

**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)

**COMMENTS
OF THE
ORGANIZATION FOR THE PROMOTION AND ADVANCEMENT
OF SMALL TELECOMMUNICATIONS COMPANIES**

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SUMMARY

As the Commission considers revisions to its tariff rules, it should keep in mind that access demand stimulation is a practice which relatively few RoR-regulated LECs have engaged in. OPASTCO is supportive of the Commission's objective to ensure that access rates remain just and reasonable. However, this can be achieved through a targeted rule change that avoids negatively affecting all rural RoR carriers and their ability to serve consumers.

For most RoR carriers, access demand has been trending downward in recent years, which places at risk their ability to earn the authorized rate of return. This is troublesome, since without an adequate return on investment, rural RoR LECs will find it more difficult to gain access to the capital resources necessary to continue to modernize their networks and offer an evolving level of services. The Commission should not compound this situation by revising the tariff rules in such a way that makes it virtually impossible for RoR carriers to achieve the prescribed rate of return from year to year.

It would be inappropriate for the FCC to forbear from enforcing the deemed lawful provision of section 204(a)(3) of the 1996 Act, which Congress intended to reduce Commission regulation of LEC tariffs. Congress provided the FCC with forbearance authority to enable it to lessen regulatory burdens on carriers when circumstances indicate that enforcement of a specific provision is no longer necessary or in the public interest. Thus, were the Commission to forbear from enforcing the deemed lawful provision, the result would be to revert back to tariff rules in effect prior to the adoption of the 1996 Act that Congress already determined were no longer necessary. The FCC

should not use its forbearance authority for the exact opposite purpose for which it was intended and contrary to the goals of Congress when it enacted section 204(a)(3).

The Commission should not require RoR carriers that file their own tariffs to automatically have to file a revised tariff whenever they exceed a certain percentage increase threshold in their access traffic. Requiring carriers to continually monitor their access minutes and make a mid-course tariff filing if an arbitrary growth factor is exceeded would be burdensome and costly. It is also unnecessary. IXCs have the section 208 complaint process at their disposal and can always petition the FCC to investigate a tariff. In addition, the FCC, on its own motion, may always investigate the lawfulness of an effective tariff under section 205 of the Act. The Commission should also consider the difficulty of establishing an access growth factor that can properly account for a variety of circumstances in a dynamic industry.

The Commission can sufficiently ensure just and reasonable access rates by requiring carriers that file tariffs pursuant to section 61.39 to remain out of the NECA traffic sensitive pool for two or, at most, three two-year tariff cycles. This would address the IXCs' concern that because section 61.39 carriers may reenter the pool after one tariff cycle, for those carriers that experience a significant increase in access traffic, their access rates do not have a chance to self-correct. Under the suggested rule change, if a section 61.39 carrier decided to engage in access demand stimulation upon exiting the pool, it would be required in the following tariff period to base its rates on the significantly increased demand level. Thus, subsequent tariff filing(s) based on historic data would correct any excessive earnings that may result from changed circumstances and engender rate neutrality.

Should the Commission adopt a new rule requiring section 61.39 carriers to remain out the pool for a stated number of tariff cycles, carriers should be permitted to file an expedited petition for waiver to reenter the pool earlier than what the rule allows. There are sure to be circumstances that arise that warrant a carrier reentering the pool before the required number of tariff cycles has been completed and that permitting them to do so would serve the public interest.

In addition, there should be a “grandfather” clause for existing section 61.39 carriers that states, in effect, that the number of tariff periods that these carriers have already spent out of the pool counts toward the new requirement. Clearly, a carrier that has already spent two or more tariff cycles operating under section 61.39 did not seek to use the rules to earn a rate of return that greatly exceeds the prescribed level and should therefore be permitted to reenter the pool immediately if they so choose.

The Commission should not make the section 61.39 election one way. There are many legitimate reasons why a carrier may wish to reenter the pool and were the Commission to make the election one way, it is doubtful that any carriers would elect it going forward.

Finally, the Commission should not eliminate the section 61.39 option altogether. Section 61.39 provides small, rural ILECs with a viable option to the traffic sensitive pool for establishing their interstate access rates. There is no need to eliminate the positive attributes of the section 61.39 option that serve the public interest in order to ensure just and reasonable access rates. This can be achieved through a targeted rule change that requires section 61.39 carriers to remain out of the traffic sensitive pool for two or, at most, three tariff cycles.

