

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

In the Matter of)
)
Establishing Just and Reasonable Rates for) WC Docket No. 07-135
Local Exchange Carriers)

TO: The Commission

**COMMENTS OF
THE WESTERN TELECOMMUNICATIONS ALLIANCE**

**WESTERN TELECOMMUNICATIONS
ALLIANCE**

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SUMMARY

The Western Telecommunications Alliance (“WTA”) defines “traffic pumping” as the discretionary routing of access traffic by a traffic aggregator to a particular incumbent local exchange carrier (“ILEC”) for the sole or primary purpose of increasing access revenues, in return for payment of a portion of such increased access revenues by the ILEC to the aggregator that directed the routing of the traffic.

WTA opposes traffic pumping, and believes that it should be declared to be an unjust and unreasonable practice under Section 201(b). However, WTA also believes that recent alleged cases of traffic pumping were very limited in scope, and that such recent practices have already been addressed and terminated by a combination of Commission, state commission and court actions, plus the monitoring, dispute and nonpayment tactics of some interexchange carriers (“IXCs”).

If the Commission believes that further action is needed to deter future traffic pumping, it can efficiently and effectively attack the factors enabling and encouraging traffic pumping by: (1) limiting the ability of ILECs that have utilized Section 61.39 tariffs to engage in traffic pumping to escape the consequences of the associated spike in access minutes by re-entering the National Exchange Carrier Association (“NECA”) tariff; and (2) restricting or prohibiting the sharing with traffic aggregators of the incremental access revenues generated by traffic pumping.

The Commission does not need to penalize the vast majority of ILECs that have not engaged in traffic pumping by overhauling its Section 61.39 tariff requirements, forbearing from the “streamlining” and “deemed lawful” provisions of the 1996 Act, or undermining the benefits of rate of return regulation.

Finally, the Commission should not focus solely or primarily on traffic pumping, but rather should vigorously address and eliminate all access “gaming” behavior. In particular, the Commission should act expeditiously on the proposals pending since 2006 in CC Docket No. 01-92 to deal with the far larger problem of the “phantom traffic” practices employed by wireless, toll and other carriers to evade an estimated annual \$2.0 billion of access charges for the termination of their traffic on ILEC networks. The Commission should also investigate and terminate the recurring schemes of IXCs to avoid and evade access charges, such as manipulation and falsification of “percentage of interstate use (“PIU”)” estimates, as well as the continuing variety of IXC ploys to disguise the nature or routing of their access traffic. Finally, the Commission should confirm that interconnected Voice over Internet Protocol (“VoIP”) providers are required to pay access charges for their use of ILEC networks to terminate their traffic, and recognize that the growing attempts by VoIP providers to evade and avoid access charges are causing increasingly serious competitive and investment distortions.

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The Western Telecommunications Alliance (“WTA”) submits its comments in response to the Notice of Proposed Rulemaking (*Establishing Just and Reasonable Rates for Local Exchange Carriers*), WC Docket No. 07-135, FCC 07-176, released October 2, 2007.

WTA opposes the actions of the small group of carriers and traffic aggregators that have engaged in traffic pumping practices during the past several years. By taking advantage of a regulatory loophole that allowed the carriers to jump back and forth between their own Section 61.39 tariffs and the National Exchange Carrier Association (“NECA”) tariffs, this small group has generated short-term windfall profits. These practices have called into question the integrity of the critical access charge system, as well as the reputations of the vast majority of rural incumbent local exchange carriers (“ILECs”) that have not engaged in traffic pumping.

WTA believes that “traffic pumping” – which WTA defines as the discretionary routing of access traffic by a traffic aggregator to a particular ILEC for the sole or primary purpose of increasing access revenues, in return for payment of a portion of such increased access revenues by the ILEC to the aggregator that directed the routing of the traffic – should be declared an unjust and unreasonable practice under Section 201(b) of the Communications Act. However, WTA also believes that all or virtually all recent traffic pumping activities have been terminated

already as a result of interexchange carrier (“IXC”) lawsuits, complaints and refusals to pay significantly increased access bills; as well as Commission and state commission investigations and actions. To the extent, if any, that traffic pumping remains an actual or potential problem, the Commission can and should take efficient and effective action to eliminate it: (1) by limiting the ability of ILECs that have utilized Section 61.39 tariffs to engage in traffic pumping to re-enter the NECA tariffs; and (2) by restricting or prohibiting the sharing with traffic aggregators of the increased access revenues generated by traffic pumping. By going straight to the core of the problem, these two changes *per se* are more than sufficient to preclude any recurrence of recent traffic pumping practices. If further regulatory action is ever needed, WTA notes that the existing and general enforcement powers of Sections 201, 204, 205 and 208 of the Act can be readily adapted to address any new traffic pumping permutations that may be devised in the future.

