

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554**

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

**COMMENTS  
OF  
U.S. TELEPACIFIC CORP. D/B/A TELEPACIFIC COMMUNICATIONS**

Nancy Lubamersky  
Vice President-Strategic Initiatives and  
Public Policy  
U.S. TelePacific Corp. d/b/a  
TelePacific Communications  
620-630 3<sup>rd</sup> St.  
San Francisco, CA 94107  
E-mail: [nlubamersky@telepacific.com](mailto:nlubamersky@telepacific.com)

Marilyn Ash  
Director, Public Policy  
U.S. TelePacific Corp. d/b/a  
TelePacific Communications  
620-630 3<sup>rd</sup> St.  
San Francisco, CA 94107  
Ph: 415-430-3119  
E-mail: [ashm@telepacific.com](mailto:ashm@telepacific.com)

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**COMMENTS**

U.S. TelePacific Corp. d/b/a TelePacific Communications (“TelePacific”) submits these comments in response to the *NPRM* seeking comment concerning “traffic stimulation.”<sup>1</sup>

Although TelePacific does not engage in, or support, the narrow "access stimulation" activities described in the *NPRM*, it opposes the proposals under consideration in the *NPRM* because they reflect a piecemeal approach to intercarrier compensation reform, would apparently be unevenly applied across the industry, and are overbroad.

**I. THE COMMISSION SHOULD ADDRESS "TRAFFIC STIMULATION" BY COMPREHENSIVE INTERCARRIER COMPENSATION REFORM**

The Commission initiated the *Intercarrier Compensation Proceeding* over six years ago to "replace the existing patchwork of intercarrier compensation rules with a unified approach..."<sup>2</sup>

At this point, the *Intercarrier Compensation Proceeding* is reportedly completely inactive, without the Commission previously having taken any action. The Commission has done nothing to establish a replacement regime for the CALLS Plan, which expired in 2005.<sup>3</sup> At the same

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<sup>1</sup> *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, WC Docket No. 07-145, FCC 07-176, released October 2, 2007 (“*NPRM*”).

<sup>2</sup> *Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, WC Docket No. 01-92, FCC 01-132, released April 27, 2001 (“*Intercarrier Compensation Proceeding*”) ¶3.

<sup>3</sup> *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Sixth Report and Order, Low-Volume Long-Distance Users, CC Docket No. 99-249, Order, and Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Eleventh Report and Order, FCC No. 00-193 (rel. May 31, 2000), as corrected by Errata (released June 14, 2000), *petition for*

time, Chairman Martin has recently stated that he intends to take no further steps in the *Special Access Proceeding*.<sup>4</sup> Other intercarrier compensation issues also continue to languish, such as the remand of the *ISP Remand Order*.<sup>5</sup>

TelePacific would hope that the *NPRM* does not reflect a decision on the part of the Commission to disengage from any serious effort to achieve resolution, in any of its open proceedings, of issues that are far more important to access charge reform than "traffic stimulation." The *NPRM* would address a very small area of access charge issues and establish yet more regulatory "patches" which would, as described in these Comments, themselves be very problematic, while leaving more important issues unresolved. The "unified approach" to access charge regulation initially envisioned by the Commission might resolve all of the concerns raised in the *NPRM*, along with other inequalities. It is the unequal treatment of carriers in similar situations that results in the ability to leverage the Commission's rules. For this and other reasons discussed in these Comments, the Commission should terminate this proceeding and instead address comprehensive intercarrier compensation reform in proceedings already established for that purpose.

## **II. THE *NPRM* DOES NOT REFLECT A BALANCED INDUSTRY APPROACH**

The Commission's goal is to create a "pro-competitive deregulatory national policy framework" for local telephony competition.<sup>6</sup> The Commission has sought to achieve reasonable

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*review filed sub. nom. US West v. FCC*, No. 00-1279 (D.C. Cir filed June 27, 2000), *stay denied*, Order, FCC 00-249, released July 14, 2000.

