carrier.

Equally important, AT&T showed, quoting numerous portions of the *Transformation Order*, that Rule 51.907(g) "does *not* address the transition in situations where the tandem owner does not own the end office."[10] Level 3's Reply completely ignores these passages, and instead simply asserts that the reference to "affiliates" in the rule was "*primarily*" to deal with termination to wireless and VoIP providers.[11] Level 3's unsupported reading is exceedingly implausible, as the *Transformation Order*'s actual treatment of wireless services shows. When the Commission wanted the *Transformation Order*'s initial transition to cover wireless traffic, the rules and the order clearly said so. Most notably, the *Transformation Order* set forth a carefully considered transition to bill-and-keep for *non*-access reciprocal compensation for LEC-CMRS traffic. The rule applies explicitly to "CMRS" traffic, and the order specifically discusses both the rule's

[1010] *Transformation Order* ¶ 1312 (emphasis added); *see also id*. ¶ 819 ("For price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem. However, transport charges in other instances, *i.e.*, where the terminating carrier does not own the tandem, are not addressed at this time."). *See generally* AT&T Br. at 4, 11-13, 18-22. *See also* Mem. Op. & Order, *AT&T Corp. v. Iowa Network Servs.*, ¶ 28 n.159, FCC 17-148, Proceeding No. 17-56, Bur. ID Number EB-17-MD-001 (Nov. 8, 2011) ("how the transition will occur in the future *when a tandem owner does not own the end office* has no bearing on how the Commission's rules presently apply") (quotations and citations omitted, emphasis added).

[11] Reply at 13 (emphasis in original).

application to CMRS and the rationale for it.[12] The Commission would not have adopted a similar transition to bill-and-keep for other wireless-related traffic without considering or explaining how such a rule would apply to CMRS services in either the rule or the order. [13]

B. Level 3's Policy Arguments Are Irrelevant and, In All Events, Superseded By CenturyLink's Advocacy.

Given that Level 3's position is so clearly refuted by the language of the rule and the *Transformation Order*, Level 3 has devoted large portions of its Complaint and its Reply trying to convince the Commission that its preferred outcome is the better policy. As AT&T previously explained, those arguments are irrelevant: the only question in this case is which scenarios the Commission decided to address in 2011 with its partial and initial transition rules, and which ones it left to the *FNPRM*. Level 3's arguments in its Reply have become even more untenable, both its new corporate parent's advocacy and its incorrect depiction of the competitive realities.

First, the current advocacy of CenturyLink— Level 3's new corporate parent[14]— makes it impossible for Level 3 to maintain any of its "policy" arguments. One of the central premises of

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[12] 47 C.F.R. § 51.705. The Commission explained in the *Transformation Order* that the transition rules apply to CMRS carriers only "to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here." *Transformation Order* ¶ 801 n.1498; *see id.* ¶ 806.

[13] In addition, because the Commission has not determined that VoIP providers are "carriers" under the Act, it violates the plain text of Rule 51.907(g) for Level 3 to argue that VoIP providers are encompassed by Rule 51.907(g), which applies to a "terminating *carrier*." On reply, Level 3 makes the startling suggestion that the price cap LEC would be the "terminating carrier" in the VoIP scenario, rather than the VoIP provider. Reply at 27. Under Level 3's own theory, however, the "terminating carrier" is the party that "performs end office switching functions . . . and delivers the call to the called party." Complaint ¶ 28. The price cap LEC operating the tandem does not perform end office switching or deliver the call the end user. *See also AT&T Corp. v. FCC*, 841 F.3d 1016 (D.C. Cir. 2016) (vacating Commission declaratory ruling that held that the LEC in a LEC-VoIP partnership performs end office switching).

[14] CenturyLink's acquisition of Level 3 closed on November 1, 2017, and Level 3 is now a wholly-owned subsidiary of CenturyLink, Inc. *See* Letter from Thomas Jones, Counsel for Level 3, to Marlene H. Dortch, FCC, *Level 3 v. AT&T*, EB Docket No. 17-227 (filed Nov. 6, 2017).

Level 3's Complaint and interpretation of Rule 51.907(g) is that, in any end-state bill-and-keep system, the tandem and transport charges at issue should, and inevitably will, be reduced to zero. As AT&T has explained, that is not necessarily the case, and Level 3's proposed relief would inappropriately pre-judge the network edge and intermediate tandem transition issues on which the Commission has sought comment in the *FNPRM*. CenturyLink has now abundantly confirmed AT&T's point. In response to the *Tandem Refresh Notice*, CenturyLink is arguing that the Commission should establish a network edge for all traffic at the end office or its equivalent—— which, if adopted, would allow AT&T to continue to assess intercarrier charges for the tandem and transport services at issue in this case whenever the sending carrier chooses AT&T to provide those services.[15] Now that Level 3 is part of CenturyLink, Level 3 can no longer argue that its proposed relief represents the "superior" or inevitable policy outcome for a bill-and-keep system.[16]

In addition, Level 3's proposed relief would not be competitively neutral. Level 3 claims that the Commission was "well aware" that "certain Price Cap Carriers—AT&T among them"

[15] Ex. A, CenturyLink Comments at 3 (Commission "should find that bill and keep should not be mandated for any tandem switching and transport services whether those services are provided in connection with traffic bound for the tandem providers' own (or affiliated) end users or to a third party (i.e. wholly unaffiliated) end users"); *see also id*. at 7-8 ("an approach whereby all providers are compensated for their tandem services equally will best facilitate the Commission's work to address the broader ICC reform issues that remain pending in the *2011 ICC Transformation FNPRM* and, as part of that, the IP transition").

[16] Level 3, with possible foreknowledge of what CenturyLink would file in the *Tandem Refresh Notice* round of comment, claims that the Commission should ignore the submissions there as "extra-record." The problem, of course, is that Level 3 *is* CenturyLink, and the fact that CenturyLink is actively advocating the opposite policy outcome for the permanent bill-and-keep rules makes it untenable for Level 3 to maintain any of the policy arguments it has advanced here. *See also* Section I.C, *infra*.

were charging "hidden, inefficient" tandem charges for traffic terminating to wireless carriers.[17] Contrary to Level 3's claims, however, how an end-state bill-and-keep regime should apply to intermediate tandem access services terminating to wireless carriers is not an "AT&T and Verizon" issue. Level 3 and many other CLECs provide tandem and transport services that terminate to many wireless and VoIP providers, and those wireless and VoIP providers are almost always unaffiliated with such CLECs.[18] Under Level 3's reading of the rule, the Commission decided in 2011 to establish fundamentally disparate treatment of tandem services for the universe of traffic terminated to wireless or VoIP providers, depending solely on whether the terminating provider was affiliated or unaffiliated with the tandem owner. That runs contrary to the reforms that Commission adopted to address the flaws in the then-existing system, including the problem that applicable "rates var[ied] based on the type of provider." Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, *Connect America Fund, et al.*, 26 FCC Rcd. 4554, ¶¶ 495, 502 (2011) ("*Transformation NPRM*"). The *Transformation Order* does not mandate any such anticompetitive outcome. Rather, the Commission pushed all of these issues to the *FNPRM*, so that the rules for intermediate tandem services relating to wireless traffic could be resolved together.

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[17] In support of this "awareness," Level 3 cites only certain *ex parte* letters filed by CLECs or Sprint (Reply at 20-21 & nn.58-59 & 61) and snippets of the *Transformation Order* extolling the general benefits of bill-and-keep (*id.* at 21-22 & nn.62-64). Again, Level 3 cannot cite *any* discussion in the *Transformation Order* that suggests that the Commission actually intended for these scenarios to be covered by the Rule.

[18] Indeed, As AT&T recently explained in response to the *Tandem Refresh Notice*, certain CLECs—Level 3 among them—have engaged in what AT&T has called "tandem re-homing" practices, in which wireless or VoIP providers partner with CLECs to require traffic to be re-routed to a new point of interconnection, which then allows the CLEC to assess intermediate tandem and transport charges. Ex. C, Comments of AT&T Services Inc. to Refresh the Record, *Connect America Fund, et al.*, WC Docket No. 10-90, *et al.*, at 9-11 (filed Oct. 26, 2017).

More broadly, Level 3's Reply has no rational response to AT&T's showing that the relief sought by Level 3 prejudges issues regarding the network edge and remaining transition that the Commission is currently considering. AT&T Br. at 11-12, 17, 19-21, 26-29. According to Level 3's Reply, those issues have "no bearing" on the scope of Rule 51.907(g), because the Commission has "already" decided that the network edge for a price cap LEC must be its tandem switch for *all* of its traffic, "whether a Price Cap Carrier, a CLEC, CMRS provider, or a VoIP provider." Reply at 28; *id.* at 29. The Commission has never said that. Rather, the Commission said in 2011 that (i) there were "numerous options for defining an appropriate network edge," (ii) due to the absence of "significant comment" on the issue it lacked the record to decide those issues, and (iii) the "edge *could be*" at an end office, mobile switching center, or media gateway. *Transformation Order*, ¶ 1320 (emphasis added). Because those issues clearly remain pending in the *Tandem Refresh Notice*, it would be improper and unlawful to read Rule 51.907(g) as having already decided these issues, before the Commission has an opportunity to develop a record and consider the full competitive ramifications of the different proposals on the table.

C. Level 3's Assertions Concerning "Extra Record" and "Secret" Meetings Are Meritless.

Level 3's assertions that AT&T and/or the Commission and its Staff have "heavily" relied on "extra-record" materials (at 14) and "private meetings" (at 1) not open to Level 3 are misleading and inaccurate. As AT&T explained in its brief (*see* AT&T Br. at 13-17), the Commission has conducted public proceedings involving many industry participants—including Level 3 and CenturyLink—in which Level 3's reading of Rule 51.907(g) has been rejected. *See also* Formal Complaint of Level 3 Communications, LLC, *Level 3 v. AT&T*, EB Docket No. 17-227, ¶ 7 (filed Sept. 12, 2017) ("Compl.") (admitting that "[t]hree other proceedings pending before the Commission" relate to Level 3's Complaint).

Contrary to Level 3's assertions, these Commission proceedings were *not* private or closed to Level 3 or any other party. For instance, in April, 2017, the Commission issued a public notice seeking comment on CenturyLink's Petition regarding Rule 51.907(g).[19] CenturyLink's Petition asserted CenturyLink's view that the Rule was ambiguous,[20] and set forth in detail the Staff's existing guidance as to the proper implementation of the Rule.[21] Level 3 thus had every opportunity to set forth its position in that proceeding. But Level 3 chose not to even participate in this proceeding, notwithstanding the alleged financial impact on Level 3 of the Staff's proposed interpretation of the rule.

A few months later, AT&T and other price cap LECs publicly filed the tariff revisions that properly implemented Rule 51.907(g), and several parties publicly filed petitions to deny or suspend those tariff filings—including Level 3 (albeit, belatedly). The Commission gave public notice that it was rejecting certain of those petitions, and those tariff proceedings were conducted

[19] Public Notice, *Wireline Competition Bureau Seeks Comment On CenturyLink Petition For Limited Stay Of ICC Transition*, 32 FCC Rcd. 3184 (rel. Apr. 24, 2017).

[20] *See* Ex. D, CenturyLink Petition for Limited Stay, *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*., at 2-3, 6 (filed Apr. 11, 2017) ("CenturyLink Pet.") (claiming Rule 51.907(g) has "ambiguities and contradictions"); *cf*. Reply at 1 ("The rule is straightforward and unambiguous"). In light of the disagreement between Level 3 and CenturyLink as to the clarity of Rule 51.907(g), Level 3's argument that the APA's notice requirements were "triggered" and "ignored" (Reply at 15) is baseless. The Commission properly gave notice of Rule 51.907(g) back in 2011, and nothing that occurred in 2017 required the Commission to provide another public notice to provide guidance on this Rule.

[21] *See* Ex. D, CenturyLink Pet. at 6 ("the industry was advised, in informal communications with Commission staff, that the Commission's expectation is that 2017 annual tariff filings would reflect the following principles: . . . [A]s applicable to call flows where the tandem is owned by a price cap carrier and the end office is owned by an affiliated CMRS carrier or CLEC, the rates . . . do not transition to bill and keep"). In light of these public statements by a company that is now its corporate parent, Level 3's assertions that there was no way for it to verify or become aware of the Commission's Staff guidance (or that it is "extra-record") (*e.g.*, Reply at 1, 14) cannot be taken seriously. To avoid any doubt, AT&T is attaching various documents to this surreply, in order to ensure that they become part of the record in this case. *See* Ex. E, Comments of AT&T in Opposition to CenturyLink Petition for Stay, WC Docket No. 10-90 (May 4, 2017).

in full compliance with the Commission's rules and established practices.[22] Indeed, as Level 3 concedes, it has been the law for years that such tariff proceedings "are exempt from disclosure under the Commission's ex parte rules." Reply at 3; *see* 47 C.F.R. § 1.1204(b)(3). In fact, Level 3's complaints about "private meetings" with Commission Staff are entirely hollow in light of Level 3's own *ex parte* contacts with Commission Staff regarding Rule 51.907(g). *See* Letter from Thomas Jones, Counsel for Level 3, to Marlene H. Dortch, FCC, *July 1, 2017 Annual Access Charge Tariff Filings*, WC Docket No. 17-65 (filed July 5, 2017) (stating that Level 3 discussed the LECs' tariff filings and the interpretation of Rule 51.907(g) with various Commission Staff).

In these circumstances, Level 3's argument that the Commission Staff developed its interpretation of Rule 51.907(g) behind closed doors and that neither Level 3 nor other interested "stakeholder[s]" "had any notice" of how Rule 51.907(g) would be interpreted (Reply at 17) is demonstrably false.

D. Level 3's Section 202 Claim Is Meritless.

Level 3's Reply does not offer any serious response to AT&T showing (AT&T Br. at 37-40) that Level 3's Section 202(a) claim should be dismissed—indeed, Level 3's reply does not even cite Section 202(a). Under Section 202(a), Level 3 bears the burden of proving that the services at issue are (1) "like;" and (2) that Level 3 has been forced to pay a different price than is paid by other customers. *Am. Message Ctrs. v. FCC*, 50 F.3d 35, 40 (D.C. Cir. 1995). As explained

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[22] *See* Public Notice, *Protested Tariff Transmittals, No Action Taken*, 32 FCC Rcd. 5500 (rel. July 7, 2017). The Notice provided that "[a]pplications for review and petitions for reconsideration of these decisions may be filed within 30 days from the date of this public notice." *Id.* Level 3 elected not to file any such application of the Staff's decisions. *See, e.g.*, Ex. F, Petition of Level 3 to Reject or Suspend and Investigate, WC Docket No. 17-65 (June 23, 2017); Ex. G, AT&T Opp. to CenturyLink Pet. to Reject and Suspend AT&T Tariff Filings, Transmittal No. 1859, *et al.* (June 20, 2017); Ex. H, AT&T's Opp. to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend AT&T Tariff Filings, WC Docket No. 17-65 (June 27, 2017).

below, Level 3 cannot meet this initial burden. But even if it could meet that burden, its Section 202(a) claim would still fail, because the rules Level 3 challenges are clearly "reasonable." *Id.* (explaining that even if a carrier discriminated among customers for a like service, such discrimination is permissible if "reasonable.").

AT&T's Brief explained why the services at issue are not like, AT&T Br. at 37-40. Nor does Level 3 establish any "difference" in AT&T's treatment of Level 3 vis-à-vis other customers under the Commission's rules. AT&T's tariffed charges to Level 3 are no different than AT&T's tariffed charges to Sprint, Verizon, T-Mobile, or any other similarly-situated customer. *All* access customers pay the same rates when purchasing AT&T's tariffed tandem and transport services—*i.e.*, all customers pay the same $0.0007 per minute when calls are routed from AT&T price cap tandem to an AT&T price cap end office, and all customers pay the same specified tariffed rates when calls are routed from an AT&T price cap tandem to any other facility, *e.g.*, a CMRS switch or VoIP provider.[23] For these reasons, Level 3 has failed to satisfy its burden of establishing discrimination among like services, and its Section 202(a) claim must therefore be dismissed.

In all events, the rules adopted by the Commission are clearly reasonable. It has long been recognized—including when the Commission initially enacted the access charge regime that it is

[23] Earlier in its reply, although not in support of its Section 202(a) claim, Level 3 seems to argue that it, T-Mobile, and Sprint pay the "full freight" of the tariffed access charges, whereas certain AT&T entities do not pay such tariffed charges and receive service at lower rates via negotiated agreements. *See* Reply at 25 & nn.74-75. There are at least two fundamental flaws with this assertion. First, none of Level 3's allegations as to the amounts paid by AT&T affiliates to AT&T price cap LECs (or to AT&T Mobility) are supported by either documentation or affidavit, and thus there is simply no valid record evidence on this point. *See* 47 C.F.R. § 1.720(c) ("Facts must be supported by relevant documentation or affidavit"). Second, and in any event, the Commission and the courts have allowed such negotiated agreements in spite of allegations that they violate Section 202(a). *E.g.*, *Transformation Order*, ¶ 812; *Competitive Telecomms. Ass'n v. FCC*, 998 F.2d 1058, 1063-64 (D.C. Cir. 1993); *Orloff v. Vodafone Airtouch Licenses LLC*, 17 FCC Rcd. 8987, ¶¶ 23-24 (2002), *aff'd*, *Orloff v. FCC*, 352 F.3d 415 (D.C. Cir. 2003).

in the midst of reforming—that, "[w]hen necessary to avoid excessively burdening carriers, the gradual implementation of new rates and policies is a standard tool of the Commission." *NARUC v. FCC*, 737 F.2d 1095, 1135 (D.C. Cir. 1984). In such circumstances, "when there is a neutral, rational basis underlying apparently disparate charges," such charges are not unlawful under Section 202(a). *Id.* at 1133.

Thus, even assuming (contrary to fact) that there were relevant price differences for like services within the meaning of the first two steps of Section 202(a), the Commission relied on a "neutral, rational basis" in establishing its partial transition of tandem and transport services. The Commission reasonably determined that it was appropriate first to transition only tandem and transport charges where the price cap LEC operated both the tandem and end office, such that the costs could be recovered within the existing access charge regime. *See* AT&T Br. at 11-12, 19-22, 36; *Transformation Order*, ¶¶ 801-02, 809-10, 1312. And it left for another day the transition for remaining tandem and transport scenarios. *See, e.g.*, *Transformation Order*, ¶¶ 801, 806, 1297, 1306-13.

The Commission's interim transition rules, including Step Six in Rule 51.907(g), fit easily within the principles announced in *NARUC* and other Section 202 cases.[24] In 2011, the Commission was faced with an intercarrier compensation system where there was a "patchwork of rates and regulations," and the applicable "rates var[ied] based on the type of provider and where the call originated, even though the function of originating or terminating a call does not change." *Transformation NPRM*, ¶¶ 495, 502. The Commission's reforms sought to eliminate the

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[24] As noted, all customers pay the same rates in each of the two tandem-transport scenarios. *Cf. NARUC*, 737 F.2d at 1133 ("when charges are grounded in relative use, a single rate can produce a wide variety of charges for a single service, depending on the amount of service used. Yet there is no discrimination among customers, since each pays equally according to the volume of services used. This is [a] neutral, reasonable principle underlying the [rate] disparities . . . .").

disparities where similar call routing functions resulted in different intercarrier charges, and yet it properly determined that a "flash cut" that moved to "bill-and-keep immediately" would "entail significant market disruption to the detriment of consumers and carriers alike." *Transformation Order*, ¶ 809; *see NARUC*, 737 F.2d at 1135, 1138. The Commission elected a gradual transition, which required a "number of line drawing decisions" as to the "timing and steps" for the initial transition. *Transformation Order*, ¶ 809. Under *NARUC*, the Commission's decision in its initial transition to move some tandem and transport rates to bill-and-keep, while leaving the transition for other rates to be determined after the development of a more complete record, was well within its authority;[25] nor does it implicate Section 202's prohibition on "unreasonable" discrimination.[26]

II. AT&T INC. SHOULD BE DISMISSED AS A DEFENDANT.

Level 3's Complaint includes AT&T Inc. as a defendant. AT&T demonstrated that AT&T Inc. is not a proper defendant because AT&T Inc. does not offer any common carrier services purchased by Level 3. Moreover, any relief sought by Level 3 can be obtained from the other AT&T defendants that are common carriers. The Commission should thus dismiss AT&T Inc. from this proceeding.

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[25] *NARUC*, 737 F.2d at 1138 ("The Commission has, to the best of its ability, attempted to reconcile existing disparities in charges levied against interexchange carriers and private line users. Its plan . . . is appropriately tailored to minimize the difficulties inherent in any transition to a new system of rates; . . . Certainly, therefore, this plan falls within the broad zone of expertise and discretion which must be granted to the Commission in a proceeding which touches the very core of the rapidly developing telecommunications industry").

[26] *NARUC*, 737 F.2d at 1137 ("the Commission acted to end existing discrimination as far as possible. We uphold its choice under these circumstances"); *Transformation Order*, ¶¶ 809-10 (citing other cases). There is little doubt that the Commission could have rationally determined that its initial transition would not address tandem and transport services at all. The Commission's decision to include in its initial, partial transition some reductions in tandem and transport charges provided a substantial benefit to Level 3 and access purchasers. The Commission, having provided Level 3 with this partial benefit (that it need not have been provided at all), did not act unlawfully in deciding not to reduce immediately all tandem and transport charges as part of the initial transition.

There is no merit to Level 3's argument (Reply at 31-33) to the contrary. As the complainant, Level 3 bears the burden of proof, including as to jurisdiction and its requested relief; under the Commission's rules, in a complaint, "[f]acts must be supported by relevant documentation or affidavit" and "[l]egal arguments must be supported by appropriate judicial, Commission, or statutory authority."[27] However, Level 3 offers *no* support for its Section 208 jurisdictional claims or its Title II-based prayer for relief as to AT&T Inc.

Rather, the Complaint makes unsupported, *ipse dixit* allegations that (i) AT&T Inc. "is a common carrier . . . subject to the requirements of Title II of the Act" and thus can properly be a defendant to a Section 208 complaint (Compl. ¶ 4; *id.* ¶ 9); and (ii) the Commission could lawfully award relief against AT&T Inc. that it "has violated Section 201(b)" and "Section 202(a)" (Compl. ¶ 71), which by their plain terms apply only to a "common carrier."[28] In fact, AT&T Inc. neither "is engaged in providing [the] telecommunications services" at issue (47 U.S.C. § 153(51)) nor has filed a tariff (as common carriers do, 47 U.S.C. § 203(a)) for the access services at issue. *See* Compl. ¶ 22 & n.35, Exs. 10-11 (discussing relevant tariffs, none of which were filed by AT&T Inc.). Level 3 has thus clearly not met its burden of establishing that AT&T Inc. is a proper party, nor could it.

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[27] 47 C.F.R. §§ 1.720(c), (d); *see Hi-Tech Furnace Sys., Inc. v. FCC*, 224 F.3d 781, 787 (D.C. Cir. 2000) ("Well-established FCC precedent imposes the burden of proof on the complainant in section 208 proceedings. So does our own." (internal footnotes omitted) (collecting authorities) (citing *Beehive Tel., Inc.*, 12 F.C.C.R. 17950, 17961-62 (1995)); *see also* 47 C.F.R. § 1.721(a)(4), (7) (complaints must cite legal authority and relief sought).

[28] 47 U.S.C. § 153(11) provides in relevant part that "[t]he term 'common carrier' or 'carrier' means any person engaged as a common carrier for hire, in interstate or foreign communication by wire or radio or interstate or foreign radio transmission of energy." 47 U.S.C. § 153(51) provides in relevant part that a "telecommunications carrier shall be treated as a common carrier under this chapter only to the extent that it is engaged in providing telecommunications services." The Complaint contains no facts that support Level 3's allegation that AT&T Inc. is a common carrier under these provisions.

On reply, Level 3 now purports to have found authority to make AT&T Inc. a party to this case under Section 411(a) of the Act, 47 U.S.C. § 411(a). Reply at 31-32. This argument is meritless.

To begin with, even if (contrary to law) Section 411(a) were a valid basis for making AT&T Inc. a defendant in this action, Level 3's Complaint relies solely on Sections 201, 202 and 208, *see* Compl. ¶¶ 4, 71, not Section 411(a), as its grounds for jurisdiction and for relief, and thus Level 3 has not properly pled its jurisdiction theory.[29] In any event, even if Level 3 had done so, Section 411(a) provides no lawful basis for imposing common carrier liability pursuant to Sections 201(b), 202, and 208 on an entity that is not a common carrier. *See, e.g.*, *Verizon v. FCC*, 740 F.3d 623, 650 (D.C. Cir. 2014) (it is "obvious that the Commission would violate the Communications Act" if it regulated non-common carriers "as common carriers").[30]

Section 411(a) is entitled "Joinder of parties" and is a "Procedural and Administrative Provision[]" within Subchapter IV of the Act; it merely provides the Commission with "authority

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[29] *See Implementation of the Telecommunications Act of 1996*, 12 FCC Rcd. 22497, ¶¶ 81, 241 (1997) (the Commission's rules "require[e] parties to plead their cases with specific, material facts and supply documentation early in the complaint process" and "compliance with deadlines in the Act requires that a complaint be fully developed prior to filing"); 47 C.F.R. § 1.727(f) (no amendments permitted without waiver).

[30] Level 3's reading of Section 411(a) would also undermine "twenty years" of "long-standing Commission precedent" that Section 208 does not authorize the Commission to hear Section 208 complaints against carriers that are merely acting as purchasers of access service. *All American Tel. Co. v. AT&T Corp.*, 26 FCC Rcd. 723, ¶ 10 (2010). If, as Level 3 contends, Section 411 authorizes the Commission to join and find non-common carriers liable in Section 208 complaints, then carriers seeking to collect access charges could rely on Section 411(a) to bring claims at the Commission to carriers liable as purchasers of access services in § 208 cases.

to join non-common carriers for enforcement of provisions of the Act *as necessary*."[31] Neither Level 3's Complaint nor its Reply contains any valid explanation as to why AT&T Inc. is a "necessary" party. Nor could it. There is no dispute that the other AT&T ILECs are common carriers, and if Level 3 were to prevail, it could obtain all of the relief to which it is entitled against those Defendants. Accordingly, even if Level 3 had pled its Section 411 theory, AT&T Inc. is not a necessary party and need not be joined to this proceeding. Rather, AT&T Inc. must be dismissed.[32]

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[31] *UCN Inc., Transferee, Transtel Commc'ns Inc., Tel Am. of Salt Lake City, Inc., Extelcom, Inc., Transferors*, 20 FCC Rcd. 16711, ¶ 9 (W.C.B. 2005) (emphasis added). Ironically, *UCN* and the other agency decisions cited by Level 3 on this point are all Staff decisions (*cf.* Reply at 14-15), and they are either inapposite or stand merely for the proposition that joinder of other entities is proper when the Commission finds it to be "essential"—a finding that cannot be made on this record. *E.g.*, *Pet. of Telecable*, 18 F.C.C.2d 348, ¶ 5 (1969). None of the cases cited by Level 3 support its position that Section 411(a) can be used to circumvent the limitations of the Commission's authority under Title II. Indeed, the *GSA* and *Ambassador* cases are not at all relevant. In *GSA*, the Common Carrier Bureau held that, as to conduct *prior* to the Bell System divestiture, a customer properly served a complaint on the "American Telephone and Telegraph Company," and that the "Associated Bell System Companies (BOCs)" (which were common carriers that "provided many of the private lines services at issue. . . .") need not be served separately. *GSA v. Am. Tel. & Tel. Co.*, 2 FCC Rcd. 3574, ¶¶ 1, 4-6 (C.C.B. 1987). In *Ambassador*, the enforcement proceeding was not a Section 208 complaint, but rather a Section 401 action in federal district court, and the district court indisputably had jurisdiction over the non-common carriers. *Ambassador, Inc. v. U.S.*, 325 U.S. 317, 325 & n.7 (1945).

[32] Rule 411(a) allows the Commission to join a non-common carrier as a party when necessary, and it might be used, for instance, to facilitate discovery from a non-common carrier third party, or to require an interested non-common carrier party to participate in briefing or in some similar capacity. Section 411(a) also might be used to join a non-common carrier as a defendant where the Commission has explicit authority under Title II to take action against a non-common carrier—such as an officer or director of more than one common carrier, *see* 47 U.S.C. § 212. But nothing in Section 411(a) authorizes the Commission to use its joinder power in a way that contravenes the limits of its Title II authority. *Cf. Verizon*, 740 F.3d at 649-50 (the Commission's Section 706 authority cannot be utilized "in a manner that contravenes any specific prohibition in the Communications Act," such as those in Title II). Level 3's position on Section 411(a) is especially ironic because the entities that are most "interested in or affected by" the regulation "under consideration" (47 U.S.C. § 411) are other price cap LECs—including Level 3's affiliate Century Link—that implemented Section 51.907 of the rules in the same manner as AT&T's ILEC affiliates. If any parties were "necessary" under Rule 411(a), it would be CenturyLink and those other carriers, not AT&T Inc.

CONCLUSION

For the foregoing reasons, the Commission should reject Level 3's claims and dismiss the Complaint.