WTA urges the Commission not to punish the entire rural telephone industry and its customers for the practices of a handful of companies. Future traffic pumping can be prevented or stopped without destroying the Section 61.39 tariff option by making it overly complicated and expensive for small carriers. Likewise, the de-regulatory streamlining and “deemed lawful” provisions of Section 204(a)(3) do not have to be written out of the Communications Act via misapplication of the forbearance power in order to protect against future traffic pumping. Finally, rate of return regulation has brought (and will continue to bring) quality, affordable and reasonably comparable facilities and services to Rural America, and need not be undermined to protect against traffic pumping.

WTA believes that traffic pumping will ultimately comprise a brief blip in the road of an otherwise fair and balanced implementation of the interstate access charge system by ILECs, and

asks the Commission to take comparably prompt and vigorous action against the far more egregious, extensive and continuing “gaming” of that system by other carriers and service providers. In particular, the dollar impacts of traffic pumping are dwarfed by the estimated \$2.0 billion per year of deliberately unidentified or misidentified “phantom traffic” dumped by wireless, toll and other carriers upon rural ILECs for termination without payment of any compensation. The Commission needs to act upon the interim and/or long term proposals of the Missoula Plan to curtail “phantom traffic” that have been pending before it in CC Docket No. 01-92 since 2006. In addition, the Commission should take vigorous action to stop and deter the various ploys that have been used by IXC’s and others to evade or avoid applicable interstate and intrastate access charges (including overestimation of “percentage of interstate use (“PIU”),” and various “IP-in-the-middle,” credit card and Canadian routing schemes).

Finally, the Commission must recognize that substantial and increasing amounts of Voice over Internet Protocol (“VoIP”) calls are being terminated without compensation on the public switched telecommunications network (“PSTN”). Until the Commission confirms that interconnected VoIP service providers are required to pay the same access charges as the toll carriers against which they compete, both long distance competition and transport/terminating network investment will become more and more distorted.

I

The Western Telecommunications Alliance

The Western Telecommunications Alliance is a trade association that represents approximately 250 rural telephone companies operating west of the Mississippi River.

WTA members are generally small ILECs that serve sparsely populated rural areas. Most WTA members serve fewer than 3,000 access lines overall and fewer than 500 access lines per exchange.

WTA members operate pursuant to rate of return regulation. Virtually all are Subset 3 carriers that serve 50,000 or fewer access lines per study area, and that are consequently eligible to file their own Section 61.39 tariffs. However, the substantial majority of WTA members are issuing carriers in the NECA tariffs and participants in NECA's traffic sensitive pool.

Rate of return regulation has enabled WTA members to make the reasonable and prudent investments in the essential telecommunications infrastructure necessary to bring quality and reasonably urban-comparable services to their rural customers at affordable rates. They have been in the forefront of upgrading their networks to employ digital switches and soft switches, to implement Signaling System 7, to install fiber optic cable and digital subscriber line capabilities, to bury fiber and cable to limit weather damage and outages, to provide local or centralized equal access, to offer custom calling options, to comply with Emergency 911 and Communications Assistance for Law Enforcement responsibilities, and to enable access to the Internet and information services. While a great deal of investment still has to be made to bring greater bandwidths and higher speeds to their rural service areas as broadband demands increase, WTA members have an excellent record of providing existing advanced telecommunications and information services to significant portions of their rural customers, and remain the entities most likely to provide, expand and upgrade such advanced services in both the short and long run.

II

Regulatory Principles to Limit All Access “Gaming” Schemes

When addressing any and all alleged attempts to “game” the access charge system, the Commission should employ basic principles of: (1) fairness and equity; (2) maximum feasible utilization of networks and services; and (3) efficient and effective targeted regulation.

Unless and until it is replaced by a new or modified intercarrier compensation mechanism, the existing access charge system must operate fairly and equitably for all providers and users of access facilities and services. ILECs that invest in, operate, upgrade and maintain expensive “last mile” networks (in the case of many rural ILECs, “last 10-to-50 mile” networks) must charge and collect just and reasonable compensation for the use of such networks. All service providers that use the “last mile” networks of ILECs must identify their traffic accurately and pay lawful charges for its carriage by the ILEC networks. Significant departures in any direction from these standards have substantial financial and equitable impacts, and cause the distortion of both “last mile” network investment incentives and interexchange competition.

Both carriers and customers should be encouraged to develop new telecommunications and information services and to maximize the use of telecommunications networks. The opening of a new factory or store or call center in a rural community not only may result in a substantial jump in access minutes, but also constitutes a major advance in the life and economic development of the area that should be fostered by the Commission and other agencies. Rural ILECs are often instrumental in bringing new businesses and organizations to their communities, as well as new and advanced telecommunications and information services. They should not be penalized for their efforts by being forced into expensive tariff reviews, investigations and rate cases to defend the associated access minute increases. Rather, Commission regulation and

enforcement procedures must distinguish clearly between legitimate economic, demographic and service changes that result in access minute increases on the one hand, and artificial contrivances for the discretionary routing of amorphous access minutes to particular exchanges on the other.

