Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC

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

COMMENTS OF ALL AMERICAN TELEPHONE CO. INC., AVENTURE COMMUNICATIONS, BROADVIEW NETWORKS, GREAT LAKES COMMUNICATIONS, NAVIGATOR TELECOMMUNICATIONS, LLC, NUVOX COMMUNICATIONS, OMNITEL COMMUNICATIONS AND XO COMMUNICATIONS, INC.

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Thomas W. Cohen
Kelley Drye & Warren LLP
3050 K Street NW, Suite 400
Washington, DC 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)

Their Attorneys

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TABLE OF CONTENTS

SUMMARY

The Commission need not and absolutely should not adopt at this time any new regulatory frameworks with respect to interstate access charges assessed by competitive local exchange carriers ("CLECs"). While the Joint CLEC Commenters take no position in these comments regarding the adoption of new regulations pertaining to rural incumbent local exchange carriers ("ILECs"), they are fundamentally opposed to the imposition of new regulatory burdens on CLECs. There is simply no evidence that CLECs are, as a group, engaging in systematic abuses such that generic rules might be warranted.

CLECs, like all carriers, strive to grow their businesses and maximize use of their network facilities. Because access service is typically wholesale in nature, when a provider of access services sees a usage increase, it is because another class of carriers, namely interexchange carriers ("IXCs"), is experiencing an increase in the use of their own services by *paying* end users. Normally, increased usage would be considered the harbinger of various and considerable public benefits. Today, with flat-rate services distinguishing a larger and larger percentage of long distance customers, IXCs do not necessarily see increased usage of their services as yielding benefits. But this is a result of long distance company pricing practices, not the product of CLEC activity that either is or should be declared unlawful.

There are numerous reasons why a CLEC's terminating access charge traffic might increase. The CLEC may be increasingly successful overall, or be winning large customer accounts that result in increased terminating minutes, for example, as a result of new businesses coming into an area. Whatever the reason, CLEC successes should be lauded and encouraged by the Commission as evidence that competition is working, not stifled as the large IXCs (and their ILEC affiliates) seek to do through this proceeding.

The Commission should also take the opportunity to emphasize that legitimate carrier-customer relationships may take many forms. Specifically, the Commission can and should conclude here, as a general matter, that the lack of net customer payments to a carrier does not, in and of itself, constitute an unlawful practice in violation of section 201 or 202 of the Act. Assuming for the sake of argument that some no-net-payment-to-the-carrier-arrangements or other CLEC practices related to access charges may be unjust and unreasonable or discriminatory, rather than try to adopt generic rules, the Commission should use other tools – principally Section 208 complaints –at its disposal to examine when such arrangements might prove unjust and unreasonable. Case-by-case examination of carrier-customer arrangements in complaint cases will provide industry guidance while avoiding the pitfalls of monolithic regulations based on anecdotal evidence and speculation regarding carrier incentives. Wholesale regulation of CLECs in the current circumstances, where there is little evidence of general abuse, will stifle innovation in billing arrangements that serves to stimulate overall usage of the public switched telephone network.

Should the Commission, despite the negative consequences, consider the adoption of generic measures applicable to CLECs, it should also adopt reporting and certification requirements applicable to IXCs to monitor and discourage self-help. For example, IXCs should be required to certify that they will not engage in call-blocking or call degradation practices regarding traffic destined for LECs with whose access charges they disagree. Further, IXCs should be required to file quarterly reports detailing traffic volumes delivered to non-affiliated LECs and the amounts of access charges incurred but not yet paid.

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All American Telephone Co. Inc.; Aventure Communications; Broadview Networks; Great Lakes Communications; Navigator Telecommunications, LLC; Nuvox Communications; OmniTel Communications; and XO Communications, Inc. (collectively, the "Joint CLEC Commenters"), through their undersigned counsel, hereby respectfully submit their comments to the Federal Communications Commission ("Commission") in response to the Notice of Proposed Rulemaking issued in the above-captioned proceeding.[1] As explained further herein, the Commission, at this time, need not and absolutely should not adopt any new regulatory frameworks with respect to interstate access charges assessed by competitive local exchange carriers ("CLECs"). The Joint CLEC Commenters are fundamentally opposed to the imposition of new regulatory burdens on CLECs when they are striving to grow their businesses, maximize the use of their network facilities, and enhance competitive choice. In the event that an interstate