Respectfully submitted,

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Dated: November 8, 2017

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<u>Table of Exhibits in Support of</u>
<u>AT&T's Surreply</u>

Ex.	Description
A	Comments of CenturyLink, *Connect America Fund, et al.,* WC Docket No. 10-90, et al. (filed Oct. 26, 2017)
B	Excerpts of Level 3 Communications, LLC, Tariff F.C.C. No. 4
C	Comments of AT&T Services Inc. to Refresh the Record, *Connect America Fund, et al.,* WC Docket No. 10-90, et al. (filed Oct. 26, 2017)
D	CenturyLink Petition for Limited Stay, *Connect America Fund, et al.,* WC Docket No. 10-90, et al. (filed Apr. 11, 2017)
E	Comments of AT&T in Opposition to CenturyLink Petition for Stay, WC Docket No. 10-90 (May 4, 2017)
F	Petition of Level 3 to Reject or Suspend and Investigate, WC Docket No. 17-65 (June 23, 2017)
G	AT&T Opp. to CenturyLink Pet. to Reject and Suspend AT&T Tariff Filings, Transmittal No. 1859, *et al.* (June 20, 2017)
H	AT&T's Opp. to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend AT&T Tariff Filings, WC Docket No. 17-65 (June 27, 2017)

Exhibit A

Comments of CenturyLink, Connect America Fund, et al., WC Docket No. 10-90, et al. (filed Oct. 26, 2017)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF CENTURYLINK

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October 26, 2017

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matters of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF CENTURYLINK

CenturyLink, Inc.[1] (CenturyLink) submits these comments in the above-referenced matter in response to the Commission's September 8, 2017 *Public Notice* regarding intercarrier compensation (ICC) reform (*Public Notice*).[2]

I. INTRODUCTION AND SUMMARY

The *Public Notice* seeks comment regarding the issues "that were raised in the *2011 ICC Transformation FNPRM* with respect to the network edge, tandem switching and transport, and transit, or developments related to those issues, that should be considered in the context of further ICC reform."[3]

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

[2] "Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport, and Transit", WC Docket No. 10-90, CC Docket No. 01-92, *Public Notice*, DA 17-863 (rel. Sep. 8, 2017); 82 Fed. Reg. 44754 (Sep. 26, 2017); Public Notice, DA 17-933 (rel. Sep. 26, 2017).

[3] *Public Notice*, p. 3.

In particular, the *Public Notice* asks that parties refresh the record and discuss relevant regulatory and market developments since the *2011 Transformation Order*[4] regarding the questions raised in the *2011 ICC Transformation FNPRM*[5] as to:

- how the Commission should define the network edge (i.e. the point of carrier financial responsibility – for bill and keep, the point to which a carrier is responsible for carrying its traffic, whether directly or indirectly);
- the steps the Commission should take to transition remaining elements associated with tandem switching and transport for access traffic to bill and keep; and
- whether there is a need for the Commission to adopt reform regulation for transit (the term "transit," as used in the *Public Notice*, meaning the non-access traffic functional equivalent to tandem switching and transport for access traffic).[6]

The *Public Notice* also asks that parties address, among other things, how the broader IP network migration affects further ICC reforms relating to these issues.[7]

In addressing these issues, the Commission has an historic opportunity to both resolve still-open critical questions from the *2011 ICC Transformation FNPRM* that are complicating the industry's implementation of the *Transformation Order* transition, and to take significant strides toward placing the treatment of intermediate network services on a solid footing for the IP

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[4] *See, e.g., 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 (2011), *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*.) (*Transformation Order* or *2011 ICC Transformation FNPRM*).

[5] *2011 ICC Transformation FNPRM, id*. at 18109-19 ¶¶ 1297-1325.

[6] *Public Notice*, pp. 1-3.

[7] *Public Notice*, p. 3.

migration. In this light, the ideal path forward requires a reversal of the Commission's *de facto* partial reform to-date of only certain categories of tandem switching and transport. This modest step, if combined with a straight-forward completion of the Commission's work on the *2011 ICC Transformation FNPRM* network edge issues in a manner that maximizes the potential for efficient and fair intercarrier network and compensation arrangements, will allow the Commission to seize the opportunity before it.

As has been well detailed in the record of a number of different Commission proceedings,[8] a fundamental asymmetry now exists in the industry whereby terminating access tandem switching and transport in only certain price cap ILEC and CLEC tandem/end office combinations are subject to bill and keep – while other tandem switching and transport services providing equivalent functionality remains compensable. The result of these asymmetric rules is that the Commission has now established a default network edge as the tandem for some terminating traffic and the end office for other traffic. The Commission should correct this asymmetry by adopting rules permitting all tandem owners to be compensated equally for the use of their networks – thereby establishing the end office as the proper default network edge for all providers. Moreover, it should find that bill and keep should not be mandated for any tandem switching and transport services whether those services are provided in connection with traffic bound for the tandem providers' own (or affiliated) end users or to a third party (i.e. wholly unaffiliated) end users.

[8] *See* Petition for Limited Stay of Transformation Order Years 6 and 7 ICC Transition – As It Impacts a Subset of Tandem Switching and Transport Charges, WC Docket No. 10-90, CC Docket No. 01-92, *et al*. (filed Apr. 11, 2017); Reply Comments of CenturyLink in Support of Petition for Limited Stay of Transformation Order Years 6 and 7, WC Docket No. 10-90, CC Docket No. 01-92, *et al*. (filed May 11, 2017); Petition of CenturyLink Communications, LLC to Reject and to Suspend and Investigate AT&T Tariff Filings, Ameritech Operating Companies Tariff F.C.C. No. 2, Transmittal No. 1859, *et al*., June 7, 2017 Access Charge Tariff Filings (filed June 14, 2017).

In addition to ensuring that all carriers have the right to be compensated equally for tandem switching and transport services, the Commission should also clarify that all carriers also have the right to determine the most economical manner in which to deliver the traffic to the edge, including the right to directly connect with terminating providers for access traffic to avoid usage-based tandem switching and transport charges. Having established the end office as the default network edge, this clarification will ensure that the carrier with the financial obligation to deliver traffic to that edge also has the ability to make the economic decision regarding how the traffic routes. And, it will also ensure that providers of tandem switching and transport services are incentivized to charge competitive rates for their services.

With these rock-solid principles in place (equal and fair compensation to all types of carriers for equivalent tandem switching and transport services, establishing the end office as the default network edge, and a right to establish direct connections to that end office to avoid those services where the economics warrant), the Commission should then simply complete its work on the remaining *2011 ICC Transformation FNPRM* network edge issues for terminating traffic by establishing rational edge/interconnection rules that support these concepts and that are symmetrical for all types of carriers. To do so, the Commission should specify, as its central network edge principle, that the switch that serves the end user (the called party on the terminating side) is the default financial edge – i.e. the point at which an IXC carrier ceases responsibility for carrying traffic. This will provide the industry with rational interconnection principles that apply to all providers as opposed to the patchwork of asymmetric rules that harm the industry today.

While the focus of the *Public Notice* appears to be on terminating access traffic scenarios, where the *Transformation Order* transition has already moved certain access elements to bill and keep, these same concepts should also carry-over to originating traffic. Although, as discussed more fully below, some originating-specific aspects may need to be attended-to – among other things, due to the fact that originating access is subject to positive compensation and not bill and keep.

Transit services, since they are the non-access traffic functional equivalent of tandem switching and transport for access traffic, and non-access traffic more generally should also be subject to these same concepts. It also follows that, for these reasons and the reasons discussed more fully below, transit services need not otherwise be the subject of further ICC reform at this time.

The above principles are not only the best way to address the status of the services at issue from an economics and policy perspective, but they are consistent with the applicable legal standards in this area.

It is increasingly critical that the Commission address all of these issues expeditiously. These are all limited and reasonable steps that the Commission can take immediately that will go a long way toward addressing current ICC problems plaguing the industry while also allowing LECs to have the opportunity to recover their costs.

II. DISCUSSION

A. The Commission Must Ensure That All Carriers Have the Right To Be Compensated Equally for Their Tandem Switching and Transport Services – and Must Reverse the Current Asymmetry in That Regard.

Tandem switching and transport services constitute the middle or intermediate component of legacy TDM network connectivity. But, unlike more downstream end office functionality, this functionality does not solely serve a carrier's own end users. And, not all carriers have invested in constructing these intermediate facilities. These services are costly to build and maintain – particularly when they consist of legacy TDM switches and other technology that are gradually becoming obsolete. Over time, the technology and architecture which enables these legacy TDM network services will evolve with the IP migration. But, intermediate network services will continue to be essential – even in the all-IP world. Therefore, continued robust investment in these facilities will be needed and this will only occur if carriers are assured of their ability to obtain fair compensation for their services. It is self-evident that a result where no carriers can obtain compensation for these services would be inappropriate. And, a result where only some carriers are able to obtain fair compensation while others cannot when they provide equivalent functionality similarly constrains investment, reduces competitive choices and encourages arbitrage. It was a fundamental goal of the *Transformation Order* reforms to eliminate this type of ICC and interconnection disparity.

Yet, fundamental asymmetry is what now exists in the industry. As a result of guidance given during the implementation of the Year 6/2017 stage of the *Transformation Order* transition, a *de facto* approach has been followed where terminating access tandem switching and transport in only certain price cap ILEC and CLEC tandem/end office combinations have been subjected to bill and keep – while all other tandem switching and transport services providing equivalent functionality remains compensable. For traffic falling into the first category, no compensation will be owed for the tandem services as of July 2018 (rates for these services were moved to $.0007 in July 2017) and, in this circumstance, the tandem becomes the network edge and the price cap LEC's end user effectively assumes the cost of the services. In contrast, for traffic falling into the other category, the IXC must pay for the tandem services. This effectively establishes the network edge for this traffic closer to the terminating end office and increases the IXC's financial obligation for transporting the traffic for this category of traffic.

The Commission can correct this asymmetry and set a path by which investment in these important network facilities will be sustained for the IP migration by simply adopting rules specifying that all tandem owners should be compensated equally for the use of their networks – thereby adopting the sound interconnection principle that no network should be utilized unilaterally for free. This principal is equally appropriate as an economic policy matter whether these intermediate network services are provided in connection with traffic bound for a third party (i.e. wholly unaffiliated) end users or in connection with traffic bound for the tandem providers' own (or affiliated) end users.

Clearly ICC compensation must be ensured in the former category since, in such circumstances, the tandem provider has no end user involved in the call flow.

But, there are also problems with a bill and keep approach to tandem switching and transport services for traffic bound to a tandem provider's own (or affiliated) end users as well. To begin with, since the edge will necessarily be the end office for some traffic (i.e. the traffic discussed immediately above – traffic bound for a third party that is wholly unaffiliated from the tandem owner), the Commission must establish that same edge for all carriers. If not, it will simply create another type of asymmetry that will skew the marketplace (since some end users would incur the cost of tandem services for traffic delivered to them – but others would not) and inevitably lead to arbitrage. Fundamentally, it also makes no policy sense to impose mandatory bill and keep on a critical portion of switched access infrastructure where only some carriers have invested to construct such facilities. To do so, would only penalize those carriers and disincentivize further investment in intermediate network services.

In contrast, an approach whereby all providers are compensated for their tandem services equally will best facilitate the Commission's work to address the broader ICC reform issues that remain pending in the *2011 ICC Transformation FNPRM* and, as part of that, the IP transition. There will continue to be a need for robust investment in intermediate network services in IP networks. The first essential ingredient to ensuring such investment is allowing all tandem providers (and providers of functionally equivalent intermediate IP network services) to exist and to compete equally. It should not matter that those intermediate carrier services are provided by a price cap ILEC, an affiliated entity or an independent provider.[9] Each provides the same value and the presence of each fosters competition. Arbitrary line-drawing that precludes some such providers, but not others, from charging for the same functionality has the result of defining network edge rules and tandem cost recovery in a harmful and inefficient way that could be precedent-setting as the industry transitions away from TDM to IP networks. The Commission should allow all tandem owners to be compensated as opposed to picking certain call flows over others to receive continued ICC recovery.

B. The Commission Should Also Clarify That Terminating Carriers Have the Obligation To Offer Direct Termination If Requested.

The second critical ingredient for an ideal regulatory approach to the issues raised regarding tandem switching and transport services is for the Commission to clarify that terminating carriers have the obligation to offer direct termination if requested. Competitive intermediate network services can only be accomplished now and with IP networks in the future if IXCs have the ability to avoid these metered tandem charges when traffic volumes warrant such direct connections. Combined, this ingredient and the first ingredient discussed above (assuring that all providers of tandem services have the ability to obtain compensation for the

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[9] This approach also reflects the fact that, even if a broad interpretation of affiliate is used when transitioning tandem and end office arrangements by affiliated entities to zero, the Commission would still eliminate the incentive for investment in intermediate network services in just some types of configurations (i.e. based on an affiliate relationship), which will lead to arbitrage and inefficiencies.

same functionality) represent limited and balanced steps that, once taken, will enable the market to do the rest and ensure that rates and practices remain reasonable and competitive. Certainly there are other important ICC concerns to be attended-to – for example, other open issues regarding the network edge (discussed above and below) and POIs more broadly, the role of agreements and tariffs in the post-*Transformation Order* world, and ensuring that LECs have adequate flexibility when it comes to end-user charges.[10] But, by assuring these two critical ingredients, the Commission can go a long way toward addressing current ICC problems currently plaguing the industry and maximizing the prospect of efficient network interconnection as the IP migration continues.

C. The Commission Should Establish Rational Edge/Interconnection Rules.

The Commission should also establish rational edge/interconnection rules that support the two concepts described above and that are symmetrical for all types of carriers. It follows from these concepts that, as a general matter, the switch that serves the end user (i.e. the end office or its equivalent) should be the default financial edge (i.e. point at which an IXC ceases responsibility for carrying traffic). It is possible that the IP migration will eventually bring about circumstances in which a different, but still appropriately localized, component of carrier networks will be the appropriate demarc for financial responsibility. But, as it stands today, the local switch remains the best dividing point between the categories of network services where it is appropriate to impose bill and keep, and thereby impose related costs on the carrier's own end users, and those where such treatment is not appropriate.

Accordingly, the Commission should reject calls to dictate, as the network edge, a '"competitively neutral'" location '"where interconnecting carriers have competitive

[10] *2011 ICC Transformation FNPRM*, 26 FCC Rcd at 18116-19 ¶¶ 1316-24.

alternatives—other than services or facilities provided by the terminating carrier to transport traffic to the terminating carrier's network.'"[11] Competition in the provision of intermediate tandem services has increased considerably in recent years. But, while the absence of a competitor could indicate the potential for concerns about whether carrier rates will be adequately regulated by the market, that concern is something that will be adequately addressed by the caps that already apply to such rates. It should not disqualify carriers from their ability to obtain *any* compensation whatsoever.

Similarly, the Commission should reject the proposal that a single point in each Local Access and Transport Area (LATA) determined by a terminating carrier for Mutually Efficient Traffic Exchange.[12] If the Commission adopts the two principles discussed above – market forces will determine the most mutually efficient traffic exchange point.

D. These Same Concepts Should Also Carry-Over to Originating Access Traffic.

As noted, the focus of the *Public Notice* appears to be on terminating access traffic scenarios, where the *Transformation Order* transition has already moved certain access elements to bill and keep. But, these same concepts discussed above can and should also carry-over to originating access traffic. Although, CenturyLink recognizes that some originating-specific aspects may need to be attended-to. This is due to, among other things, the fact that originating access is subject to positive compensation and not bill and keep. By way of example, the Commission would need to attend-to the specifics of how edge compensation would work in the context where direct connection is sought for 8YY originating traffic – particularly in a scenario where the originating carrier doesn't have the technical capability to do so.

[11] *Public Notice*, p. 2 (citation omitted).

[12] *Public Notice*, p. 2.

E. The Commission Should Not Impose New Regulation on Transit Services.

The Commission, in the *Public Notice*, describes "transit" as the term historically used for non-access traffic to describe the functional equivalent of tandem switching and transport for access traffic.[13] It follows that transit services and non-access traffic more generally should similarly be subject to the concepts above.

And, with respect to the *Public Notice*'s specific request for comment as to whether greater regulation is needed, the historic treatment for transit services has been that providers of such services are generally compensated by the financially responsible carrier on the originating side (for non-access traffic, typically the originating LEC). And, the assurance of direct connection rights on origination and termination will drive similar efficiencies for non-access traffic. It also follows that, for these reasons and the reasons discussed more fully below, transit services need not otherwise be the subject of further ICC reform at this time. And, it follows that, notwithstanding the recent court decision cited in the *Public Notice*,[14] transit services should *not* be deemed Section 251 services subject to the provision's pricing and other requirements of Section 252 (which would effectively mandate that they be sold at TELRIC). As the Commission acknowledged, it has not previously ruled that transit services must be provided

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[13] *Id.*, p. 3.

[14] *Id.* (citing *Petition of Sprint Spectrum L.P. for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish Interconnection Agreements with Michigan Bell Tel. Co., d/b/a AT&T Michigan; The Joint Submission of Sprint Spectrum L.P. and Michigan Bell Tel. Co., d/b/a AT&T Michigan, for Approval of an Interconnection Agreement*, Case Nos. U-17349, U-17569, Michigan Public Service Commission, Order, 2014 WL 1285874 (Mar. 18, 2014), *aff'd in part and rev'd in part and remanded by Michigan Bell Tel. Co. v. Michigan Pub. Serv. Comm'rs*, No. 1:14-cv-416, 2017 WL 2927485 (W.D. Mich., July 10, 2017)). This holding is contrary to the prior holdings of the Commission and numerous courts and no doubt will be appealed.

pursuant to Section 251[15] and it should not do so now. Rather, transit rates should continue to be negotiated/market-based rates.

F. These Principles Are Also Consistent With Applicable Legal Standards.

The Commission has authority to adopt these sensible proposals by exercising its rulemaking authority under Section 201, including its authority thereunder to adopt rules to implement Section 251(a).

To begin with, the questions teed-up in both the *Public Notice* and the *2011 ICC Transformation FNPRM* regarding the future of tandem switching and transport services effectively ask whether bill and keep or zero rate treatment should apply to certain categories of tandem switching and transport. Answering these questions and related questions regarding the network edge requires application of the "just and reasonable rates" standards imposed by Sections 201 and 332[16] as well as the "mutual and reciprocal recovery of costs" standard of Section 252(d)(2)[17] and requires that the Commission navigate the usual prescriptions that its conduct not contravene requirements that agencies avoid arbitrary and capricious rulings.[18]

And, while the Commission's authority to impose bill and keep on certain aspects of access and non-access ICC components has been sustained,[19] transition of new components such

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[15] *Transformation Order*, 26 FCC Rcd at 18114 ¶ 1311.

[16] 47 U.S.C. §§ 201, 332.

[17] 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[]").

[18] *See 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 *Public Notice* and the proposals herein are subject to these various standards because they implicate all types of carriers – e.g. ILECs, CLECs, and CMRS providers.

[19] *E.g.*, *Direct Communs. Cedar Valley, LLC v. FCC*, note 4, *supra*, 753 F.3d at 1109.

as the tandem and transport functionality at issue here can not satisfy those standards. 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 another carrier, so long as it can recover those costs from its own end users and explicit universal service support where necessary.[20]

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. But, as explained above, that rationale simply does not extend to access and non-access tandem switching and transport provided in connection with traffic bound for (or coming from) another party's end users. Given the fact that the tandem provider, in this circumstance, does not have a customer relationship with an end user for the long distance service at issue here, these requirements are more demanding and, in fact, cannot be met. Indeed, CenturyLink maintains that the above discussion also demonstrates that, in the current environment, a bill and keep approach to tandem switching and transport services for traffic bound to or from a tandem provider's own (or affiliated) end users also does not ultimately satisfy either the "just and reasonable rates" standard imposed by Sections 201 and 332 or Section 252(d)(2)'s "mutual and reciprocal recovery of costs" standard and would be arbitrary and capricious. 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.

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

Similarly, a rule clarifying that all carriers have the right to determine the most economical manner in which to deliver the traffic to the edge, including the right to directly connect with originating and/or terminating providers, is consistent with Section 251(a) and Commission decisions implementing its requirements as well as other Commission rules and precedents. Regarding Section 251(a), the Commission established in the *Local Competition Order*[21] that an incumbent LEC at the time of the 1996 Act could not *force* a competitive provider into direct interconnection. Similarly, it follows that an originating or terminating carrier today cannot force indirect interconnection with a competitive IXC that requests direct interconnection with it. In the *Local Competition Orde*r, the Commission was focused on the distinct question of whether non-ILECs (primarily CMRS providers) should *be required* to enter into direct interconnection with an ILEC subject to the requirements of Section 251(c).[22] In finding that they could not be so required, the Commission stated that "indirect connection . . . satisfies a telecommunications carrier's duty to interconnect pursuant to section 251(a)[]" and that "direct interconnection . . . is not required under section 251(a)" for non-ILECs.[23] But, the Commission also made clear in the same discussion that the driving concern was that competitive carriers be permitted to set up interconnection arrangements, particularly those with ILECs, "based upon their most efficient technical and economic choices."[24] In other words, just as CMRS providers in the late 1990's contended that they should be free to choose the most

[21] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket Nos. 96-98, 95-185, First Report and Order, 11 FCC Rcd 15499, 15988-92 ¶¶ 992-998 (1996) (*Local Competition Order*) (subsequent regulatory history omitted).

[22] *Id.*

[23] *Id.*, 11 FCC Rcd at 15991 ¶ 997.

[24] *Id*.

efficient manner of interconnection with ILECs, so too IXCs should be free to do so when seeking interconnection arrangements with CMRS providers or other types of carriers today.

It is important to note that it is impossible to interpret the statutory language of Section 251 (stating that [e]ach telecommunications carrier has the duty…to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers[]"[25]) in a meaningful way without imposing the determinative right of choice on one of the parties in an interconnection relationship. Otherwise, one party's exercise of its purported right to insist on one form of interconnection or another would necessarily result in a trumping of the other party's purported right to insist on another type. Thus, the only way to give Section 251(a) meaning is to give one party the determinative choice and, that being the case, it would only be reasonable to give that right to the financially responsible party.

Of course, a "financially responsible party's right to direct interconnection rule" such as that described above would only be mandatory as a default rule. The rule would permit the parties to, under appropriate circumstances, negotiate an appropriate alternative to direct connection.

Finally, it is noteworthy that, since a direct interconnection obligation would apply equally to all types of carriers (all types of ILEC, as well as CLECs and CMRS providers), it must also comply with Section 251(f) (exempting qualifying rural ILECs from 251(c)).[26] But, Section 251(f) does not present a hurdle to this result. This is because Section 251(f) only relieves qualifying rural ILECs from the special Section 251(c) interconnection obligations otherwise applicable to ILECs – leaving them subject to the more generic interconnection obligations of Section 251(a) applicable to all carriers.

[25] 47 U.S.C. § 251(a).

[26] 47 U.S.C. § 251(f).

III. CONCLUSION

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

Respectfully submitted,

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October 26, 2017

Exhibit B

Excerpts of Level 3 Communications, LLC, Tariff F.C.C. No. 4

REGULATIONS AND SCHEDULE OF

CHARGES APPLICABLE TO INTERSTATE AND INTERNATIONAL

SWITCHED ACCESS SERVICES

FURNISHED BY LEVEL 3 COMMUNICATIONS, LLC

AND ITS CONCURRING CARRIERS BETWEEN

POINTS IN THE UNITED STATES AND

BETWEEN POINTS IN THE UNITED STATES AS SPECIFIED HEREIN

SECTION 1 - DEFINITION OF TERMS

Certain terms used generally throughout this tariff for Communications Service of the Company are defined below. The definitions below apply whether or not the defined term is capitalized in this tariff, although for the convenience of the Customer the Company has endeavored to identify the use of defined terms by capitalizing them where they occur. Where a term defined in this tariff is also defined in the Commission's rules (including without limitation Section 69.2 of those rules), the term in this tariff is to be construed in a manner that is consistent with the definition in the Commission's rules, subject to Section 61.26(a) of those rules, under which access services provided by a competitive local exchange carrier (such as the Company) are construed to include services and functions that are the functional equivalent of access services provided by an incumbent local exchange carrier. When terms used in this tariff are not specifically defined, they are intended to be understood as conveying the meaning they are normally given within the United States telecommunications industry (including with reference to the Commission's rules), or, if no such specific meaning exists, their normal English meaning. [T] [N]

Advance Payment: Part or all of a payment required before the start of service.

Authorized User: A person, firm or corporation which is authorized by the Customer or Joint User to be connected to the service of the Customer or Joint User, respectively.

Bit: The smallest unit of information in the binary system of notation.

Commission: Federal Communications Commission.

Company: Level 3 Communications, LLC, the issuer of this tariff.

Connection to the PSTN: Any service or facility provided by a carrier that provides the purchaser of the service or facility with the ability to send calls to the PSTN, and to receive calls from the PSTN, based on one or more standard telephone numbers which are assigned by that carrier to the service or facility and which are listed in the database of the Number Portability Administration Center as assigned to that carrier. [N]

Customer: The person, firm or corporation which purchases service and is responsible for the payment of charges and compliance with the Company's regulations.

Direct Trunked Transport: The term "Direct Trunked Transport" refers to any service or arrangement provided by the Company that, in the context of the Company's network configuration, is functionally equivalent to the facilities and/or services normally referred to as "direct trunked transport" when purchased in connection with switched access services provided by an incumbent local exchange carrier. The term generally refers to transport dedicated to the use of a single Customer without switching at a tandem Switch, between the Serving Wire Center and an End Office, or between two Customer-designated End Offices. Depending on the specific arrangements provided to a customer, Direct Trunked Transport may consist of a connection between the Customer's location and/or the Serving Wire Center, and a Company tandem switch. [N]

Certain material previously appearing on this page now appears on Original Page 6.1.

SECTION 15 – RATES AND CHARGES (CONT'D)

15.1.3.4.3 Switched Transport Usage Rates – Switched Transport (cont'd.) [T]

15.1.3.4.3.2 Terminating – To 3rd Party [T]

	Rates Per Access Minute	Rates Per Access Minute Per Mile	[M]
Alabama	$0.000168	$0.000020	|
Alaska	$0.0000	$0.000000	|
Arizona	$0.00024	$0.000030	|
Arkansas	$0.000053	$0.000003	|
California	$0.000075	$0.000015	|
Colorado	$0.00024	$0.000030	|
Connecticut	$0.000063	$0.000003	|
Delaware	$0.0000	$0.000002	|
District of Columbia	$0.0000	$0.000002	|
Florida	$0.000168	$0.000020	|
Georgia	$0.000168	$0.000020	|
Hawaii	$0.0000	$0.000000	|
Idaho	$0.00024	$0.000030	|
Illinois	$0.000103	$0.000013	|
Indiana	$0.000103	$0.000013	|
Iowa	$0.00024	$0.000030	|
Kansas	$0.000053	$0.000003	|
Kentucky	$0.000168	$0.000020	|
Louisiana	$0.000168	$0.000020	|
Maine	$0.0000	$0.000003	|
Maryland	$0.0000	$0.000002	|
Massachusetts	$0.0000	$0.000002	|
Michigan	$0.000103	$0.000013	|
Minnesota	$0.00024	$0.000030	|
Mississippi	$0.000168	$0.000020	|
Missouri	$0.000053	$0.000003	|
Montana	$0.00024	$0.000030	[M]

[M] – Certain material found on this page was previously located on Page 63.

SECTION 15 – RATES AND CHARGES (CONT'D)

15.1.3.4.3 Switched Transport Usage Rates – Switched Transport (cont'd.) [T]

15.1.3.4.3.2 Terminating - To 3rd Party (cont'd.) [T]

	Rates Per Access Minute	Rates Per Access Minute Per Mile	
			[M]
Nebraska	$0.00024	$0.000030	|
Nevada	$0.000120	$0.000008	|
New Hampshire	$0.0000	$0.000003	|
New Jersey	$0.0000	$0.000002	|
New Mexico	$0.00024	$0.000030	|
New York	$0.0000	$0.000002	|
North Carolina	$0.000168	$0.000020	|
North Dakota	$0.00024	$0.000030	|
Ohio	$0.000600	$0.000117	|
Oklahoma	$0.000053	$0.000003	|
Oregon	$0.00024	$0.000030	|
Pennsylvania	$0.0000	$0.000002	|
Puerto Rico	$0.000225	$0.000060	|
Rhode Island	$0.0000	$0.000002	|
South Carolina	$0.000168	$0.000020	|
South Dakota	$0.00024	$0.000030	|
Tennessee	$0.000168	$0.000020	|
Texas	$0.000053	$0.000003	[M]
U.S. Virgin Islands	$0.000569	$0.000016	[N]
Utah	$0.00024	$0.000030	[M]
Vermont	$0.0000	$0.000003	|
Virginia	$0.0000	$0.000002	|
Washington	$0.00024	$0.000030	|
West Virginia	$0.0000	$0.000002	|
Wisconsin	$0.000103	$0.000013	|
Wyoming	$0.00024	$0.000030	[M]

[M] – Certain material found on this page was previously located on Page 64.