Finally, regulation should be minimal and carefully targeted so as to stop or limit a particular “gaming” activity without imposing extensive and expensive regulation upon hundreds or thousands of innocent carriers and/or customers throughout the industry. Effective and efficient regulation allows regulators, carriers and customers to obtain the maximum benefit from their resources, and prevents the majority from being punished or over-regulated due to the practices of a few.

III

The Current Extent of the Traffic Pumping Problem

Whereas reasonable people can debate whether the traffic pumping practices of the past several years constituted a significant problem or an overly publicized aberration, WTA believes that most or all of such practices have already been terminated and are very unlikely to recur.

First, WTA notes that at least 80-to-90 percent of rural ILECs have been issuing carriers in the NECA tariffs and participants in the NECA pools since they were established in the mid-1980s, and are likely to remain so indefinitely. The NECA pooling process requires cost companies to remit to the pools all collected interstate access revenues in excess of their reported expenses, investment and taxes, and therefore eliminates any financial benefit or incentive for an individual cost company to generate artificially high access minutes and revenues. The NECA pooling process likewise requires average schedule companies to remit all collected interstate revenues in excess of their average schedule settlements, and employs average schedule formulas

that further eliminate traffic pumping incentives by reducing per-unit settlements as access minutes increase. WTA will leave it to NECA to describe in more detail its tariffs and pooling processes and their impact upon traffic pumping incentives. However, WTA can clearly state that it has seen no allegations or evidence that any carriers have engaged in traffic pumping practices while they were in the NECA traffic sensitive tariff and pool.

Second, WTA is aware of no allegations or evidence that ILECs issuing their own Section 61.38 tariffs have engaged in traffic pumping practices. The Section 61.38 requirements to furnish substantial cost and demand support (including projected and historical costs and projected and historical access minutes), plus the associated requirements to file FCC Form 492 Rate of Return Reports, make it very difficult for the primarily mid-sized ILECs filing Section 61.38 tariffs to implement, sustain or benefit from traffic pumping practices.

Finally, the only ILECs alleged to have participated in traffic pumping practices are some (and WTA emphasizes that the word is “some” rather than “all” or “most”) ILECs that were operating pursuant to their own Section 61.39 tariffs for traffic sensitive interstate access services. The Commission’s recently concluded investigation of the predominantly Section 61.39 tariffs for the 2007-2009 period encompassed only 10 tariffs and only 41 issuing carriers, at least some of which investigated carriers have never engaged or intended to engage in traffic pumping practices. Order (*Investigation of Certain 2007 Annual Access Tariffs*), WC Docket No. 07-184 and WCB/Pricing No. 07-10, FCC 07-210, released November 30, 2007. Hence, the overall scope of the potential traffic pumping problem does not appear to be large at this time. Moreover, whereas WTA believes that there are far more effective and efficient anti-traffic pumping measures than the monitoring and mid-course rate revision conditions imposed in the

Order, the Commission's actions therein will preclude the ILECs that are currently operating pursuant to Section 61.39 tariffs from engaging in traffic pumping during the 2007-2009 period.

WTA recognizes that some Section 61.39 carriers that may have engaged in traffic pumping during the 2005-2007 period may have re-entered the NECA tariffs and pools as of July 1, 2007. However, prior to that time, actual and alleged traffic pumping practices had come under vigorous and effective attack via federal and state lawsuits, via complaints to the Commission and state commissions, and via IXC monitoring, disputation and refusal to pay access bills containing substantial increases in access minutes. The success of these suppression tactics, plus unfavorable media attention, will further deter traffic pumping during 2007-2009 and subsequent periods.

Hence, whereas some may argue regarding the legal status and extent of traffic pumping during recent years, it is very clear at this time that the Commission and others have already succeeded in eliminating the practice.

IV

Regulatory Changes That Will Prevent Future Traffic Pumping

To the extent that the Commission determines that it needs to take additional measures to discourage a future recurrence of traffic pumping, it first must define "traffic pumping" carefully, and then declare expressly that it is an unjust and unreasonable practice prohibited by Section 201(b) of the Act.

WTA's proposes that "traffic pumping" be defined as the discretionary routing of long distance toll traffic by a traffic aggregator to a particular ILEC for the sole or primary purpose of increasing access revenues, in return for the payment of a portion of such increased access

revenues by the ILEC to the aggregator that directed the routing of the traffic. This definition is intended to distinguish “traffic pumping” from legitimate and desirable efforts to promote and advance the public interest by introducing new services and by encouraging increased utilization of the telecommunications network. For a practice to constitute “traffic pumping”: (1) it must involve “discretionary” access traffic that can be routed to a variety of terminating locations rather than particular businesses or residences; (2) there must be a “traffic aggregator” able to control the routing of substantial amounts of discretionary access traffic; (3) the traffic aggregator must enter into an arrangement with an ILEC for the routing of the discretionary access traffic to a particular ILEC exchange or study area in return for compensation; (4) the sole or primary purpose of the arrangement must entail the increase of the ILEC’s terminating access minutes and access revenues; and (5) the compensation from the ILEC to the traffic aggregator must consist of a portion of the resulting increase in the ILEC’s access revenues so that both entities share the risks and profits of the arrangement. These five elements all appear to have been present in the recent practices that have drawn complaints from IXCs and that the Commission wants to discourage. In contrast, the five elements are not likely to be present in the types of new service roll-outs and increased network utilizations that the Commission and other government agencies want to encourage.