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I. INTRODUCTION

The Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO) hereby submits these comments in response to the FCC's Notice of Proposed Rulemaking (NPRM) in the above-captioned proceeding.¹ The NPRM seeks comment on proposals for ensuring that the rules governing the tariffing of traffic sensitive switched access services by local exchange carriers (LECs) remain just and reasonable.

OPASTCO is a national trade association representing over 520 small incumbent LECs (ILECs) serving rural areas of the United States. Its members, which include both commercial companies and cooperatives, together serve more than 3.5 million customers. All OPASTCO members are rural telephone companies as defined in 47 U.S.C. §153(37). They are also all subject to rate-of-return (RoR) regulation in the interstate jurisdiction. OPASTCO members offer a wide array of communications services to rural consumers in addition to the traditional telephone services they provide as ILECs. These include

¹ *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989 (2007) (NPRM).

broadband, video services, mobile wireless services, long distance resale, and competitive local exchange service.

As the Commission considers changes to the tariff rules, it should seek to avoid negatively affecting rural RoR-regulated LECs and their end-user customers. Access demand stimulation is a practice which relatively few RoR carriers have engaged in. In fact, for most RoR carriers, access demand has been declining in recent years. Were the tariff rules modified in such a way that made it virtually impossible for carriers to earn the prescribed rate of return, it would threaten the continued availability of modern services at reasonable rates in rural service areas.

It would be improper for the Commission to forbear from the deemed lawful provision of the Telecommunications Act of 1996 (1996 Act, the Act). This proposal is entirely at odds with the deregulatory purpose of the forbearance authority granted to the FCC by the Act and therefore should be rejected. The Commission should also abandon its proposal to require RoR LECs that file their own tariffs to automatically file a revised tariff whenever an arbitrary access growth factor is exceeded. Such a requirement would be burdensome and costly and is also unnecessary in light of the FCC's ability to conduct tariff investigations.

The FCC can sufficiently ensure that RoR carriers' access rates remain just and reasonable by requiring those that file tariffs under section 61.39 to remain out of the National Exchange Carrier Association (NECA) traffic sensitive pool for two or, at most, three two-year tariff periods. This would address the crux of the interexchange carriers' (IXCs) complaints concerning LECs being able to reenter the pool after one tariff cycle. By making this targeted rule change, the Commission would be able to realize its goal of

ensuring just and reasonable access rates while also minimizing the negative impact on rural RoR carriers and the consumers that rely on them for the provision of high-quality, affordable service.

II. THE COMMISSION SHOULD SEEK TO AVOID NEGATIVE IMPACTS ON RURAL RoR CARRIERS AND THEIR END-USER CUSTOMERS AS IT CONSIDERS CHANGES TO THE TARIFF RULES

As the Commission considers revisions to its tariff rules, it should keep in mind that endogenous access demand stimulation is a practice which relatively few RoR-regulated carriers have engaged in.² OPASTCO certainly recognizes the need to ensure that tariffed rates remain just and reasonable even when a carrier experiences a significant increase in access traffic. However, this can be achieved through a targeted rule change (discussed in Section V) that avoids negatively affecting all rural RoR carriers and their ability to serve consumers.

The Commission should put the practice of access demand stimulation into its proper context. While a small number of LECs may have been able to earn a rate of return in excess of the allowed maximum via access stimulation activities, on the whole, RoR carriers' access demand has been trending downward in recent years. Specifically, for the 2005 – 2006 tariff period (July 1, 2005 – June 30, 2006), the billable minutes in NECA's traffic sensitive pool declined by 3.8 percent from the prior period.³ Likewise, for the 2006 – 2007 tariff period, access demand decreased by 6.2 percent.⁴ And, for the

² The FCC recently designated for investigation the switched access rates of 41 RoR LECs. *Investigation of Certain 2007 Annual Access Tariffs*, WC docket No. 07-184, WCB/Pricing No. 07-10, Order Designating Issues for Investigation, 22 FCC Rcd 16109, 16124-16125 (2007) (*Investigation Order*). This represents less than four percent of all RoR study areas. (NECA reports that 1,249 study areas currently participate in its common line pool. This is a reasonable approximation of the total universe of RoR LECs. See, National Exchange Carrier Association, Inc., Tariff F.C.C. No. 5, Transmittal No. 1172, Vol. 1, p. 3 (fil. June 15, 2007) (NECA 2007 Annual Access Tariff Filing).)