<sup>4</sup> Letter from Chairman Kevin J. Martin to Honorable John E. Sununu, November 28, 2007.

<sup>5</sup> *Inter-carrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, CC Docket No. 99-68, FCC 01-131, released April 27, 2001.

<sup>6</sup> Joint Managers' Statement, S. Conf. Rep. No. 1-4-230, 104th Cong., 2d Sess. 113 (1996) ("Joint Explanatory Statement") at 1.

access charges wherever possible through marketplace forces rather than regulation.<sup>7</sup> The Commission has stated that “[g]iven our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers.”<sup>8</sup>

The *NPRM* would, however, abandon these goals and impose new, burdensome regulations on competitive carriers. The *NPRM* explores at length possible proposals for rate-of-return ILECs and CLECs but devotes only five sentences and no proposals to ILECs subject to price cap regulation.<sup>9</sup> The *NPRM* would leave in place price cap regulation for BOCs that would permit them to achieve unlimited earnings for switched access while imposing awkward and harmful regulation on other carriers for supposedly excessive earnings. Although this would be consistent with the Commission’s recent focus on deregulating the BOCs,<sup>10</sup> it is unbalanced and would disproportionately burden competitive carriers as well as most non-BOC ILECs.

Instead of proposals that favor BOCs, the Commission should, as noted, address “traffic stimulation” and other intercarrier compensation issues under a more reasonable, comprehensive approach. To the extent the Commission does adopt any rules in this proceeding, it must assure that they apply to all carriers, including BOCs.

### **III. CERTIFICATIONS SHOULD NOT BE ADOPTED**

The *NPRM* asks whether a CLEC should be required, as a precondition of filing a tariff, to certify that it does not, and will not, engage in any “traffic pumping kickback” scheme.<sup>11</sup>

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<sup>7</sup> *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order, 12 FCC Rcd 15982 (1997) (subsequent history omitted) (“*Access Charge Reform Order*”) ¶9.

<sup>8</sup> *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 01-146, released April 27, 2001 (“*CLEC Benchmark Order*”), ¶ 41.

<sup>9</sup> *NPRM* ¶ 33.

<sup>10</sup> *Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Compute Inquiry Rules With Respect to its Broadband Services*, Memorandum Opinion and Order, WC Docket No. 06-125, released October 12, 2007.<sup>r</sup>

<sup>11</sup> *NPRM* ¶ 37.

TelePacific believes that it would be impossible for the Commission to establish a workable rule that could define impermissible traffic stimulation without harming normal LEC business activities.

The *NPRM* notes that traffic may be stimulated by a variety of means including conference bridges, chat lines, call center operations, and help desk provisioning.<sup>12</sup> There are few if any LECs, however, that do not offer or have arrangements with conference bridges or that do not serve some call centers. The services and arrangements that LECs enter into with these types of businesses are no different than arrangements that LECs have with other types of end user customers. The Commission's rules permit a variety of regulated and unregulated relationships including contract tariffs, special construction arrangements, detariffed provision of CPE and information services, and joint ownership with unrelated or affiliated entities. This will make it impossible to identify when or what "access stimulation" arrangements should be considered impermissible. The Commission has previously noted the "legal and beneficial revenue sharing arrangements that exist in the telecommunications industry today."<sup>13</sup> The Commission has found that payments to traffic aggregators (which are essentially traffic simulating entities) are ordinary business expenses.<sup>14</sup>

Consequently, the Commission could not feasibly write regulations to identify unlawful traffic stimulation activities and arrangements without restricting many routine and normal business activities, arrangements, and joint ventures of LECs with end user customers. It would be impossible for any carrier to certify that it is not engaging in "traffic stimulation" without

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<sup>12</sup> *NPRM* ¶ 7.

<sup>13</sup> *Pay-Per Call NPRM* at n. 83.

