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

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

COMMENTS OF THE
NATIONAL CABLE & TELECOMMUNICATIONS ASSOCIATION

The National Cable & Telecommunications Association ("NCTA") hereby submits its comments in the above-captioned proceeding.[1] For the reasons explained below, NCTA supports adoption of adequate safeguards on rural local exchange carriers (LECs) to guard against the abuses identified in the *Notice,* as well as more comprehensive action to curtail excessive rural LEC access charges.

INTRODUCTION AND SUMMARY

NCTA is the principal trade association for the U.S. cable industry, representing cable operators serving more than 90 percent of the nation's cable television households and more than 200 cable program networks. The cable industry is the nation's largest broadband provider of high-speed Internet access after investing $110 billion since 1996 to build a two-way interactive network with fiber optic technology. Cable companies also provide voice service to millions of American homes and are rapidly making these services available nationwide.

The entry of cable operators into the voice services marketplace unquestionably is good news for consumers across America. According to a recent report from MiCRA, subscribers to cable voice service save almost $12.00 a month on their telephone bills compared to the rates

---

[1] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176 (rel. Oct. 2, 2007) (*Notice*)

charged by the incumbents.[2] Consumers already have saved over $23 billion from cable voice competition over the last four years and they are projected to save an additional $111 billion over the next five years.[3]

NCTA fully supports the Commission's efforts to eliminate access charge abuses by rural LECs – both incumbents and competitors. Excessive access charges raise the cost of providing voice service and therefore limit the benefits that consumers will realize from competition. In addition to new procedures to control the "access stimulation" schemes identified in the *Notice*, NCTA also requests that the Commission clarify that carriers may not file tariffs to assess termination charges for non-access traffic. Like the schemes identified in the *Notice*, these state tariffs provide a mechanism by which some companies are imposing excessive charges for the termination of large amounts of local or ISP-bound traffic. After taking these immediate steps, the Commission should return its attention to comprehensive reform of the intercarrier compensation regime. Until the Commission moves forward with reducing intercarrier charges for all types of traffic to cost-based levels, the types of abuses identified in the *Notice* will continue to arise.

I. CABLE OPERATORS SUPPORT EFFORTS TO ENSURE THAT RURAL LEC ACCESS CHARGES REMAIN REASONABLE

The Commission initiated this rulemaking in response to complaints that rural LECs have been manipulating the Commission's access charge procedures. As described in the *Notice*, the basic problem is that some rate of return LECs will establish their per-minute access charges based on a predicted level of demand, and then enter into contracts with certain types of customers that are designed to produce a substantially higher amount of traffic, and therefore

2 *See* Michael Pelcovits and Daniel Haar, *Consumer Benefits of Cable-Telco Competition*, at 11, available at http://www.micradc.com/news/publications/pdfs/Updated_MiCRA_Report_FINAL.pdf.

3 *Id*. at 27, 30.

substantially higher revenues.[4] In some cases, these contracts involve revenue-sharing or other compensation paid by the carrier to customers that are expected to terminate significant amounts of traffic, such as conference calling services.[5] As the Commission recognizes in the *Notice*, pre-filing review of these tariffed rates cannot identify this type of situation and the "deemed lawful" provision of Section 204(a)(3) has the effect of insulating these rates from meaningful review.[6]

NCTA agrees with the Commission's tentative conclusion that the Commission "should have the opportunity to review the relationship between rates and average costs through the filing of a revised tariff" when a LEC "experiences significant increases in traffic."[7] The Commission has an obligation to ensure that the earnings of rate of return carriers are reasonable and it should take whatever steps are necessary to adjust its rules so that objective is achieved. Rate of return regulation should not be used as a mechanism for imposing exorbitant access charges and earning extraordinary returns.

NCTA also supports the adoption of new rules applicable to competitive LECs that are engaging in these schemes. As the Commission explained, a competitive LEC may have the same incentive as an incumbent to stimulate traffic.[8] These incentives are particularly strong for competitive LECs that either compete with rural LECs (and therefore benchmark their access rates to the rural LEC rates) or that qualify for the rural exemption under Section 61.26 of the Commission's rules (and therefore are permitted to charge access rates contained in the NECA tariff).

---

4 *Notice* at ¶ 12.

5 *Id.*

6 *Id.* at ¶ 21.

7 *Id.*

8 *Id*. at ¶ 34.