³ NECA 2007 Annual Access Tariff Filing, Vol. 1, p. 36.

⁴ *Id.*

current 2007 – 2008 tariff period, the downslide is expected to continue as NECA is presently forecasting a 7.9 percent decline in minutes of use from the prior period.⁵

With a downward trend in billable access minutes, the ability of carriers to earn the authorized rate of return is at risk. This is problematic since without an adequate return on investment, rural RoR LECs will find it more difficult to gain access to the capital resources necessary to continue to modernize their networks and offer an evolving level of services to their end-user customers.⁶ The Commission should not compound this situation by revising the tariff rules in such a way that makes it virtually impossible for RoR-regulated carriers to achieve, let alone exceed, the prescribed rate of return from year to year.⁷

Normal variations in access demand, as well as changes in costs and expenses, will naturally cause fluctuations in a carrier's rate of return from year to year. It would be unreasonable to expect that access rates based on a RoR carrier's projected or historical cost and demand data will produce a rate of return that precisely matches the authorized level in any given year. In most years, however, the difference between a

⁵ *Id.* NECA has stated that the decline in billable minutes of use is due to both legitimate competition from other services as well as phantom traffic and other unfair “access avoidance” behaviors. It is difficult to quantify the exact role of competition versus access avoidance, but the overall effect is significant. *See*, NECA Ex Parte Presentation, CC Docket No. 01-92 (fil. May 2, 2007).

⁶ As the Commission notes in the NPRM, one of the purposes of the authorized rate of return is to provide a carrier with the opportunity “to earn a return that is high enough to maintain the financial integrity of the company and to attract new capital to the business...” NPRM, 22 FCC Rcd 17991, fn. 16 (citing *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, CC Docket No. 89-624, Order, 5 FCC Rcd 7507, 7532, ¶213 (1990)).

⁷ In a 1988 decision by the DC Circuit Court of Appeals, the Court rejected a “refund rule” that the FCC had adopted for RoR-regulated carriers. This rule required carriers to refund any earnings above the upper bound of its target plus a buffer, but did not permit carriers to recoup any shortfall in its earnings below the target. The Court found the rule to be arbitrary and capricious because it “...seem[ed] to guarantee the regulated company an economic loss” which “...would operate over the long run to put a carrier out of business.” *American Telephone and Telegraph Company v. FCC*, 836 F.2d 1386, 1391, 1390 (D.C. Cir. 1988).

carrier's actual interstate earnings and the prescribed rate of return should be relatively small and, over the long run, come close to the authorized level.

It is important that as the Commission considers changes to its tariff rules, it take heed of its own prior pronouncements that the authorized rate of return reflects the proper balance of investor and consumer interests.⁸ Thus, as a balance point, it represents not only a target maximum return but also "...the minimum return the carrier requires."⁹

As the Commission knows, rural RoR ILECs derive a significant portion of their operating revenue from the provision of access services.¹⁰ As the carriers of last resort in their service areas, these revenues have been essential to enabling these carriers to make available high-quality services at affordable rates to all of the consumers in their territories. Were rural RoR ILECs not able to earn the prescribed rate of return on their interstate access services due to a systematic bias in the tariff rules that depressed carrier earnings below their target, over the long run it would jeopardize their viability. More importantly, it would threaten the continued availability of modern services, including advanced services, at reasonable rates in rural service areas. The Commission can avoid this outcome by proceeding with caution and restraint in its response to the limited practice of endogenous access demand stimulation.

⁸ *Id.*, 836 F.2d 1390.

⁹ *Id.*

¹⁰ In 2005, NECA estimated that pool members receive, on average, approximately 29 percent of their total net telephone company operating revenue from intercarrier compensation (primarily inter- and intrastate switched access charges). However, for the group of pool members that rely most heavily on intercarrier compensation (*i.e.*, those in the top 10 percent), reliance on intercarrier access revenues increases to an average of 49 percent of total net operating revenue. *See*, Comments of the National Exchange Carrier Association, Inc., CC Docket No. 01-92, p. 4 (fil. May 23, 2005).