<sup>14</sup> *National Telephone Services, Inc. Petition for Declaratory Ruling that Untariffed Payment of Commissions by Dominant Carriers to Customers Violates Section 203 of the Communications Act*, 8 FCC Rcd 654 (Com. Car. Bur. Rel. January 28, 1993) ("NTS Order") at ¶ 9.

effectively terminating essential, normal business activities. A certification requirement is exactly the type of harmful, piecemeal regulation that the Commission should not adopt. Instead, as noted previously in these Comments, the Commission should proceed with comprehensive intercarrier compensation reform.

#### IV. NO RULES SHOULD BE ADOPTED FOR CLECS

##### A. *Rules Under Consideration For Rate-Of-Return ILECs May Not Be Applied to CLECs*

Most of the *NPRM* discusses proposals and tentative conclusions concerning ILECs subject to rate-of-return regulation.<sup>15</sup> Those carriers are subject to a number of rules that govern the costs that may be recovered in regulated rates.<sup>16</sup>

In contrast, competitive carrier access charges are subject to benchmark regulation that establishes a “safe harbor” that permits competitive carriers to tariff charges that are generally no higher than the competing ILEC rate.<sup>17</sup> Benchmark regulation does not specify or determine what costs may be included in competitive carrier access charges, and CLECs have the flexibility to recover access costs from their end user customers.<sup>18</sup> Competitive carriers may apportion access costs between IXCs and end users as long as charges to IXCs do not exceed benchmark levels. The Commission has noted “the extreme difficulty of establishing a ‘reasonable’ CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking”<sup>19</sup> and that “we lack an established framework for translating CLEC costs into access rates.”<sup>20</sup>

Applying rate-of-return concepts to CLECs on a going-forward or any basis would subject them to the same regulation as the most heavily regulated ILECs, contravening the

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<sup>15</sup> *NPRM* ¶¶ 19-33.

<sup>16</sup> *NPRM* ¶

<sup>17</sup> *CLEC Benchmark Order* ¶¶ 5, 40, and 46.

<sup>18</sup> *CLEC Benchmark Order* ¶ 39.

<sup>19</sup> *CLEC Benchmark Order* ¶ 44.

<sup>20</sup> *CLEC Benchmark Order* ¶ 46.

Commission's goals of creating a "pro-competitive deregulatory national policy framework" for local telephony competition.<sup>21</sup> Accordingly, regardless of what it concludes for rate-of-return carriers, the Commission should retain the current benchmark approach for CLECs notwithstanding any "traffic stimulation."

***B. Thresholds Should Not Be Adopted for Competitive Carriers***

The *NPRM* asks whether the Commission should adopt any access demand thresholds that would trigger revised tariff filings for rural CLECs, as proposed by Verizon, or possibly for all CLECs. The *NPRM* asks how the Commission should calculate any access demand threshold that it might apply to CLECs.<sup>22</sup>

This proposal should not be adopted. First, it would impose burdensome requirements on all rural and potentially even non-rural CLECs even though it has not been shown that a significant number of CLECs are engaging in "traffic stimulation" activities that BOCs now object to.

Second, access minutes can increase dramatically for a number of reasons such as when a CLEC enters a new service territory or if it wins a large enterprise customer from the ILEC. Any threshold that the Commission might adopt that could be effective in capturing "traffic stimulation," unfortunately would very likely be triggered by a CLEC's success in providing competitive services to new areas or new customers.

Third, it will not be possible to establish workable thresholds. Rates of growth of total minutes, or average minutes per access lines, as proposed in the *NPRM* will vary very significantly between competitive carriers depending on business plan. CLECs focusing on

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<sup>21</sup> Joint Managers' Statement, S. Conf. Rep. No. 1-4-230, 104th Cong., 2d Sess. 113 (1996)("Joint Explanatory Statement") at 1.

<sup>22</sup> *NPRM* ¶ 36.

serving residential and business customers, or business customers, or subsets of business customers will likely have very different patterns of access minutes because the customers they focus on have different usage patterns. Rural CLECs may well differ from urban CLECs in terms of any measure of access minutes or growth.