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[1] *In the Matter Establishing Just and Reasonable Rates For Local Exchange Carriers,* Notice of Proposed Rulemaking, WC Docket No. 07-135, FCC 07-176. (rel. October 2, 2007) ("*NPRM*")

access customer believes that a particular CLEC is imposing rates that are discriminatory, unjust, or unreasonable, or is otherwise engaging in an unjust, unreasonable, or unreasonably discriminatory practice, the Communications Act of 1934, as amended (the "Act"), and the Commission's Section 208 complaint process already make available adequate and time-tested remedies.

I. INTRODUCTION

In 2001, the Commission comprehensively addressed, prospectively, the problem of allegedly unreasonable CLEC interstate access charges in its *CLEC Access Reform Order*.[2] Prior to the release of that order, the Commission had declined prospectively to regulate CLEC access rates, believing that competition and the prospect of challenges to the rates' reasonableness under sections 206-209 of the Act would prevent CLECs from imposing unreasonable rates in their interstate access tariffs. In the *CLEC Access Reform Order*, the Commission largely reinforced this perspective but took steps to eliminate perceived remaining regulatory arbitrage opportunities that might exist with respect to tariffed CLEC access services by revising its rules to align tariffed CLEC access rates more closely with those of the incumbent LECs, which are subject to more extensive rate regulation. The Commission concluded that CLEC access rates at or below the benchmarks it set in that proceeding will be presumed to be just and reasonable, and CLECs may impose them by tariff. Above the benchmark, CLEC access services must be detariffed, and any CLEC seeking to assess higher rates must negotiate such rate levels directly with the interexchange carriers ("IXCs"). The Commission concluded that this new framework would "provide a bright line rule that permits a simple determination as to whether CLEC access

2 *In the Matter of Access Charge Reform*, Seventh Report and Order, 16 FCC Rcd 9923 (2001) ("CLEC Access Reform Order").

charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering."[3]

Since the Commission's decision in 2001 establishing the framework under which CLECs continue to operate today, there has been a relative dearth of complaints about CLEC access charge rates. There has been no showing to date that CLECs have been the source of any significant problem requiring the imposition of generic measures like those outlined in the *NPRM*.[4] The *NPRM* does not muster any such evidence but merely speculates about potential incentives that might extend to CLECs and notes that a number of IXCs have brought complaints against certain LECs. The reality is that CLEC access charge rates have not been shown to jeopardize the ability of IXCs to keep their interstate rates low or for IXCs to remain profitable. Indeed, for the past several years, the long distance sector (in fact, all of telecommunications) has been increasingly defined by "all you can eat" pricing packages which give customers of IXCs the ability to make unlimited long distance calls for a single monthly charge.[5] In short, by

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3 *Id.* ¶ 4. The Commission also noted that IXCs could not engage in self-help and refuse to deliver calls to the end user customers of CLECs whose rates the IXCs believed were unreasonable: "We also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request." *Id.* ¶ *5.* Earlier this year, in this docket, the Commission issued a Declaratory Ruling and Order prohibiting IXCs from blocking calls to rural ILECs with whose rates the IXCs take issue. *In the Matter Establishing Just and Reasonable Rates For Local Exchange Carriers,* Declaratory Ruling and Order, WC Docket No. 07-135, DA-2863 (rel. June 28, 2007) ("Call Blocking Order").

4 The Joint CLEC Commenters, in taking this position in these Comments, do not, as a group or individually, necessarily maintain that other reforms to the access charge regime are also inappropriate. Each of the Joint CLEC Commenters reserves the right to advocate for adjustments or reforms to the access charge regime in appropriate fora and proceedings.

5 *See, e.g.*, Debbie Jacobsen, *Unlimited Long Distance Calling – Big Savings Ahead* (Oct. 12, 2005) < http://EzineArticles.com/?expert=Debbie_Jacobsen>; Nicholas Thompson, *Phone Companies See Their Future In Flat-Rate Plans of Many Services*, N.Y. TIMES, May 23, 2003.

eliminating marginal cost to the end user, the IXCs making such flat-rate plans available are encouraging their customers to make as many calls as possible which, of course, means that more and more calls will be terminated by local exchange carriers, whether ILECs or CLECs.[6] Significantly, the IXCs developed these pricing plans with full knowledge of the access charge regime and other factors affecting their costs. It is not the role of regulators to bail out the large IXCs if all of their assumptions regarding usage of their services did not prove to be well founded.