After defining “traffic pumping” carefully, the Commission should declare expressly that it constitutes an unjust and unreasonable practice prohibited under Section 201(b) of the Act. Whereas WTA opposes traffic pumping, it does not pass judgment upon any ILECs that may

previously have engaged in the practice¹ because the practice has never previously been explicitly prohibited or declared to be unlawful.

Once the Commission defines “traffic pumping” and declares it to be unlawful, WTA believes that the Commission can most efficiently and effectively preclude any future recurrence of the practice by taking a narrow approach focused upon the factors that directly have enabled and encouraged it. Specifically, WTA recommends that the Commission: (1) revise its Part 61 rules to limit the present ability of ILECs to jump back and forth between their own Section 61.39 tariffs and the NECA tariff; and (2) limit or prohibit ILECs from sharing their resulting increases in access revenues with traffic aggregators that opt to route discretionary access traffic to them.

Limitation on Tariff Switching. The present ability of certain ILECs to switch back and forth between the NECA tariff and their own Section 61.39 tariff in an unrestricted manner as often as every two years facilitates traffic pumping. Some tariff changes are made for reasonable and legitimate business reasons that have nothing to do with traffic pumping. However, other tariff changes may have been undertaken solely or primarily to pump up access minutes and revenues artificially during one two-year Section 61.39 period, and then to escape the rate reduction consequences of the pumped-up minutes during the following two-year period² by returning to the NECA tariff.

¹ WTA notes that the “free” conference calling services that have been alleged by some IXCs to constitute “traffic pumping” have been very popular with business and residential customers, and have produced substantial economic and social benefits. WTA clarifies that the “free” portion of such conferencing has been the bridge, and that many of the conference participants have paid toll charges to their IXCs that have exceeded any terminating access charges paid by the IXCs with respect to the calls. WTA believes that (in addition to the general adverse reaction to competitors of the IXC’s own conferencing services) the source of many IXC complaints against free conference calling services is that the IXCs are losing money on their participating customers who have signed up for fixed-price toll plans permitting unlimited calls.

² For example, assume that Carrier X had \$1,000,000 of applicable interstate costs and 50,000,000 interstate access minutes during 2003-2005 when it was an issuing carrier in the NECA tariff. If it leaves NECA and files its own Section 61.39 tariff for 2005-2007, it can set a rate of \$0.02 per minute based upon its historical costs and minutes. If Carrier X can then pump up its 2005-2007 access minutes tenfold to 500,000,000, it can generate \$10,000,000 in interstate access revenues and take away \$9,000,000 in windfall profits for 2005-2007. However, if it then has to calculate its 2007-2009 Section 61.39 rates on the basis of \$1,000,000 in relatively unchanged interstate costs and the pumped-up 500,000,000 access minutes during 2005-2007, its per

WTA recommends that ILECs with existing or future Section 61.39 tariffs be restricted from entering or re-entering the NECA tariff: (1) unless and until the ILEC has operated under its Section 61.39 tariff for a minimum of three consecutive two-year monitoring periods; or (2) unless the ILEC obtains an appropriate waiver or Part 61 special permission from the Commission to enter or re-enter the NECA tariff at an earlier date. Such waivers or special permissions would be granted only if the ILEC can demonstrate reasonable and legitimate business reasons for the change, and show that any significant increases in its interstate access minutes during the Section 61.39 period were not primarily the result of unjust and unreasonable traffic pumping.

In the alternative, the Commission could revise Section 61.39 to require all ILECs that elect to leave the NECA tariff and file their own Section 61.39 tariff after the effective date of the rule revision, to obtain a waiver or Part 61 special permission in order to return to the NECA tariff. This more stringent approach should be applied in a prospective fashion only, so that eligible small ILECs would clearly know the potential consequences of selecting the Section 61.39 tariff option before making their election. The associated waivers or special permissions would be granted only upon satisfaction of the foregoing “legitimate business reason” and “traffic pumping” showings.

In adopting either alternative, WTA reiterates the need for the Commission to distinguish carefully between traffic pumping on one hand, and legitimate introduction of new services and increased network usage on the other. For example, ILECs may become involved in business ventures or trade association activities during which they may host numerous and lengthy multi-party conference calls that result in significant increases in their access minutes that have nothing

minute rate for 2007-2009 would drop to \$0.002. Under the present rules, Carrier X can side-step this rate decrease and the risks inherent therein by returning to the NECA tariff for the 2007-2009 period.

to do with traffic pumping. Or, like AT&T, Verizon and other large carriers, small ILECs may establish and market their own commercial conference calling services and bridges that provide valuable communications capabilities to individuals and businesses, and that entail increases in access minutes but do not constitute traffic pumping. Or local communities (often with the encouragement and assistance of ILECs) may bring in new businesses and/or real estate developments that substantially increase local telecommunications traffic, but undertake these important projects for community and economic development reasons rather than for any motive remotely related to traffic pumping.