III. THE COMMISSION SHOULD NOT FORBEAR FROM THE “DEEMED LAWFUL” PROVISION OF THE 1996 ACT AS IT IS INCONSISTENT WITH THE DEREGULATORY PURPOSE FOR WHICH CONGRESS GAVE THE FCC FORBEARANCE AUTHORITY UNDER SECTION 10(a)

It would be inappropriate for the Commission to forbear from enforcing the deemed lawful provision of section 204(a)(3) of the 1996 Act.¹¹ This proposal is inconsistent with the deregulatory purpose of the forbearance authority granted to the FCC by section 10(a) of the Act and should therefore be rejected.¹²

Congress established section 10 of the Act to enable the Commission to reduce the burdens imposed on telecommunications carriers when market and technological circumstances indicate that enforcement of a specific regulatory or legislative provision is no longer necessary or in the public interest. In fact, the legislative history of this section makes clear that the intent was to force the FCC to “*eliminate* outdated regulations, and do so in a timely manner.”¹³ This is also consistent with the overriding purpose of the 1996 Act “[t]o promote competition and *reduce regulation*...” in the telecommunications industry.¹⁴

Equally as clear is that the deemed lawful provision of section 204(a)(3) was intended to *reduce* Commission regulation of LEC tariffs. The Joint Explanatory Statement of the Committee of Conference accompanying the 1996 Act states that this provision “...addresses regulatory *relief* that streamlines the procedures for revision by

¹¹ See, NPRM, 22 FCC Rcd 18001-18002, ¶¶29-30.

¹² For a more thorough discussion of why forbearance from “deemed lawful” is improper, see, Joint Comments of Eastern Rural Telecom Association, Independent Telephone & Telecommunications Alliance, National Exchange Carrier Association, Inc., National Telecommunications Cooperative Association, Organization for the Promotion and Advancement of Small Telecommunications Companies, United States Telecom Association, and Western Telecommunications Alliance, WC Docket No. 03-256 (fil. Jan. 30, 2004).

¹³ 141 CONG. REC. S7898 (June 7, 1995) (Statement of Sen. Dole) (emphasis added).

¹⁴ Preamble, Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (emphasis added).

local exchange carriers of charges, classifications and practices under section 204 of the Communications Act.”¹⁵

The Commission recognized in the *Streamlined Tariff Order* that section 204(a)(3) changed significantly the legal consequences of allowing tariffs filed under this provision to become effective without suspension.¹⁶ Specifically, tariff filings that take effect without suspension under section 204(a)(3) that are subsequently determined to be unlawful do not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness.¹⁷ Nevertheless, the Commission correctly found that “...based on the language of the statute, *this is the balance between consumers and carriers that Congress struck when it required eligible streamlined tariffs to be deemed lawful.*”¹⁸

Therefore, were the Commission to forbear from enforcing the deemed lawful provision, the result would be to revert back to tariff rules in effect prior to the adoption of the 1996 Act that Congress already determined were no longer necessary. The FCC should not use its forbearance authority for the exact opposite purpose for which it was intended and contrary to the goals of Congress when it enacted section 204(a)(3).¹⁹

There are many provisions of the Communications Act that have the effect of eliminating certain regulations for specific types of communications providers. For example, section 332(c)(3) preempts states from regulating the entry and rates of wireless

¹⁵ Joint Explanatory Statement, S. Conf. Rep. No. 104-230, 104th Cong., 2d Sess., 69 (1996) (emphasis added).

¹⁶ *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Order, 12 FCC Rcd 2170, 2182, ¶20 (1997) (*Streamlined Tariff Order*).

¹⁷ *Id.*, 12 FCC Rcd 2183, ¶20.

¹⁸ *Id.* (emphasis added).

¹⁹ For the same reason, it would be equally inappropriate to deny LECs the benefits of the deemed lawful provision by requiring them to file tariffs on a notice period such that deemed lawful status would not apply. *See*, NPRM, 22 FCC Rcd 18002, ¶30. The end result is the same as forbearance and, like forbearance, it flouts Congress’ intent in section 204(a)(3) to reduce LEC tariff regulation.

carriers. Using the Commission's same line of reasoning in the NPRM, it suggests that it could forbear from this provision by making a case that state preemption is not "necessary" to assure reasonable rates, the protection of consumers, or the protection of the public interest. Such a result, of course, would be absurd.