The concerns of the largest IXCs about the ability of CLECs to stimulate long distance additional traffic in a way that impacts their profitability should fall on deaf regulatory ears. Accordingly, as amplified below, the Commission should decline to adopt any measures in this proceeding impacting CLEC access charges or enlarging the administrative burdens of CLECs associated with providing access services. In the event that an IXC believes that a CLEC is engaging in an unjust and unreasonable practice regarding its interstate, interexchange access charges, that IXC can file a complaint with the Commission, and the Commission can assess the alleged practice in the light of specific facts and circumstances. The Commission should encourage the IXCs to take such actions if they feel rates are unlawful, rather than engage in self-help by refusing to pay tariffed access charges or by blocking or degrading calls *of their own customers* destined for those LECs with whose access charges the IXCs may disagree. There has been no showing that generic, prophylactic regulatory measures are required. Such regulation

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6 In large part, the large IXCs' complaints leading to this *NPRM* do nothing more than reflect the current reality that, in the United States' dial-up telecommunications marketplace, wireline customers do not, as a general matter, pay for incoming interexchange calls while IXCs must pay to complete calls. IXCs, understandably, are seeking to reduce the rates for calls initiated by their customers to rock bottom levels but they must rely on inputs and services provided by third-party carriers, such as LECs, and pay for them. But there is no reason that IXC pricing practices should force corresponding changes or limits on their suppliers of access services.

would only stifle the prospects for continued growth of the network, inhibit the development of competitive services and arrangements, and harm consumers.

II. THE COMMISSION SHOULD CONTINUE TO PROMOTE, NOT RESTRICT, INCREASED USE OF COMPETITIVE LOCAL EXCHANGE FACILITIES

All telecommunications carriers make money by providing services. As a general matter, it goes without saying that increasing the volume of services enhances the potential for a carrier's profitability. Continuing success for carriers, as in any other business, requires diligent efforts to increase customer demand for their services, whether in volume, variety, or both. As the Commission notes at the beginning of the *NPRM*, "it is reasonable for carriers to seek to increase demand for their services . . ."[7] These principles apply to *all* categories of telecommunications carriers – local exchange carriers, interexchange carriers, and access charge providers – and all carriers engage in efforts to stimulate demand.[8]

Because access service is typically wholesale in nature, when a provider of access services sees an increase in its usage, another class of carriers, namely interexchange carriers

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7 *NPRM*, ¶ 1.

8 Telecommunications carriers are increasingly using creative techniques, which are becoming commonplace, to stimulate traffic. For example, AT&T's CMRS affiliate, AT&T Mobility entered into an exclusive arrangement with the popular television show "American Idol" to provide a service that allows viewers to vote for their favorite contestant by text message or cell phone call. Similarly, AT&T provided seed money for IXTC, the leading wholesaler of IP telephony, which allows its affiliate carriers to charge their customers considerably lower rates for international phone calls by pulling the call off the public switched telephone network and onto the Internet. As further examples, carriers have entered into revenue-sharing arrangements with broadcasters to use text messaging to make money through selling sponsorships to advertisers interested in reaching consumers with meaningful text messaging information. Carriers have also entered into revenue-sharing arrangements with sports teams to allow fans to use text messaging during sporting events to encourage crowd interaction during the event. Carriers also routinely enter into arrangements with various promoters to allow contestants to use an 800 number to place a vote or enter a contest. As these few illustrations demonstrate, efforts to stimulate traffic are manifold and limited only by the imagination.

using the access providers' services, also sees an increase in the use of their own services by end users. Consequently, increased access usage is a harbinger of considerable public benefits. First, end users see the advantage in increased use of the services they are purchasing from their interexchange service providers, with derivative social and economic benefits. Second, the carriers serving and billing these end users experience additional usage of their facilities. If the end users take their long distance service on a per unit basis, increased traffic means additional revenues. If the IXCs are assessing flat-rated, unlimited usage services, revenues will not grow with usage but it may be appropriate for them to reconsider the rates they assess their end users if their costs are going up with the increased volume.[9] Third, any underlying carriers providing wholesale services, including access service providers, also receive the benefits of additional traffic on their facilities and increased revenues.