SECTION 15 – RATES AND CHARGES (CONT'D)

15.1.3.4.3 Switched Transport Usage Rates – Switched Transport (cont'd.) [T]

15.1.3.4.3.3 Terminating – To Company End Office [T]

	Rates Per Access Minute		Rates Per Access Minute Per Mile		
Alabama	$0.000000	[R]	$0.000000	[R]	[M]
Alaska	$0.000000	[R]	$0.000000		|
Arizona	$0.000000	[R]	$0.000000	[R]	|
Arkansas	$0.000000	[R]	$0.000000	[R]	|
California	$0.000000	[R]	$0.000000	[R]	|
Colorado	$0.000000	[R]	$0.000000	[R]	|
Connecticut	$0.000000	[R]	$0.000000	[R]	|
Delaware	$0.000000		$0.000002		|
District of Columbia	$0.000000		$0.000002		|
Florida	$0.000000	[R]	$0.000000	[R]	|
Georgia	$0.000000	[R]	$0.000000	[R]	|
Hawaii	$0.000000		$0.000000	[R]	|
Idaho	$0.000000	[R]	$0.000000	[R]	|
Illinois	$0.000000	[R]	$0.000000	[R]	|
Indiana	$0.000000	[R]	$0.000000	[R]	|
Iowa	$0.000000	[R]	$0.000000	[R]	|
Kansas	$0.000000	[R]	$0.000000	[R]	|
Kentucky	$0.000000	[R]	$0.000000	[R]	|
Louisiana	$0.000000	[R]	$0.000000	[R]	|
Maine	$0.000000		$0.000000	[R]	|
Maryland	$0.000000		$0.000000	[R]	|
Massachusetts	$0.000000		$0.000000	[R]	|
Michigan	$0.000000	[R]	$0.000000	[R]	|
Minnesota	$0.000000	[R]	$0.000000	[R]	|
Mississippi	$0.000000	[R]	$0.000000	[R]	|
Missouri	$0.000000	[R]	$0.000000	[R]	|
Montana	$0.000000	[R]	$0.000000	[R]	[M]

[M] – Certain material found on this page was previously located on Page 63.

SECTION 15 – RATES AND CHARGES (CONT'D)

15.1.3.4.3 Switched Transport Usage Rates – Switched Transport (cont'd.) [T]

15.1.3.4.3.3 Terminating – To Company End Office, (cont'd.) [T]

	Rates Per Access Minute		Rates Per Access Minute Per Mile		
					[M]
Nebraska	$0.000000	[R]	$0.000000	[R]	|
Nevada	$0.000000	[R]	$0.000000	[R]	|
New Hampshire	$0.000000		$0.000000	[R]	|
New Jersey	$0.000000		$0.000000	[R]	|
New Mexico	$0.000000	[R]	$0.000000	[R]	|
New York	$0.000000		$0.000000	[R]	|
North Carolina	$0.000000	[R]	$0.000000	[R]	|
North Dakota	$0.000000	[R]	$0.000000	[R]	|
Ohio	$0.000000	[R]	$0.000000	[R]	|
Oklahoma	$0.000000	[R]	$0.000000	[R]	|
Oregon	$0.000000	[R]	$0.000000	[R]	|
Pennsylvania	$0.000000		$0.000000	[R]	|
Puerto Rico	$0.000000	[R]	$0.000000	[R]	|
Rhode Island	$0.000000		$0.000000	[R]	|
South Carolina	$0.000000	[R]	$0.000000	[R]	|
South Dakota	$0.000000	[R]	$0.000000	[R]	|
Tennessee	$0.000000	[R]	$0.000000	[R]	|
Texas	$0.000000	[R]	$0.000000	[R]	[M]
U.S. Virgin Islands	$0.000000		$0.000000	[R]	[N]
Utah	$0.000000	[R]	$0.000000	[R]	[M]
Vermont	$0.000000		$0.000000	[R]	|
Virginia	$0.000000		$0.000000	[R]	|
Washington	$0.000000	[R]	$0.000000	[R]	|
West Virginia	$0.000000		$0.000002		|
Wisconsin	$0.000000	[R]	$0.000000	[R]	|
Wyoming	$0.000000	[R]	$0.000000	[R]	[M]

[M] – Certain material found on this page was previously located on Page 64.

SECTION 15 – RATES AND CHARGES (CONT'D)

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.) [T]

15.1.3.4.5.2 Terminating – To 3rd Party [T]

	RATES PER ACCESS MINUTE		
	Tandem Switching	Multiplexing DS3 to DS1	
Alabama	$0.001145	N/A	[M]
Alaska	$0.000000	N/A	|
Arizona	$0.002252	$0.000036	|
Arkansas	$0.000288	N/A	|
California	$0.000440	$0.000098	|
Colorado	$0.002252	$0.000036	|
Connecticut	$0.000634	N/A	|
Delaware	$0.001574	N/A	|
District of Columbia	$0.001574	N/A	|
Florida	$0.001145	$0.000380	|
Georgia	$0.001145	$0.000380	|
Hawaii	$0.000000	N/A	|
Idaho	$0.002252	N/A	|
Illinois	$0.001084	$0.000015	|
Indiana	$0.001084	N/A	|
Iowa	$0.002252	N/A	|
Kansas	$0.000288	N/A	|
Kentucky	$0.001145	N/A	|
Louisiana	$0.001145	N/A	|
Maine	$0.001600	N/A	|
Maryland	$0.001574	N/A	|
Massachusetts	$0.001574	$0.0000	|
Michigan	$0.001084	$0.000015	|
Minnesota	$0.002252	N/A	|
Mississippi	$0.001145	N/A	|
Missouri	$0.000288	$0.000047	|
Montana	$0.002252	N/A	[M]

[M] – Certain material found on this page was previously located on Page 67.

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.) [T]

15.1.3.4.5.2 Terminating – To 3rd Party, (cont'd.) [T]

	RATES PER ACCESS MINUTE Tandem Switching	Multiplexing DS3 to DS1	
Nebraska	$0.002252	N/A	[M]
Nevada	$0.001062	N/A	|
New Hampshire	$0.001600	N/A	|
New Jersey	$0.001574	N/A	|
New Mexico	$0.002252	N/A	|
New York	$0.001574	$0.0000	|
North Carolina	$0.001145	N/A	|
North Dakota	$0.002252	N/A	|
Ohio	$0.002001	$0.000240	|
Oklahoma	$0.000288	N/A	|
Oregon	$0.002252	N/A	|
Pennsylvania	$0.001574	$0.0000	|
Puerto Rico	$0.003236	$0.000052	|
Rhode Island	$0.001574	N/A	|
South Carolina	$0.001145	N/A	|
South Dakota	$0.002252	N/A	|
Tennessee	$0.001145	N/A	|
Texas	$0.000288	$0.000047	[M]
U.S. Virgin Islands	$0.002821	$0.000143	[N]
Utah	$0.002252	N/A	[M]
Vermont	$0.001600	N/A	|
Virginia	$0.001574	$0.0000	|
Washington	$0.002252	$0.000036	|
West Virginia	$0.001574	N/A	|
Wisconsin	$0.001084	N/A	|
Wyoming	$0.002252	N/A	[M]

[M] – Certain material found on this page was previously located on Page 68.

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.) [T]

15.1.3.4.5.3 Terminating – To Company End Office [T]

RATES PER ACCESS MINUTE

	Tandem Switching		Multiplexing DS3 to DS1		
Alabama	$0.000700	[R]	N/A		[M]
Alaska	N/A	[T]	N/A		|
Arizona	$0.000700	[R]	$0.000038	[I]	|
Arkansas	$0.000700	[R]	N/A		|
California	$0.000440		$0.000098		|
Colorado	$0.000700	[R]	$0.000000	[R]	|
Connecticut	$0.000634		N/A		|
Delaware	$0.000700	[R]	N/A		|
District of Columbia	$0.000700	[R]	N/A		|
Florida	$0.000700	[R]	$0.000000	[R]	|
Georgia	$0.000700	[R]	$0.000000	[R]	|
Hawaii	$0.000000		N/A		|
Idaho	$0.000700	[R]	N/A		|
Illinois	$0.000700	[R]	$0.000000	[R]	|
Indiana	$0.000700	[R]	N/A		|
Iowa	$0.000700	[R]	N/A		|
Kansas	$0.000700	[I]	N/A		|
Kentucky	$0.000700	[R]	N/A		|
Louisiana	$0.000700	[R]	N/A		|
Maine	$0.000700	[R]	N/A		|
Maryland	$0.000700	[R]	N/A		|
Massachusetts	$0.000700	[R]	$0.000000		|
Michigan	$0.000700	[R]	$0.000000	[R]	|
Minnesota	$0.000700	[R]	N/A		|
Mississippi	$0.000700	[R]	N/A		|
Missouri	$0.000700	[I]	$0.000000	[R]	|
Montana	$0.000700	[R]	N/A		[M]

[M] – Certain material found on this page was previously located on Page 67.

SECTION 15 – RATES AND CHARGES (CONT'D

15.1.3.4.5 Switched Transport Usage Rates – Tandem Switching & Multiplexing, (cont'd.) [T]

15.1.3.4.5.3 Terminating – To Company End Office, (cont'd.) [T]

	RATES PER ACCESS MINUTE Tandem Switching		Multiplexing DS3 to DS1		
Nebraska	$0.000700	[R]	N/A		[M]
Nevada	$0.000700	[R]	N/A		|
New Hampshire	$0.000700	[R]	N/A		|
New Jersey	$0.000700	[R]	N/A		|
New Mexico	$0.000700	[R]	N/A		|
New York	$0.000700	[R]	$0.0000		|
North Carolina	$0.000700	[R]	N/A		|
North Dakota	$0.000700	[R]	N/A		|
Ohio	$0.000700	[R]	$0.00000	[R]	|
Oklahoma	$0.000700	[I]	N/A		|
Oregon	$0.000700	[R]	N/A		|
Pennsylvania	$0.000700	[R]	$0.0000		|
Puerto Rico	$0.000700	[R]	$0.0000	[R]	|
Rhode Island	$0.000700	[R]	N/A		|
South Carolina	$0.000700	[R]	N/A		|
South Dakota	$0.000700	[R]	N/A		|
Tennessee	$0.000700	[R]	N/A		|
Texas	$0.000700	[I]	$0.0000	[R]	[M]
U.S. Virgin Islands	$0.000700		N/A		[N]
Utah	$0.000700	[R]	N/A		[M]
Vermont	$0.000700	[R]	N/A		|
Virginia	$0.000700	[R]	$0.0000		|
Washington	$0.000700	[R]	$0.0000	[R]	|
West Virginia	$0.000700	[R]	N/A		|
Wisconsin	$0.000700	[R]	N/A		|
Wyoming	$0.000700	[R]	N/A		[M]

[M] – Certain material found on this page was previously located on Page 68.

Exhibit C

Comments of AT&T Services Inc. to Refresh the Record, Connect America Fund, et al., WC Docket No. 10-90, et al. (filed Oct. 26, 2017)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

COMMENTS OF AT&T SERVICES INC. TO REFRESH THE RECORD

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October 26, 2017

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
Connect America Fund	)	WC Docket No. 10-90
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

COMMENTS OF AT&T SERVICES INC. TO REFRESH THE RECORD

Pursuant to the Commission's Public Notice, dated September 8, 2017, in the above-captioned proceeding,[1] AT&T Services, Inc. ("AT&T") submits these comments to refresh the record.

INTRODUCTION AND SUMMARY

The Commission's *Refresh Notice* is extremely welcome and long overdue. In its 2011 *Transformation Order*,[2] the Commission decided to transition the intercarrier compensation regime for traffic on the public switched telephone network ("PSTN") to a bill-and-keep system. The *Transformation Order* established an initial phase for this transition, which focused mostly on terminating end office charges and slowly reduced those intercarrier rates to zero. The *Transformation Order* left the remaining aspects of the transition to a further notice of proposed rulemaking, and now (six years later) the Commission asks the parties to refresh the record on the

[1] Public Notice, *Parties Asked to Refresh the Record on Intercarrier Compensation Reform Related to the Network Edge, Tandem Switching and Transport and Transit,* WC Docket No 10-90; CC Docket No. 01-92 (Sept. 8, 2017) ("*Refresh Notice*").

[2] *Connect America Fund, et al.*, 26 FCC Rcd. 17663 (2011) ("*Transformation Order*").

issues necessary to complete the transition for all terminating charges. In the years since the *Transformation Order*, as the transition to bill-and-keep has eliminated most of the arbitrage opportunities involving end office charges, carriers have shifted their arbitrage activities to the elements of the historic system that have yet to switch to bill-and-keep, including not just terminating tandem and transport charges, but also originating access charges (including, especially, charges for 8YY calls). Given that these arbitrage schemes involve billions of minutes and massive access charges, the need to complete the transition to bill-and-keep – for the *entire* intrercarrier compensation system, not just terminating charges – has become increasingly urgent.

To complete the transition for terminating charges, the Commission will need to resolve two sets of issues. First, the Commission will need to adopt a rule establishing a default "network edge" – the point marking where the financial responsibilities of the sending and terminating carriers begin and end. The end-state bill-and-keep system with a network edge will not end all intercarrier payments, however, because sometimes the sending carrier will need to engage (and pay) a third carrier to deliver calls to the designated edge. Thus, the Commission will also need to determine what residual regulation, if any, should govern these intermediate arrangements on the sending carrier's side of the edge.

With respect to the first set of issues, AT&T submitted a detailed network edge proposal in its original comments in 2012. The precise locations of default network edges, however, are far less important than their existence. AT&T expects that once a default set of edges is established, most carriers will negotiate arrangements to exchange to traffic efficiently. Such arrangements might incorporate the use of default edges or, as is more likely, could involve the use of traffic exchange points like carrier hotels. Accordingly, these comments will focus primarily on the second set of issues. Regardless of where the Commission establishes the network edge, the Commission's end-state bill-and-keep regime should have the following four features:

First, a necessary corollary to any network edge rule is a rule that explicitly guarantees that the party that has the financial responsibility to carry traffic to or from a network edge has the unfettered freedom to choose how, and by what arrangements, that party will carry the traffic on its side of the edge. The network edge rule, by itself, is not enough: some terminating carriers today engage in a variety of tactics designed to force a sending carrier to use inefficient and costly arrangements to deliver traffic to their networks, and these carriers could continue to pursue such tactics even in a bill-and-keep world with network edge rules. Accordingly, the Commission should adopt a network edge rule that *explicitly* ensures a carrier's freedom to choose how it will deliver traffic on its side of the designated edge.

Second, the Commission should detariff and remove most *ex ante* rate regulation from all intercarrier payments for intermediate services that may survive on the sending carrier's side of the edge. As AT&T has explained previously and reiterates below, the Commission has no authority to regulate the rates of these intermediate services under any provision of Sections 251 and 252, and there is no continuing policy justification for general *ex ante* rate regulation (such as price cap regulation) of such services under Section 201.

Third, the Commission will need to maintain some residual regulations to combat the lingering threat of unlawful traffic stimulation schemes. Carriers in remote areas of the country should not be allowed to abuse the network edge rules by partnering with unscrupulous tandem or transport providers on the sending carrier's side of the edge to engage in traffic-pumping schemes or traffic aggregation schemes. The Commission should therefore adopt a bill-and-keep/network-edge rule that if the ratio of traffic goes above 3-to-1, the network edge will automatically revert to any tandem in the LATA selected by the sending carrier.

Fourth, the Commission should reaffirm that it has no statutory authority to regulate IP-to-IP interconnection; the rules contemplated here apply only to PSTN traffic. Similarly, the Commission should confirm that its prior VoIP decisions, which hold that VoIP and other IP-based services are indivisibly interstate and which broadly pre-empt state commission regulation of IP-based calls, extend to IP-to-IP interconnection.

Finally, as explained below, carriers are also engaging in massive arbitrage schemes involving originating traffic as well, and therefore the Commission should expeditiously complete the transition to bill-and-keep for originating access charges.

I. DEVELOPMENTS SINCE 2011 CONFIRM THAT, IN COMPLETING THE TRANSITION TO BILL-AND-KEEP FOR TERMINATING PSTN TRAFFIC, THE COMMISSION SHOULD ADOPT RULES AND TAKE OTHER ACTIONS TO COMBAT ABUSIVE PRACTICES.

The *Transformation Order* began the transition to a bill-and-keep regime by reducing a specified subset of carrier rate elements, relating mostly to end office charges, to zero.[3] Now that this initial transition is mostly complete, many carriers have shifted their arbitrage schemes to the portions of the PSTN-related intercarrier compensation regime that have not yet been reformed to bill-and-keep. Accordingly, as AT&T has argued elsewhere, the transition to a full, end-state bill-

[3] Specifically, this initial transition applied to (1) price cap ILEC end office charges (*Transformation Order* ¶ 800), (2) price cap ILEC tandem and transport charges in cases where the ILEC also owned the end office (*id.* ¶¶ 800, 1312); (3) CLEC tandem, transport and end office charges, to the extent CLECs must benchmark those rates to ILEC rates under the pre-existing CLEC access charge rules (*id.* ¶ 807); and (4) LEC-CMRS reciprocal compensation arrangements (*id.* ¶ 806). All of these intercarrier rates were (or will be) transitioned to zero, thus implementing a default bill-and-keep arrangement for these specified rate elements. *Id.* ¶ 812 (transition rules are default rates and "carriers remain free to enter into negotiated agreements that differ from the default rates"). The Commission also implemented a similar transition for rate-of-return carrier rate elements. *See id.* ¶ 800.

and-keep regime has become increasingly urgent.[4] To *complete* the transition to a comprehensive bill-and-keep system, however, the Commission will have to address two significantly more complex sets of issues.

First, the Commission must adopt a federal rule establishing a "network edge." *See Refresh Notice* at 1-2. Every coherent bill-and-keep regime has a default point on each terminating carrier's network, known as the network "edge," that marks where the sending carrier's financial obligations end and the terminating carrier's obligations begin. The Commission will need to balance a number of competing considerations to establish a default edge that is easy to identify and enforce, that gives all parties appropriate incentives to negotiate the most efficient arrangements, and that eliminates arbitrage opportunities to the maximum extent possible.[5]

Second, the Commission must determine what level of regulation is necessary for the tandem, transport, and transit services that remain. *Refresh Notice* at 2-3. The end-state bill-and-keep regime will not eliminate intercarrier compensation altogether. Once the edge has been established, the sending carrier (*i.e.*, the originating carrier for non-access traffic or the IXC for access traffic) will be responsible for the costs of delivering that traffic to the terminating carrier's edge. If the sending carrier does not interconnect physically at the network edge, it can satisfy its financial obligation to deliver its traffic to the terminating carrier's edge in a variety of ways, including by purchasing intermediate services from a third party. Accordingly, even after the

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[4] *See, e.g.*, Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), *Petition of AT&T Services, Inc. for Forbearance Under U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges*, WC Docket No. 16-363 (filed Sept. 30, 2016) ("AT&T Forbearance Petition").

[5] The Commission should establish the default network edge via a federal rule that applies uniformly across the country. *See Refresh Notice* at 2 (seeking comment on state involvement in selecting edge). A federal rule is necessary to promote predictability and reduce transaction costs, whereas a patchwork of state-determined edges would make negotiations for efficient arrangements more difficult.

default network edge rules have been established, the Commission will still need to fashion the right mix of regulatory relief for the remaining intermediate services and residual rules that guard against any lingering opportunities for arbitrage.

With respect to the first set of issues – how to set the network edge – AT&T put forward a detailed proposal in its 2012 comments.[6] AT&T is also open to other potential proposals for setting default edges. As long as the default edges fairly apportion responsibility, carriers will have appropriate incentives to establish efficient traffic exchange points. These comments will thus focus primarily on the second set of issues, relating to what types of residual regulation may be necessary for the intermediate intercarrier services that remain. Regardless of where the Commission sets the network edge, the Commission's end-state bill-and-keep regime should explicitly include the following four features: (1) as a corollary to the network edge rules, the Commission should adopt rules that specifically give carriers on the originating side of the network edge complete freedom to decide how they will deliver traffic to a network edge; (2) the Commission should remove all tariffing requirements and *ex ante* rate regulation from whatever tandem and transport services remain on the originating side of any network edge; (3) the Commission should adopt residual bill-and-keep/edge rules to combat any lingering risk of abusive traffic stimulation arbitrage schemes; and (4) the Commission should make clear that IP-to-IP interconnection for voice services will be subject to the same regime of "unregulation" that has successfully applied to the peering and transit marketplace for Internet exchange services for the last two decades.

[6] *See* Comments of AT&T, *Connect America Fund, et al.*, WC Docket No. 10-90, *et al*. (filed Feb. 24, 2012) ("AT&T 2012 Comments").

A. The Commission Should Adopt A Rule Guaranteeing The Sending Carrier's Unfettered Right to Decide How It Will Deliver Traffic To A Terminating Carrier's Edge.

The establishment of an end-state bill-and-keep system with a default network edge will not end all intercarrier compensation. The network edge establishes where the parties' *financial* obligations begin and end – *i.e.*, the originating and terminating carriers each bear their own costs on their respective sides of the edge. The parties' financial responsibilities, however, need not coincide with the physical points of interconnection, and thus there will be cases in which either carrier may contract with either the other carrier or third-party providers to ensure that traffic is delivered to or from the designated edge. Although a network edge rule will give all parties more appropriate incentives to use the most efficient arrangements, the mere establishment of the network edge, alone, is not sufficient to prevent abusive tactics designed to force the other carrier to use less efficient arrangements. Accordingly, the Commission should adopt a rule, as a necessary corollary to the network edge rule, that the carrier that bears the financial responsibility to deliver traffic to (or from) the edge has the unfettered right to choose how and by what arrangements it will deliver that traffic to (or from) the designated edge.

A rule that aligns the financial responsibility for transport to a network edge with the choice of implementing the interconnection obligation would help reduce interconnection disputes, bring about more efficient interconnection arrangements, and help curtail arbitrage opportunities that arise under the Commission's current regime. Under the current Commission rules, there is a mismatch, because the sending carrier can be obliged in most cases to deliver and pay the costs of transporting the call to the terminating end office, but then some terminating carriers and/or intermediate transport providers have insisted that they have the right to dictate the transport route used by the sending carrier.[7] As described in more detail below, this mismatch—combined with the Commission's incomplete reforms on certain tariffed tandem and transport services—creates arbitrage opportunities.[8] In some cases, terminating carriers and intermediate transport providers seek to force sending carriers to route traffic via a particular tandem switch owned by the intermediate provider, and then agree to share the resulting revenues from tariffed tandem and transport charges. In other cases, terminating carriers or intermediate transport providers have even claimed they have an *exclusive* right to transport traffic and assess inflated tariffed tandem and transport charges on sending carriers, which, they say, have no right to deliver the traffic directly or via a third party that the sending carrier chooses.[9]

In both cases, the terminating carriers charging for the tariffed tandem and transport services have no incentive to select the most efficient route, based on economic or engineering

[7] Incumbent LECs, however, are required to enter into interconnection agreements and generally to permit interconnection either at their tandem switches or at the end offices, and thus the sending carriers are generally able to elect the most appropriate transport route when routing calls to the customers of incumbent LECs. For other carriers, the Commission's interconnection rules are not as well-established, and some carriers have attempted to take advantage of perceived ambiguities in the Commission's rules to insist that a particular transport route must be used.

[8] *See also* AT&T Forbearance Petition at 8 ("much of the problem arises because, under the Commission's traditional rules, IXCs generally must pay properly tariffed and billed tandem and transport charges, but are not always clearly permitted to select the provider of those services or the most efficient means to transport traffic. This perverse economic relationship means that IXCs are often billed for inefficient and costly tandem and transport services, which they would not willingly choose if they could more freely select among competitive providers of tandem and transport services.").

[9] As AT&T explained in its comments on originating access as to 8YY services and below in Section II, similar arbitrage practices have become prevalent on originating 8YY traffic, which the Commission has acknowledged is similar to terminating access. On originating 8YY traffic, numerous arbitrage schemes have developed because of the same type of mismatch: the originating carrier or intermediate carrier will seek to force the receiving carrier to use a certain transport route to originate 8YY calls, and the receiving carrier can be required to pay tariffed tandem and transport charges that are not efficient and that it would seek to avoid if it had the clear ability to select the transport route. *E.g.*, *AT&T Servs., Inc. v. Great Lakes Comnet, Inc.*, 30 FCC Rcd. 2586, ¶¶ 13-15, 21, 23 (2015), *aff'd in relevant part, remanded in part on other grounds*, *Great Lakes Comnet, Inc. v. FCC*, 823 F.3d 998 (D.C. Cir. 2016) (describing a scheme to overcharge transport on aggregated 8YY traffic, and confirming that IXCs may "'have no choice but to accept traffic from an intermediate competitive LEC chosen by the originating or terminating carrier. . . .'") (citing *Access Charge Reform*, 19 FCC Rcd. 9104, ¶¶ 15, 17 (2004)).

considerations—to the contrary, certain carriers are seeking to force the use of particular transport routes because they will be able to collect or share in tariffed tandem and transport charges. Accordingly, a rule establishing a reasonable network edge, by itself, is not enough: the Commission should also issue rules making clear that the sending carrier, which has the financial responsibility to carry the traffic to the network edge, has the right to select how to transport the traffic to the edge, *i.e.*, which route to take, and whether to do so with its own facilities or via the use of a third party provider. The receiving carrier would be obligated to accept the traffic at its edge, and could not refuse to interconnect at that point, or impose conditions or obligations on the interconnection (so long as the method of interconnection were technically feasible).

"Tandem Rehoming." One practice that has arisen in light of the Commission's partial and incomplete intercarrier compensation reforms involves sudden network rearrangements that AT&T has referred to as "tandem rehoming." Typically, when it exchanges traffic with a particular carrier, AT&T has developed over the years a mixture of transport routes, sometimes exchanging traffic via direct connections to a carrier's end office, and in other instances connecting indirectly using tandem switches operated by either incumbent LECs or third parties. These existing arrangements involve transport facilities that are appropriately sized to handle the traffic volumes in a given area. In recent years, however, AT&T has received sudden, radical, and unilateral demands—often issued via changes to the industry database known as the Local Exchange Routing Guide ("LERG")—that AT&T must promptly revise all its existing traffic arrangements with a particular carrier. The carrier may refuse to allow direct connections, and, using the LERG, will specify that all of the traffic between AT&T and the carrier should be exchanged at one or a few tandem switches owned by alternative providers. The re-arrangements do not appear to be always necessary on engineering, economic, or competitive grounds, but rather are likely to arise because the alternative tandem provider and the other carrier have executed a revenue sharing agreement. Under such agreements, the intermediate tandem provider agrees to share a portion of the resulting increase in tariffed tandem and transport access charges with the carrier, if the carrier will make the LERG changes to re-designate the tandem provider's switch as the interconnection point.[10]

These sudden and unilateral changes to existing transport arrangements often result in substantial potential increased costs for sending carriers. AT&T would need to build or significantly augment facilities to the new tandem operated by the alternative provider, because AT&T may either have no existing connection, or the existing transport is far too small to handle the large volumes of traffic that are being re-routed from existing connections to the newly designated tandem. AT&T also must pay to remove or resize existing connections. The costs of these re-arrangements, which were caused by the terminating carrier—and its likely receipt of a share of tandem and transport revenue from the alternative provider—can be many millions of dollars. Moreover, AT&T also could be forced to pay increased transport charges, because the new recurring tandem and transport charges can be more expensive than the existing arrangements.[11] These tandem rehoming disputes, if not checked, could also lead to increased

[10] A carrier's designations in the LERG that a particular tandem switch should be employed to route traffic are not legally binding, and the LERG has consistently been described as an "industry guide." *See, e.g.*, *Numbering Policies for Modern Communications*, 28 FCC Rcd. 5842, ¶ 14 n.53 (2013). Nevertheless, when carriers use the LERG to designate a new route when they begin offering service in a new area, or make incremental changes to existing network routing arrangements, carriers generally implement those LERG changes without substantial dispute. With tandem rehoming, however, some carriers are seeking to rely on the LERG to make broad and unilateral changes to virtually all traffic they exchange with other carriers.

[11] For example, if the terminating carrier no longer is willing to directly connect with AT&T at an end office with large traffic volumes, then the tandem and transport costs will likely exceed the costs of a direct connection.

instances of network blocking, because carriers may not be able to arrange for transport facilities that can accommodate all of the "rehomed" traffic.

Although there is nothing improper about re-arranging existing transport facilities to achieve greater efficiencies, the tandem rehoming described here is occurring at least in part because there is a mismatch between the carriers selecting the transport route and the carrier that bears the financial obligation for paying for the route—and because the Commission's existing rules on tandem and transport services provide a revenue opportunity for carriers willing to engage in arbitrage. To prevent disputes about such actions, the Commission should adopt a rule ensuring that the carrier with the financial obligation to transport traffic has the right to dictate how to carry the traffic up to the network edge. The carrier with the financial responsibility to deliver the traffic to an edge has the appropriate incentives to use the most efficient arrangements and thus should have the right to deliver the traffic to the edge using the arrangements of its choice.

At the same time, such a rule would reduce wholesale changes in network routing that are motivated by access arbitrage, rather than network efficiency. Under AT&T's proposed rule, a carrier would be able to rehome its traffic to a different carrier's tandem, and insist that sending carriers deliver their traffic to that carrier, *only* if all of those arrangements remained on the terminating side of the edge – which means that the terminating carrier would have the responsibility to bear the costs of transporting that traffic to and from the tandem. A terminating carrier presumably would agree to incur those costs only if the alternative tandem provider offered genuine efficiencies compared to the existing transport arrangements—as one would expect in actual, competitive markets. By contrast, where a tandem rehoming request arises primarily because the alternative tandem provider is willing to pay the terminating carrier a share of the tandem and transport revenues, then rehoming would not be likely to occur because the terminating carrier would be obliged to incur the transport costs.

