Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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

COMMENTS
OF
HYPERCUBE, LLC
MCLEODUSA TELECOMMUNICATIONS SERVICES, INC.

James Mertz
Vice President, Government Affairs
Hypercube, LLC
Bldg 300 Suite 330
5300 Oakbrook Parkway
Norcross, GA 30093

William A. Haas
Deputy General Counsel
6400 C Street, S.W.
McLeodUSA Telecommunications
Services, Inc.
McLeodUSA Technology Park
Cedar Rapids, IA 52406

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SUMMARY

The Commission should establish comprehensive intercarrier compensation reform via the *Intercarrier Compensation, Special Access Proceeding,* and other proceedings instead of the piece meal approach reflected in the *NPRM*, even assuming that "traffic stimulation" merited new rules.

Every telecommunications carrier engages in traffic stimulation, another description of which is marketing. Nearly every carriers offers conference calling or provides service to calling centers. Revenue sharing does not violate the Act. The Commission has previously declined to find that revenue sharing is unlawful. Revenue sharing is an ordinary business practice that the Commission should not attempt to change. Nor could the Commission feasibly distinguish in regulations revenue sharing and traffic stimulations arrangements that it would want to limit from routine business practices that the Commission has already approved. Revenue sharing is not an unlawful rebate because, if for no other reason, there is no rebate of access charges to the IXC. To the extent the Commission has issues with particular carrier practices, it should rely on the complaint process.

The proposed regulations would favor BOCs because under price caps BOCs may earn unlimited rates-of-return. The rules under consideration for ILECs subject to rate-of-return regulation may not be applied to CLECs because CLECs are not subject to any cost-based regulation.

No new rules should be adopted for CLECs. Thresholds should not be adopted because this would impose burdensome requirements on all rural or all CLECs even though it has not

been shown that a significant number of CLECs is engaging in "traffic stimulation." Thresholds would thwart competition because they would penalize CLECs whose access minutes increase because of entering new service territories or because of taking on new customers. The Commission will not be able to successfully identify thresholds because growth of access minutes or average minutes per access line will vary dramatically between CLECs depending on business plan. Requiring CLECs to reduce prices might prevent them from recovering costs of service because CLECs have higher costs than ILECs for a number of reasons. Even if there were any merit to thresholds for rural carriers, there could be no basis for thresholds for non-rural CLECs that benchmark to price cap ILEC rates.

Certifications should not be adopted for CLECs because there is no practical way that the Commission could distinguish "traffic stimulation" from normal business activities. A carrier could not make a certification without terminating essential business activities.

CLECs that benchmark to an ILEC that is required to reduce rates because of "traffic stimulation" should not be required to reduce prices because the *NPRM*'s theory that increased traffic could lead to unreasonable earnings could not apply to a carrier that does not experience increased traffic.

Any determinations by the Commission in this proceeding that "traffic stimulation" arrangements are unlawful could only be applied to CLECs prospectively because current benchmark rules establish a "safe harbor" that precludes any retroactive liability.

The Commission should terminate this proceeding without adoption of any new rules applicable to competitive carriers.

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COMMENTS

Hypercube, LLC and McLeodUSA Telecommunications Services, Inc. submit these comments in response to the Commission's *NPRM* seeking comment concerning "traffic stimulation."[1] The Commission should terminate this proceeding without adoption of any new rules applicable to CLECs.

I. THE COMMISSION'S PRIORITIES ARE MISPLACED

While the *NPRM* reflects a Commission decision to move quickly to address "traffic stimulation," other far more important access charge issues languish. The CALLS Plan expired in 2005.[2] The Commission has done nothing to establish a replacement regime that would assure reasonable BOC access charges going forward, even though the X-Factor is now set at inflation meaning that BOC access customers do not obtain the benefits of improved productivity, new technology, and cost savings that price caps was intended to stimulate. These lost savings to customers dwarf access charges associated with "traffic stimulation."

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[1] *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*").

[2] *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 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.