There are numerous reasons why a CLEC's terminating access charge traffic might increase within its operating territory, and within particular exchanges. The CLEC may simply become more successful overall because of attractive local exchange service plans and grab a larger share of the market from the incumbent. A larger share of the local exchange market will result in increased volumes of exchange access traffic terminated by the competitor. In addition, increases in terminating access traffic may reflect economic growth in an area resulting from

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9 One of the risks that carriers assume when assessing charges on a flat-rated basis is that overall usage, and thus underlying costs, will exceed projections used to price these services. Such increased usage could occur for any number of reasons, but it is inherent with flat-rate services that some customers will increase usage so significantly that the charges they pay will not adequately compensate for the costs of providing service to that customer. Flat-rate prices thereby rely on other subscribers to use their services less to average out the service to acceptable levels relative to cost. Where wholesale inputs for a flat-rate service are sold on a usage basis, there is always the danger that customers of the flat-rate service will drive usage up to the point that the *total* per-unit input costs exceed the flat-rate charges for the retail service. Where this occurs frequently enough, there are market-based solutions for the retail service provider, such as the renegotiation of the input prices on a one-on-one basis or the adjustment of the retail pricing.

significant enterprise relocations or expansions, such as telemarketing groups, hotels, airports, shopping malls, or other high volume traffic generators. A CLEC successful in securing the business of one or more such entities might experience a material increase in traffic terminated in an exchange. Alternatively, a new business unit might be established within an exchange that, by its nature, is characterized by high incoming call volumes, such as a call center or a help desk, and a smaller local carrier may secure the account. These are just a few of the examples by which a LEC may experience notable increases in volume in its service area or within given exchanges, all of which should be lauded and encouraged by the Commission, not stifled as the large IXCs (and their ILEC affiliates) aim to achieve through this proceeding.[10]

Where CLEC operations are previously small in a given local market, it is axiomatic that an increase in demand for their local exchange services, and attendant access services, will lead to significant increases in traffic for the competitive carrier. CLECs should be encouraged to pursue such opportunities, and the Commission should support those efforts -- not punish them and their customers. The Commission should categorically refrain in this proceeding from

10 Increases in local exchange and exchange access traffic may also be temporary because of unique events such as large conventions or conferences, or major sporting, cultural, or entertainment events. While the Joint CLEC Commenters do not believe that the Commission should adopt any of the measures discussed in the *NPRM* and apply them to CLECs, were the Commission to adopt provisions that are triggered by increases in volumes, the Commission should adopt sufficiently long periods of time over which to assess call volumes to ascertain whether regulatory obligations have been triggered. *See NPRM,* ¶ 22 (inquiring about the length of time over which traffic volumes should be measured for purposes of various possible regulatory triggers). The baseline for any CLEC, for comparative purposes, should be at least six months, and preferably twelve, following the issuance of any order in this docket so as to eliminate any anomalous events or anomalous short-lived spikes in traffic. Moreover, the periods over which changes are assessed should also be of sufficient length, ideally at least twelve months, but in all events at least six months. Anything shorter than a year would give undue weight to short-term spikes in traffic that distort the true nature of the carrier's ongoing traffic volumes.

taking measures needlessly and preemptively to increase CLECs' administrative burdens as they become more successful. Such measures, especially if adopted without adequate proof and upon the suspicion that incentives may exist in the future, would merely create disincentives for such firms to compete rigorously and offer customers new services and opportunities. It should not be lost on the Commission that those interexchange carriers that have, to date, called for regulatory measures triggered by increases in traffic to be imposed on CLECs in addition to rural ILECs, are not only among the very largest IXCs in the country, but also the largest incumbent local exchange carriers as well, with whom the Joint CLEC Commenters and other CLECs are competing. The burden on these IXCs/ILECs to demonstrate the need for the imposition of a new regulatory framework on CLECs should be set very high, and there is no indication that such evidentiary hurdles can be met.