IXCs and wireless carriers are not penalized by regulators for acting (by themselves or in partnership with others) to stimulate their traffic – for example, by promoting the generation of millions of calls to vote for contestants on “American Idol” and similar television programs. Likewise, rural ILECs should not be penalized for developing new services and/or encouraging new business or population growth that results in the increase (or, in many cases, slows or regains some of the recent decrease) of the traffic on their networks. In fact, the Commission should vigorously promote new and increased usage of all telecommunications networks by all Americans.

Payments to Traffic Aggregators. Whereas typical business and residential traffic has a specific destination, the types of traffic susceptible to traffic pumping practices can be routed to a variety of destinations. An essential factor in the development of recent traffic pumping schemes is the existence of a traffic aggregator that can control the discretionary routing of large amounts of amorphous access minutes and that is willing to direct them to a particular ILEC or exchange in return for a substantial payment. During recent years, this payment appears to have been most

frequently calculated as a percentage of the incremental access revenues billed and/or collected by the ILEC for the additional access minutes generated by the traffic pumping arrangement.

If the traffic aggregator is an access customer of the paying ILEC, such a “percentage of additional access revenues” payment may be an unlawful rebate under Section 203(c) of the Act. However, whether or not such payments are prohibited currently by statute, they encourage and enable unjust and unreasonable traffic pumping, have at least an appearance of impropriety, and serve no significant public interest.

WTA believes that payments by ILECs to traffic aggregators based upon a percentage or portion of the incremental access revenues generated by the discretionary routing of access traffic to the ILECs by the aggregators should be prohibited as an unjust and unreasonable practice under Section 201(b) of the Act. In the alternative, the Commission should prohibit the inclusion of such aggregator payments in the access costs or revenue requirements upon which the ILEC’s interstate or intrastate access rates are based.

WTA believes that prohibiting such payments or forcing ILECs to exclude such payments from their revenue requirements will be sufficient and effective to eliminate any remaining incentives for future traffic pumping. WTA recognizes that certain ILECs and traffic aggregators could theoretically enter into “marketing” or other arrangements based upon flat fees, but has determined upon further analysis that such arrangements are neither likely nor practicable. For a potential arrangement to be attractive to a traffic aggregator, the upfront and/or recurring flat fees would have to be substantial. In contrast, given the recent history of regulatory and IXC opposition, a substantial upfront and/or recurring flat fee would pose a large and unacceptable risk of loss for any ILEC that might still be presented with a proposal for a traffic pumping arrangement. Any attempt to bridge this divergence of interests by providing for

adjustment of the flat fees based upon the “success” of the arrangement would run afoul of the prohibition or limitation of access revenue sharing.

WTA notes that payments to traffic aggregators based upon incremental access revenues constitute distinctive and auditable events, and can and should be distinguished from legitimate and good faith business practices. For example, such payments are different and readily distinguishable from volume discounts, contract prices and similar arrangements that a rural ILEC may employ to help attract a new factory, store or call center to its community or to retain the business of such entity in the future.

V

Broad Re-Regulation of ILECs Is Not Necessary

The proposed restrictions upon tariff jumping and aggregator payments will directly, efficiently and effectively eliminate any remaining capabilities and incentives for traffic pumping without imposing extensive and expensive regulation upon the more than 1,150 rural ILECs that have not engaged in traffic pumping. The Commission should reject overly broad and unnecessary reactions such as overhaul of the Section 61.39 tariff requirements, “forbearance” from the streamlined tariff and “deemed lawful” provisions of Section 204(a)(3) of the Act, or other measures that would undermine the benefits of rate of return regulation.

Overhaul of Section 61.39 Tariff Requirements. Since the Section 61.39 tariff option was adopted in 1987³, it has enabled small ILECs with special needs to file and maintain their own traffic sensitive interstate access tariffs without incurring substantial legal, consulting, filing, monitoring and other administrative costs. Until this year, Section 61.39 tariffs had been

³ Report and Order (*Regulation of Small Telephone Companies*), CC Docket No. 86-467, 2 FCC Rcd 3811 (1987) (“*Small Carrier Tariff Order*”).

utilized for almost twenty years to calculate and implement just and reasonable interstate access rates for small rural ILECs without significant complaints or compliance problems.

As the Commission recognized in its *Small Carrier Tariff Order*, the use of historical costs and demand produces just and reasonable interstate access rates for small ILECs over multiple tariff periods because the calculation process is self-correcting and rate neutral over time. *Id.* at 3812. This finding has proven true during the last 20 years, and will continue to remain true. The recent traffic pumping problem is emphatically **not** the result of any weakness or loophole in the Section 61.39 requirements or rate calculation process, but rather has been facilitated by the ability of the involved ILECs to escape the Section 61.39 consequences of their practices by jumping back into the NECA tariff.