Mileage-Pumping And Other Arbitrage Schemes. The mismatch between the financial obligation for tariffed tandem and transport charges and the selection of transport routes has also exacerbated so-called "mileage-pumping" schemes, especially in connection with access stimulation on terminating traffic and originating traffic on 8YY calls. In 2011, the Commission agreed that "the continuation of transport charges in perpetuity would be problematic." *Transformation Order*, ¶ 820. The Commission specifically pointed to "mileage-pumping," in which "service providers designate distant points of interconnection to inflate the mileage used to compute the transport charges." *Id.*

Unfortunately, the Commission's failure to reform the tandem and transport rules has only exacerbated these issues since 2011. As opportunities for arbitrage using terminating end office access charges declined when the Commission began transitioning those charges to bill-and-keep, unscrupulous carriers have turned to arbitrage using originating charges on 8YY traffic, and to manipulating tandem and transport charges to support arbitrage and access stimulation schemes.[12] Even worse, some carriers have become emboldened, brazenly asserting that they have a *de jure* right to be the exclusive provider of tandem or transport services. Although a number of these schemes are already unlawful under the Commission's existing rules, litigating the disputes is

[12] *See* AT&T Forbearance Petition at 3-4, 8, 9-10. If the relief in AT&T's Petition were granted, then carriers could no longer tariff tandem and transport charges on access stimulation traffic. Although that relief is warranted under the statutory forbearance criteria, the Commission should also act in this proceeding to set new rules to define the network edge, and to clarify that the sending carrier, which has the financial responsibility to carry the traffic to the network edge, has the right to select how to transport the traffic to the edge.

costly, and more comprehensive intercarrier compensation reform could eliminate the incentives to engage in such arbitrage schemes in many cases.[13]

Because of the Commission's incomplete reforms, there is a clear incentive for unscrupulous carriers to inflate tandem and transport charges to unreasonable levels. The access stimulation schemes that have endured often involve situations in which carriers have refused direct connections (despite Commission and court precedent),[14] and then bill excessive transport charges, including lengthy per-mile, per-minute charges to remote areas on large volumes of stimulated or aggregated traffic. In fact, one such scheme has grown so large that the *one* transport provider at issue is responsible for over *12 percent* of AT&T's *total, nationwide* billed terminating switched access expense—even though AT&T is billed by over 1,300 different LECs.[15]

As a result of the lack of reform, and the arbitrage schemes unleashed by certain carriers, literally billions of minutes of long distance traffic have been inefficiently transported to or from remote locations like Spencer, Iowa; Westphalia, Michigan; and, Redfield, South Dakota. There is no legitimate economic or engineering reason why carriers – and ultimately consumers – must

[13] As explained below in Section I.C, even if the Commission adopts clear network edge rules and clarifies the interconnection obligations, there will likely remain arbitrage opportunities in certain circumstances. Accordingly, the Commission also should keep and strengthen its access stimulation rules so that they can be applied under the new network edge regime.

[14] *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 27 (2008) ("a competitive LEC will permit an IXC to install direct trunking from the IXC's point of presence to the competitive LEC's end office, thereby bypassing any tandem function" and associated transport charges).

[15] *See* Formal Complaint of AT&T Corp., *AT&T Corp. v. Iowa Network Servs. Inc.*, EB Docket No. 17-56, ¶ 8 (filed Jun. 8, 2017). Making matters worse, the carrier at issue even contends that the Commission has adopted a "mandatory use" requirement that compels sending carriers to use only the carrier's transport services, and that all competitive transport alternatives are foreclosed as a matter of law. In practice, however, no such mandatory use requirement was followed. Nevertheless, because of this carrier's tariffing and billing practices, along with the refusal of terminating LECs to provide or permit direct connections, a "price umbrella" was created such that the price of alternatives to the carrier's transport was inflated well above any reasonable market rate. Indeed, AT&T estimates that, if direct connections were used to carry the traffic, the costs would be a tiny fraction of the tariffed transport charges. *Id.* ¶ 13.

pay outdated tariffed transport charges to carry incredibly large volumes of traffic to these areas. The only reason that extraordinarily large volumes of traffic are being routed to these remote areas are that carriers continue to engage in access stimulation schemes in such locations, and are seeking to exploit the Commission's existing, incomplete rules for tariffing tandem and transport services. The Commission should promptly implement rules that put a stop to transport routing schemes like these that divert carrier resources and harm consumers. *See Transformation Order* ¶¶ 9, 662-65.

Along with revised rules for access stimulation, *see infra* Part I.C, one step in that direction would be for the Commission to set rules for an appropriate network edge, and then align its rules to provide that (i) the carrier with the financial obligation to carry the traffic to the network edge has control over how to route the traffic to the edge (*e.g.*, that it could choose to do so itself or use a third party provider of its choice) and (ii) that the receiving carrier is obliged to accept the traffic at the edge, and may not charge, or impose conditions for, any technically feasible method of interconnection. In the absence of such a rule, some carriers have sought to force sending carriers to use inflated and inefficient transport options. For example, in one case, a carrier elected to locate an access stimulation scheme in rural South Dakota, over 190 miles away from the nearest tandem switch. The carrier has for years billed over 190 miles of tariffed, per-mile, per-minute transport charges on its billions of minutes of access stimulation traffic, leading to excessive and unreasonable transport charges. This carrier has flatly refused to provide or permit direct connections that would bypass its tandem transport charges. In fact, when AT&T negotiated an alternative transport arrangement that covered a substantial part of the transport route, and substantially reduced the expense, the carrier sued AT&T and the alternative transport provider, claiming that, as the terminating carrier, it had the exclusive right to bill the 190 miles of transport, and that the agreement for competitive transport services was unlawful. Although such abusive practices are plainly unlawful, *see, e.g.*, 47 C.F.R. § 61.26(g); *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 27; *Transformation Order*, ¶ 812, the lack of reform on transport charges has emboldened such misconduct, and new rules should be put in place so that tariffed tandem and transport charges are no longer abused.

B. Under A Bill-And-Keep Regime With An Established Network Edge, The Commission Should Detariff and Deregulate Tandem and Transport Services.

Depending on where the Commission (by default) or the parties (by agreement) set the network edge, many services that now entail intercarrier switched access charges or reciprocal compensation payments will move to the terminating side of the edge and thus will transition to bill-and-keep. But there will still be many instances in which a sending carrier will choose to fulfill its financial commitment to deliver traffic *to* the terminating carrier's edge by contracting with a third party provider. Under the end-state bill-and-keep regime, the Commission should deregulate and detariff all such intermediate, intercarrier arrangements and charges.[16]

Switched Services. The end-state bill-and-keep regime should bring all intermediate, third-party services that carriers use for *indirect* interconnection under one unified regulatory umbrella. In most of these contexts, the sending carrier hands off traffic to a third-party provider, which transports it over its own network and in turn hands it off to the terminating carrier. The third-party provider may perform different types of switching and transmission functions in this process, and under the current "calling party's network pays" regimes those functions go by a variety of different names and are subject to a variety of different regulatory regimes (*e.g.*, "transit,"

[16] There will also inevitably be cases in which the terminating carrier contracts with a third party to carry some portion of a call from the edge to the end user on the terminating carrier's side of the edge. Such instances are likely to be less frequent, depending on where the Commission or the parties establish the edge, but any such intermediate services should also be detariffed and deregulated, for the reasons discussed in this section.

"dedicated transport," "tandem switching and transport," *etc.*). But the basic concept is the same in all cases: the sending carrier has hired this third party to fulfill its financial obligation to deliver traffic to the terminating carrier's edge, and all such scenarios should be treated the same in the Commission's final bill-and-keep regime.[17] In this way, the final bill-and-keep and network edge rules should create financial arrangements that give the sending carrier appropriate incentives *either* to build out its network *or* to outsource the same network functions to a third party, depending on whether it is more economically efficient to build or to buy.

As AT&T has previously explained, the Commission has no legal authority to regulate the *rates* for any of these intermediate services under the Section 251(b)(5) bill-and-keep framework. Such services are not subject to the rate regulation provisions of Sections 251(b)(5) and 252(d)(2) because those provisions apply only to compensation for the "transport *and termination*" of traffic, and by definition intermediate third parties do not "terminate" traffic. 47 U.S.C. § 251(b)(5) (emphasis added). The Commission's existing reciprocal compensation regulations already make clear that "transport," as used in Section 251(b)(5), includes only situations in which the carrier providing the transport is also the terminating provider.[18] In particular, "[t]he reciprocal compensation provisions of the Act address the exchange of traffic between an originating carrier

[17] *See Transformation Order* ¶ 1311 ("[A]lthough transit is the functional equivalent of tandem switching and transport, today transit refers to non-access traffic, whereas tandem switching and transport apply to access traffic. As all traffic is unified under section 251(b)(5), the tandem switching and transport components of switched access charges will come to resemble transit services in the reciprocal compensation context where the terminating carrier does not own the tandem switch.").

[18] 47 C.F.R. § 51.701; *see also Atlas Tel. Co. v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1261 (10th Cir. 2005) ("Under the Act, reciprocal compensation is based solely on the costs of transport and termination incurred by the terminating provider.").

and a terminating carrier, but the Commission's reciprocal compensation rules do not directly address the intercarrier compensation to be paid to the transit service provider."[19]

To the extent any of these intermediate services remain subject to *ex ante* rate regulation under the access charge rules today, the Commission should detariff and deregulate such services under the final bill-and-keep regime. There is no justification for continuing to apply *ex ante* rate regulation to tandem and transport services, whether provided by ILECs or anyone else, because these services are now highly competitive in most areas of the country.[20] For example, Inteliquent (formerly Neutral Tandem) claims to be the first—although certainly not the last or only—competitive tandem transit service provider.[21] The company started in a few major markets in 2004 and expanded to "almost all markets in the contiguous United States, Hawaii, and Puerto Rico."[22] In early 2017, Inteliquent was acquired by a private entity but continues to operate under

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[19] *See* Further Notice of Proposed Rulemaking, *Developing a Unified Intercarrier Compensation Regime*, 20 FCC Rcd 4685, ¶ 120 (2005). As AT&T previously explained, switched services also do not qualify as direct "interconnection" within the scope of Sections 251(c)(2) and 252(d)(1). As the Commission has explained, "the term 'interconnection' under section 251(c)(2) refers only to the physical linking of *two networks* for the *mutual exchange* of traffic." *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, 11 FCC Rcd. 15499, ¶ 176 (1996) (emphasis added); *see also* 47 C.F.R. § 51.5 ("Interconnection is the linking of two networks for the mutual exchange of traffic. This term does not include transport and termination of traffic."). Thus, the duty of an ILEC to provide "interconnection" under section 251(c)(2) is limited to providing a direct link to that ILEC's *own network*. That duty does not include providing intermediate routing or other "services" between two other carriers' networks, as in the switched transit context. *See AT&T Corp. v. FCC*, 317 F.3d 227, 234-35 (D.C. Cir. 2003); *see also Competitive Telecomms. Ass'n v. FCC*, 117 F.3d 1068, 1071-72 (8th Cir. 1997).

[20] As explained in Section I.C, *infra*, the Commission will need to retain targeted rules to guard against continuing opportunities for abusive traffic stimulation schemes .

[21] Inteliquent, Inc., Annual Report (Form 10-K), at 3 (Feb. 18, 2016) ("Inteliquent 2015 10-K").

[22] *Id.* at 4. According to one filing it made with the FCC, Inteliquent provides competitive tandem services in 189 of the 192 Local Access and Transport Areas ("LATAs") in the United States and Puerto Rico (all except Fishers Island and parts of the Navajo Nation). *See* Comments of Neutral Tandem, Inc. In Support of Vonage's Petition for Waiver of the Commission's Rules Regarding Access to Numbering Resources, *Administration of the North American Numbering Plan*, CC Docket No. 99-200, at 1, n.1 (Feb. 21, 2012).

the Inteliquent brand.[23] Prior to the acquisition, Inteliquent reported that competition in the market had intensified[24] and that it "faced increasing direct competition from other competitive providers of voice services, including Level 3, Peerless Network, and Hypercube."[25] Indeed, Inteliquent refers to itself as "in competition with incumbent LECs."[26]

Other companies are also competing in the market. West Telecom Services—formerly known as HyperCube—provides tandem switching services throughout the United States.[27] According to one Commission filing, West Telecom Services provides "facilities-based competitive tandem service[]" in 47 states and the District of Columbia.[28] Level 3 has its own tandem network with five regional tandems.[29] Peerless Network also provides "tandem switched access services to other carriers, and local and access tandem services."[30] The company has invested "nearly $30 million in over 40 major markets across the country" and "provides a combined TDM and IP network connected to nearly every major domestic carrier offering call origination and termination services in over 100 LATAs (Local Access Transport Areas) and 30

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[23] Inteliquent, *GTCR Completes Acquisition of Inteliquent* (Feb. 10, 2017), http://ir.inteliquent.com/releasedetail.cfm?ReleaseID=1011437. GTCR also owns Onvoy, which previously offered its own tandem switching product that is now a part of Inteliquent.

[24] Inteliquent 2015 10-K at 4.

[25] *Id.* at 7.

[26] Comments of Inteliquent, Inc., *Connect America Fund*, WC Docket No. 10-90, at 3 (May 4, 2017).

[27] *See* West Corporation, Annual Report 2016, at 8, http://files.shareholder.com/downloads/WTSC/5442591519x0x934878/89D13E47-D295-4A84-8EAE-26BE93B11167/West_Corp_2016_Annual_Report.pdf. ("West Corp. 2016 Annual Report").

[28] Letter from M. Hazzard (counsel for HyperCube) to M. Dortch (FCC), *Access Charge Reform*, CC Docket No. 96-262, Attachment at 2 (filed June 12, 2009). *See also* West Corp. 2016 Annual Report at 19.

[29] See Letter from J. Nakahata (counsel for Level 3) to M. Dortch (FCC), *Connect America Fund*, WC Docket No. 10-90, at 6 (filed April 15, 2013).

[30] Letter from H. Kelly (counsel for Peerless Networks) to M. Dortch (FCC), *IP-Enabled Services*, WC Docket No. 04-36, at 2 (filed Sept. 8, 2008).

MTAs (Major Trading Areas)."[31] Tandem Transit, LLC is an "IP alternative" that works as a "third party transit manager."[32]

The Commission could adopt a detariffing transition similar to the one it recently adopted in the *Business Data Services* proceeding, in which it set a date certain for mandatory detariffing while permitting permissive detariffing in the interim. That type of transition would give carriers ample opportunity to transition to negotiated agreements. Once such services are detariffed, the Commission would retain authority to address any case-specific concerns about individual intermediate service arrangements via complaints brought pursuant to sections 201 and 202 of the Act. Those provisions enable the Commission to ensure that any intermediate third-party services are offered on just, reasonable, and non-discriminatory terms. *See* 47 U.S.C. §§ 201, 202. There would be no need for continuing *ex ante* rate regulation of those services.

Dedicated transport service. When a third-party intermediary sells dedicated transport to connect two other carriers, the Commission's end-state bill-and-keep regime should treat those services the same as switched services. If a sending carrier chooses to purchase dedicated transport from a third-party carrier to reach the terminating carrier's edge, the third-party carrier should be permitted to charge the sending carrier for that service, just as a switched service provider would. Any such dedicated transport service would not be subject to the rate regulation provisions of Section 251(b)(5) and 252(d)(2), because such transport does not involve "termination" of traffic.

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[31] Comments of Peerless Network, Inc., *Technologies Transitions Policy Task Force*, GN Docket No. 13-5, at 2 (filed July 8, 2013). In mid-2016, Peerless Network announced it offered service in 103 LATAs. *See* Peerless Expands into 10 New Markets – Now in 103 LATAs, https://www.peerlessnetwork.com/new-market-announcement-september-2016/. Peerless now operates in 42 states. *See* Comments of West Telecom Services, LLC and Peerless Network, Inc., *Connect America Fund*, WC Docket No. 10-90, at 3 (filed May 4, 2017).

[32] Marisa Torrieri, *Advanced IP Carrier Report: Tandem Transit Offers Cost-Saving, IP-Based Alternative*, Tandem Transit, http://www.tandemtransit.com/it-news.html.

And, like switched services, such transport services should be detariffed and deregulated (to the extent they are not already) and governed solely by the statutory standards of Sections 201 and 202.

The same rule should apply if the sending carrier chooses the terminating carrier's *own* transport service to reach the terminating carrier's edge; any other approach would defeat the purpose of defining an edge.[33] As AT&T has previously explained, implementing this specific aspect of the bill-and-keep regime will require the Commission to adopt a different interpretation of Section 251(b)(5) as it relates to a bill-and-keep regime. Specifically, the Commission should now make clear that *all* transport provided on the sending carrier's side of the edge falls outside the scope of the statutory term "transport" for purposes of section 251(b)(5) and thus outside the pricing rules of section 252(d)(2). Under the current regime, the Commission has understood "transport" in Section 251(b)(5) to apply to all transmission from the physical point of interconnection with an ILEC to the ILEC's terminating end office switch.[34] While that definition may have made sense in a "calling party's network pays" regime, requiring the ILEC to bear the costs of transmission from the physical point of interconnection to its terminating end office switch, even when that point of interconnection is not at its network edge, would encourage sending carriers inefficiently to shift their edge-related financial obligations to the ILEC. Such a rule would discourage such sending carriers from any further build-out of their networks to that edge, because they could now obtain all the same objectives without paying anything. Accordingly, the Commission should clarify that, for purposes of a Section 251(b)(5) bill-and-

[33] In its 2012 Comments, AT&T called this "extra-Edge transmission." *See AT&T 2012 Comments* at 63 & Appendix A, § 1.j.iii

[34] 47 C.F.R. § 51.701(c).

keep regime that necessarily includes a default edge, "transport" is limited to the function of carrying traffic from the terminating carrier's *edge* to the end-office switch serving the called party.

This end-state bill-and-keep regime will also require the Commission to adopt a different interpretation of incumbent LECs' Section 251(c)(2) interconnection obligations with respect to entrance facilities used to link the sending carrier's network to the point of interconnection on the terminating carrier's network.[35] In *Talk America Inc. v. Michigan Bell Telephone Co.*, the Supreme Court held that an incumbent LEC must make its existing entrance facilities available at cost-based rates if they are to be used for interconnection.[36] As the Court acknowledged, however, "[n]o statute or regulation squarely addresses whether an incumbent LEC must provide access to entrance facilities at cost-based rates as part of its interconnection duty under § 251(c)(2)," and thus it simply deferred to a position endorsed in an FCC amicus brief.[37] The Commission is free to reconsider that interpretation and conclude that entrance facilities do not qualify as "interconnection" for purposes of Section 251(c)(2), and should do so now. As the Supreme Court noted, "the statute makes clear that an incumbent LEC need not provide access to *any* facilities—much less entrance facilities—to provide interconnection. . . . § 251(c)(2) does not mention incumbent LECs' facilities, but rather mandates only that incumbent LECs provide interconnection 'for the facilities and equipment of any [competing] carrier.'"[38] Thus, an ILEC's

[35] The Commission has already held that transport provided by the terminating carrier *from* the point of interconnection on its network is not section 251(c)(2) "interconnection" to which the pricing standards of section 252(d)(1) apply. The relevant regulation defines "interconnection" as "the linking of two networks for the mutual exchange of traffic. This term does not include the transport and termination of traffic." 47 C.F.R. § 51.5.

[36] *Talk Am., Inc. v. Mich. Bell Tel. Co.,* 564 U.S. 50 (2011).

[37] *Id.* at 57-58; *see also id.* at 58 ("Nothing in that language expressly addresses entrance facilities. Nor does any regulation do so.").

[38] *Id.* (alteration in original). The statutory text provides that an ILEC has the "duty to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the [ILEC's] network" at a "point within" the ILEC's network. 47 U.S.C. § 251(c)(2)(B).

obligation under section 251(c)(2) is merely to enable competitors to connect their *own facilities and equipment* to the ILEC's network at an interconnection point, and the Commission should now so hold.

C. The Commission's Bill-And-Keep Regime Will Need Residual Protections Against Unreasonable Traffic-Stimulation Schemes.

Although it is critical for the Commission to complete the transition to bill-and-keep, and to establish clear network edge and interconnection rules, those rules alone will not prevent all forms of access arbitrage. Unscrupulous carriers have proven to be obstinate in seeking out opportunities for arbitrage based on the Commission's rules. Even though more complete reform of intercarrier compensation will likely reduce arbitrage, it will not eliminate it entirely.[39] The Commission should thus continue and strengthen safeguards against access stimulation and other arbitrage schemes.

First, as stated above, the Commission should emphasize that, even after reform is complete, carriers providing regulated service, although not priced according to *ex ante* regulations, remain subject to Sections 201 and 202 of the Act.[40] These sections provide the

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[39] Under the Commission's rules, even if additional reform were implemented, there are certain aspects of its intercarrier regime that allow arbitrage schemes to arise. For one, the Commission has adopted strong rules against the blocking of traffic, because of the public interest in having calls completed. *See, e.g.*, *Transformation Order* ¶ 718 n.1234; *id.* ¶ 734. While that may be a salutary public interest goal, truly competitive markets depend upon wholly voluntary transactions. Because of the Commission's anti-blocking rules, however, carriers are forced to deal even with entities that act unreasonably and that are determined to exploit loopholes for financial gain. In addition, for interexchange carriers, the Commission has continued to retain its geographic averaging rules, which prevent IXCs from passing on high terminating costs imposed by certain carriers engaged in arbitrage. *See Access Charge Reform*, 16 FCC Rcd. 9923, ¶ 31 (2001). In truly competitive markets, appropriate pricing signals are provided to the entities that cause costs to be incurred, but the Commission's averaging rules limit the use of such price signals. Finally, although competition for intermediate transport is generally robust, there are undoubtedly specific transport routes where effective competition is lacking, and in those instances, arbitrage schemes could proliferate even after the Commission completes reform of intercarrier compensation.

[40] *Cf. Policy and Rules Concerning the Interstate Interexchange Marketplace*, 12 FCC Rcd. 15014, ¶¶ 76-77 (1997) (after detariffing of long distance charges, carriers remain subject to Section 201 and 202, which

Commission with broad authority to address unreasonable practices, including arbitrage schemes related to intercarrier compensation practices.[41] Further, the Commission can rely on Section 201(b) to find access arbitrage schemes to be unlawful "even where no independent violation of a particular rule was found." *AT&T Corp. v. All Am. Tel. Co.*, 28 FCC Rcd. 3477, ¶ 29 (2013). Sections 201 and 202 can thus provide an important backstop to prevent unreasonable practices even after reform is completed.

Second, the Commission should retain its access stimulation rules but modify them to work within its reformed intercarrier compensation regime. Even after reform is complete, carriers can still engage in access stimulation and other intercarrier compensation arbitrage schemes. To take a paradigmatic example, if a competitive LEC's network edge were set at its central office, then that CLEC could set up an access stimulation scheme in a very remote area that is far from any tandem and where there is no effective competition for transport to or from the network edge (the CLEC end office). Where the CLEC—or an intermediate transport provider—controls the only available transport route to the CLEC end office, then the CLEC and/or the intermediate transport provider would have the incentive and ability to charge excessive, monopoly-based rates for the transport services.

To prevent LECs from abusing the network edge rules and charging unreasonable rates, the Commission should modify its rules on access stimulation to address this type of market failure within the context of a bill-and-keep regime. For example, the Commission could revise its access stimulation rules to provide that, whenever a carrier's traffic is imbalanced such that it carries at

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apply to determine whether rates, terms and conditions for regulated services are just, reasonable, and non-discriminatory).

[41] *See, e.g.*, *Global Crossing Telecomms., Inc. v. Metrophones Telecomms., Inc.*, 550 U.S. 45, 48–49 (2007); *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *W. Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501, n.2 (D.C. Cir. 1987).

least three or more times more terminating access traffic than originating access traffic (or vice-versa), the default network edge would automatically revert to a tandem within the same LATA as the carrier's end office, to be selected by the sending carrier.[42] Thus, in the example above, if the terminating carrier set up an access stimulation scheme, and the traffic to or from that carrier exceeded the 3-to-1 ratio (or the 100 percent growth trigger), sending carriers could elect to hand off traffic to the terminating carrier at any tandem switch within the LATA, and the terminating carrier (and the carrier operating the tandem) would be obliged to accept the traffic at the tandem, and the terminating carrier would be responsible for the costs of routing the traffic between the tandem and its end office. Such a rule, along with the continued enforcement of Section 201 and 202, would help reduce any access stimulation schemes and protect the public interest.

D. IP-to-IP Interconnection Should Remain Unregulated.

Finally, the Commission has no authority to regulate IP-to-IP interconnection, and therefore the transition on which the *Refresh Notice* seeks comment must be limited to PSTN traffic. The term "IP-to-IP interconnection," as used here, means interconnection between two networks that provide service in IP format. As voice and other communications increasingly migrate to IP networks, most electronic communications now ride as higher-layer applications over IP, and almost all inter-network traffic exchanges will in the future take the form of "IP-to-IP interconnection" in this sense. As AT&T has explained, the long-term policy issues surrounding such IP-to-IP interconnection are distinct from shorter-term issues concerning the provision of the IP-TDM media gateways needed to enable *PSTN* customers to place calls to, or

[42] Currently, the Commission's triggers for access stimulation are either a terminating-to-originating traffic ratio of 3-to-1, or a growth in traffic of 100%, *see* 47 C.F.R. § 61.3(bbb). Because access stimulation schemes have increasingly migrated to originating access, *see infra* Section II, the Commission should revise the trigger to include an originating-to-terminating ratio of 3-to-1. The Commission should retain the growth trigger, and also the presumption of access stimulation based on a sending carrier's traffic volumes. *See Transformation Order* ¶ 699.

receive calls from, VoIP users ("IP-to-PSTN" interconnection). The Commission should keep these two sets of issues completely distinct. Although the Commission should expeditiously complete the transition to a bill-and-keep regime for PSTN traffic and manage the transition to an all-IP world, interconnection issues in the all-IP world *itself* will not require regulatory intervention any more than Internet peering and transit does today and would in fact be harmful.

As AT&T has previously explained, the Commission has no statutory authority to regulate IP-to-IP interconnection. Neither Section 251(a), (b), nor (c) applies to IP-to-IP interconnection, because those sections apply only to "telecommunications carriers" and give carriers various rights with respect to other "telecommunications carriers" in general and :local exchange carriers" or "incumbent local exchange carriers" in particular. For all relevant purposes, the term "telecommunications carrier" is synonymous with "common carrier," and the Act further specifies that any "telecommunications carrier shall be treated as a common carrier under this [Act] *only to the extent that it is engaged in providing telecommunications services*." 47 U.S.C. § 153(51) (emphasis added). By their terms, those provisions of Section 251 are inapplicable *either* when the party seeking to interconnect *or* when the party from whom interconnection is sought is not itself a "telecommunications carrier." With IP-to-IP interconnection, *both* are true: VoIP providers, like other providers of IP-based services, are not "telecommunications carriers" because they provide "information services" and not "telecommunications services."[43] Similarly, the IP-based terminating provider against whom the request for interconnection would be made would not be acting as any sort of carrier either, but rather as a broadband information services provider.

[43] *See, e.g.*, Opposition of AT&T, *tw telecom inc. Petition for Declaratory Ruling Regarding Direct IP-to-IP Interconnection Pursuant to Section 251(c)(2) of the Communications Act*, WC Docket No. 11-119, at 3-8 (filed Aug. 15, 2011) ("*AT&T tw telecom Opposition*"); Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 33-42 (filed May 28, 2004) (discussing IP-enabled services and VoIP); Reply Comments of SBC Communications Inc., *IP-Enabled Services*, WC Docket No. 04-36, at 22-26 (filed July 14, 2004) (same).

Nor can state commissions fill the gap. The Commission has held that VoIP services, and IP-based voice services more generally, are indivisibly *interstate* services.[44] Indeed, the Commission held that such services are inseverably interstate because it would be impossible to separately identify interstate and intrastate VoIP calls for regulatory purposes (and harmful to the Internet to try to do so). The Commission held this to be true even when one end of a VoIP call originates or terminates on the PSTN, and that "impossibility" holding applies even more strongly to IP-to-IP interconnection. Based on these holdings of "impossibility," the Commission has generally pre-empted state commission regulation of VoIP and other IP-based services,[45] and the Commission should now confirm that such pre-emption extends to the arrangements for IP-to-IP interconnection.

II. THE COMMISSION SHOULD ALSO COMPLETE THE TRANSITION FOR ORIGINATING ACCESS EXPEDITIOUSLY.

Although the Public Notice focuses on refreshing the record on issues related to terminating traffic, there are certain other related issues that need prompt Commission attention. First, earlier this year, the Commission refreshed the record on 8YY originated traffic, and that record confirms that the Commission should immediately transition that traffic to bill-and-keep.[46] Second, the Commission recently developed a record demonstrating that forbearance from the Section 203 and

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[44] *See Vonage Holdings Corporation*, 19 FCC Rcd. 22404, ¶¶ 20, 31 (2004) ("*Vonage Order*"), *aff'd*, *Minn. Pub. Utils. Comm'n v. FCC*, 483 F.3d 570 (8th Cir. 2007); *Petition For Declaratory Ruling That pulver.com's Free World Dialup Is Neither Telecommunications Nor A Telecommunications Service*, 19 FCC Rcd. 3307 (2004) ("*Pulver Order*"). *See also Protecting and Promoting the Open Internet*, 30 FCC Rcd. 5601, ¶ 431 (2015) ("broadband Internet access service is jurisdictionally interstate for regulatory purposes. . . . [t]he 'Internet's inherently global and open architecture' enables edge providers to serve content through a multitude of distributed origination points, making end-to-end jurisdictional analysis extremely difficult—if not impossible—when the services at issue involve the Internet.").