III. THE COMMISSION SHOULD NOT REVISIT THE PROPRIETY OF SO-CALLED REVENUE SHARING ARRANGMENTS BETWEEN END USER CUSTOMERS AND LOCAL EXCHANGE CARRIERS

The Commission has long been a champion of innovation in its many forms. This extends beyond simple service offerings and reaches arrangements between customers and carriers as well. In the NPRM, however, the Commission entertains the possibility of adopting rules which would serve to chill such innovation. Specifically, the Commission seeks comment on the contention of AT&T that "the payment of compensation by a carrier to a customer, such as an entity providing an access stimulation service, violates section 201 or 202 [of the Act], even if the carrier does not seek to recover the cost of the compensation through access charges."[11]

[11] *NPRM*, ¶ 10.

The Commission recently confirmed that payments of marketing fees to local exchange end user customers does not affect their status as end user customers.[12] In so doing, the Commission rejected an argument made by Qwest that an end user customer must make a net payment to a service provider in order to subscribe to a local exchange service, finding that the mere fact that the marketing fee may exceed the payment for service does not mean the subscriber does not pay for the service.[13]

While the Commission in *Qwest v. Farmers and Merchants Mutual Telephone Service* ("Qwest Order") may have been focused on the question of whether the marketing fee arrangement disqualified Farmers and Merchants' free conference calling customer as an end user and a subscriber, the Commission in effect was confirming that the customer was, for purposes of the LEC's tariff, a subscriber to the tariffed service and that entry into the arrangement was just and reasonable for the carrier. Just as the Commission made clear that net payments to a carrier are not required for the conference calling company to be a subscriber to a tariffed telecommunications service, the Commission can and should conclude here, *as a general matter*, that the lack of net payments does not, in and of itself, constitute an unjust or unreasonable practice in violation of section 201 of the Act or an unjustly and unreasonably discriminatory practice in violation of section 202 of the Act.

On several previous occasions the Commission has concluded that arrangements involving marketing fees paid to customers and others to stimulate traffic (and carrier revenues)

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12 *Qwest v. Farmers and Merchants Mutual Telephone Company*, FCC 07-175 (rel. Oct 2, 2007) ¶ 38.

13 *Id.*

do not render the telecommunications services unjust and unreasonable.[14] In *Jefferson,* the FCC stated very plainly, after reviewing the billing and so-called revenues sharing arrangement in that case involving a conference calling company, that "AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable."[15] Significantly, although the Commission stated in the *Qwest Order* that it did not address in *Jefferson* and its progeny whether access charges for the services in those cases were appropriate – it simply assumed that they were – the Commission, in those cases, did examine and failed to find fault with the arrangements by which net payments were made *by the carrier to the customers.*[16]

Further, in the Commission's *Access Charge Reform* proceeding, numerous commenters detailed the prevalence in the marketplace of arrangements involving marketing fees and commissions paid by carriers to stimulate traffic.[17] In response, the Commission declined to find that such arrangements between carriers and customers based upon minutes of use or revenue

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14 *E.g., AT&T Corp. v. Jefferson Telephone Company*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*Jefferson*"); *AT&T v. Frontier Comm's of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041 (2001) ("*Frontier*").

15 *Jefferson,* 16 FCC Rcd at 16136.

16 *See Jefferson*, 16 FCC Rcd at 16134-36 (¶¶ 7, 15)(AT&T failed to demonstrate that the revenue sharing arrangement violated Sections 201(b) or 202(a)); *Frontier*, 17 FCC Rcd at 4042 ("we conclude that AT&T has failed to meet its burden of demonstrating that Defendants violated either Section 202(a) or Section 201(b) of the Act."); AT&T Corp. v. Beehive Telephone Co., Inc., Memorandum Opinion and Order, 17 FCC Rcd 11641, 11655 (¶ 29)(AT&T failed to meet its burden of showing a Section 201(a) or Section 202(b) violation through the revenue-sharing arrangement) (2002). *See also Qwest Order,* ¶ *33 n.115.* Even accepting the Commission's recent characterization of these 2001 decisions in the *Qwest Order*, the Commission found that terminating access service was being provided to a customer that made no net payments and that the IXC was bound to pay the charges. Notably, in this *NPRM*, the question of whether a tariffed service is being provided is *not* what is at stake, but rather whether the arrangements (or, more precisely, broad categories of arrangements) between customer and carrier are lawful and legitimate. Accordingly, *Jefferson* and its progeny are extremely relevant and resolve the matter in favor of the arrangements.