Imposition of substantial monitoring and mid-period correction requirements upon the Section 61.39 process will destroy its viability for small ILECs. Section 61.39 was designed as an option for reducing the regulatory burdens on small ILECs (many of whom serve far less than its maximum limit of 50,000 access lines) that needed to issue their own interstate access tariffs. It employs actual historical costs and demand to calculate the tariffed interstate access rates rather than expensive cost and demand studies and projections. Once issued, Section 61.39 rates have generally remained in place for two years, and have not been subject to substantial monitoring or mid-course rate revision requirements.

Proposals under consideration to compel small ILECs with Section 61.39 tariffs to monitor and analyze access minute fluctuations would place expensive and complex new administrative burdens upon them. Whereas all ILECs have to record, identify, assign and bill their access minutes (or pay a third party vendor to perform some or all of these functions), the additional task of monitoring fluctuations in access minutes on a monthly or other periodic basis

would impose significant additional man-hour requirements upon the small administrative staffs of Section 61.39 filers (or significantly increase the functions and charges of their billing vendors).

Analyzing access minute fluctuations would be a far more complex and expensive undertaking for rural ILECs. In a sparsely populated rural ILEC service area, any significant or unusual local or regional event (*e.g.*, bad weather, flood, forest fire, high school sporting event, or election) may cause a spike in access minutes as distant relatives and friends seek news and assurances. In relatively small rural study areas, a couple of such spikes on a comparatively small base of access minutes can result in a large percentage increase or “growth rate” for a particular month or other period. If some or all substantial spikes have to be analyzed pursuant to new rules or conditions, Section 61.39 filers will incur substantial new time and dollar expenses to have their managers, consultants and attorneys confer to determine whether the increased access minutes have triggered any reporting or tariff revision obligations.

One or more required mid-term tariff revisions would add substantially to a Section 61.39 filer’s regulatory burdens and expenses. In addition to the Commission’s required tariff filing fee (currently \$775.00), the small ILEC is likely to incur at least \$2,000-to-\$3,000 of tariff preparation, cost and demand support, rate calculation, review and filing fees from its consultants and attorneys (over and above the cost of the time expended by its own staff for such tariff transmittals). Whereas these costs may not seem like a large amount to the Commission or large carriers, they can be quite significant in relation to a small ILEC’s access lines and/or to the incremental increase or decrease in its affected access revenues.

In sum, the Commission has already employed its general investigation and enforcement powers under Sections 201, 203, 204, 205 and 208 of the Act to help stop recent traffic pumping,

and can effectively and efficiently prevent any recurrence by adopting WTA's proposed limitations on switching between Section 61.39 tariffs and the NECA tariff, and on payments to aggregators based upon incremental access revenues from traffic pumping activities. There is no need to punish the rural ILECs that have not engaged in traffic pumping by imposing expensive and unnecessary monitoring and mid-course rate revision requirements that will destroy the viability of the Section 61.39 option.

Forbearance from "Streamlining" and "Deemed Lawful" Deregulation. WTA vigorously opposes proposals that the Commission use its "forbearance" power to write the "streamlined tariff" and "deemed lawful" provisions of Section 204(a)(3) out of the Communications Act.

The forbearance power in Section 10 of the Act is a deregulatory provision that was added in the Telecommunications Act of 1996 to give the Commission flexibility to reduce the regulatory burdens on telecommunications carriers when market and technological changes are determined to have made enforcement of a particular statutory or regulatory provision no longer necessary or in the public interest. At the time the forbearance provision was added to bills that eventually became the 1996 Act, Senator Robert Dole stated that the legislative intent was to force the Commission to "eliminate outdated regulations, and do so in a timely manner." 141 Cong. Record S7898 (June 7, 1995).

The "streamlined tariff" and "deemed lawful" provisions of Section 204(a)(3) are also deregulatory provisions that were added in the 1996 Act. They were intended to reduce the regulatory burdens upon both the Commission and ILECs with respect to the issuance, evaluation and administration of interstate access tariffs. As Congress specifically stated, Section 204(a)(3) was intended to provide "regulatory relief that streamlines the provisions for

revision by local exchange carriers of charges, classifications and practices.” *Joint Explanatory Statement*, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 69 (1996). If review by the Commission staff and interested access customers does not raise any significant questions regarding the lawfulness of a particular streamlined tariff transmittal, it is allowed to go into effect without any further investigation or litigation other than a Section 205 prescription proceeding if problems are discovered or arise in the future. On the other hand, if review by the Commission staff or interested access customers raises significant questions, a streamlined tariff transmittal can be suspended and investigated pursuant to Section 204(a)(1) and (2), thereby abrogating the “streamlining” and “deemed lawful” provisions.