In short, the Act's forbearance authority permits the FCC to eliminate or impose less regulation under certain conditions. The intention was not for the Commission to impose more regulation under the guise of "forbearing from enforcing" a provision of the Act designed to provide regulatory relief. To do so would contradict the plain meaning of the term "forbearance" and subvert Congress' intention that section 10 be used to eliminate regulations that are no longer necessary. Taken to its logical extreme, the Commission's proposed use of its forbearance authority would suggest that it has *cart blanche* to amend the entire Communications Act as it sees fit – a result which Congress certainly did not intend.

In any event, the FCC still has tools at its disposal to ensure that the access rates charged by LECs remain just and reasonable. As the FCC noted in the *Streamlined Tariff Order*, the deemed lawful language of section 204 did not limit the Commission's authority either to conduct tariff investigations under section 205 or to process complaint proceedings commenced under section 208. Thus, "[i]t does nothing to change the Commission's ability to prescribe rates as to the future under section 205 or to find under section 208 that a rate will be unlawful if charged in the future."²⁰ There is no need, therefore, for the Commission to take the legally questionable step of forbearing from the deemed lawful provision of section 204(a)(3).

²⁰*Streamlined Tariff Order*, 12 FCC Rcd 2183, ¶21.

IV. THE COMMISSION SHOULD NOT REQUIRE RoR CARRIERS THAT FILE THEIR OWN TARIFFS TO AUTOMATICALLY HAVE TO FILE A REVISED TARIFF WHENEVER A CERTAIN GROWTH RATE IN ACCESS MINUTES IS EXCEEDED

The Commission should not require RoR carriers that file their own tariffs to automatically have to file a revised tariff whenever they exceed a certain percentage increase threshold in their interstate access traffic.²¹ Requiring all carriers that file tariffs pursuant to sections 61.38 and 61.39 to continuously monitor their access minutes and file a revised tariff in the middle of a tariff cycle if an arbitrary growth factor is exceeded is both burdensome and costly. It is also unnecessary. IXCs have the section 208 complaint process at their disposal and can always petition the Commission to investigate a tariff if they believe that the access rates of a LEC are unjust and unreasonable. Indeed, it was petitions filed by IXCs earlier this year that led to the FCC's suspension and investigation of the tariffs of several LECs and that prompted this proceeding.²² In addition, the FCC, on its own motion, may always investigate the lawfulness of an effective tariff pursuant to section 205 of the Act. Therefore, there is no need for the Commission to significantly reduce the legitimate benefits of the section 61.38 and 61.39 tariff filing options by requiring the constant monitoring of minutes and automatic mid-course tariff filings.

The FCC should also consider the difficulty of establishing an access growth factor that can properly account for a variety of circumstances in a dynamic industry. For example, within a given tariff period a carrier may acquire a new exchange (which includes loops as well as one or more switches) and, as a result, experience a significant

²¹ See, NPRM, 22 FCC Rcd 17998-18000, ¶¶21-26.

²² See, *July 1, 2007 Annual Access Charge Tariff Filings*, WCB/Pricing No. 07-10, Order, 22 FCC Rcd 11619, ¶1, fn. 3 (2007) (*Suspension Order*); *Investigation Order*, 22 FCC Rcd 16113, ¶7, fn. 25; NPRM, 22 FCC Rcd 17994, ¶11, fn. 37.

increase in access minutes. However, because the carrier's traffic sensitive costs have also increased in proportion to the growth in access minutes, a mid-course tariff filing would not be warranted, even if the growth threshold was exceeded.

From a longer-term perspective, as previously noted, the NECA traffic sensitive pool has experienced a decline in billable minutes for the past two tariff periods and it is reasonable to assume that the majority of carriers filing their own tariffs are experiencing similar declines. If this trend continues, as carriers' access demand decreases over time, a fixed percentage growth trigger will be exceeded with smaller and smaller increases in minutes. This would lead to a growing number of carriers being required to file mid-course tariff revisions, even when the increase in minutes, viewed numerically, was moderate.