17 *Access Charge Reform*, 19 FCC Rcd 9108, 9140-41 (2004).

levels generated by customer-stimulated demand were unjust or unreasonable, unlawful or illegitimate.[18]

The payment by non-dominant CLECs of marketing fees to customers that generate large amounts of terminating access traffic is a reasonable form of discrimination in that, unlike other local exchange customers of the CLEC, customers that generate a large amount of incoming traffic are not similarly situated with "typical" local exchange customers that make and receive smaller volumes of calls. In order to secure such customers, who have a choice in providers and whose subscription presents not only the opportunity for local exchange revenues but large volumes of access revenues as well, carriers should be entitled to offer incentives when competing for such customers.

Assuming for the sake of argument that some type of no-net-payment-to-the-carrier-arrangements may exist that are unjust and unreasonable or non-discriminatory, rather than try to adopt generic rules, the Commission should use other tools at its disposal to examine the circumstances in which such arrangements might prove unjust and unreasonable. Specifically, evaluating whether any such arrangement is unjust and unreasonable requires a careful examination of the terms of the tariff, the terms of the arrangement by which payments are made by the carrier to the customer, and the nature of the customer's use of the LEC's services, among other circumstances. In the recently decided *Qwest Order,* for example, resolution of questions involving the propriety of the LEC's access charges and related practices involved an examination of the Farmers and Merchants' tariff and the circumstances of the

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18 *Id.* n.257. *See also California Payphone Assoc.,* 12 FCC Rcd 14191, 14193, 14207 n.87 (2004) (Commission finds lawful a 32% revenue sharing agreement for payphone usage between a municipality and the ILEC providing the phones).

marketing fees under examination. The Commission should decline in this generic proceeding to adopt any one-size-fits-all rules regarding the lawfulness of arrangements that CLECs or other LECs may enter into with their customers that involve payments by the carriers of marketing fees, agency commissions, or other compensation for the customer generating substantial volumes of incoming traffic. Case-by-case adjudication is an appropriate way for the Commission to proceed to examine any CLEC-customer arrangements that concern IXCs, particularly given the absence of clear evidence that there is a widespread problem and the broad and constantly shifting range of arrangements employed in the industry. This approach will provide CLECs and IXCs any necessary guidance.[19] Case-by-case examination of carrier-customer commission, marketing fee, or other similar arrangements in complaint cases will provide industry guidance while avoiding the pitfalls of monolithic regulations based on anecdotal evidence and speculation regarding possible carrier incentives which will have the potential to stifle continued innovation in billing arrangements that serve to stimulate overall usage of the public switched telephone network.

IV. AS A GENERAL MATTER, RATHER THAN ADOPT NEW REGULATIONS, THE COMMISSION SHOULD RELY UPON THE COMPLAINT PROCEDURES ALREADY AVAILABLE TO IT

Apart from the issue of whether no-net-payments-to-the-carrier arrangements are just and reasonable, the *NPRM* seeks comment on a variety of other proposed or possible measures to be imposed upon CLECs.[20] The Joint CLEC Commenters remain concerned that adoption of new

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19 In the *Qwest Order*, the Commission observed that its decision in that two-party complaint proceeding would provide "important guidance to the telecommunications industry." *Qwest Order*, ¶ 12 n.36. *See also Bell Atlantic-Delaware Inc. v. Global NAPs, Inc.,* Order on Reconsideration, 15 FCC Rcd 5997, 6000, ¶ 8 (2000) ("adjudication of cases generates precedents and clarifies the law, providing benefits to the public at large.").

20 *NPRM,* ¶ 34-37.

measures, such as requirements to file quarterly access traffic volume reports, monitoring when traffic volumes exceed certain triggers, adjusting their access rates as a result, or certifying that they are not involved in "access stimulation" that violates Sections 201-203 of the Act, would be regulation for regulation's sake. As an overarching matter, it is difficult to see how such regulations would promote the public interest. Rather, such rules would create additional burdens for all affected CLECs, when there is no showing that, as a general matter, efforts to promote use of network facilities including incoming interexchange traffic would contravene the Act. No matter how the Commission might choose to craft such generic regulations, numerous carriers that are not involved in practices that appear to be the focus of the IXC's stated concerns would become subject to additional regulatory obligations utterly without justification or offsetting public benefits. It would be an unsound and arbitrary public policy for the Commission to adopt regulations that impact subcategories of carriers differently based upon the Commission's predictions or, even worse, large IXCs' projections (generated, in part, it is reasonable to presume,[21] by efforts to protect their own operations against competition) about which types of carriers have incentives to engage in traffic stimulation activities that the Commission concludes, before the fact, may violate Sections 201 or 202 of the Act.[22]