[45] *Vonage Order* ¶ 32; *Minn. Pub. Utils. Comm'n*, 483 F.3d at 578-81 (affirming pre-emption); *Pulver Order* ¶ 16.

[46] Public Notice, *Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform*, WC Docket Nos. 10-90, 07-135, CC Docket No. 01-92 (June 29, 2017) ("8YY Notice").

related rules governing 8YY database queries (DIP charges) is necessary to prevent substantial abuses.[47] Third, the Commission should promptly address the treatment of non-8YY originating traffic.

8YY Traffic. The Commission should immediately transition 8YY originating access services to bill-and keep. Earlier this year the Commission "refresh[ed] the record on 8YY access charges," noting that the industry has observed "arbitrage and access stimulation schemes [that] are increasingly shifting to 8YY service," and sought comment on how to address that issue.[48] The comments submitted in that CLECs have indeed shifted to arbitrage schemes on originating 8YY traffic.[49] Even as 8YY originating minutes have plummeted, CLEC 8YY originating access minutes have exploded, and now account for the majority of all originating access minutes.[50] Moreover, the persistence of this arbitrage opportunity is hindering the transition to IP: in AT&T's experience, CLECs engaged in arbitrage are resisting agreements to exchange traffic in IP format because they are reluctant to relinquish high access revenues from originating 8YY traffic that would go to bill-and-keep under and IP arrangement.[51]

The solution is straightforward. As Ad Hoc and others have explained, the Commission should return to its historical approach to treating 8YY originating traffic in the same way that it

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[47] Public Notice, *Pleading Cycle Established For Comments On AT&T's Petition For Forbearance From Certain Tariffing Rules*, WC Docket No. 16-363 (Nov. 2, 2016) ("DIP Public Notice").

[48] 8YY Public Notice at 1.

[49] *See, e.g.,* Comments of AT&T, *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 4-8 (filed Jul. 31, 2017) ("AT&T 8YY Comments"); Comments of Verizon, *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 5-6 (filed Jul. 31, 2017); Comments of Sprint Corporation, *Connect America Fund, et al.*, WC Docket No. 10-90, et al., at 1-3 (filed Jul. 31, 2017). *See also* Letter from C. Boothby (counsel for Ad Hoc Telecommunications Users Committee) to M. Dortch (FCC), *Connect America Fund, et al.,* WC Docket No. 10-90, et al., at 1 (filed May 19, 2017) ("Ad Hoc Letter").

[50] *See, e.g.,* Ad Hoc Letter, at 1-2; AT&T 8YY Comments at 8-9.

[51] *Id.*

treats terminating access traffic, and thus transition 8YY originating traffic to bill-and-keep.[52] As the Commission has explained, the originating carrier in an 8YY call is playing the role "more akin to the traditional role of the terminating LEC."[53] The calling party in an 8YY call chooses the originating LEC but does not pay for the call, just like the end user on the terminating end of an ordinary call. This creates a fundamental misalignment of pricing signals: the IXC has no choice but to use the originating LEC chosen by the calling party, but the "calling party . . . has no incentive to select a provider with lower originating access rates" because he "does not pay for the toll call."[54] The proper solution, as the Commission has indicated, is to "distinguish" originating access for 8YY traffic from all other originating access, and treat originating 8YY traffic the same as terminating traffic under the intercarrier compensation regime.[55] Accordingly, the Commission should promptly issue an order that transitions 8YY originating access to bill-and-keep.

DIP Charges. For the reasons set forth in the AT&T's September 30, 2016 forbearance petition and the comments supporting that Petition, the Commission should also forbear from its rules that permit LECs to tariff and assess per query database dip charges for 8YY traffic.[56] These queries enable a LEC to identify the IXC to which an 8YY call should be routed. Under the current regulatory regime, LECs are permitted to tariff these charges. Unfortunately, as demonstrated in the AT&T Forbearance Petition, many LECs (mainly CLECs) have used this regulatory regime to set clearly excessive rates for these queries. As the FCC has previously recognized, the cost of

[52] *See, e.g.*, Reply Comments of Ad Hoc Telecommunications Users Committee, *Connect America Fund, et al.*, WC Docket No. 10-90, et al. (July 31, 2017) ("Ad Hoc 8YY Comments"); AT&T 8YY Comments, at 4-8.

[53] *Transformation Order* ¶ 1303.

[54] *Id.*

[55] *Id.*

[56] AT&T Forbearance Petition at 18-23.

merely querying a database is negligible.[57] Yet CLECs have tariffed very high rates for these services, often many times higher than the cost the CLEC would incur if it simply purchased those services from a third party.[58] As explained in AT&T's Forbearance Petition, the Commission should put an end to this abusive practice by forbearing from Section 203 of the Communications Act and its implementing rules for these services.[59]

Originating Access In General. More generally, the Commission should promptly complete the full transition to bill-and-keep, including for all originating access services. History shows that, absent comprehensive reform, unscrupulous CLECs will continue to engage in regulatory arbitrage and other misconduct that they claim is permitted under perceived loopholes within the existing, outdated regime, resulting in continued overcharges and decreased broadband investment – to the detriment of consumers and competition.[60]

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[57] *Provision of Access for 800 Service*, 4 FCC Rcd. 2824, ¶ 73 (1989); *see also* AT&T Forbearance Petition at 18.

[58] *See* AT&T Forbearance Petition at 19-20.

[59] AT&T Forbearance Petition at 1-4.

[60] *See, e.g.*, *Transformation Order* ¶ 663 ("[a]ccess stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment."); *id.* ¶ 664 (estimating that these arbitrage schemes cost long distance rate payers between $330 to $440 million per year); *id.* ¶ 33 (describing these "wasteful arbitrage practices, which cost carriers and ultimately consumers hundreds of millions of dollars annually").

CONCLUSION

For the foregoing reasons, the Commission should expeditiously complete the transition to a bill-and-keep regime for originating and terminating PSTN services in accordance with the proposals in these comments.

Respectfully submitted,

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October 26, 2017

Exhibit D

CenturyLink Petition for Limited Stay, Connect America Fund, et al., WC Docket No. 10-90, et al. (filed Apr. 11, 2017)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR LIMITED STAY OF TRANSFORMATION ORDER YEARS 6 AND 7 ICC TRANSITION – AS IT IMPACTS A SUBSET OF TANDEM SWITCHING AND TRANSPORT CHARGES

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Lifeline and Link-Up	)	WC Docket No. 03-109
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Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

PETITION FOR LIMITED STAY OF TRANSFORMATION ORDER YEARS 6 AND 7 ICC TRANSITION – AS IT IMPACTS A SUBSET OF TANDEM SWITCHING AND TRANSPORT CHARGES

I. INTRODUCTION AND SUMMARY

CenturyLink, Inc. by and on behalf of its subsidiaries ("CenturyLink") hereby requests a stay of a single component of the intercarrier compensation (ICC) reform transition adopted in the Commission's 2011 *Transformation Order*[1] – pursuant to Sections 1.41 and 1.43 of the Commission's rules.[2]

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[1] *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,

Specifically, CenturyLink seeks a stay of the Years 6 and 7 transitions called for in Sections 51.907(g) and 51.907(h) regarding just a subset of the industry's tandem switching and transport charges.[3] As described more fully below, if this stage of the ICC transition is not suspended there will likely be a confusing morass as carriers take a variety of different approaches to the Section 51.907(g) requirements in the Year 6 annual tariff filing process that begins June 16, 2017. Additionally, there will be irreversible competitive harm in Years 6/7 and beyond and arbitrage schemes that have already been launched in anticipation of this transition will only expand.

CenturyLink's request is supported by Commission rules and precedents and is in the public interest. As described more fully below, industry members were advised, in informal communications with Commission staff related to their upcoming 2017 annual tariff filings, of

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26 FCC Rcd 17663 (2011) (*Transformation Order* and *FNPRM)* (subsequent history omitted), *aff'd sub nom., 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*.).

[2] 47 C.F.R. §§ 1.41, 1.43; *see also* 47 C.F.R. §§ 1.44(e), 1.45(d) and (e), and 1.298. As described herein, the context of this filing is unusual as it addresses concerns now expected to arise out of tariffs filed in the upcoming 2017 annual tariff filing process in which an estimated hundreds of carriers must simultaneously file tariffs implementing complex rules adopted in the *Transformation Order* **–** based on very recent guidance given informally in the tariff filing process. The substance of this stay petition also demonstrates the basis for a potential future legal challenge on the merits of the interpretation question described herein that CenturyLink currently anticipates filing **–** possibly via challenges to future tariff filings, a declaratory ruling petition, or a petition for reconsideration (*see e.g.*, *Amendment of Section 2.106 of the Commission's Rules to Allocate Spectrum at 2 GHz for Use by the Mobile-Satellite Service*, Second Report and Order and Second Memorandum Opinion and Order, 15 FCC Rcd 12315, 12360 ¶ 132 (2000) (recognizing the Commission's ability to accept such petitions after the customary 30-day period where substantial reasons are demonstrated such as new facts or a party's lack of notice of the action at issue). But, CenturyLink's substantive challenge is likely premature in these unusual circumstances and, in all events, must be presented in a separate pleading from this stay request. 47 C.F.R. § 1.44(e).

[3] 47 C.F.R. §§ 51.907(g), 51.907(h). This stay request does not impact the other aspects of the Year 6 transition that are unrelated to tandem switching and transport charges **–** that is, the completion of the transition of end office charges to bill and keep.

certain expectations regarding those filings. And, as a result of what was learned, there is likely to be:

- Considerable potential for debate, disagreement and confusion regarding how to shape 2017 annual tariff filings;
- Substantial legal challenges as to the stated expectations for those filings;
- Resulting significant and extensive implementation and "re-implementation costs" imposed on the Commission as well as on industry and consumers once the right answers are sorted out.
- Regardless of the ultimate result, establishment of a fundamental asymmetry in ICC treatment that will lead to irreversible competitive harm.
- Damaging market inefficiencies and arbitrage – harms that cannot be undone at a later date.

These circumstances easily demonstrate satisfaction of the Commission's customary legal standard for grant of a stay.

As is also explained below, a grant of this request will also best facilitate the Commission's broader intercarrier compensation (ICC) reform effort and as part of that, the IP transition. When it comes to addressing the broader ICC reform issues that remain pending in the Commission's ICC portion of the *Transformation Order FNPRM* docket,[4] a central and overarching goal must be a competitive market where all providers can compete under the same rules with a minimum or arbitrage and administrative inefficiency.[5]

[4] *See*, n. 1, *supra*.

[5] *See also* CenturyLink Opposition/Comments to AT&T Forbearance Petition, WC Docket No. 16-363, *Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges* (Dec. 2, 2016), pp. 8-9 (discussing the variety of important concerns that need to be attended-to when looking for solutions to the *Transformation Order FNPRM* issues, including: that any reform of originating access charges must account for the reality that originating access functionality is distinct from terminating access functionality; the need to ensure an adequate recovery mechanism in connection with any further reform; the open issues regarding the future treatment of common and dedicated transport access elements and other access service elements,

II. BACKGROUND

In Years 1 (2012) and 2 (2013) of the ICC transition rules adopted in the *Transformation Order*, carriers moved many terminating intrastate and interstate access and non-access rates into parity.[6]

In Years 3-5 (2014-2016), terminating end office rates were reduced to $0.0007 in three steps.[7]

The Commission's rules now anticipate that, in Year 6 (2017), terminating end office rates are to be moved permanently to zero.[8]

Additionally, a subset of tandem switching and transport rates are expected to move to $0.0007 in Year 6 and then to zero in Year 7 (2018).[9] Price cap carrier and rate of return carrier tandem switching and transport rates were capped immediately by the *Transformation Order* and higher intrastate rates for these services were moved to parity with interstate rates in Years 1 and 2.[10] And, the *Transformation Order* and Commission rules anticipated that rates for tandem switching and transport rates would not be further impacted by Years 3-5.[11] But, as noted, rates for a subset of these terminating access services, when provided by price cap carriers, move to $0.0007 in Year 6 and then to zero in Year 7.

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the network edge and points of interconnection, the role of agreements and tariffs, and ensuring that LECs have adequate flexibility when it comes to end-user charges must all be carefully addressed); Erratum (to p. 4 of the CenturyLink Opposition/Comments), WC Docket No. 16-363 (Feb. 10, 2017).

[6] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(b) and (c).

[7] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(d)-(f).

[8] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. § 51.907(g).

[9] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(g) and (h).

[10] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(a)-(c).

[11] *Transformation Order*, 26 FCC Rcd at 17934-35 ¶ 801; 47 C.F.R. §§ 51.907(d) through (e).

It is also noteworthy that, contemporaneous with the *Transformation Order,* the Commission issued a Further Notice of Proposed Rulemaking (*Transformation Order FNPRM*) in which it raised questions regarding the future status of tandem services more comprehensively.[12] However, five and a half years later, those issues have not been resolved.

At the same time, significant debate has arisen within the industry about what subset of tandem switching and transport rates are subject to the Years 6 and 7 transition to bill and keep. This is largely because the *Transformation Order* states that the Years 6/7 bill and keep transition applies: "(1) for transport and termination within the tandem serving area where the terminating carrier owns the tandem serving switch; and (2) for termination at the end office where the terminating carrier does not own the tandem serving switch."[13] But, the Commission's rules define a potentially different scope of services. Specifically, Rule 51.907(g)(2) states that the Year 6 transition step to $0.0007 applies to "terminating traffic traversing a tandem switch that the terminating carrier *or its affiliates* owns…" (emphasis added).[14] And, Rule 51.907(h) specifies that the Year 7 transition step to zero applies to "charges applicable to terminating tandem-switched access service traversing a tandem switch that the terminating carrier *or its affiliate* owns." (emphasis added).[15] Nowhere in the *Transformation Order* or rules does the Commission define what "affiliates" are referred to in this language.

[12] *Transformation Order*, 26 FCC Rcd at 17934 ¶ 801 (describing intent to provide rate-of-return carriers "additional time to transition as appropriate[]" their tandem transport and termination charges), 17943 ¶¶ 819-20 (discussing need to address further reform for rate of return tandem transport rates and tandem transport rates more broadly via the *Transformation Order FNPRM*), 18112-15 ¶¶ 1306-13 (raising issues in *Transformation Order FNPRM* re: tandem transport and termination not "fully address[ed]" by *Transformation Order* as well as future status of intermediate network services more broadly).

[13] *Transformation Order*, 26 FCC Rcd at 18112 ¶ 1306 and n. 2358 (internal reference omitted).

[14] 47 C.F.R. § 51.907(g).

[15] 47 C.F.R. § 51.907(h).

Because of these ambiguities and contradictions, carriers have had a number of discussions within customary industry discussion groups formed to assist carriers as they anticipate the complexities associated with their annual tariff filings and those groups have reached-out to Commission staff, as is customary, for related guidance.[16] Just recently, the industry was advised, in informal communications with Commission staff, that the Commission's expectation is that 2017 annual tariff filings would reflect the following principles:

- Tandem switching and transport rates are *not* intended to be moved to bill and keep in Years 6/7 for call flows where the price cap carrier owns the tandem but neither it nor an affiliate own the end office (hereafter "Terminating Tandem To Third Party" service).

- These rates as applicable to call flows where the price cap carrier is the terminating carrier (i.e. it owns the end office) and it also owns the tandem are intended to be moved to bill and keep in Years 6/7 (hereafter "Terminating Tandem To End Office" service).

- These rates as applicable to call flows where the tandem is owned by a price cap carrier and the end office is owned by another price cap carrier that is affiliated – i.e. owned by the same holding company – are also considered Terminating Tandem to End Office service (and transition to bill and keep). However, as applicable to call flows where the tandem is owned by a price cap carrier and the end office is owned by an affiliated CMRS carrier or CLEC, the rates are considered Terminating Tandem to Third Party service (and do not transition to bill and keep).

- If a rate of return ILEC owns the tandem, no tandem charges, in any call flows, move to bill and keep – since the rate of return ILEC, unlike the price cap ILEC rules, leave tandem services untouched in Years 6/7.

[16] Questions around requirements for individual company annual tariff filings are typically resolved, under current practices and the express direction of the Commission's rules, via discussions between industry groups such as the Price Cap Implementation Forum and Commission staff from the Wireline Competition Bureau. *See*, *e.g.*, 47 C.F.R. § 0.91(k) (the functions of the Wireline Competition Bureau include "…[i]nteract with the public,…and industry groups on wireline telecommunications regulation and related matters."); 47 C.F.R. § 1.1204(b)(3)(exempting communications to and from Commission personnel relating to tariff proceedings before being set for investigation from Commission ex parte rules).

Given this direction, there is now considerable potential for debate and disagreement regarding how the conclusions described above for price cap ILECs and rate of return ILECs carry-over (by virtue of the CLEC benchmark rule)[17] to the variety of potential call flows where a CLEC might own the tandem. It would seem clear that, where a price cap ILEC is the applicable CLEC benchmark, and a single CLEC entity owns both the tandem and end office in a given call flow, the applicable rates will move to zero in Years 6/7. Similarly, it would seem clear that rates are not impacted for traffic terminated via a CLEC-owned tandem and an un-affiliated entity of any type owns the end office. And, where a rate of return ILEC is the applicable benchmark, it would seem that the rules are the same as described above for rate of return ILECs – no tandem charges, in any call flows, move to zero.

But, since the *Transformation Order* and the Commission's rules fail to define "affiliate," even the conclusions above are likely to be subject to debate and confusion. This is particularly true where there is no written guidance that carriers can follow.

And, even if there were complete agreement about the above aspects of CLEC tandem charges, there are other complexities that are likely to lead to further confusion. For example, where a price cap ILEC is the applicable benchmark, it would seem to follow from the affiliate rule described above that rates also move to zero when a call terminates to a CLEC tandem and an end office owned by another, affiliated CLEC. Similarly, it would also seem to follow that rates do not move to zero for traffic terminated via a CLEC-owned tandem where an affiliated CMRS carrier or ILEC owns the end office. But, it is doubtful that the CLEC industry will uniformly implement those complex requirements. For many of them, this filing may be the first occasion they have had to consider these issues.

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[17] 47 C.F.R. § 61.26.

Moreover, regardless of how these debates regarding the proper application of the CLEC benchmark rule are resolved, these guidelines lead to fundamental asymmetry in ICC treatment that will lead to irreversible competitive harm. An approach where the transition to bill and keep applies to tandem services in some contexts but the identical service is not subject to the transition in other contexts leads to obvious market inefficiencies and disincentivizes investment. These same competitive harms will follow where the transition to zero applies to tandem services provided when the tandem owner and the end office owner are affiliated and are one type of carrier, but not when they are affiliated and are another type of carrier.

Such asymmetry also leads, as night follows day, to damaging market inefficiencies and arbitrage – harms that cannot be undone at a later date.

Finally, legal challenge is also inevitable as the expected interpretation, if it manifests, would be arguably arbitrary and capricious since it, arguably without any basis in the rules or adopting order and contrary to the plain meaning of the rule language, would adopt a view that "affiliates" means just one type of affiliate.

III. GRANT OF THIS LIMITED STAY REQUEST IS IN THE PUBLIC INTEREST

A stay of the Years 6 and 7 transitions called for in Sections 51.907(g) and 51.907(h) regarding a subset of tandem switching and transport charges will avoid these problems and merely preserve the status quo while the Commission more carefully considers unintended consequences. This is critical for all the reasons described above – but also because the compensation exchanged between carriers impacts whether and how investment will occur for such intermediate network services – both currently and in IP networks of the future.

A fundamental policy underpinning of the Commission's adoption of the ICC reform transition reflected in the *Transformation Order* and the resulting rules was the Commission's desire to eliminate the confusing market signals and other competitive harm and the variety of arbitrage schemes that result when there is disparity in rates for identical services.[18] Yet, this is exactly what will result should the Years 6/7 transition as envisioned by the Commission be allowed to come into effect.

To begin with, there will be massive confusion in the annual tariff filing process for price cap ILECs and, perhaps even more so, for CLECs when they follow-up on July 16, 2017 with attempts to conform their filings. This will inevitably lead to a huge drain of industry and Commission resources as an estimated hundreds and hundreds of tariff filings must be reviewed for compliance with the complex guidelines described above. This does not account for the estimated thousands of state tariff filings and the multitude of supporting systems changes and related calculations of end-user charges, etc. that must accompany and conform with these disparate approaches in FCC tariff filings. And, given the complexities and potential for confusion, there are likely to be a high number of billing disputes – leading to a further drain on industry and FCC resources alike. Unless a stay is granted, these issues will likely have to be worked-out via the Commission's tariff challenge and investigation processes – which are not well-suited to resolving issues of this magnitude and complexity.

Moreover, even assuming the initial Year 6 chaos is resolved and a uniform approach is ultimately accomplished, the result will only be significant and extensive "re-implementation costs" for the industry and consumers once the right answers (since there can and should be only one right answer to each of the various interpretation questions implicated) are sorted out.

And, even putting this harm aside, the result will, as noted above, only be a cementing of an asymmetrical ICC approach to tandem switching and transport where identical services will be compensable via charges to IXCs depending solely on the type of carrier involved or the type

[18] *Transformation Order*, 26 FCC Rcd at 17929-30 ¶¶ 790-92.

of affiliation that may exist between the tandem owner and end office owner. Among other things, this will create the perverse result whereby the majority of traffic terminated to CMRS providers, will continue to be subject to tandem access charges while other traffic flows will not. Specifically, this result will occur because the IXC traffic will be terminated to the CMRS provider via tandems owned by affiliated price cap carriers. In other words, price cap carriers with wireless affiliates will continue to recover access charges from IXCs when terminating traffic to those affiliates, but price cap carriers with price cap ILEC affiliates will not recover access charges from IXCs when terminating traffic to those affiliates. This creates a clear, unequal competitive position when it comes to managing such assets as networks continue to evolve. It also creates unfair results for consumers/end users – since end users of some end office owners will be forced to carry the cost of tandem services while IXCs will incur the costs for such services for other end office owners.

For other traffic, similar inequities will occur because CMRS providers have entered into unlawful conduct by which they refuse to allow direct connections for certain traffic and instead force IXCs to use the tandem facilities of independent tandem owners while contracting to receive a share of the tandem owner's tandem access charge revenue. Even when the Commission's enforcement authority catches-up with this unlawful activity, other forms of arbitrage will emerge – leading to the endless game of "whack a mole" that inevitably follows when irrational rate disparity is put in place and arbitrage constantly moves around until it is detected and prosecuted. And, in the meantime, this type of conduct will be encouraged by an asymmetric ICC transition approach like that outlined above.

In addition to these problems, the subjecting of just one subset of tandem services (that of price cap ILECs) to zero rating will inevitably lead to a migration of traffic that is currently routed over direct end office trunks to tandems. This will further increase the burden on those tandem facilities while simultaneously depriving price cap ILECs of the ability to derive revenue that might be used to meet the new capacity needs and prevent tandem exhaust. ILEC networks and tandems are not prepared for large shifts of traffic. Moreover, the complete exclusion of tandems owned by rate of return ILECs creates another context ripe for arbitrage. While the *Transformation Order* intentionally decided not to address rate of return ILEC reform as fully as it did price cap ILEC reform, it was not envisioned that this necessarily meant that that reform would still remain fixed six years later. Finally, the Commission has not yet addressed the questions around "edge" definition that are teed-up in the as-yet-unresolved *Transformation Order FNPRM*. Thus, the Commission has also not yet put in place measures discussed there – such as the need to accompany an edge definition with restrictions of such migration (for example, requiring direct end office connection at certain traffic volume levels).[19] At a minimum, this must be accomplished before the Commission effectively establishes the edge at the tandem for any category of services.

As noted above, there is also the significant prospect of a successful legal challenge.

A stay by the Commission will, at least temporarily, stave off many of these problems and permit the Commission to more carefully consider the best ICC approach to appropriately deal with the entire suite of tandem services at this point in time. Clearly, the full impact of a transition of even a subset of price cap tandem transport services to bill and keep in Years 6 and 7 was not adequately considered by the Commission in the *Transformation Order*. Indeed, the Commission could not have anticipated the market changes and arbitrage schemes that have emerged since 2011. Given this, the best approach at this point in time is to suspend any further

[19] *Transformation Order FNPRM*, 26 FCC Rcd at 18115-20 ¶¶ 1315-25.

transition for those tandem services until those impacts can be weighed. Grant of this stay request will merely preserve the status quo while the Commission addresses these fundamental concerns.

This approach will also best facilitate the Commission's work to address the broader ICC reform issues that remain pending in the Commission's ICC portion of the *Transformation Order FNPRM* docket[20] and, as part of that, the IP transition. There will continue to be a need for robust investment in intermediate network services in IP networks. In CenturyLink's view, there are two essential ingredients to ensuring such investment:

> (1) Allowing all tandem providers (and providers of functionally equivalent intermediate IP network services) to exist and to compete equally. It should not matter that those intermediate carrier services are provided by a price cap ILEC, an affiliated entity or an independent provider.[21] Each provides the same value and the presence of each fosters competition. Arbitrary line-drawing that precludes some such providers, but not others, to charge for the same functionality only leads to arbitrage.
>
> (2) Ensuring that terminating carriers have the obligation to offer direct termination if requested. Competitive intermediate network services can only be accomplished now and with IP networks if IXCs have the ability to avoid these metered tandem charges when traffic volumes warrant such direct connections.

If these ingredients are assured, the market will do the rest and ensure that rates and practices remain reasonable and competitive. Conversely, reducing tandem/transport rates for some carriers and not others in Years 6/7 has the result of defining network edge rules and tandem cost recovery in a way that could be precedent setting as the industry transitions away from TDM to

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[20] *See* n. 5, *supra*.

[21] This approach also reflects the fact that, even if a broad interpretation of affiliate is used when transitioning tandem and end office arrangements by affiliated entities to zero, the Commission would still eliminate the incentive for investment in intermediate network services in just some types of configurations (i.e. based on an affiliate relationships), which will lead to arbitrage and inefficiencies.

IP networks. The Commission should allow all tandem owners to be compensated as opposed to picking certain call flows over others to receive continued ICC recovery.

Even if the Commission's ultimate approach to intermediate services differs from this approach, a grant of this stay request will at least ensure that the Commission does not prematurely cement in place a disparate treatment of these services based on arbitrary distinctions – a result that will start to be planted in arrangements for IP services.

For all of these reasons, the best approach at this point in time is to suspend any further transition for tandem switching and transport services until the full impact of a transition of even a subset of price cap tandem transport services to bill and keep in Years 6/7 can be adequately considered by the Commission. Good cause exists and the public interest would be served by granting this stay request. The circumstances described above also easily demonstrate satisfaction of the Commission's customary legal standard for grant of a stay: (i) that the petitioner has a substantial prospect of prevailing on the merits; (ii) irreparable injury will otherwise occur, due to the unavailability of an adequate legal remedy; (iii) the threatened injury outweighs any possible injury to the opposing party; and (iv) issuing a stay will not disserve the public interest.[22]

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[22] *See Virginia Petroleum Jobbers Association v. Federal Power Commission*, 259 F.2d 921, 925 (D.C. Cir 1958).

IV. CONCLUSION

For the foregoing reasons, CenturyLink respectfully submits that this limited stay request should be granted.

Respectfully submitted,

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April 11, 2017

Exhibit E

Comments of AT&T in Opposition to CenturyLink Petition for Stay, WC Docket No. 10-90 (May 4, 2017)

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	WC Docket No. 10-90
Connect America Fund	)	

COMMENTS OF AT&T IN OPPOSITION TO CENTURYLINK PETITION FOR STAY

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COMMENTS OF AT&T IN OPPOSITION TO CENTURYLINK PETITION FOR STAY

Pursuant to the Commission's *Public Notice*, DA 17-388, AT&T Services, Inc., on behalf of its affiliates ("AT&T"), hereby submits these comments in opposition to the Petition for Stay ("Pet.") filed by CenturyLink, requesting that the Commission stay the portions of its rules (47 C.F.R. 51.907(g) and (h)) that require certain tariffed tandem switching and transport services provided by price cap carriers to be transitioned to bill-and-keep. For the reasons stated below, CenturyLink's Petition should be denied.

I. INTRODUCTION AND SUMMARY

In 2011, the Commission took the landmark step of reforming its inefficient system of intercarrier compensation, deciding that carriers, consumers, and the public interest would be better served if a "uniform national bill-and-keep framework" is the "ultimate end state" for all telecommunications traffic between carriers. Report and Order, *In re Connect America Fund*, 26 FCC Rcd. 17663, ¶ 34 (2011) ("*Transformation Order*"); *id.* ¶¶ 740-97 (setting forth policy advantages of bill-and-keep). The Commission did not immediately move to the new bill-and-keep framework, but adopted a "multi-year transition" for some traffic. *Id.* ¶¶ 798, 800. As to price cap carriers and competitive local exchange carriers ("CLECs") that benchmark their rates against price cap carriers, terminating end office access rates must transition to bill-and-keep by July 1, 2017. *Id.* ¶ 801. Also on that date, the rates of price cap carriers for terminating tandem switching and transport services would begin a transition to bill-and-keep, but only "when the terminating carrier owns the serving tandem switch." *Id.*; *see also id.* ¶ 819.