In addressing the abuses identified in the *Notice*, the Commission must take care to ensure that any new regulation does not unintentionally burden competitors whose traffic levels are increasing because they are attracting new subscribers. As compared to ILECs, whose market share is declining, all new entrants necessarily start with no subscribers and therefore experience substantial growth when they enter a market. To avoid unnecessary regulation of legitimate growth by competitive providers, the Commission should avoid relying solely on changes in a CLEC's total access minutes as the test for determining whether additional regulation is needed. Rather, the Commission should consider alternative measures, such as changes in a CLEC's per-subscriber minutes, that are more focused on identifying the "access stimulation" schemes identified in the *Notice*.

II. THE COMMISSION SHOULD CLARIFY THAT TARIFFS MAY NOT BE USED TO ASSESS TERMINATION CHARGES FOR NON-ACCESS TRAFFIC

In the *Notice*, the Commission invites comment on whether there are similar concerns related to non-access traffic.[9] One issue that cable operators have encountered with increasing frequency is competitive LECs that file state tariffs for the termination of non-access traffic. For the reasons explained below, NCTA requests that the Commission clarify that termination charges for non-access traffic may not be imposed unilaterally pursuant to a federal or state tariff.

In Section 251(b)(5) Congress provided that all LECs have a duty to establish reciprocal compensation arrangements, and in Section 252 it established a set of procedures by which competitive providers can negotiate an interconnection agreement with an incumbent LEC and arbitrate any disputed issues before the relevant state commission.[10] Because the scope of these

[9] *Id.* at ¶ 38.

[10] 47 U.S.C. §§ 251(b)(5), 252.

two provisions is not identical, there are some scenarios where two carriers will have an obligation to enter into reciprocal compensation arrangements, but no recourse to the Section 252 arbitration procedures in the event of a dispute, *e.g.*, if both carriers are competitive LECs.

When two companies that exchange traffic with each other do not have recourse to the Section 252 arbitration procedures, the exchange of traffic should be governed by commercial agreements. Because neither company is an ILEC, and therefore neither has market power, a commercial agreement should be mutually beneficial. A commercial agreement will always be necessary when two companies exchange through a direct interconnection arrangement because the parties must be clear about how the two networks will be connected. And commercial agreements increasingly are being used in cases where two parties exchange non-access traffic through indirect interconnection arrangements.

In situations where there is no direct interconnection and no commercial agreement between two carriers, the common understanding of most companies is that non-access traffic should be exchanged on a bill-and-keep basis. In other words, in the absence of a 252 agreement or a commercial agreement, carriers still have an obligation to establish reciprocal compensation arrangements to terminate traffic they receive, but no right to impose non-reciprocal terminating compensation. Like commercial agreements, this *de facto* bill-and-keep regime for carriers that are exchanging traffic through indirect interconnection arrangements generally will be mutually beneficial because the carriers get the benefit of exchanging traffic without the administrative costs of negotiating a contract or establishing processes to support wholesale billing.

While most companies recognize the benefits of this *de facto* bill-and-keep regime, some companies recently have started filing tariffs at the state level to impose termination charges on non-access traffic. Typically the companies filing these tariffs are competitive LECs that expect to terminate far more traffic than they originate, including companies that serve dial-up ISPs.[11] Some states have rejected these tariffs,[12] but others have allowed them to take effect, resulting in millions of dollars of unjustified payments.[13]

NCTA requests that the Commission clarify that the filing of tariffs for non-access traffic is prohibited. A tariff is a method of imposing compensation obligations unilaterally – one company dictates the terms and conditions under which it will accept traffic from other companies. The unilateral nature of a tariff is fundamentally inconsistent with the reciprocal compensation obligation imposed under Section 251(b)(5). The Commission has resolved similar issues between wireless carriers and incumbent LECs by prohibiting the use of tariffs,[14] and it should extend that policy to avoid the numerous disputes and time-consuming litigation that such tariffs create.

In addition to being inconsistent with the reciprocal compensation obligation under Section 251(b)(5), these tariffs raise many of the same concerns the Commission has identified in the *Notice*. As is the case with interstate tariffs, state commissions may not have procedures

---

[11] In the *ISP Remand Order*, the Commission established a regulatory regime under Section 201, including a termination rate of $.0007 per minute, that was intended to limit arbitrage concerns related to ISP-bound traffic. *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*). Although those rules were remanded by the United States Court of Appeals in 2002, *see Worldcom v. FCC*, 288 F.3d 429 (D.C. Cir. 2002), the Commission has yet to respond to the court's remand and those rules remain in effect.