The better course is for the Commission to do what principally it has done for the past decade or so, namely to rely upon the formal complaint process. As noted above, this mechanism can work efficiently, as manifested by the rapid resolution of Qwest's complaint in *Qwest v. Farmers and Merchants Mutual Telephone Company.* Rather than imposing new

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21 There can be no doubt that incentives for IXCs with affiliated LECs to engage in such protected activities exist.

22 Even were the Commission to conclude from the record in this proceeding that individual carriers are acting with certain motives or incentives, such findings would be an unsound basis for imposing generic regulations.

administrative obligations indiscriminately on large segments of the industry, the Commission will be able to examine the facts and circumstances of particular cases including carrier motives and incentives, if appropriate, in their complexity and adopt narrowly-tailored rulings.[23] Having recently been chastised by the Commission for their self-help activities, particularly call-blocking,[24] the large IXCs seek to circumvent the need to challenge specific LECs that they believe are acting unjust and unreasonably. But in doing so, the IXCs are already ignoring the *Call Blocking Order*. There, the Wireline Competition Bureau made clear that "[w]e find that carriers that contend that access charges of a LEC are unreasonable should use these mechanisms [*i.e.,* challenging tariff filings and Section 208 complaints] to seek relief and may not engage in self help such as call blocking."[25] Nothing has changed in six months.

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23 In the event that the Commission, despite the negative consequences, determines to consider the adoption of generic measures applicable to CLECs, the Commission should also, given the long history of IXC-self help when they IXCs face tariffed access charges with which they disagree, adopt corresponding measures applicable to IXCs. For example, consistent with the *Call Blocking Order, supra,* IXCs should be required to certify that they will not engage in call-blocking practices nor adopt practices that have the effect of degrading the quality of traffic (*e.g.*, routing traffic to facilities with insufficient capacity) destined for LECs with whose access charges they disagree. Further, IXCs should be required to file reports with the Commission on a quarterly basis stating the volume of traffic terminated to non-affiliated LECs for each of the previous six calendar quarters, the amount of access charges assessed against them by unaffiliated LECs for those quarters, and the amount of access charges that have not been paid to date for each of the quarters. The Commission has previously found that the failure of IXCs to pay legitimate tariffed access charges is unlawful self help. *MGC Communications Inc. v. AT&T,* 14 FCC Rcd 11647 (1999). The IXC reporting advocated above will help ensure and assist the Commission in monitoring that IXCs are not engaged in such unlawful activity.

24 *Call Blocking Order, supra.*

25 *Id.* at 1.

V. CONCLUSION

For the foregoing reasons, the Commission should refrain from adopting new regulations applicable to CLECs regarding so-called traffic stimulation activities. Rather, the Commission should make clear that *all* carriers are encouraged to pursue opportunities to increase usage of their network facilities and that innovation and a variety of competitive approaches are in the public interest and will be supported. Rather than adopting generic administrative burdens to satisfy the unfounded concerns of a few large IXCs and their affiliate major ILECs about possible unreasonable practices, the Commission should confirm that, in the event that an IXC believes that a CLEC is engaging in an unjust, unreasonable, or unreasonably discriminatory practice, it is able to and encouraged to avail itself of the Commission's complaint procedures.

Respectfully submitted,

Thomas Cohen

Brad E. Mutschelknaus
Edward A. Yorkgitis, Jr.
Thomas W. Cohen
KELLEY DRYE & WARREN LLP
3050 K Street NW, Suite 400
Washington, D.C. 20007
(202) 342-8400 (telephone)
(202) 342-8451 (facsimile)

Attorneys for
All American Telephone Co. Inc.,
Aventure Communications,
Broadview Networks,
Great Lakes Communications,
Navigator Telecommunications, LLC,
Nuvox Communications,
OmniTel Communications, and
XO Communications, Inc.

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