For other access services (originating access services and other terminating transport services not subject to the initial transition) provided by price cap carriers, the Commission established no transition, other than requiring certain intrastate rates to be brought into parity with interstate rates. *See id.* ¶¶ 801, 804, 819-20. As to the "transition and recovery for [these] other rate elements," the Commission requested additional comments, which were submitted in early 2012. *Id.* ¶ 800; *see id.* ¶¶ 1297-1325 (further notice of proposed rulemaking, or "*FNPRM*"). The Commission nevertheless found that the "continuation of transport charges in perpetuity would be problematic." *Id.* ¶ 820. It further determined that "failure to take action promptly on these [remaining rate] elements could perpetuate inefficiencies, delay the deployment of IP networks and IP-to-IP interconnection, and maintain opportunities for arbitrage." *Id.* ¶ 1297.

Despite the "problematic" and irrefutable public interest harms arising from the lack of prompt action, the Commission has not yet set a transition for the remaining access services, including transport. *Id.* ¶ 820 (noting comments that "perpetuating high transport rates could undermine the Commission's reform effort and lead to anticompetitive behavior or regulatory arbitrage"). Nor has the Commission addressed the important issues that it raised in its *FNPRM* regarding the establishment of default "network edges" that would define the points at which the responsibility for transport would shift from one carrier to the next. *Id.* ¶ 1320 ("the 'edge' is the point" where a "carrier is responsible for carrying, directly or indirectly by paying another provider, its traffic to that edge"). Because the Commission has not yet acted on these issues, and based on a purported "ambiguity" in the Commission's initial transition, CenturyLink asks the Commission to stay its transition to bill-and-keep for price cap carriers' terminating tandem switching and transport charges. Pet. at 2 & n.3. CenturyLink's Petition should be denied.

First, CenturyLink's characterization of its request for relief as a "limited stay" Pet. at 1, is inaccurate and inappropriate. A stay is typically a temporary suspension of a rule, in order to maintain the status quo during the time in which a legal challenge to the rule is considered. Here, by contrast, the Petition requests what is in effect a repeal (or untimely reconsideration) of Sections

51.907(g) and (h) of the Commission's rules. As the Petition concedes, there is no pending legal challenge to those rules, which have been valid and binding since 2011. As such, even though price cap carriers have not yet begun the transition required by Sections 51.907(g) and (h), the Petition seeks a substantive change to current law, not a temporary suspension pending review. Indeed, the Petition proposes no expiration to its "stay." To obtain the relief requested, CenturyLink should have filed a petition to repeal the rule, not a "stay" request. Further, and in all events, the Petition does not meet the stringent criteria necessary for a stay.

Second, even though the Commission's failure to take prompt action to set a further transition and define default network edges has led to the very problems identified in 2011 (*e.g.*, anticompetitive behavior and arbitrage), the response to those problems should not be to delay but to complete the necessary additional reforms. It makes no sense to say that, because the pace of additional reform has moved too slowly, the Commission should slow down (or, in effect, repeal) its existing reforms. To the contrary, the Commission should take a strong stance against the use of originating access charges and terminating transport charges to engage in arbitrage and inefficient behavior. It can do so by, *inter alia*, granting AT&T's pending Petition for Forbearance,[1] and by completing its longstanding rulemaking. On the other hand, an indefinite "stay" of the Commission's 2011 transition rules for terminating tandem switching and transport would do nothing to speed the transition to bill-and-keep for tariffed access charges, which is the end state that the Commission has determined "best advances the Commission's policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks." *Transformation Order*, ¶ 741.

[1] *See* Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) From Enforcement of Certain Rules For Switched Access Services And Toll Free Database Dip Charges, at 3, WC Docket No. 13-363 (filed September 30, 2016) ("AT&T Forbearance Petition").

Third, the supposed "ambiguity" put forward by CenturyLink has already been addressed informally by the Commission, and its guidance is reasonable and consistent with the Commission's stated purposes for its initial transition. Rules 51.907(g) and (h) apply to a price cap LEC that is the "terminating carrier" – *i.e.*, the carrier that actually terminates a call to the end user and thus owns the end office switch. *See Transformation Order* ¶ 1312. A price cap LEC that owns the end office must transition its tandem rates to bill-and-keep if that LEC or its affiliate owns the tandem. This reading makes sense because the price cap LEC that owns the end office has an end user customer from which it can recover its tandem costs in filed tariffs. CenturyLink's contrary interpretation is not tenable: if the transition applied to price cap LECs that were merely the "affiliate" of a *non*-price-cap carrier, then the existing rule would be extended to a broad array of intermediate tandem arrangements, which present very different issues and on which the Commission has sought comment in the pending *FNPRM*. Such an interpretation would undermine and pre-empt the *FNPRM* and effectively impose inefficient network edge rules that would distort competition.

II. THE PETITION IS NOT A "LIMITED" STAY REQUEST BUT AN IMPROPER REQUEST FOR RECONSIDERATION OR REPEAL OF THE TRANSITION.

Although CenturyLink has characterized its request for relief as a "limited stay," Pet. at 1, the actual relief the Petition seeks is neither limited in time – because the "stay" would last indefinitely – nor accurately described as a "stay." Rather, what the Petition is asking for is a change in the status quo. More specifically, the Petition seeks either reconsideration of existing rules, or a repeal of such rules. That request is flawed for multiple reasons, as explained below.

First, even though the tandem switching and transport step down for price cap carriers has not yet begun, the rules governing that transition, including Sections 51.907(g) and (h), were promulgated over five years ago. Those rules were not successfully challenged on appeal, and there is currently no pending challenge to those rules at the Commission or in a court of appeals.[2] As such, current law (*i.e.*, the status quo) provides quite clearly that "[f]or price cap carriers, in the final year of the transition, transport and terminating switched access shall go to bill-and-keep levels where the terminating carrier owns the tandem." *Transformation Order*, ¶ 819.

In these circumstances, the Commission cannot issue a "stay" of valid and binding rules that have not been and are not being challenged in any forum. It is well established that a "stay simply suspends judicial alteration of the status quo."[3] A stay does not (as the Petition seeks) change the status quo indefinitely.[4] To be sure, because the Commission adopted a multi-year transition, the transitions required in the Commission's rules for years six and seven have not yet begun to be implemented in tariff filings. But that does not mean that Sections 51.907(g) and (h) are not currently binding law that represents the status quo. Rather, it has been clear since 2011 that, in years six and seven, where the terminating carrier owns the tandem switch, price cap carriers' rates "*shall* go to bill-and-keep." *Transformation Order*, ¶ 819 (emphasis added). It makes no sense to issue an indefinite stay of rules that have been in effect for more than five years, when there is no current substantive challenge to those rules.[5]

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[2] *See* Petition n.2 (referring to a "potential future legal challenge" on how to interpret the rules, and conceding that such a substantive challenge is "likely premature.").

[3] *Nken v. Holder*, 556 U.S. 418, 428-29 (2009) (quotations and citations omitted).

[4] *See, e.g.*, Order, *Unbundled Access to Network Elements*, 20 FCC Rcd. 5413, ¶¶ 2-3 (WCB 2005) (denying a request for stay pending appeal as "procedurally defective" because it "seeks not the maintenance of the status quo pending judicial review," but a change in substantive law).

[5] In this regard, a stay "*temporarily* suspend[s]" a rule, *Nken*, 556 U.S. at 428 (emphasis added), so that the status quo is maintained during the time that a court or agency considers a substantive legal challenge to a rule. *Id.* at 421 ("a stay does not make time stand still, but does hold a ruling in abeyance" to allow time necessary for further review). Here, by contrast, the "stay" requested in the Petition is not at all temporary, but would apparently last indefinitely, until the time that the Commission acts on its longstanding decision to transition all remaining tariffed access charges to bill-and-keep. This is another reason why the requested relief cannot properly be called a stay.

Second, the request for relief in the Petition is not properly characterized as a "stay," but is rather either an extremely belated and untimely request for reconsideration, or a request for repeal of existing rules. In either case, the Petition fails to establish any right to relief. As to reconsideration, the Petition seems to recognize (*see* n.2) that any request for the Commission to reconsider the transitions set forth in Sections 51.907(g) and (h) should have been filed in 2012, 30 days after public notice of the rules. *See* 47 C.F.R. § 1.429(d). Although there can be "extremely unusual circumstances" in which the Commission may accept an untimely petition for reconsideration, *Virgin Islands Tel. Corp. v. FCC*, 989 F.2d 1231, 1237 (D.C. Cir. 1993), the Petition does not even attempt to demonstrate that it meets those standards, particularly in light of the Commission's clear statements about the importance of the transition. *See Transformation Order*, ¶¶ 801, 819.

As to repeal of a valid and binding Commission rule, the lawful procedure is to issue a notice of proposed rulemaking, consider public comment, and then issue an order explaining why the Commission has decided to change the rule. 5 U.S.C. § 553. Rather than file a request for a supposedly "limited stay," CenturyLink should and could have filed a request to repeal Sections 51.907(g) and (h). 47 C.F.R. § 1.401(a) ("[a]ny interested person may petition for the issuance, amendment or repeal of a rule or regulation"). It did not do so, and for this additional reason the Petition is deficient.

Third, even if the Petition's request for relief could properly be called a stay, the Petition fails to demonstrate that it meets the "stringent criteria" for a stay. *Unbundled Access to Network Elements*, 20 FCC Rcd. 5413, ¶ 2; *see, e.g.*, *Nken*, 556 U.S. at 433-35. The two "most critical" factors (*id.* at 434) are the likelihood of success on the merits and irreparable harm, and the Petition does not establish either one. As to the likelihood of success on the merits, because no substantive challenge to Sections 51.907(g) or (h) is pending, there are no "merits" on which CenturyLink could be successful. As such, it is not possible for this factor to be satisfied in these circumstances. The Petition notes that, in the future, there may be "potential future legal challenge" of the Commission's interpretation of Sections 51.907(g) or (h), but even assuming, *arguendo,* that a potential future challenge could form the basis for a stay, on that question, the Petition does not assert that any such legal challenge has a high likelihood of success. Rather, it merely claims that the interpretation of Sections 51.907(g) and (h) are subject to "considerable potential for debate and disagreement," which is insufficient to meet the requirements for a stay. *Compare Nken*, 556 U.S. at 434 ("it is not enough that the chance of success on the merits be better than negligible" and "more than a mere possibility of relief is required") (citations omitted) *with* Pet. at 8 (claiming that the informal guidance offered by the Commission staff is "*arguably* arbitrary and capricious") (emphasis added).

Likewise, the "possibility of irreparable injury" fails to satisfy the requirements for a stay. *Nken*, 556 U.S. at 434-45; *Access to Unbundled Elements,* ¶ 2. The Petition fails to identify any definitive harms that are not speculative or irreparable. *See* Pet. at 3. As explained below, AT&T agrees that consumers, carriers, and the public interest are being harmed by the Commission's current intercarrier compensation system. However, the source of the harm is not primarily the rules that are the subject of the Petition. Rather, the harm arises because the Commission has failed to act to define default network edges and specify a further transition for remaining tariffed access charges. Thus, any public interest considerations support compelling further Commission action, not the "stay" sought in the Petition.

III. THE PETITION IS FLAWED BECAUSE THE PROPER RESPONSE TO INCOMPLETE REFORM IS NOT TO SLOW DOWN REFORM FURTHER, BUT TO ACT PROMPTLY BY COMPLETING THE TRANSITION TO BILL-AND-KEEP FOR TARIFFED ACCESS CHARGES.

As a general matter, AT&T agrees with CenturyLink's claims in the Petition that, due to the lack of complete reform in intercarrier compensation, there are numerous "arbitrage schemes" that seek to exploit the Commission's inefficient, legacy framework. Pet. at 2. AT&T also agrees that the Commission should avoid "fundamental asymmetry" in intercarrier compensation, and that, as the Commission has long recognized, such inefficiencies cause "competitive harm" (Pet. at 3); AT&T further agrees that the Commission must act promptly to issue rules that permit the use of a "competitive market where all providers can compete under the same rules." *Id.*; *see Transformation Order,* ¶ 9 ("we need a more incentive-based, market driven approach that can reduce arbitrage and competitive distortions by phasing down byzantine per-minute and geography-based charges").

AT&T, however, strongly disagrees that the relief sought in the Petition – an effective repeal of the tandem switching and transport transition set forth in Sections 51.907(g) & (h) – "will also best facilitate the Commission's broader intercarrier compensation reform." Pet. at 3. The best way to advance reform is not to issue indefinite "stays" of rules that, though incomplete, provide transitions to the Commission's "ultimate end state" of bill-and-keep for tariffed access charges (*Transformation Order*, ¶ 34). Rather, the best way to advance reform is for the Commission to continue to implement its initial transition rules and to act on its long-pending notice of proposed rulemaking (*id.* ¶¶ 1297-1325) by establishing a reasonable transition of all remaining tariffed access charges to bill-and-keep.[6] The Commission should also use its

[6] *See* AT&T Forbearance Petition at 3 (the Commission should "act with urgency and finish the intercarrier compensation reforms that it years ago concluded were vital.").

enforcement authority to crack down on arbitrage schemes and its forbearance authority to eliminate the outdated rules described in AT&T's Forbearance Petition (at 11-23).

The Lack Of A Transition Plan for Transport And Other Rate Elements Has Allowed Arbitrage Schemes To Continue And Has Stifled Competitive Market Conditions. As explained in more detail in AT&T's Forbearance Petition, it is clear that the Commission's failure to put in place a transition plan for originating access and the additional transport rate elements has allowed arbitrage schemes to flourish. AT&T Forbearance Petition at 3-4, 9-11, 15. The record that was developed in response to AT&T's Forbearance Petition confirmed, for example, that access stimulation schemes remain prevalent. AT&T Reply Comments, WC Docket No. 13-363, at 8-13 (Dec. 19, 2016). Even though the Commission unambiguously determined that access stimulation should be "curtailed," *Transformation Order*, ¶¶ 33, 649, unscrupulous carriers have been able to perpetuate access stimulation and related schemes. AT&T Forbearance Petition at 9-11, 13-18; AT&T Reply Comments at 8-13. As the Commission concluded, these access stimulation schemes have many "adverse effects" and "impose[] undue costs on consumers." *Transformation Order*, ¶¶ 662-663. In addition, arbitrage activities also affect originating access charges. To win business, some tandem providers are sharing a portion of the tandem switching and transport revenues, to the detriment of both ratepayers and competitors. AT&T Forbearance Petition at 10-11.

Further, because there is no transition plan in place for originating access and the remaining transport charges, carriers that continue to tariff these charges can be subject to limited effective "competitive discipline." *Transformation Order*, ¶ 742. The Commission concluded that one of the benefits of moving to bill-and-keep as the ultimate end state for tariffed access charges would be that consumers would benefit due to competition and "substantial innovation to attract and retain customers." *Id.* ¶¶ 748-50. Even though there are competitive providers of transport and tandem services, the Commission's lack of a transition plan, coupled with other inefficiencies, have hindered the development of a more fully competitive market. AT&T Forbearance Petition at 6-8. The Commission's failure to begin the transition of originating access and the remaining transport charges to bill-and-keep is also likely deterring investment in broadband and the orderly transition to IP networks. *See id*. at 9; *see also Transformation Order,* ¶ 820 ("if transport rates are allowed to persist," it serves as a "disincentive" to "establish more efficient interconnection arrangements such as IP").

The Commission Needs To Move Forward, Not Stand Still. The Commission concluded in 2011 that bill-and-keep would be the ultimate end state as the default methodology for all telecommunications traffic, and CenturyLink's Petition could not and does not challenge that fundamental determination. Because there is no serious dispute that the failure to establish and conclude a transition for all remaining access charges is harming the market and consumers, the Commission's foremost goal should be to complete the transition to bill-and-keep for tariffed access charges, and at the same time make clear as a default matter where the transport obligation shifts from one carrier to another.

By contrast, instituting a stay of some of the final steps to the Commission's initial transition would be counterproductive. Such a stay would likely lead to more delay, rather than more haste. Further, the purported basis for the stay – that there may be difficulties in interpreting and implementing the stepdown in Sections 51.907(g) and (h) – is not sufficient to justify a halt to the initial transition. Anytime the Commission substantially revises its rules and puts in place a new system that affects many carriers, there will always be "potential for debate and disagreement" about the precise steps required to implement the changes. *See* Pet. at 7. The proper approach is for the Commission to provide appropriate and reasonable guidance, which is precisely what has occurred here.

IV. THE COMMISSION'S INFORMAL GUIDANCE ON ITS TANDEM TRANSITION RULES IS REASONABLE AND CONSISTENT WITH THE PURPOSES OF ITS INITIAL REFORMS.

Finally, the guidance the Commission has given in advance of the annual tariff filings represents the most reasonable interpretation of Rules 51.907(g) and (h), and thus CenturyLink is not likely to succeed on any future claim that those Rules or the Commission's interpretation of them are "arguably arbitrary and capricious."[7]

The two rules at issue apply to "Price Cap Carriers" that are also "the terminating carrier" – *i.e.*, the carrier that is actually terminating the call to the end user and thus owns the end office switch.[8] From the Commission's perspective in 2011, Price Cap Carriers in this situation presented the simplest and most straightforward scenario for the initial transition to bill-and-keep, because such carriers have end user customers that take services pursuant to tariffs and from whom they can recover the costs of both tandem and end office switching via the tariffs. Rule 51.907 thus established a gradual transition in which such a Price Cap Carrier's switching charges are slowly phased out, beginning with the end office charges and ending, in Years 6 and 7, with such a carrier's tandem charges. Consistent with the notion of bill-and-keep, such a carrier would be in a position to "bill" its end user customers via tariffs to recover the tandem costs and "keep" that

[7] Petition at 8; *see also id.* at 9-11 (asserting a "significant prospect of a successful legal challenge").

[8] 47 C.F.R. §§ 51.907(g) & (h); *Transformation Order* ¶ 1312. These transitions also apply to CLECs that benchmark their rates to price cap carriers. *Id.*, ¶¶ 801, 807, 866; 47 C.F.R. § 61.26.

recovery without charging the IXC.[9]

The Commission issued a further notice of proposed rulemaking, however, to establish a separate bill-and-keep transition for all *other* price cap LEC tandem charges, including, *inter alia*, situations in which the price cap LEC performs tandem functions for a CMRS carrier that terminates the call over a wireless network, and that offers services via contracts, not tariffs. In 2011, the Commission reasonably concluded that the transition for tandem charges when the price cap LEC does *not* own the end office switch, and thus has no end user customers, presented very different issues. Indeed, the *FNPRM* specifically noted that commenters had "express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office." *Transformation Order*, ¶ 1312. The Commission explained that Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch," but it "does *not* address the transition in situations where the tandem owner does not own the end office." *Id.* The Commission thus sought comment on both the transition and "the appropriate end state" for such intermediate tandem switching services. *Id.* ¶¶ 1306-10, 1312-13. Moreover, as the Commission noted, many of those issues are "closely related" to the issue of how to establish the "network edge" for purposes of a bill-and-keep rule applicable to such tariffed tandem services, another issue on which

[9] *Cf.* 47 C.F.R. § 51.713. Another aspect of the Commission's initial, partial transition was its adoption of the Access Recovery Charge (ARC), which is a "transitional recovery mechanism" from certain end users (or the CAF Fund) that helped offset the loss of revenues "reduced as part of this Order." *Transformation Order* ¶ 847. The Commission allowed "incumbent LECs" – either price cap LECs or rate of return LECs – to recover the ARC from specified end users, but not CMRS carriers. *Id.* n.1668. Although the ARC was never intended to be revenue neutral, the fact that the Commission provided for a partial transitional recovery mechanism for price cap LECs and rate of return LECs, but not CMRS carriers, undercuts the view that Section 51.907(g) or (h) apply when the terminating carrier is a CMRS provider.

it sought comment in the *FNPRM*.[10] In 2011, the Commission concluded that the rules for how bill-and-keep will work for such intermediate tandem charges, and where the network edge is established, would have a substantial and perhaps far-reaching impact on how those services are purchased and provided, and the Commission was not ready to resolve those issues based on the record it had accumulated in 2011.[11]

In light of this context from the *Transformation Order* and the *FNPRM*, it is clear that the Commission's informal guidance represents the most reasonable interpretation of Rule 51.907.[12] The phrase "the terminating carrier" in subsections (g) and (h) is necessarily a reference back to the "Price Cap Carrier" – *i.e.*, a Price Cap Carrier must phase out its tandem charges when it is "the terminating carrier" and, as such, owns both the end office and tandem switches.[13] If the

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[10] *Id*. ¶ 1310 ("As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport"); *id.* ¶¶ 1315-21 (seeking comment on points of interconnection and the "network edge" in a full bill-and-keep system).

[11] Consistent with the discussion in the *FNPRM*, the *Transformation Order* makes clear that the initial transition applies to CMRS services only insofar as the CMRS carrier itself provides reciprocal compensation, and affects CLEC charges only insofar the pre-existing CLEC benchmark rule forces CLECs to conform their own tandem and end office switching charges to their benchmark price cap LEC. *Transformation Order* ¶ 806 ("[a]lthough CMRS providers are subject to mandatory detariffing, these providers are included [in the *Transformation Order* transition] to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here"); *id.* ¶¶ 807-08, 866 ("[a]pplication of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule").

[12] *See, e.g., Verizon Cal. v. FCC*, 555 F.3d 270, 273 (D.C. Cir. 2009) ("The context is key," and the Commission "understandably . . . looked to the context"); *Bell Atlantic Tel. Cos. v. FCC*, 131 F. 3d 1044, 1047 (D.C. Cir. 1997) ("textual analysis is a language game played on a field known as 'context.'"); *Center For Communications Management v. AT&T Corp.*, 23 FCC Rcd. 12249, ¶ 11 (2008) ("To ascertain how best to interpret [a Commission rule], we must examine the rule's text, history, purpose, and structure.").

[13] *Transformation Order* ¶ 1312 (Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the *terminating carrier* owns the serving tandem switch," but not "where the tandem owner does not own the end office" (emphasis added)).

"terminating carrier" could be a carrier *other* than the Price Cap Carrier (such as a CLEC or a CMRS carrier), then the rule would already address many of the more difficult intermediate situations on which the Commission sought comment in the *FNPRM*. Indeed, applying the plain-vanilla Rule 51.907 transition to these very different scenarios in which the Price Cap Carrier has no tariffed end user would effectively prejudge the *FNPRM* and impose bill-and-keep and network edge rules on such traffic, which could distort competition with no real opportunity for the Commission to consider the possible consequences.[14]

This understanding also eliminates any ambiguity with respect to the term "affiliate" in the two rules. The rule requires the Price Cap Carrier to phase out its tandem charges when the "terminating carrier or *its* affiliate" – *i.e.*, the terminating carrier's affiliate – owns the tandem. As discussed above, however, the "terminating carrier" can only be a Price Cap Carrier that owns the end office. Accordingly, the term "affiliate" comes into play only when the "*terminating*" price cap carrier that owns the end office has an affiliate that owns the tandem. The *Transformation Order* does not address why the phrase "or its affiliate" was added to the text of the two rules,[15] but it was most likely designed either (1) to prevent a LEC from trying to evade the tandem transition by transferring its tandem assets to an affiliate, or (2) to cover situations in more rural

[14] For example, if (as CenturyLink seems to suggest) Rule 51.907(g) or (h) were read to apply to a situation in which a CMRS carrier was the "terminating carrier" and its "affiliate," a Price Cap Carrier, owned the tandem, such a reading could have substantial unintended consequences. Applying Rule 51.907 to this scenario would be destabilizing, because price cap LECs would have no means of recovering tandem costs through a CMRS affiliate's end user customer charges, and fierce price competition from CMRS carriers that do *not* have price cap LEC affiliates, such as T-Mobile and Sprint, would preclude them from doing so in all events. *See, e.g.*, Ryan Knutson and Joshua Jamerson, "Verizon Customers Defect As Competition Ramps Up," The Wall Street Journal, p. A1 (April 21, 2017) (reintroduction of unlimited data plans has set off a "bruising price war"). These are precisely the sorts of issues that the Commission must carefully consider and resolve in the *FNPRM*.

[15] *Cf. Transformation Order* ¶ 801 & Figure 9 (omitting the phrase "or its affiliate").

areas where a price cap LEC's end user is served by the tandem of a neighboring affiliate. As explained above, however, the Commission cannot reasonably read the rule to treat the Price Cap Carrier as the "affiliate" of a *non*-price-cap carrier that terminates the call to the end user.

CONCLUSION

For the foregoing reasons, the Commission should deny CenturyLink's Petition for Stay.

Respectfully submitted,

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Attorneys for AT&T Services, Inc.

Exhibit F

Petition of Level 3 to Reject or Suspend and Investigate, WC Docket No. 17-65 (June 23, 2017)

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

In the Matter of	)	
	)	
July 1, 2017 Annual Access Charge Tariff Filings	)	WC Docket No. 17-65
	)	
Ameritech Operating Companies Tariff F.C.C. No. 2	)	Transmittal No. 1860
	)	
BellSouth Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 130
	)	
Nevada Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 301
	)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 553
	)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	)	Transmittal No. 3444
	)	

PETITION OF LEVEL 3 TO REJECT OR SUSPEND AND INVESTIGATE

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Pacific Bell Telephone Company Tariff F.C.C. No. 1	)	Transmittal No. 553
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	)	Transmittal No. 3444

PETITION OF LEVEL 3 TO REJECT OR SUSPEND AND INVESTIGATE

Pursuant to Section 1.773(a) of the Commission's rules and the *July 1, 2017 Tariff Filing Order*,[1] Level 3 Communications, LLC ("Level 3") hereby petitions the Wireline Competition Bureau ("Bureau") to reject, or, in the alternative, suspend and investigate the above-referenced transmittals filed by AT&T, Inc. ("AT&T") on June 16, 2017 as they apply to AT&T's

[1] 47 C.F.R. § 1.773(a); *July 1, 2017 Annual Access Charge Tariff Filings*, Order, 32 FCC Rcd. 1918 (WCB 2017) ("*July 1, 2017 Tariff Filing Order*").

implementation of revisions to Tandem Switched Transport Access Service rates required by Section 51.907(g)(2) of the Commission's rules.[2]

I. INTRODUCTION

The tariff changes proposed by AT&T are inconsistent with the Commission's access charge transition rules, the Commission's order adopting those rules, Section 3(2) of the Communications Act of 1934, as amended, the dictionary definition of "affiliate," and sound public policy.[3] The Bureau should therefore reject the transmittals or, at the very least, suspend them and initiate a thorough investigation of their lawfulness.

The Bureau should reject the proposed transmittals because they are patently unlawful. Section 51.907(g)(2) of the Commission's rules states that, beginning July 1, 2017, each price cap carrier must "establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier *or its affiliates* owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute."[4] The definition of "affiliate" in Section 3(2)

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[2] 47 C.F.R. § 51.907(g)(2). The AT&T June 16, 2017 tariff filings at issue include the following: Ameritech Operating Companies, Transmittal No. 1860, Tariff F.C.C. No. 2 § 6.9.1(A), 13th Revised Page 207.1.1.1 (June 16, 2017); BellSouth Telecommunications, Transmittal No. 130, Tariff F.C.C. No. 1 § 6.8.1(C), 4th Revised Page 6-273 (June 16, 2017); Nevada Bell Telephone Company, Transmittal No. 301, Tariff F.C.C. No. 1 § 6.8.1(C), 11th Revised Page 6-146 (June 16, 2017); Pacific Bell Telephone Company, Transmittal No. 553, Tariff F.C.C. No. 1 § 6.8.2(C), 15th Revised Page 6-214 (June 16, 2017); Southwestern Bell Telephone Company, Transmittal No. 3444, Tariff F.C.C. No. 73 § 6.9.2(C), 29th Revised Page 6-179.11 (June 16, 2017).

[3] 47 U.S.C. § 153.

[4] 47 C.F.R. § 51.907(g)(2) (emphasis added); *see also 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 a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd. 17663, 18173 (2011) ("*USF/ICC Transformation Order* or *USF/ICC Transformation FNPRM*"), *aff'd sub nom. In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014) (emphasis added).

of the Communications Act encompasses *all* entities owned or under common ownership, regardless of the services provide by such entities. This definition makes sense here because it promotes the Commission's policy objective of transitioning the industry to bill and keep. Neither the rule nor the *USF/ICC Transformation Order* limits the term "affiliates" in any way. Yet AT&T's tariff transmittals limit the term "affiliates" to mean only AT&T ILECs. AT&T therefore excludes other affiliates from the definition, including affiliates that provide CLEC service, VoIP service, or wireless service. Since this interpretation of "affiliates" has no basis in law or policy, it should be rejected.

Even if the Bureau does not reject the transmittals, it should suspend and investigate them because there are significant questions as to whether AT&T has sought to unlawfully evade application of the Tandem-Switched Transport Access Service rate reduction to its affiliates that are not ILECs. If the Bureau does not suspend the instant tariffs, interconnecting carriers will be forced to pay rates that exceed the maximum rates permitted under Section 51.907(g)(2) and the transition to bill and keep will be needlessly undermined.

II. ARGUMENT

As explained below, the Bureau should reject AT&T's proposed tariff revisions, or, in the alternative, suspend and investigate the proposed tariff revisions.

A. The Extent to Which AT&T Has Complied with Section 51.907(g)(2) Can Only Be Determined By Reviewing AT&T's June 16 Tariff Transmittals.