[12] *See Pennsylvania PUC v. MCImetro Access Transmission Services d/b/a Verizon Access Transmission Services*, Docket No. R-00050799, Order at 17 (Pa. PUC June 22, 2006) (rejecting tariff filing "until the FCC provides greater clarity on the scope and intent of federal law.")

[13] *See Pac-West Telecomm, Inc. v. AT&T Communications of California*, Case 04-10-024, Decision Granting Complaint, D.06-06-055 at 23 (June 29, 2006) ("Pac-West's intrastate tariff is the appropriate source to look to for the compensation that AT&T must pay Pac-West for terminating ISP-bound calls.").

[14] *Developing a Unified Intercarrier Compensation Regime; T-Mobile Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, CC Docket No. 01-92, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855 (2005) (*T-Mobile Order*). In the *T-Mobile Order*, the Commission prohibited the use of tariffs by ILECs for the termination of non-access wireless traffic, but it also imposed the Section 252 negotiation and arbitration requirements on wireless carriers so that both companies would have access to similar dispute resolution procedures. That second step is unnecessary in this case because the two companies already would be similarly situated, *i.e.*, neither can invoke the Section 252 procedures against the other.

in place to provide a meaningful review of competitive LEC tariff filings and therefore the tariffed rates may greatly exceed the cost of terminating the traffic. For a company that anticipates it will be terminating large amounts of traffic, the ability to file a tariff that creates a unilateral right to impose charges eliminates any incentive that company may have to enter into commercial negotiations. The Commission should put a stop to this practice before it becomes a significant drain on cable operators and other companies that are finally bringing the benefits of competition to residential consumers.

III. COMPREHENSIVE ACCESS CHARGE REFORM IS URGENTLY NEEDED

As described above, NCTA fully supports Commission action to stop abusive practices. While new rules will be helpful, however, without more comprehensive reform these types of problems will continue to arise.

The fundamental problem at the root of the current spate of access charge abuses is well known to the Commission. Simply put, when the compensation for terminating a call substantially exceeds the incremental cost of terminating that call, companies have an incentive to sign up customers that receive more traffic than they send. As the Commission stated in the *Notice*, "[i]t is well established that there is a large fixed cost to purchasing a local switch and that the marginal or incremental cost of increasing the capacity of a local switch is low (some contend that it is zero) and certainly less than the average cost per minute of the local switch."[15]

Confirming this proposition, Qwest has submitted an analysis demonstrating that the additional switching cost for traffic is roughly $.0007 per minute,[16] the same rate the

---

[15] *Notice* at ¶ 14.

[16] *See Qwest Communications Corp. v. Farmers and Merchants Mutual Telephone Co.*, File No. EB-07-MD-001, Declaration of Peter B. Copeland at ¶ 9 (May 1, 2007) (submitted in WC Docket 07-135 on Nov. 30, 2007).

Commission adopted in connection for the termination of ISP-bound traffic.[17] While many companies exchange non-access traffic at rates that are in that range, access charges for all LECs, particularly rural LECs, are orders of magnitude higher.[18]

Although the Commission acknowledged the problems associated with using average cost as the basis for access charges six years ago in the *Intercarrier Compensation NPRM*,[19] it has yet to take any action to correct the situation. The continuing existence of excessive access charges is bad for consumers because it increases the cost of providing competitive service, which means that rates will not be as low as they otherwise would be.[20] Accordingly, as NCTA has urged previously, the Commission must begin to lower the access charges that incumbent LECs are permitted to impose.[21]

---

[17] *ISP Remand Order*, 16 FCC Rcd at 9187, ¶ 78.

[18] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4694, ¶ 15, n.46 (2005).

[19] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9616, 9650, ¶¶ 11, 110-11 (2001).

[20] *Id*. at ¶ 17 ("[T]raffic-sensitive termination charges represent real marginal costs to the carrier that pays them [and] they impose pressure on the calling party's carrier to flow these costs through to end-user customers.")

[21] *See* Reply Comments of the National Cable & Telecommunications Association at 10-11, CC Docket No. 01-92 (filed Feb. 1, 2007).

CONCLUSION

For all the reasons explained above, NCTA supports both short-term and long-term efforts to bring LEC access charges under control.

Respectfully submitted,

/s/ Daniel L. Brenner

Daniel L. Brenner
Steven F. Morris
Counsel for the National Cable &
Telecommunications Association
25 Massachusetts Avenue, N.W.
Suite 100
Washington, D.C. 20001-1431

December 17, 2007