Forbearance from “enforcement” of a deregulatory provision would effectively constitute an increase in regulation in direct contravention of the intent and plain language of Section 10. WTA can imagine the outcry from the wireless industry if someone sought to eliminate a substantial wireless deregulatory initiative such as the Section 332(c)(3) preemption of state or local entry and rate regulation by requesting forbearance from the “enforcement” thereof. In like manner, the Commission should not repeal or rewrite via forbearance Section 204(a)(3) -- one of the very few provisions of the pro-competitive and de-regulatory 1996 Act that actually reduced the regulatory burden on ILECs.

The Commission does not need to forbear or otherwise repeal “streamlined tariffs” and the associated “deemed lawful” access rates in order to discourage or prevent future traffic pumping. It should not risk reversal on appeal by disregarding the deregulatory nature and intent of Section 10, nor set a dangerous precedent by expanding the scope of forbearance in a manner that may stimulate a rash of re-regulatory forbearance petitions.

Rate of Return Regulation. WTA is concerned that some of those attacking traffic pumping would like to see spill-over impacts that undermine rate of return regulation. Such a result would not only be unnecessary and misguided, but would harm the public interest.

Rate of return regulation has enabled rural ILECs to provide their service areas with quality services at affordable rates that are reasonably comparable to the services and rates available in urban areas. Not only is wireline telephone service available throughout most high-cost areas served by rural ILECs, but these small carriers have an excellent record of bringing their rural customers digital and soft switches, Signaling System 7, fiber optic facilities, digital subscriber line capabilities, equal access, and custom calling options.

Although much more investment and upgrading will be necessary to satisfy the burgeoning demand for broadband services and bandwidth, many rural ILECs have kept pace to date with their larger urban counterparts in the provision of the current state of the art in broadband facilities and advanced services. At a time when Congress is calling for the United States to be a world leader in broadband services, rural ILECs have been answering the bell. The Commission should do nothing to undermine the rate of return regulation that has been responsible in major part for their success.

VI

All Gaming of the Access System Must Be Addressed

Rather than focusing solely or primarily at this time upon traffic pumping, the Commission should act vigorously and expeditiously to address and eliminate **all** access “gaming” schemes. Whether the scope of the traffic pumping problem was significant or exaggerated, it is now largely over. However, many large-scale access gaming problems remain,

including phantom traffic and IXC evasion and avoidance schemes. In addition, as the amount of VoIP traffic delivered to the public switched telecommunications network for termination increases at faster and faster rates, the Commission needs to confirm that interconnected VoIP traffic is subject to access charges and to stem the increasingly harmful efforts of VoIP providers to evade and avoid such charges. The Commission is requested to place the same importance and priority upon addressing these critical issues as it has in resolving traffic pumping practices.

Phantom Traffic. “Phantom traffic” is terminating traffic that cannot be billed or billed accurately for access charges or reciprocal compensation because originating carrier and/or originating location information has been intentionally or inadvertently stripped or erroneously reported on the call records. Studies of ILEC exchanges have indicated that as much as 20-to-30 percent of terminating traffic is arriving with billing information that is absent, lost, stripped or altered. Approximately two-thirds of such phantom traffic appears to be wireless traffic. ILEC industry consultants have estimated that total ILEC revenue losses from phantom traffic are about \$2.0 billion per year.

The Missoula Intercarrier Compensation Reform Plan (“Missoula Plan”), which was filed July 24, 2006, proposes both interim and permanent solutions that address the phantom traffic problem by requiring all terminating traffic to contain appropriate call detail records and/or call summary information, by prohibiting the falsification or stripping of such information, and by establishing appropriate payment responsibilities and enforcement procedures.

During 2006, the Commission requested and accepted comments on the Missoula Plan in its entirety, including its proposed permanent phantom traffic solution, Public Notice (Comment Sought on Missoula Intercarrier Compensation Reform Plan), CC Docket No. 01-92, DA 06-1510, released July 25, 2006; and on the Missoula Plan’s interim phantom traffic solution, Public

Notice (*Comment Sought on Missoula Plan Phantom Traffic Interim Process and Call Detail Records Proposal*), CC Docket No. 01-92, DA 06-2294, released November 8, 2006. Given that the approximately \$2.0 billion of lost annual revenues from phantom traffic dwarf the likely dollar impact of recent traffic pumping practices, the Commission is requested to act soon to address the phantom traffic problem.

IXC Avoidance and Evasion. The IXC industry that has complained vigorously about traffic pumping has been responsible for developing and implementing a significant number of schemes to avoid or evade lawful access charges. The most common of these contrivances is the deliberate over-reporting or over-estimation of the “Percentage of Interstate Use (“PIU”)” of IXC traffic delivered to rural ILECs for termination. Rural ILECs strongly suspect that many IXCs regularly report erroneously high PIUs in order to minimize their access charges by paying for more minutes than warranted at lower interstate access rates and by paying for correspondingly fewer minutes than warranted at higher intrastate access rates. See, *e.g.* LDDS Communications, Inc. v. United Telephone of Florida, File No. E-94-71, released March 8, 2000. Many small ILECs have not yet been able to afford the equipment or to perform the audits necessary to substantiate the existence and amount of erroneous PIU reporting by particular IXCs. Federal and state audits and investigations would be useful to promote accurate PIU reporting, but have never been implemented or otherwise appeared to be a significant priority for federal or state regulators.