In its June 7, 2017 tariff transmittals, AT&T purported to restructure its tandem transport and host remote rate elements by splitting tandem rate elements for terminating tandem traffic into two categories.[5] For example, the June 7 BellSouth transmittal explains that:

[5] *See* Ameritech Operating Companies, Transmittal No. 1859, Tariff F.C.C. No. 2 § 6.8.2(D)(4), 9th Revised Page 180 (June 7, 2017); BellSouth Telecommunications, Transmittal No. 129,

> Access Tandem Switching provides for the function of switching traffic through the Access Tandem from or to the end office switch(es). The Access Tandem Switching charge is assessed on all originating and terminating minutes of use switched at the Access Tandem. Access Tandem Switching charges are billed as Originating, Terminating to Telephone Company's own end office and Terminating to non-Telephone Company 3rd party locations based on call recordings. Non-Telephone Company 3rd party locations are all offices or other locations not owned by the Telephone Company. *Examples of 3rd party locations include terminations to other local exchange and wireless carriers*.[6]

The Description and Justification narratives accompanying both the June 7 transmittals and the instant transmittals explain further that AT&T considers "3rd party locations" to "include[] traffic that terminates from a Price Cap ILEC-owned tandem to an affiliated CLEC or wireless end office," while "Traffic Terminating from a Price Cap ILEC-owned Tandem to its own or any other Price Cap ILEC End Office owned by the same Holding Company, will be considered 'Tandem-to-End Office' that will transition to $0.0007."[7] The June 7 transmittals did not,

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Tariff F.C.C. No. 1 § 6.1.3(A)(2)(b)(3), 1st Revised Page 6-17 (June 7, 2017); Nevada Bell Telephone Company, Transmittal No. 300, Tariff F.C.C. No. 1 § 6.7.1(D)(3), 1st Revised Page 6-112, 2nd Revised Page 6-113 (June 7, 2017); Pacific Bell Telephone Company, Transmittal No. 552, Tariff F.C.C. No. 1 § 6.7.1(D)(3), 2nd Revised Page 6-167 (June 7, 2017); Southwestern Bell Telephone Company, Transmittal No. 3443, Tariff F.C.C. No. 73 § 6.8.3(E)(3), 5th Revised Page 6-149.4, 6th Revised Page 6-149.5 (June 7, 2017).

6 BellSouth Telecommunications, Transmittal No. 129, Tariff F.C.C. No. 1 § 6.1.3(A)(2)(b)(3), 1st Revised Page 6-17 (June 7, 2017); (emphasis added). The other AT&T June 7 transmittals, *supra* note 5, include substantially similar provisions.

7 Ameritech Operating Companies, Transmittal No. 1859, Description and Justification, 1 (June 7, 2017); BellSouth Telecommunications, Transmittal No. 129, Description and Justification, 1 (June 7, 2017); Nevada Bell Telephone Company, Transmittal No. 300, Description and Justification, 1 (June 7, 2017); Pacific Bell Telephone Company, Transmittal No. 552, Description and Justification, 1 (June 7, 2017); Southwestern Bell Telephone Company, Transmittal No. 3443, Description and Justification, 1 (June 7, 2017); Ameritech Operating Companies, Transmittal No. 1860, Description and Justification, 34 (June 16, 2017); BellSouth Telecommunications, Transmittal No. 130, Description and Justification, 32 (June 16, 2017); Nevada Bell Telephone Company, Transmittal No. 301, Description and Justification, 31 (June 16, 2017); Pacific Bell Telephone Company, Transmittal No. 553, Description and Justification, 31 (June 16, 2017); Southwestern Bell Telephone Company, Transmittal No. 3444, Description and Justification, 32 (June 16, 2017).

however, establish specific rates for the classes of traffic described in those transmittals. The June 16 transmittals did that.

As a result, it is only possible to determine whether AT&T's rate restructuring complies with Section 51.907(g)(2) by reviewing the June 16 transmittals. AT&T could have set all of the rates proposed in the June 16 transmittals at or below the level required by Section 51.907(g)(2), in which case bifurcation would not have resulted in a violation of the rule. It was not until the June 16 transmittals that AT&T actually set forth the rates for traffic to be terminated by non-ILEC affiliates that exceed the level permitted under Section 51.907(g)(2). This petition therefore is timely pursuant to the deadlines set forth in the *July 1, 2017 Tariff Filing Order*.[8]

B. The Transmittals Are Unlawful and Should Be Rejected.

The Bureau should reject the instant tariff transmittals. The transmittals propose rates for calls "Terminating to non-Telephone Company 3rd party locations" that exceed the $0.0007 cap established in Section 51.907(g)(2) of the Commission's rules. Exempting this traffic from the transition to bill and keep is flatly inconsistent with the terms of Section 51.907(g)(2), the *ICC/USF Transformation Order*, the definition of "affiliate" in Section 3(2) of the Communications Act, the dictionary definition of "affiliate," and the Commission's policy objectives.

The terms of Section 51.907(g)(2) do not explicitly or implicitly limit the scope of the word "affiliates." The only permissible inference is that "affiliates" as used in Section 51.907(g)(2) means *all* affiliates of the terminating tandem owner, as that term is defined in Section 3(2) of the Communications Act.[9]

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[8] *July 1, 2017 Tariff Filing Order* ¶ 9.

[9] 47 U.S.C. § 153(2).

The *USF/ICC Transformation Order* supports this conclusion. The *USF/ICC Transformation Order* does not indicate that the term "affiliates" – for purposes of Section 51.907(g)(2) or otherwise – is limited to the ILEC affiliates of terminating carriers or in any other way. While the *USF/ICC Transformation Order* does not define "affiliates" in the context of the Section 51.907(g)(2) Tandem-Switched Transport Access Service rate reduction, there are several instances in the *USF/ICC Transformation Order* where "affiliate" is used, and the context gives no indication that the Commission construes that definition to exclude non-ILEC affiliates.[10] Moreover, in at least one other context, the *USF/ICC Transformation Order* expressly relies on the statutory definition of the term.[11]

Indeed, the definition of "affiliate" in the Communications Act eliminates any possible doubt that the term "affiliates" is not limited in the manner proposed by AT&T. In fact, because "affiliates" is not defined in Section 51.907(g)(2), the terms of the Act and Commission precedent dictate that the statutory definition applies.[12] Section 3(2) of the Communications Act states as follows:

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[10] *See, e.g., USF/ICC Transformation Order* n. 240 ("Parties seeking relief against an interconnected VoIP provider for alleged violations of our signaling rules could seek relief against that interconnected VoIP provider's partnering or affiliated LEC.").

[11] In adopting an annual reporting requirement for eligible telecommunications carriers ("ETCs"), the *USF/ICC Transformation Order* explains that, when reporting their affiliated interests, ETCs should rely on the definition of "affiliate" in Section 3 of the Communications Act. *See USF/ICC Transformation Order* n.981.

[12] *See* 47 U.S.C. § 153 (stating that, "[f]or the purposes of this chapter [Chapter 5: Wire or Radio Communication], unless the context otherwise requires…." the definitions set forth in the Act apply); *Implementation of Section 210 of the Satellite Home Viewer Extension & Reauthorization Act of 2004 to Amend Section 338 of the Communications Act*, 20 FCC Rcd. 14242, ¶ 9 (2005) ("In determining the proper interpretation, we bear in mind that Section 3 of the Communications Act provides definitions of terms that apply for the purposes of this Act, 'unless the context otherwise requires.'").

> The term "affiliate" means a person that (directly or indirectly) owns or controls, is owned or controlled by, or is under common ownership or control with, another person. For purposes of this paragraph, the term "own" means to own an equity interest (or the equivalent thereof) of more than 10 percent.[13]

The rule includes no carve out for affiliates that are not ILECs. Thus, in applying the Section 51.907(g)(2) rate reduction only to ILEC affiliates of tandem owners, and not to "affiliates" as the term is defined in the statute, the instant tariff transmittals are unlawful.

Furthermore, the dictionary definition of "affiliate" is consistent with an interpretation of the term that is not limited in the manner proposed by AT&T. For example, Merriam-Webster defines affiliate as "an affiliated person or organization; *specifically*: a business entity effectively controlling or controlled by another or associated with others under common ownership or control."[14] Courts can and do rely on dictionary definitions to interpret language on which the Commission has relied to impose regulatory obligations.[15] Accordingly, the Bureau should find that AT&T's limited interpretation of "affiliates" defies both the statutory definition and common usage of the term.

Not only is interpreting "affiliates" in a manner consistent with the statute required, it also is in the public interest because it furthers important policy objectives articulated in the *USF/ICC Transformation Order*. In that order, the Commission determined that intercarrier compensation charges should be eliminated and that the industry should transition as soon as

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[13] 47 U.S.C. § 153(2).

[14] Affiliate, *Merriam-Webster*, https://www.merriam-webster.com/dictionary/affiliate (emphasis in original).

[15] *See, e.g.*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 394 (1999) (citing the Webster's dictionary definition of "unbundled" to show that it "matches the FCC's interpretation of the word," as it appears in 47 U.S.C. § 251(c)(3)); *SBC Commc'ns Inc. v. FCC*, 373 F.3d 140, 149 (D.C. Cir. 2004) (using Merriam Webster's Collegiate Dictionary to define "subject to" where the implications of its use in an FCC order were at issue).

possible to bill and keep.[16] As the Commission explained, the transition to bill and keep would cause (1) carrier operations to become more efficient, including over time by "eliminat[ing] wasteful arbitrage schemes and other behaviors designed to take advantage of or avoid above-cost interconnection rates";[17] (2) carrier decisions to invest in communications services to increasingly be based on efficient price signals;[18] and (3) carriers to have increased incentives to innovate to attract and maintain customers.[19]

The sooner the industry transitions to bill and keep, the sooner these benefits will be realized. But AT&T's proposal to exempt tandem-switched traffic to non-ILEC affiliate terminating carriers would delay the transition to bill and keep for a large volume of traffic, i.e., all AT&T ILEC tandem-switched traffic terminated by AT&T's wireless, CLEC, and VoIP affiliates. Doing so would perpetuate the inefficiencies caused by intercarrier compensation and harm consumer welfare. There is simply no reason to allow this to happen.

C. The Proposed Tariff Revisions Raise Significant Questions of Lawfulness.

Even if the Bureau does not find that the instant transmittals should be rejected, AT&T's proposed revisions raise significant issues or questions concerning the lawfulness of the tariffs and therefore warrant suspension and investigation.

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[16] *See, e.g., USF/ICC Transformation Order* ¶ 741 ("We find that a bill-and-keep framework for intercarrier compensation best advances the Commission's policy goals and the public interest, driving greater efficiency in the operation of telecommunications networks and promoting the deployment of IP-based networks.").

[17] *Id.* ¶ 749

[18] *See id.*

[19] *See id.* ¶ 750.

In reviewing the instant tariff transmittals, the Bureau should apply the rule that a tariff filing should be suspended and investigated if there are significant issues or questions concerning the tariff's lawfulness.[20] Under the Commission's rules, that standard applies to tariffs that propose a rate restructuring. Since the instant tariff transmittals, along with the June 7 transmittals, propose a rate restructuring under the Commission's rules,[21] the "significant issues or questions" standard applies.[22] But even if the Bureau were to apply the more rigorous standard of review for suspension and investigation set forth in Section 1.773(a)(1)(iv), there is ample basis for concluding that the tariffs should be suspended and investigated.[23]

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[20] *See Bell Atlantic Telephone Cos. Transmittal Nos. 741, 786; Revisions to Tariff F.C.C. 10; Rates, Terms, and Regulations* Order, 10 FCC Rcd. 10831, ¶ 3 (1995). The Bureau suspends and investigates tariff filings when it finds, after initial review, that a more complete record is needed to resolve whether all or certain parts of the tariff filings are lawful. *Id.*

[21] Section 61.3 of the Commission's rules defines a restructured service as "[a]n offering which represents the modification of a [price cap] service; or the introduction of a new method of charging or provisioning that does not result in a net increase in options available to customers." 47 C.F.R.§ 61.3(mm). Here, AT&T is proposing rates that implement a new method of charging for Tandem Switched Transport Access Services. There can therefore be no doubt that AT&T is proposing restructured services.

[22] The more rigorous standards for suspension and investigation set forth in Section 1.773(a) apply only to tariffs submitted by (1) non-dominant carriers; (2) small ILECs (those serving 50,000 or fewer access lines in a given study area) pursuant to Section 61.39; (3) price cap carriers filing pursuant to Section 61.49(b); and (4) price cap carriers filing pursuant to Section 61.42(d)(4)(ii). Only the category that applies to price cap carriers filing tariffs pursuant to Section 61.49(b) – that is, tariffs proposing new, "within-cap" and "within band rates" that do not qualify as restructured services – could potentially encompass the AT&T services that are the subject of this petition. However, this category is inapplicable because tariffs proposing restructured services are not filed pursuant to Section 61.49(b).

[23] Under Section 1.773(a)(1)(iv), the Bureau may suspend and investigate a within-cap, within-band tariff filing if it finds that (1) "there is a high probability the tariff would be found unlawful after investigation"; (2) "the suspension would not substantially harm other interested parties"; (3) "irreparable injury will result if the tariff filing is not suspended"; and (4) "the suspension would not otherwise be contrary to the public interest." 47 C.F.R. § 1.773(a)(1)(iv). All four parts of this test are satisfied here.

The Bureau should find that there is a substantial question as to whether AT&T has sought to evade application of the access charge transition rules by applying unlawful Tandem-Switched Transport Access Service rate to affiliates that are not ILECs. As explained, the rates that AT&T has proposed rely on a definition of "affiliates" that is inconsistent with the Commission's rules, the *USF/ICC Transformation Order*, the Communications Act, the dictionary definition of "affiliate," and the Commission's policy objectives. The Bureau should therefore suspend the instant tariff transmittals and investigate AT&T's proposed exclusion of non-ILEC affiliates' traffic from the category of traffic to which the July 1, 2017 rate reduction applies, and the inclusion of non-ILEC affiliates' traffic in the category of traffic to which higher rates apply. If the Bureau does not suspend and investigate the instant transmittals, AT&T's tariffs will be deemed lawful, and interconnecting carriers such as Level 3 will be unable to recover Tandem-Switched Transport Access Service charges assessed at rates above the maximum lawful rates for such services, needlessly undermining the transition to bill and keep envisioned in the *USF/ICC Transformation Order*.

D. The *USF/ICC Transformation FNPRM* Does Not Support AT&T's Interpretation of Section 51.907(g)(2).

In its opposition to CenturyLink's petition to reject or suspend and investigate AT&T's June 7 transmittals, AT&T argues that the Commission's *USF/ICC Transformation FNPRM* supports the interpretation of Section 51.907(g)(2) that it has applied in the instant transmittals.[24] Specifically, AT&T asserts that, since the Commission sought comment on what rates should apply to ILEC tandem switched calls terminated by non-ILEC affiliates in the *FNPRM*, it makes

[24] *See* AT&T's Opposition to CenturyLink's Petition to Reject and to Suspend and Investigate AT&T Tariff Filings (filed June 20, 2017) .

no sense to interpret Section 51.907(g)(2) to encompass that traffic. There is no merit to this argument.

First, it would be beyond strange to define the scope of a rule adopted in an order based on the questions posed in an accompanying further notice of proposed rulemaking. The meaning of a rule must be derived first and foremost from the terms of the rule itself, the order in which the rule is adopted, and relevant statutory provisions. As explained, all of those sources support the conclusion that AT&T's proposed rates are unlawful. Creative (and incorrect) inferences from the non-binding questions posed in the *USF/ICC Transformation FNPRM* cannot somehow undo that conclusion.

Second, and in all events, the questions posed in the *USF/ICC Transformation FNPRM* do not seek comment on the rates that should apply to ILEC tandem switched traffic terminated by non-ILEC affiliates. In the *USF/ICC Transformation FNPRM* the Commission observes that charges for price cap carriers, "where the terminating carrier owns the tandem in the serving area," are subject to the rules adopted in the *USF/ICC Transformation Order*, but that the rules do not address "the transition for tandem . . . charges if the price cap carrier does not own the tandem in the serving area."[25] The appropriate reading of the phrase "where the carrier owns the tandem" is to include situations where the tandems are owned by any ILEC affiliate, as stated in the rule. This clarification defines the parameters of the discussion of tandem-switched traffic in the *FNPRM*. The recognition that the rates have been set in Section 51.907(g)(2) and the *USF/ICC Transformation Order* for tandem-switched calls terminated by affiliates, without

[25] *USF/ICC Transformation FNPRM* ¶ 1306.

qualification or limitation, forecloses any argument that the *FNPRM* should be read to limit "affiliates" in Section 51.907(g)(2) to ILEC affiliates.

Other passages in the *USF/ICC Transformation FNPRM* confirm this conclusion. For example, in the *FNPRM*, the Commission notes commenters' concern regarding "the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office."[26] The Commission also solicits comments on both the transition and appropriate end state of tandem switching services as they relate to separate ownership of a tandem and terminating carrier.[27] Nowhere does the Commission seek comment on the rates applicable to tandem-switched traffic terminated by a non-ILEC affiliate. Thus, there is simply no basis for the argument that the *FNPRM* can be read to support AT&T's interpretation of Section 51.907(g)(2).

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[26] *Id.* ¶ 1312.

[27] *See id.* ¶¶ 1306, 1312.

III. CONCLUSION

For these reasons, the Bureau should reject the instant transmittals. In the alternative, the Bureau should suspend and investigate the instant transmittals, as doing so would give the Bureau time to develop a record sufficient to determine whether the proposed tariff revisions are lawful and to design appropriate remedies.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Samuel Eckland, hereby certify that on this 23rd day of June 2017, I caused to be served a true and correct copy of the foregoing Petition of Level 3 to Reject or Suspend and Investigate on the following parties in the following manner:

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Exhibit G

AT&T Opp. to CenturyLink Pet. to Reject and Suspend AT&T Tariff Filings, Transmittal No. 1859, et al. (June 20, 2017)

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

In the Matter of	)	
	)	
Ameritech Operating Companies Tariff F.C.C. No. 2	))	Transmittal No. 1859
	)	
BellSouth Telecommunications, LLC Tariff F.C.C. No. 1	))	Transmittal No. 129
	)	
Nevada Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 300
	)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 552
	)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	))	Transmittal No. 3443

AT&T'S OPPOSITION TO CENTURYLINK'S PETITION TO REJECT AND TO SUSPEND AND INVESTIGATE AT&T TARIFF FILINGS

Pursuant to Section 1.773(b) of the Commission's Rules,[1] Ameritech Operating Companies, BellSouth Telecommunications, LLC, Nevada Bell Telephone Company, Pacific Bell Telephone Company, and Southwestern Bell Telephone Company (collectively, "AT&T") file this reply in opposition to CenturyLink Communications LLC's ("CenturyLink") petitions to reject and to suspend and investigate[2] AT&T's June 7 tariff filings implementing aspects of the Commission's transition of tandem switching charges to bill-and-keep.[3]

CenturyLink's principal contention is that AT&T's tariffs do not properly implement Rule 51.907(g)(2), which requires a certain subset of tandem switching and transport rates to transition

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[1] 47 C.F.R. § 1.773(b).

[2] Petition of CenturyLink Communications, LLC to Reject and to Suspend and Investigate AT&T Tariff Filings (filed June 14, 2017) ("Petition").

[3] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 800-01 (2011) ("*USF/ICC Transformation Order*").

to $0.0007 by July 1, 2017. AT&T's tariff changes in fact fully comply with that rule by adopting that rate for traffic where the Price Cap local exchange carrier owns both the tandem and the end office (referred to in the tariff as "Terminating to Telephone Company's own end office"). CenturyLink argues that the rule also requires AT&T to apply that rate to tandem services where price cap LEC hands the traffic off to an affiliated wireless carrier or CLEC. CenturyLink's argument, however, has been vetted in the industry and before the Commission staff, and as CenturyLink acknowledges (at 5 n.16), AT&T's tariff filing simply follows the Commission's informal guidance. As explained below, the Commission's guidance represents the most reasonable interpretation of the rules, and the Commission should therefore deny the Petition.

CenturyLink's Petition concerns Rule 51.907(g) and its companion, Rule 51.907(h), which governs next year's filing.[4] Those two rules apply to "Price Cap Carriers" that are also "the terminating carrier" – *i.e.*, the carrier that is actually terminating the call to the end user and thus owns the end office switch. From the Commission's perspective in 2011, Price Cap Carriers in this situation presented the simplest and most straightforward scenario for the initial transition to bill-and-keep as the default compensation system, because such carriers have end user customers that take services pursuant to tariffs and from whom they can recover the costs of both tandem and end office switching via the tariffs. Rule 51.907 thus established a gradual transition in which a Price Cap Carrier's switching charges are slowly phased out, beginning with the end office charges and ending, in Years 6 and 7, with such a carrier's tandem charges. Consistent with the notion of bill-and-keep as the default mechanism, such a carrier would be in a position to "bill" its end user

[4] 47 C.F.R. § 51.907(g)-(h); *USF/ICC Transformation Order* ¶ 1312. Rule 51.907(g)(2) (which governs this tariff filing) provides that "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute." 47 C.F.R. § 51.907(g)(2). These transitions also apply to CLECs that benchmark their rates to price cap carriers. *USF/ICC Transformation Order* ¶¶ 801, 807, 866; 47 C.F.R. § 61.26.

customers via tariffs to recover the tandem costs and "keep" that recovery without charging the IXC.[5]

The Commission issued a further notice of proposed rulemaking, however, to establish a separate bill-and-keep transition for all *other* price cap LEC tandem charges, including, *inter alia*, situations in which the price cap LEC performs tandem functions for a CMRS carrier that terminates the call over a wireless network, and that offers services via contracts, not tariffs. In 2011, the Commission reasonably concluded that the transition for tandem charges when the price cap LEC does *not* own the end office switch, and thus has no end user customers, presented very different issues. Indeed, the *FNPRM* specifically noted that commenters had "express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office. . . ." *USF/ICC Transformation Order* ¶ 1312. The Commission explained that Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch," but it "does *not* address the transition in situations where the tandem owner does not own the end office." *Id.* (emphasis added). The Commission thus sought comment on both the transition and "the appropriate end state" for such intermediate tandem switching services. *Id.* ¶¶ 1306-10, 1312-13. Moreover, as the Commission noted, many of those issues are "closely related" to the issue of how to establish the "network edge" for purposes of a bill-and-keep default rule applicable to such

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[5] *Cf.* 47 C.F.R. § 51.713. Another aspect of the Commission's initial, partial transition was its adoption of the Access Recovery Charge (ARC), which is a "transitional recovery mechanism" from certain end users (or the CAF Fund) that helped offset the loss of revenues "reduced as part of this Order." *USF/ICC Transformation Order* ¶ 847. The Commission allowed "incumbent LECs" – either price cap LECs or rate of return LECs – to recover the ARC from specified end users, but not CMRS carriers. *Id.* ¶ 864 n.1668. Although the ARC was never intended to be revenue neutral, the fact that the Commission provided for a partial transitional recovery mechanism for price cap LECs and rate of return LECs, but not CMRS carriers, undercuts the view that Section 51.907(g) or (h) apply when the terminating carrier is a CMRS provider.

tariffed tandem services, another issue on which it sought comment in the *FNPRM*.[6] In 2011, the Commission thus concluded that the rules for how bill-and-keep will work for such intermediate tandem charges, and where the network edge is established, would have a substantial and perhaps far-reaching impact on how those services are purchased and provided, and the Commission was not ready to resolve those issues based on the record it had accumulated at that time.[7]

In light of the discussion of these considerations in the *USF/ICC Transformation Order* and the *FNPRM*, the Commission's informal guidance represents the most reasonable interpretation of Rule 51.907.[8] The phrase "the terminating carrier" in subsections (g) and (h) is necessarily a reference back to the "Price Cap Carrier" – *i.e.*, a Price Cap Carrier must phase out its tandem charges when it is "the terminating carrier" and, as such, owns both the end office and tandem switches.[9] If the "terminating carrier" could be a carrier *other* than the Price Cap Carrier (such as a CMRS carrier), then the rule would already address many of the more difficult

[6] *USF/ICC Transformation Order* ¶ 1310 ("As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport."); *id.* ¶¶ 1315-21 (seeking comment on points of interconnection and the "network edge" in a full bill-and-keep system).

[7] Consistent with the discussion in the *FNPRM*, the *USF/ICC Transformation Order* makes clear that the initial transition applies to CMRS services only insofar as the CMRS carrier itself provides reciprocal compensation, and affects CLEC charges via the pre-existing CLEC benchmark rule, which requires CLECs to conform their own tandem and end office switching charges to their benchmark price cap LEC. *USF/ICC Transformation Order* ¶ 806 ("[a]lthough CMRS providers are subject to mandatory detariffing, these providers are included [in the *USF/ICC Transformation Order* transition] to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here"); *id.* ¶¶ 807-08, 866 ("[a]pplication of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule.").

[8] *See, e.g.*, *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 273 (D.C. Cir. 2009) ("The context is key," and the Commission "[u]nderstandably . . . looked to the context. . . ."); *Bell Atl. Tel. Cos. v. FCC*, 131 F. 3d 1044, 1047 (D.C. Cir. 1997) ("textual analysis is a language game played on a field known as 'context.'"); *Ctr. For Commc'ns Mgmt. Info., EconoBill Corp., and On Line Mktg., Inc. v. AT&T Corp.*, 23 FCC Rcd. 12249, ¶ 11 (2008) ("To ascertain how best to interpret [a Commission rule], we must examine the rule's text, history, purpose, and structure.").

[9] *USF/ICC Transformation Order* ¶ 1312 (Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the *terminating carrier* owns the serving tandem switch," but not "where the tandem owner does not own the end office" (emphasis added)).

intermediate situations about which the Commission sought comment in the *FNPRM*.[10] Indeed, applying the plain-vanilla Rule 51.907 transition to these very different scenarios in which the Price Cap Carrier has no tariffed end user would effectively prejudge the *FNPRM* and impose *de facto* bill-and-keep and network edge rules on such traffic, which could distort competition with no real opportunity for the Commission to consider the possible consequences.[11]

The approach adopted by AT&T also eliminates any ambiguity with respect to the term "affiliate" in the two rules.[12] The rule requires the Price Cap Carrier to phase out its tandem charges when the "terminating carrier or *its* affiliate" – *i.e.*, the terminating carrier's affiliate – owns the tandem. As discussed above, however, the "terminating carrier" can only be a Price Cap Carrier that owns the end office. Accordingly, the term "affiliate" comes into play only when the "*terminating*" price cap carrier that owns the end office has an affiliate that owns the tandem. The *USF/ICC Transformation Order* does not address why the phrase "or its affiliates" was added to the text of the two rules,[13] but it was most likely designed either (1) to prevent a LEC from trying

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[10] Although CenturyLink claims it has the "plain language" reading of the rule, it effectively concedes the rule is ambiguous when it repeatedly claims that the end office owner must be "defined broadly" to include non-Price Cap Carriers like CMRS providers, even though CMRS providers, strictly speaking, do not have "end offices." *See, e.g.*, Petition at 9 ("with 'affiliated' and end office defined broadly"), 10 ("an end office owner (defined broadly – e.g. ILEC, CLEC, CMRS provider)"). Choosing the "broad" understanding of an end office owner, however, has the effect of interfering with, and pre-judging, the *FNPRM* – which provides a powerful argument for choosing the narrower interpretation of limiting the end office owner to a "Price Cap Carrier."

[11] For example, if (as CenturyLink seems to suggest) Rule 51.907(g) or (h) were read to apply to a situation in which a CMRS carrier was the "terminating carrier" and its "affiliate," a Price Cap Carrier, owned the tandem, such a reading could have substantial unintended consequences. Applying Rule 51.907 to this scenario would be destabilizing, because price cap LECs would have no means of recovering tandem costs through a CMRS affiliate's end user customer charges, and fierce price competition from CMRS carriers that do *not* have price cap LEC affiliates, such as T-Mobile and Sprint, would preclude them from doing so in all events. *See, e.g.*, Ryan Knutson and Joshua Jamerson, *Verizon Customers Defect As Competition Ramps Up*, The Wall Street Journal (Apr. 20, 2017), https://www.wsj.com/articles/verizon-for-first-time-loses-core-wireless-customers-1492691308 (reintroduction of unlimited data plans has set off a "bruising price war"). These are precisely the sorts of issues that the Commission must carefully consider and resolve in the *FNPRM*.

[12] *Cf.* Petition at 8-9.

[13] *Cf. USF/ICC Transformation Order* ¶ 801 & Figure 9 (omitting the phrase "or its affiliates"). CenturyLink acknowledges (at 5-6, 10-11) there is a conflict between the *USF/ICC Transformation Order* and the text of the rule, insofar as the *Order* "only discusses the Years 6/7 bill and keep transition as applying to traffic flows handled by tandem and end office facility combinations where the terminating carrier owns the tandem switch" with no mention

to evade the tandem transition by transferring its tandem assets to an affiliate, or (2) to cover situations where a price cap LEC's end user is served by the tandem of a neighboring affiliate. As explained above, however, the Commission cannot reasonably read the rule to treat the Price Cap Carrier as the "affiliate" of a *non*-price-cap carrier that terminates the call to the end user.

Finally, CenturyLink notes (at 7) that the language in AT&T's tariffs applies the $0.0007 rate when the same Price Cap Carrier owns the tandem and end office, whereas the Description and Justification ("D&J") is worded more broadly, suggesting that the rate will apply when the traffic is terminated "to its own or any other Price Cap ILEC End Office owned by the same Holding Company." The discrepancy is immaterial. AT&T does not have any situations in which one of its operating companies would be terminating a call to an end office owned by a different operating company owned by the same holding company. Accordingly, the tariffed language is adequate and complies with the rule. The fact that AT&T inadvertently included broader language in its D&J that encompasses scenarios that are not applicable to AT&T does not constitute grounds for rejecting or suspending the tariff.