Thus, the Commission should not establish an access traffic growth rate which, when exceeded, would automatically require section 61.38 and 61.39 carriers to file a revised tariff. In cases where a LEC's access rates may have become unjust and unreasonable as a result of a significant increase in access demand, it can be adequately addressed by an investigation prompted by a legitimate complaint or on the Commission's own motion. There is no need to burden all LECs filing their own tariffs with a rigid process that would not likely be able to account for changes in carrier circumstances and larger market trends.

V. THE COMMISSION CAN SUFFICIENTLY ENSURE JUST AND REASONABLE ACCESS RATES BY REQUIRING SECTION 61.39 CARRIERS TO REMAIN OUT OF THE TRAFFIC SENSITIVE POOL FOR TWO OR, AT MOST, THREE TARIFF PERIODS

In the NPRM, the Commission tentatively concludes that it must revise the tariff rules so that it can be confident that tariffed rates remain just and reasonable even if a

carrier experiences or induces a significant increase in access demand.²³ OPASTCO believes that this is a fair and reasonable objective. However, it is critical that this objective be achieved in a manner that is consistent with the Act and that minimizes the burden and potential harm to RoR LECs and their end-user customers. This can be accomplished by adopting the Commission’s proposal to require carriers that file tariffs pursuant to section 61.39 to remain out of the NECA traffic sensitive pool for a stated number of tariff cycles²⁴ – specifically, two or, at most, three.

All of the petitions filed by the IXCs seeking the suspension and investigation of certain LEC tariffs pertained solely to carriers leaving the NECA traffic sensitive pool and filing tariffs pursuant to section 61.39.²⁵ It follows, then, that any modifications to the tariff rules should focus on section 61.39. According to the NPRM, “[t]he IXCs allege that the section 61.39 carriers have exhibited a pattern of exiting the traffic-sensitive pool when their demand is low, thus establishing a high rate for the two-year effective period of the tariff.”²⁶ Then, “...after a single two-year period as a section 61.39 carrier, the carriers reenter the traffic-sensitive pool to avoid basing rates for the next two years on the high demand realized while they were not in the NECA pool.”²⁷ In other words, the IXCs contend that because section 61.39 carriers may reenter the traffic sensitive pool after one tariff cycle, for those carriers that experience a significant increase in access traffic, their access rates do not have a chance to self-correct as the Commission intended.²⁸

²³ NPRM, 22 FCC Rcd 17994, ¶11.

²⁴ *Id.*, 22 FCC Rcd 18002-18003, ¶32.

²⁵ *See, Suspension Order*, 22 FCC Rcd 11620, ¶4; *Investigation Order*, 22 FCC Rcd 16113, ¶7.

²⁶ NPRM, 22 FCC Rcd 18002-18003, ¶32.

²⁷ *Id.*

²⁸ *See, Regulation of Small Telephone Companies*, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811, 3812, ¶12 (1987) (*Small Carrier Tariff Order*).

The Commission can easily address this concern by requiring carriers that elect section 61.39 to remain out of the traffic sensitive pool for two or, at most, three two-year tariff periods. This simple rule change would go a long way toward ensuring that section 61.39 carriers' access rates remain just and reasonable. If a section 61.39 carrier decided to engage in access demand stimulation upon exiting the NECA pool, it would be required in the following tariff period to base its rates on the significantly increased demand level, thereby causing its access rates to fall accordingly. Thus, the subsequent tariff filing(s) based on historic data would "...correct any excessive earnings that may result from changed circumstances"²⁹ and engender rate neutrality.

Of course, should the Commission adopt a new rule requiring section 61.39 carriers to remain out of the traffic sensitive pool for a stated number of tariff cycles, carriers should be permitted to file an expedited petition for waiver to reenter the pool earlier than what the rule allows. There are sure to be circumstances that arise that warrant a section 61.39 carrier reentering the pool before the required number of tariff cycles has been completed and that permitting them to do so would serve the public interest. Section 61.39 carriers should at least have the opportunity to petition the Commission to present their reasons for reentering the pool early and if good cause is shown, the Commission should grant the petition in a timely manner.