By contrast, BOCs are more likely to show some uniformity of access minute growth or average access minutes per line because of their historic monopoly for all categories of customers, their millions of access lines, and their many years of operation. But it is not feasible, and it would be anticompetitive, to attempt to do so for CLECs that do not have the same experience or share the some uniformity as the BOCs. Any threshold is likely to be inappropriate for some or all CLECs because of their different business plans.

Finally, there is absolutely no basis for applying a threshold to CLECs that benchmark to non-rural ILEC rates. If non-rural access rates, such as BOC access rates, create an undue incentive to engage in traffic stimulation (which is not the case), then all ILECs have an incentive to engage in traffic stimulation and the appropriate solution is comprehensive intercarrier compensation reform, not the piece meal regulation envisioned in the *NPRM*. Therefore, the Commission should not adopt any thresholds for CLECs that benchmark to a non-rural ILEC even assuming that it erroneously adopts thresholds for CLECs that benchmark to rate-of-return ILECs.

***C. CLECs Should Not Be Subject to Reduced Benchmark Rates Because of ILEC "Traffic Stimulation"***

Assuming that it is correct that "if the average revenue per minute remains constant as demand grows [because of traffic stimulation], but the average cost per minute falls ...then

profits will rise" leading to excessive earnings,<sup>23</sup> this would only apply to the carrier experiencing an increase in demand because of traffic stimulation. There could be no cost or other basis for requiring a CLEC that is not experiencing increases in demand due to traffic stimulation to reduce access rates. Therefore, to the extent the Commission adopts any rules applicable to ILECs that would require them to reduce rates because of traffic stimulation, CLECs benchmarking to the ILEC rate should be permitted to continue to charge the unreduced ILEC rate.

#### **V. THE COMMISSION SHOULD RELY ON THE COMPLAINT PROCESS**

The complaint process is adequate for addressing IXC concerns that a LEC's access charges are unreasonable to the extent they are engaging in traffic stimulation. The Commission has already resolved one complaint with respect to an ILEC.<sup>24</sup> This case will be as effective as rules in addressing any concerns about traffic stimulation activities by rural ILECs. The complaint process would additionally avoid the one-sided, burdensome rules envisioned in the *NPRM*, especially with respect to CLECs.

At the same time, "traffic stimulation" is overwhelmingly a rural ILEC issue. The *NPRM* states that "complaints to date about access stimulation have generally been directed at" rate-of-return ILECs.<sup>25</sup> There may be a few CLECs engaging in the arrangements with conference calling services complained of by BOCs, but they are few and far between and, some or all of those are CLECs affiliated with rural ILECs. BOCs' concern that CLEC "traffic stimulation" will increase is no more than speculation.

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<sup>23</sup> *NPRM* ¶ 14.

<sup>24</sup> *Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Memorandum Opinion and Order, File No. EB-07-MD-001, FCC 07-175, released October 2, 2007.

<sup>25</sup> *NPRM* ¶ 33.

Therefore, even if the Commission in this proceeding were to adopt new rules applicable to rural ILECs, it should proceed by the Section 208 complaint process with respect to competitive carriers.

## **VI. CONCLUSION**

The Commission should terminate this proceeding without adoption of any new rules and instead address issues concerning "traffic stimulation" in the context of comprehensive intercarrier compensation reform.

Respectfully submitted,

/s/ Nancy Lubamersky  
Nancy Lubamersky  
Vice President-Strategic Initiatives and  
Public Policy  
U.S. TelePacific Corp. d/b/a  
TelePacific Communications  
620-630 3<sup>rd</sup> St.  
San Francisco, CA 94107  
E-mail: [nlubamersky@telepacific.com](mailto:nlubamersky@telepacific.com)

Marilyn Ash  
Director, Public Policy  
U.S. TelePacific Corp. d/b/a  
TelePacific Communications  
620-630 3<sup>rd</sup> St.  
San Francisco, CA 94107  
Ph: 415-430-3119  
E-mail: [ashm@telepacific.com](mailto:ashm@telepacific.com)

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