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of affiliates. AT&T's reading of the rule, however, *minimizes* that conflict, whereas CenturyLink's more expansive reading of the rule creates a concomitantly broader conflict with the order.

CONCLUSION

For the foregoing reasons, the Commission should allow the tariff changes to take effect as scheduled and reject the Petition to reject or suspend and investigate AT&Ts tariff submissions.

Respectfully submitted,

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Dated: June 20, 2017

Counsel for AT&T

CERTIFICATE OF SERVICE

I, James P. Young, do hereby certify that on this 20th day of June 2017, the foregoing OPPOSITION TO CENTURYLINK'S PETITION TO REJECT AND TO SUSPEND AND INVESTIGATE AT&T TARIFF FILINGS was served on the following parties by e-mail:

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Exhibit H

AT&T's Opp. to Petitions of Level 3 and Sprint Corporation to Reject or to Suspend AT&T Tariff Filings, WC Docket No. 17-65 (June 27, 2017)

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

In the Matter of	)	
	)	
July 1, 2017 Annual Access Charge Tariff Filings	))	WC Docket No. 17-65
	)	
Ameritech Operating Companies Tariff F.C.C. No. 2	))	Transmittal No. 1859
	)	
BellSouth Telecommunications, LLC Tariff F.C.C. No. 1	))	Transmittal No. 129
	)	
Nevada Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 300
	)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 552
	)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	))	Transmittal No. 3443

AT&T'S OPPOSITION TO PETITIONS OF LEVEL 3 AND SPRINT CORPORATION TO REJECT OR TO SUSPEND AND INVESTIGATE AT&T TARIFF FILINGS

Pursuant to Section 1.773(b) of the Commission's Rules,[1] Ameritech Operating Companies, BellSouth Telecommunications, LLC, Nevada Bell Telephone Company, Pacific Bell Telephone Company, and Southwestern Bell Telephone Company (collectively, "AT&T") file this reply in opposition to the petitions of Level 3 Communications, LLC ("Level 3") and Sprint Corporation ("Sprint") to reject and to suspend and investigate[2] AT&T's June 16 tariff filings

[1] 47 C.F.R. § 1.773(b).

[2] Petition of Level 3 to Reject or Suspend and Investigate (filed June 23, 2017) ("Level 3 Petition"); Petition to Reject, or in the Alternative Suspend and Investigate, Of Sprint Corporation (filed June 23, 2017) ("Sprint Petition").

implementing aspects of the Commission's transition of tandem switching charges to bill-and-keep.[3]

Level 3 and Sprint's only contention is that AT&T's tariffs do not properly implement Rule 51.907(g)(2), which requires a certain subset of tandem switching and transport rates to transition to $0.0007 by July 1, 2017. AT&T's tariff changes in fact fully comply with that rule by adopting that rate for traffic where the Price Cap local exchange carrier owns both the tandem and the end office (referred to in the tariff as "Terminating to Telephone Company's own end office"). Level 3 and Sprint argue that the rule also requires AT&T to apply that rate to tandem services where a price cap LEC hands the traffic off to an affiliated wireless carrier or CLEC.

As explained below, both Petitions are untimely, because they challenge aspects of AT&T's tariffs that were established in its June 7, 2017 filing and which have already gone into effect. In all events, Level 3 and Sprint's substantive challenges are unfounded. Their argument has been vetted in the industry and before the Commission staff, and AT&T's tariff filings have followed the Commission's informal guidance. The Commission's guidance represents the most reasonable interpretation of the rules, and the Commission should therefore deny the Petitions.

I. Level 3 and Sprint's Petitions Are Untimely.

Level 3 and Sprint's petitions purport to challenge AT&T's tariff changes as inconsistent with the Rule 51.907(g) access charge transition rules.[4] These substantive challenges are incorrect, as will be explained further below. But even under their theory of the access charge rules, their

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[3] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 800-01 (2011) ("*USF/ICC Transformation Order*").

[4] *See* Level 3 Petition at 2; Sprint Petition at 6.

petitions are untimely as they are challenging a tariff change made in AT&T's June 7 tariff filing. Such a challenge was due on June 14, 2017. The petitions should therefore be dismissed.[5]

AT&T filed revisions to its tariffs on June 7, 2017 in which it explained that it was bifurcating "terminating tandem rate elements to reflect traffic terminating to the Telephone Companies own end office and traffic terminating to non-Telephone Company 3rd party locations based on call recordings."[6] The June 7 tariff was filed on 15 days' notice, giving parties seven (7) days to file a petition to suspend or investigate the tariff under Section 1.773(a)(2)(iii) of the Commission's rules.[7] One party (CenturyLink) did file a timely petition challenging AT&T's June 7 tariff. The Commission allowed the June 7 tariff to go into effect.

On June 16, 2017, AT&T transmitted its 2017 Annual Filing. AT&T revised its tariffs to reduce the tandem charges for traffic terminating to the Telephone Companies' own end office to $0.0007 as appropriate under Rule 51.907(g). AT&T did not change the rates for tandem services terminating to non-Telephone Company Third Party locations.[8]

Level 3 filed a petition to reject or suspend and investigate the tariff on June 23 and has attempted to argue that it could only challenge the June 7 tariff revisions in light of the June 16 tariff filing. That position is untenable for two reasons.

First, Level 3's main justification for the late filing is that the June 16 transmittal is the first time AT&T established specific rates for the classes of traffic described in the June 7

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[5] *See, e.g. United & Central Telephone Cos. Revisions to Tariff F.C.C. No. 1*, 10 FCC Rcd. 1700, ¶ 3, n.3 (1994) (late-filed request for Commission action on a transmittal dismissed as untimely); *AT&T; Revisions to Tariff F.C.C. No. 4*, 5 FCC Rcd. 1093. ¶ 5 (1990) (late filed challenge with no "persuasive explanation for the delay" dismissed as untimely filed).

[6] *See, e.g.,* Ameritech Operating Companies Description and Justification, Transmittal No. 1859, at 1 (June 7, 2017).

[7] 47 C.F.R. § 1.773(a)(2)(iii).

[8] *See, e.g.,* Ameritech Operating Companies (Ameritech), 2017 Annual Filing, Description and Justification, at 34 (June 16, 2017).

transmittals.[9] That is not true. Level 3's challenge is focused on the rates for tandem services terminating to non-Telephone Company Third Party locations. AT&T established the rates for those services in the June 7 filing; it did not *change* them in the June 16 filing. The Section 204 tariff filing process and the Commission's rules provide only for challenges to a "new or revised tariff filing."[10] The rates Level 3 is challenging were established in the June 7 filing and have already gone into effect. There are no "new" or "revised" tariff provisions with respect to tandem charges terminating to Third Party locations to "reject" or "suspend."[11]

Second, despite Level 3's claim that it was "only possible to determine whether AT&T's rate restructuring complies" by reviewing the June 16 transmittal,[12] that is also not true, given that CenturyLink did in fact grasp the significance of AT&T's filing and challenge it as an alleged violation of Rule 51.907(g).[13] Indeed, CenturyLink challenged AT&T's June 7 transmittal on exactly the same grounds that Level 3 is challenging AT&T's June 16 transmittal. The Commission should dismiss Level 3's Petition as untimely.

Sprint's Petition is not only untimely for the same reasons, it was also not properly served. Section 1.773(a)(4) requires that "[p]etitions seeking investigation, suspension, or rejection of a new or revised tariff made on 15 days or less notice shall be served either personally or via facsimile on the filing carrier." *See* 47 C.F.R. § 1.773(a)(4). AT&T did not receive service copies by either means, and Sprint's petition is subject to dismissal on this ground as well.

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[9] Level 3 Petition at 4-5.

[10] *See* 47 U.S.C. § 204(a)(1) & (3); 47 C.F.R. 1.773(a)(1).

[11] Level 3 of course agrees with the tariff revisions in AT&T's *current* filing, which reduce the tandem rates terminating to the Telephone Companies' own End Office to $0.0007.

[12] Level 3 Petition at 5.

[13] *See* Petition of CenturyLink Communications, LLC to Reject and to Suspend and Investigate AT&T Tariff Filings (filed June 14, 2017) ("CenturyLink Petition"). AT&T explained in its June 7 filing that tandem traffic terminating to the Telephone Company's own end office would transition to $0.0007 in July, as required by Section 51.907(g)(2) of the Commission's rules, whereas traffic terminating to non-Telephone Company 3rd party locations would not.

II. AT&T's Tariffs Comply With Rule 51.907(g).

Level 3 and Sprint contend that AT&T's tariff violates Rule 51.907(g)(2) because it assesses the $0.0007 rate only for tandem services that are terminated via a price cap carrier's end office.[14] Both parties misread the rule, and AT&T's tariff is consistent with the Commission Staff's informal guidance.

As AT&T has previously explained, Rule 51.907(g) applies to "Price Cap Carriers" that are also "the terminating carrier" – *i.e.*, the carrier that is actually terminating the call to the end user and thus owns the end office switch.[15] In context, the phrase "the terminating carrier" in subsection (g) makes sense only if it is a reference back to the "Price Cap Carrier." In other words, the rule requires a Price Cap Carrier to phase out its tandem charges when it is "the terminating carrier" and, as such, owns the end office.[16]

Level 3's argument is based entirely on statutory and other definitions of "affiliate," *see* Level 3 Petition at 5-8, but this misses the point.[17] The issue is not the meaning of "affiliate," but who the rule deems to be the "terminating carrier." The rule requires the Price Cap Carrier to phase out its tandem charges when the "terminating carrier or *its* affiliate" – *i.e.*, the terminating carrier's affiliate – owns the tandem. As AT&T has previously explained, if the "terminating

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[14] Level 3 Petition at 5-12; Sprint Petition at 2-3.

[15] *See* AT&T's Opposition to CenturyLink's Petition to Reject and to Suspend and Investigate AT&T's Tariff Filings, at 4-5 (filed June 20, 2017) (attached); *see also Connect America Fund*, WC Docket No. 10-90, *Comments of AT&T In Opposition to CenturyLink Petition for Stay*, at 11-15 (filed May 4, 2017). Rule 51.907(g)(2) (which governs this tariff filing) provides that "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute." 47 C.F.R. § 51.907(g)(2).

[16] *USF/ICC Transformation Order* ¶ 1312 (Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the *terminating carrier* owns the serving tandem switch," but not "where the tandem owner does not own the end office" (emphasis added)).

[17] Level 3 repeatedly misstates AT&T's position as "carving out" exceptions to the definition of "affiliate" that are not in the statute. *See, e.g.*, Level 3 Petition at 6, 7. AT&T's (and Commission Staff's) interpretation of the rule does not limit who can be an "affiliate," but they must be an affiliate of a price cap LEC terminating carrier.

carrier" could be a carrier *other* than the Price Cap Carrier (such as a CMRS carrier), then the rule would already address – and unreasonably pre-judge – many of the difficult issues on which the Commission separately sought comment in the *USF/ICC Transformation Order*'s *FNPRM*.[18] The better reading of the rule is that the term "affiliate" comes into play only when the "*terminating*" Price Cap Carrier that owns the end office has an affiliate that owns the tandem.

In its Petition challenging the June 7 tariff, CenturyLink effectively conceded that this aspect of the rule – how to interpret "terminating carrier" – is ambiguous. Indeed, CenturyLink repeatedly argued that the end office owner should be "defined broadly" to include non-Price Cap Carriers like CMRS providers. *See, e.g.*, CenturyLink Petition at 9 ("with 'affiliated' and end office defined broadly"), 10 ("an end office owner (defined broadly – e.g. ILEC, CLEC, CMRS provider)"). Choosing this "broader" interpretation, however, would have the effect of interfering with, and pre-judging, the *FNPRM*. The narrower interpretation of limiting the end office owner to a "Price Cap Carrier" is thus more consistent with the *USF/ICC Transformation Order*, and neither Level 3 nor Sprint attempts to answer this point.[19]

[18] Indeed, applying the plain-vanilla Rule 51.907 transition to these very different scenarios in which the Price Cap Carrier has no tariffed end user would effectively prejudge the *FNPRM* and impose *de facto* bill-and-keep and network edge rules on such traffic, which could distort competition with no real opportunity for the Commission to consider the possible consequences. For example, if Rule 51.907(g) were read to apply to a situation in which a CMRS carrier was the "terminating carrier" and its "affiliate," a Price Cap Carrier, owned the tandem, such a reading could have substantial unintended consequences. Applying Rule 51.907 to this scenario would be destabilizing, because price cap LECs would have no means of recovering tandem costs through a CMRS affiliate's end user customer charges, and fierce price competition from CMRS carriers that do *not* have price cap LEC affiliates, such as T-Mobile and Sprint, would preclude them from doing so in all events. *See, e.g.*, Ryan Knutson and Joshua Jamerson, *Verizon Customers Defect As Competition Ramps Up*, The Wall Street Journal (Apr. 20, 2017), https://www.wsj.com/articles/verizon-for-first-time-loses-core-wireless-customers-1492691308 (reintroduction of unlimited data plans has set off a "bruising price war"). These are precisely the sorts of issues that the Commission must carefully consider and resolve in the *FNPRM*.

[19] Level 3 does claim that its reading of the rule is "clear" and, therefore, the *FNPRM* does not actually seek comment on the traffic at issue. Level 3 Petition at 11-12. Level 3 has it backwards. The rule is at best ambiguous, and the fact that the Commission clearly sought comment on how to deal with the traffic at issue in the *FNPRM* should be dispositive in resolving whatever ambiguity exists in the rule. *USF/ICC Transformation Order* ¶¶ 1306-10, 1312-13 (Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch," but it "does not address the transition in situations where the

Nor does Level 3's interpretation of the rule further the policy objectives of the *USF/ICC Transformation Order*. *Cf.* Level 3 Petition at 7-8. To be sure, the Commission established an overall goal of transitioning to bill-and-keep. In the *USF/ICC Transformation Order*, however, the Commission was not yet prepared to initiate that transition for all types of traffic, and it sought comment on more difficult scenarios (like the traffic at issue here) in the *FNPRM*. As AT&T has previously noted, the ultimate rules governing these more difficult cases will depend heavily on a variety of policy choices that the Commission has not yet made, including where to set the network edge.[20] The proper course for resolving these lingering issues, as AT&T has repeatedly urged, is to complete the *FNPRM* expeditiously – not to misconstrue and misapply Rule 51.907(g).[21]

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tandem owner does not own the end office," and the Commission thus sought comment on both the transition and "the appropriate end state" for such intermediate tandem switching services).

[20] *USF/ICC Transformation Order* ¶ 1310 ("As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport."); *id.* ¶¶ 1315-21 (seeking comment on points of interconnection and the "network edge" in a full bill-and-keep system).

[21] *Connect America Fund*, WC Docket No. 10-90, *Comments of AT&T In Opposition to CenturyLink Petition for Stay*, at 14, n.14; AT&T's Opposition to CenturyLink's Petition to Reject and to Suspend and Investigate AT&T's Tariff Filings, at 5, n.11; *see also* Petition of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c), at 3, WC Docket No. 13-363 (filed September 30, 2016).

CONCLUSION

For the foregoing reasons, the Commission should allow the tariff changes to take effect as scheduled and reject the Petitions to reject or suspend and investigate AT&Ts tariff submissions.

Respectfully submitted,

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June 27, 2017

CERTIFICATE OF SERVICE

I, James P. Young, do hereby certify that on this 27th day of June 2017, the foregoing OPPOSITION TO PETITIONS OF LEVEL 3 AND SPRINT CORPORATION TO REJECT OR TO SUSPEND AND INVESTIGATE AT&T TARIFF FILINGS was served on the following parties by e-mail:

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ATTACHMENT

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

In the Matter of	)	
	)	
Ameritech Operating Companies Tariff F.C.C. No. 2	))	Transmittal No. 1859
	)	
BellSouth Telecommunications, LLC Tariff F.C.C. No. 1	))	Transmittal No. 129
	)	
Nevada Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 300
	)	
Pacific Bell Telephone Company Tariff F.C.C. No. 1	))	Transmittal No. 552
	)	
Southwestern Bell Telephone Company Tariff F.C.C. No. 73	))	Transmittal No. 3443

AT&T'S OPPOSITION TO CENTURYLINK'S PETITION TO REJECT AND TO SUSPEND AND INVESTIGATE AT&T TARIFF FILINGS

Pursuant to Section 1.773(b) of the Commission's Rules,[1] Ameritech Operating Companies, BellSouth Telecommunications, LLC, Nevada Bell Telephone Company, Pacific Bell Telephone Company, and Southwestern Bell Telephone Company (collectively, "AT&T") file this reply in opposition to CenturyLink Communications LLC's ("CenturyLink") petitions to reject and to suspend and investigate[2] AT&T's June 7 tariff filings implementing aspects of the Commission's transition of tandem switching charges to bill-and-keep.[3]

CenturyLink's principal contention is that AT&T's tariffs do not properly implement Rule 51.907(g)(2), which requires a certain subset of tandem switching and transport rates to transition

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[1] 47 C.F.R. § 1.773(b).

[2] Petition of CenturyLink Communications, LLC to Reject and to Suspend and Investigate AT&T Tariff Filings (filed June 14, 2017) ("Petition").

[3] Report and Order and Further Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 17663, ¶¶ 800-01 (2011) ("*USF/ICC Transformation Order*").

to $0.0007 by July 1, 2017. AT&T's tariff changes in fact fully comply with that rule by adopting that rate for traffic where the Price Cap local exchange carrier owns both the tandem and the end office (referred to in the tariff as "Terminating to Telephone Company's own end office"). CenturyLink argues that the rule also requires AT&T to apply that rate to tandem services where price cap LEC hands the traffic off to an affiliated wireless carrier or CLEC. CenturyLink's argument, however, has been vetted in the industry and before the Commission staff, and as CenturyLink acknowledges (at 5 n.16), AT&T's tariff filing simply follows the Commission's informal guidance. As explained below, the Commission's guidance represents the most reasonable interpretation of the rules, and the Commission should therefore deny the Petition.

CenturyLink's Petition concerns Rule 51.907(g) and its companion, Rule 51.907(h), which governs next year's filing.[4] Those two rules apply to "Price Cap Carriers" that are also "the terminating carrier" – *i.e.*, the carrier that is actually terminating the call to the end user and thus owns the end office switch. From the Commission's perspective in 2011, Price Cap Carriers in this situation presented the simplest and most straightforward scenario for the initial transition to bill-and-keep as the default compensation system, because such carriers have end user customers that take services pursuant to tariffs and from whom they can recover the costs of both tandem and end office switching via the tariffs. Rule 51.907 thus established a gradual transition in which a Price Cap Carrier's switching charges are slowly phased out, beginning with the end office charges and ending, in Years 6 and 7, with such a carrier's tandem charges. Consistent with the notion of bill-and-keep as the default mechanism, such a carrier would be in a position to "bill" its end user

[4] 47 C.F.R. § 51.907(g)-(h); *USF/ICC Transformation Order* ¶ 1312. Rule 51.907(g)(2) (which governs this tariff filing) provides that "[e]ach Price Cap Carrier shall establish, for interstate and intrastate terminating traffic traversing a tandem switch that the terminating carrier or its affiliates owns, Tandem-Switched Transport Access Service rates no greater than $0.0007 per minute." 47 C.F.R. § 51.907(g)(2). These transitions also apply to CLECs that benchmark their rates to price cap carriers. *USF/ICC Transformation Order* ¶¶ 801, 807, 866; 47 C.F.R. § 61.26.

customers via tariffs to recover the tandem costs and "keep" that recovery without charging the IXC.[5]

The Commission issued a further notice of proposed rulemaking, however, to establish a separate bill-and-keep transition for all *other* price cap LEC tandem charges, including, *inter alia*, situations in which the price cap LEC performs tandem functions for a CMRS carrier that terminates the call over a wireless network, and that offers services via contracts, not tariffs. In 2011, the Commission reasonably concluded that the transition for tandem charges when the price cap LEC does *not* own the end office switch, and thus has no end user customers, presented very different issues. Indeed, the *FNPRM* specifically noted that commenters had "express[ed] concern with the end state for tandem switching and transport for price cap carriers when the tandem owner does not own the end office. . . ." *USF/ICC Transformation Order* ¶ 1312. The Commission explained that Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the terminating carrier owns the serving tandem switch," but it "does *not* address the transition in situations where the tandem owner does not own the end office." *Id.* (emphasis added). The Commission thus sought comment on both the transition and "the appropriate end state" for such intermediate tandem switching services. *Id.* ¶¶ 1306-10, 1312-13. Moreover, as the Commission noted, many of those issues are "closely related" to the issue of how to establish the "network edge" for purposes of a bill-and-keep default rule applicable to such

[5] *Cf.* 47 C.F.R. § 51.713. Another aspect of the Commission's initial, partial transition was its adoption of the Access Recovery Charge (ARC), which is a "transitional recovery mechanism" from certain end users (or the CAF Fund) that helped offset the loss of revenues "reduced as part of this Order." *USF/ICC Transformation Order* ¶ 847. The Commission allowed "incumbent LECs" – either price cap LECs or rate of return LECs – to recover the ARC from specified end users, but not CMRS carriers. *Id.* ¶ 864 n.1668. Although the ARC was never intended to be revenue neutral, the fact that the Commission provided for a partial transitional recovery mechanism for price cap LECs and rate of return LECs, but not CMRS carriers, undercuts the view that Section 51.907(g) or (h) apply when the terminating carrier is a CMRS provider.

tariffed tandem services, another issue on which it sought comment in the *FNPRM*.[6] In 2011, the Commission thus concluded that the rules for how bill-and-keep will work for such intermediate tandem charges, and where the network edge is established, would have a substantial and perhaps far-reaching impact on how those services are purchased and provided, and the Commission was not ready to resolve those issues based on the record it had accumulated at that time.[7]

In light of the discussion of these considerations in the *USF/ICC Transformation Order* and the *FNPRM*, the Commission's informal guidance represents the most reasonable interpretation of Rule 51.907.[8] The phrase "the terminating carrier" in subsections (g) and (h) is necessarily a reference back to the "Price Cap Carrier" – *i.e.*, a Price Cap Carrier must phase out its tandem charges when it is "the terminating carrier" and, as such, owns both the end office and tandem switches.[9] If the "terminating carrier" could be a carrier *other* than the Price Cap Carrier (such as a CMRS carrier), then the rule would already address many of the more difficult

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[6] *USF/ICC Transformation Order* ¶ 1310 ("As we move to a new intercarrier compensation system governed by a section 251(b)(5) bill-and-keep methodology, we invite parties to comment on the existing and future payment and market structures for dedicated transport, tandem switching, and tandem switched transport."); *id.* ¶¶ 1315-21 (seeking comment on points of interconnection and the "network edge" in a full bill-and-keep system).

[7] Consistent with the discussion in the *FNPRM*, the *USF/ICC Transformation Order* makes clear that the initial transition applies to CMRS services only insofar as the CMRS carrier itself provides reciprocal compensation, and affects CLEC charges via the pre-existing CLEC benchmark rule, which requires CLECs to conform their own tandem and end office switching charges to their benchmark price cap LEC. *USF/ICC Transformation Order* ¶ 806 ("[a]lthough CMRS providers are subject to mandatory detariffing, these providers are included [in the *USF/ICC Transformation Order* transition] to the extent their reciprocal compensation rates are inconsistent with the reforms we adopt here"); *id.* ¶¶ 807-08, 866 ("[a]pplication of our access reforms will generally apply to competitive LECs via the CLEC benchmarking rule.").

[8] *See, e.g.*, *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 273 (D.C. Cir. 2009) ("The context is key," and the Commission "[u]nderstandably . . . looked to the context. . . ."); *Bell Atl. Tel. Cos. v. FCC*, 131 F. 3d 1044, 1047 (D.C. Cir. 1997) ("textual analysis is a language game played on a field known as 'context.'"); *Ctr. For Commc'ns Mgmt. Info., EconoBill Corp., and On Line Mktg., Inc. v. AT&T Corp.*, 23 FCC Rcd. 12249, ¶ 11 (2008) ("To ascertain how best to interpret [a Commission rule], we must examine the rule's text, history, purpose, and structure.").

[9] *USF/ICC Transformation Order* ¶ 1312 (Rule 51.907 "includes the transition for transport and termination within the tandem serving area where the *terminating carrier* owns the serving tandem switch," but not "where the tandem owner does not own the end office" (emphasis added)).

intermediate situations about which the Commission sought comment in the *FNPRM*.[10] Indeed, applying the plain-vanilla Rule 51.907 transition to these very different scenarios in which the Price Cap Carrier has no tariffed end user would effectively prejudge the *FNPRM* and impose *de facto* bill-and-keep and network edge rules on such traffic, which could distort competition with no real opportunity for the Commission to consider the possible consequences.[11]

The approach adopted by AT&T also eliminates any ambiguity with respect to the term "affiliate" in the two rules.[12] The rule requires the Price Cap Carrier to phase out its tandem charges when the "terminating carrier or *its* affiliate" – *i.e.*, the terminating carrier's affiliate – owns the tandem. As discussed above, however, the "terminating carrier" can only be a Price Cap Carrier that owns the end office. Accordingly, the term "affiliate" comes into play only when the "*terminating*" price cap carrier that owns the end office has an affiliate that owns the tandem. The *USF/ICC Transformation Order* does not address why the phrase "or its affiliates" was added to the text of the two rules,[13] but it was most likely designed either (1) to prevent a LEC from trying

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[10] Although CenturyLink claims it has the "plain language" reading of the rule, it effectively concedes the rule is ambiguous when it repeatedly claims that the end office owner must be "defined broadly" to include non-Price Cap Carriers like CMRS providers, even though CMRS providers, strictly speaking, do not have "end offices." *See, e.g.*, Petition at 9 ("with 'affiliated' and end office defined broadly"), 10 ("an end office owner (defined broadly – e.g. ILEC, CLEC, CMRS provider)"). Choosing the "broad" understanding of an end office owner, however, has the effect of interfering with, and pre-judging, the *FNPRM* – which provides a powerful argument for choosing the narrower interpretation of limiting the end office owner to a "Price Cap Carrier."

[11] For example, if (as CenturyLink seems to suggest) Rule 51.907(g) or (h) were read to apply to a situation in which a CMRS carrier was the "terminating carrier" and its "affiliate," a Price Cap Carrier, owned the tandem, such a reading could have substantial unintended consequences. Applying Rule 51.907 to this scenario would be destabilizing, because price cap LECs would have no means of recovering tandem costs through a CMRS affiliate's end user customer charges, and fierce price competition from CMRS carriers that do *not* have price cap LEC affiliates, such as T-Mobile and Sprint, would preclude them from doing so in all events. *See, e.g.,* Ryan Knutson and Joshua Jamerson, *Verizon Customers Defect As Competition Ramps Up*, The Wall Street Journal (Apr. 20, 2017), https://www.wsj.com/articles/verizon-for-first-time-loses-core-wireless-customers-1492691308 (reintroduction of unlimited data plans has set off a "bruising price war"). These are precisely the sorts of issues that the Commission must carefully consider and resolve in the *FNPRM*.

[12] *Cf.* Petition at 8-9.

[13] *Cf. USF/ICC Transformation Order* ¶ 801 & Figure 9 (omitting the phrase "or its affiliates"). CenturyLink acknowledges (at 5-6, 10-11) there is a conflict between the *USF/ICC Transformation Order* and the text of the rule, insofar as the *Order* "only discusses the Years 6/7 bill and keep transition as applying to traffic flows handled by tandem and end office facility combinations where the terminating carrier owns the tandem switch" with no mention

to evade the tandem transition by transferring its tandem assets to an affiliate, or (2) to cover situations where a price cap LEC's end user is served by the tandem of a neighboring affiliate. As explained above, however, the Commission cannot reasonably read the rule to treat the Price Cap Carrier as the "affiliate" of a *non*-price-cap carrier that terminates the call to the end user.

Finally, CenturyLink notes (at 7) that the language in AT&T's tariffs applies the $0.0007 rate when the same Price Cap Carrier owns the tandem and end office, whereas the Description and Justification ("D&J") is worded more broadly, suggesting that the rate will apply when the traffic is terminated "to its own or any other Price Cap ILEC End Office owned by the same Holding Company." The discrepancy is immaterial. AT&T does not have any situations in which one of its operating companies would be terminating a call to an end office owned by a different operating company owned by the same holding company. Accordingly, the tariffed language is adequate and complies with the rule. The fact that AT&T inadvertently included broader language in its D&J that encompasses scenarios that are not applicable to AT&T does not constitute grounds for rejecting or suspending the tariff.

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of affiliates. AT&T's reading of the rule, however, *minimizes* that conflict, whereas CenturyLink's more expansive reading of the rule creates a concomitantly broader conflict with the order.

CONCLUSION

For the foregoing reasons, the Commission should allow the tariff changes to take effect as scheduled and reject the Petition to reject or suspend and investigate AT&Ts tariff submissions.

Respectfully submitted,

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Dated: June 20, 2017

Counsel for AT&T

CERTIFICATE OF SERVICE

I, James P. Young, do hereby certify that on this 20th day of June 2017, the foregoing OPPOSITION TO CENTURYLINK'S PETITION TO REJECT AND TO SUSPEND AND INVESTIGATE AT&T TARIFF FILINGS was served on the following parties by e-mail:

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