In addition, should the Commission require section 61.39 carriers to remain out of the traffic sensitive pool for two or, at most, three tariff cycles, there should be a "grandfather" clause for existing section 61.39 carriers at the time the new rule is implemented. This clause should state, in effect, that the number of tariff periods that existing section 61.39 carriers have already spent out of the traffic sensitive pool counts

²⁹ *Id.*, 2 FCC Rcd 3813, ¶18.

toward the new requirement. For example, if a new rule requires section 61.39 carriers to remain out of the pool for at least two tariff periods, an existing section 61.39 carrier that is presently in its second tariff period out of the pool should be permitted to reenter the pool the following tariff period. Clearly, a carrier that has already spent two or more tariff cycles operating under section 61.39 did not seek to utilize the rules to earn a rate of return that greatly exceeds the prescribed level and therefore should be permitted to reenter the pool immediately if they so choose.

The Commission should reject the proposal to make the section 61.39 election one way.³⁰ There are legitimate reasons why a section 61.39 carrier may wish to reenter the traffic sensitive pool. For example, a LEC may need to make a major upgrade to one or more of its switches that will significantly increase its traffic sensitive costs. If the section 61.39 election was permanent, the carrier would be forced to wait until the following two-year tariff cycle before being able to begin recovering these costs. However, within the NECA pool, the carrier would begin to recover those costs in the same tariff cycle in which they were incurred which, in turn, would enable it to reinvest those revenues more promptly for the benefit of its customers. Similarly, if a section 61.39 carrier began to observe a consistent trend of declining access demand, then it may determine it is more beneficial for the company and its end users to reenter the traffic sensitive pool. Given the myriad of internal and external factors that may cause a section 61.39 carrier to want to reenter the NECA pool, the Commission should consider that if it were to make the election one way, it is doubtful that any carriers would elect it going forward.

³⁰ NPRM, 22 FCC Rcd 18002-18003, ¶32.

Finally, the Commission should also abandon its proposal to eliminate the section 61.39 option altogether.³¹ For a number of small, rural ILECs, section 61.39 has provided a viable alternative to the NECA traffic sensitive pool for establishing their interstate access rates. As the FCC correctly recognized in the *Small Carrier Tariff Order*, “[s]mall telephone companies may have valid reasons for electing to file their own access tariffs, but may confront administrative costs that are proportionately higher in relation to their revenues and smaller resources than large companies.”³² By permitting small, rural carriers to file access tariffs using historical cost and demand data, it enables them to bypass the costs associated with the use of projected data, thereby reducing the regulatory burdens faced by these carriers.³³ In addition, the use of historical cost data in setting access rates provides section 61.39 carriers with incentives to seek cost efficiencies which serve to benefit both its access customers and its end users.

In sum, there is no need for the Commission to eliminate the positive attributes of the section 61.39 option that serve the public interest in order to ensure just and reasonable access rates. This can be achieved through a targeted rule change that requires section 61.39 carriers to remain out of the NECA traffic sensitive pool for two or, at most, three tariff cycles. Again, the Commission should seek to minimize the negative impact on rural RoR carriers and their end-user customers in its effort to address a limited problem and achieve a valid goal.

VI. CONCLUSION

OPASTCO supports the Commission’s objective in this proceeding to ensure that access rates remain just and reasonable, even when a carrier experiences a significant

³¹ *Id.*

³² *Small Carrier Tariff Order*, 2 FCC Rcd 3811, ¶2.

³³ *See, Id.*, 2 FCC Rcd 3812, ¶13.

increase in access traffic. Access demand stimulation, however, is a practice which relatively few RoR-regulated LECs have engaged in. Therefore, the Commission should strive to avoid rule changes that needlessly burden and/or harm all rural RoR carriers and jeopardize their ability to serve consumers.

In particular, forbearance from the deemed lawful provision of the Act and requiring automatic mid-course tariff filings when an arbitrary growth trigger is surpassed are both excessive and unnecessary proposals that should not be adopted. Instead, the Commission can adequately ensure that RoR carriers' access rates remain just and reasonable by requiring section 61.39 carriers to remain out of the traffic sensitive pool for two or, at most, three two-year tariff periods. This targeted rule change would correct any excessive earnings that may result from an increase in access traffic and provide for rate neutrality. Just as important, this proposal would minimize the burden and potential harm to RoR LECs and enable them to continue providing their end-user customers with high-quality service at affordable rates.

Respectfully submitted,

**THE ORGANIZATION FOR THE
PROMOTION AND ADVANCEMENT OF
SMALL TELECOMMUNICATIONS COMPANIES**

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