Other IXC avoidance and evasion attempts have been more “creative.” For example, AT&T once devised and implemented a scheme to route its regular wireline long distance toll calls through Internet Protocol facilities during a portion of the middle of their routes, and then refused to pay access charges on the grounds that such calls fell within the exemption of

information service traffic from access charges. AT&T ultimately lost its request for a declaratory ruling that its contrived “IP-in-the-middle” toll traffic was exempt from access charges, Petition for Declaratory Ruling that AT&T’s Phone-to-Phone IP Telephony Services Are Exempt from Access Charges, 19 FCC Rcd 7457 (2002), but still avoided a substantial amount of previously “disputed” access charges because the Commission ruling was prospective only. Qwest Corporation v. AT&T Corp., 479 F.3d 1206 (10th Circ. March 14, 2007). AT&T has also engaged in attempts to avoid or evade intrastate and interstate access charges (as well as universal service contributions) by developing “enhanced” prepaid calling cards that it unsuccessfully tried to pass off as an “information service” that it alleged to be exempt from access charges. See American Telephone and Telegraph Company v. Federal Communications Commission, Case No. 05-1096 (D.C. Circ. July 14, 2006). As yet another example, there arose in 2003 a rash of disputes, allegations and investigations regarding an alleged scheme by MCI to route domestic toll traffic into Canada for transfer to Bell Canada and then back to the United States via AT&T’s network in order to shift responsibility for the payment of interstate terminating access charges from MCI to AT&T. “US: MCI’s Furious Rivals Cry Foul,” The Economist (August 7, 2003); “MCI Disputes Fraud Claim By AT&T,” The New York Times (August 5, 2003). WTA expects that these examples may be only the tip of the iceberg of IXC access charge evasion and avoidance ploys.

Interconnected VoIP Traffic. Substantial and increasing amounts of VoIP calls are being delivered to rural and other ILECs for termination on their networks without any compensation. Even though this VoIP traffic competes with and is a direct substitute for traditional toll traffic, interconnected VoIP service providers currently evade or avoid payment of most access charges because: (1) they do not properly identify themselves and/or the

originating location of their traffic; and/or (2) they refuse to pay access charges on the alleged ground that their traffic is included within the Commission's information services exemption. Unless and until the Commission confirms that interconnected VoIP service providers are required to pay the same access charges as the toll carriers against which they compete, VoIP evasion and avoidance efforts will continue unabated and both long distance competition and transport/terminating network investment will become more and more distorted. The Commission's IP-enabled services rulemaking has now been pending for almost four years. Notice of Proposed Rulemaking (IP-Enabled Services), WC Docket No. 04-36, FCC 04-28, released March 10, 2004. WTA urges the Commission to address and resolve this rapidly increasing problem expeditiously.

VII

Conclusion

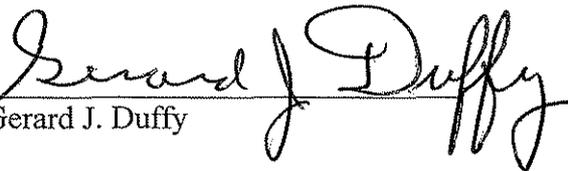
WTA does not believe that "traffic pumping" has been a widespread practice among rural and other ILECs, but agrees that it should be defined carefully by the Commission (to avoid confusion with legitimate and desirable efforts to introduce new services and to increase utilization of telecommunications networks) and declared expressly to be an unjust and unreasonable practice under Section 201(b) of the Act.

WTA further believes that recent alleged instances of traffic pumping have already been addressed and terminated by a variety of formal judicial and regulatory actions and informal IXC tactics. To the extent the Commission determines to take further action at this time to preclude future recurrence of traffic pumping, it can do so effectively and efficiently by: (1) restricting the present capability of ILECs to jump back and forth between Section 61.39 tariffs and the NECA

tariff; and (2) limiting ILECs from paying a portion of their incremental access revenues from traffic pumping to the traffic aggregators that route the discretionary access traffic to them. The Commission does not need to punish the vast majority of ILECs that have not engaged in traffic pumping by overhauling its Section 61.39 tariff requirements, forbearing from the “streamlining” and “deemed lawful” provisions of the 1996 Act, or undermining the benefits of rate of return regulation.

Finally, rather than focusing solely or primarily upon traffic pumping, the Commission should vigorously and expeditiously address and eliminate all access “gaming” behavior, including the far larger phantom traffic problem and the plethora of recurrent IXC avoidance and evasion schemes. In addition, the Commission should soon address the rapidly growing problems and market distortions caused by the evasion and avoidance of access charges for VoIP traffic by confirming that interconnected VoIP providers are required to pay access charges for their use of the PSTN to terminate their traffic.

Respectfully submitted,
**WESTERN TELECOMMUNICATIONS
ALLIANCE**

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