There is considerable evidence on the record in the *Special Access Proceeding*[3] that BOC special access prices are unreasonable. The Commission has done nothing to bring BOC special access prices closer to forward looking costs -- the Commission's goal for access charge pricing.[4] In fact, Chairman Martin has recently stated that he intends to take no further steps in that proceeding.[5]

The Commission has taken no action in the *Intercarrier Compensation Proceeding* since initiating that proceeding.[6] The *Intercarrier Compensation Proceeding* is reportedly at this point completely inactive. It is possible that comprehensive intercarrier compensation reform could obviate the need for oppressive regulation of competitive carriers while solving problems that actually need regulatory attention. For this and other reasons stated in these Comments, the Commission should rearrange its priorities, terminate this proceeding, or leave it inactive, and instead address more important access charge issues.

II. REVENUE SHARING IS A REASONABLE AND LAWFUL BUSINESS PRACTICE

Neither "traffic stimulation" nor "revenue sharing," by themselves, is necessarily contrary to the public interest. Every telecommunications carrier engages in traffic stimulation—another word for this practice is "marketing." And, as discussed in more detail below, revenue sharing arrangements can serve entirely proper ends. If, as suggested in the *NPRM*, a relatively

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[3] *Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, FCC 05-18 (rel. Jan. 31, 2005).

[4] *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*") ¶ 44.

[5] Letter from Chairman Kevin J. Martin to Honorable John E. Sununu, November 28, 2007.

[6] *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*").

small number of carriers have engaged in schemes that use these legitimate tools for improper purposes, the Commission should focus its attention on those particular schemes. It should not regulate hammers to prevent burglars from using them to break windows.

A. Revenue Sharing Does Not Violate the Act

The *NPRM* solicits comment on AT&T's contention that payment of compensation by a carrier to a customer, such as an entity providing an access stimulation service, violates section 201 or section 202.[7] AT&T requests that the Commission "declare that traffic pumping kickback arrangements – defined as LEC arrangements to pay a communications service provider to direct calls to or through the LECs' exchange that can be expected over the life of the arrangement to produce net payments from the LEC to its communications service 'customer' – are unlawful."[8]

On three previous occasions AT&T or its predecessor has asked the Commission to make essentially the same blanket finding of unlawfulness of revenue sharing between LECs and information or telecommunications service providers. *AT&T v. Jefferson Corp*. (2001); *AT&T v. Frontier Pulaski* (2002); *AT&T v. Beehive* (2002).[9] The Commission in each instance declined to make any such finding and the Commission should do so again here.

In *Jefferson*, the Commission addressed a formal complaint filed by AT&T challenging the lawfulness of Jefferson Telephone Company's access revenue-sharing arrangement with a chat line service.[10] The chat-line service did not impose any charges on callers; it obtained all of

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[7] *NPRM* ¶ 20.

[8] Letter to Hon. Kevin J. Martin from Gary L. Phillips, AT&T, WC Docket No. 07-135, July 30 3007 at 3.

[9] *AT&T Corp. v. Jefferson Telephone Co*., 16 FCC Rcd 16130 (2001); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc*., 17 FCC Rcd 4041 (2002); *AT&T Corp. v. Beehive Telephone Co*., 17 FC rcd 11641 (2002).

[10] Jefferson ¶ 3.

its revenues from Jefferson Telephone Company. Jefferson Telephone Company paid the chat line provider based on the amount of access revenues that it received from IXCs for terminating calls to the chat line provider.[11] AT&T requested an order from the FCC declaring that Jefferson Telephone Company's access revenue-sharing arrangement with the chat line provider was unlawful.[12] The FCC found that AT&T had not demonstrated that the access revenue-sharing arrangement between Jefferson Telephone Company and the chat line provider violated Section 201(b) of the Act.[13]

The Commission took the same approach in *Beehive* and *Pulaski* on similar facts. In 2004, the Commission characterized these decisions as establishing that "the existence of a revenue-sharing arrangement between a common carrier and a chat-line service did not demonstrate that a carrier's conduct was unjust and unreasonable under Section 201(b)."[14] The Commission effectively overruled a previous staff opinion to the contrary.[15] Although AT&T correctly notes that the Commission in *Jefferson* limited its decision to the facts and circumstances of those cases,[16] the facts there were virtually identical in all relevant respects to those presented by "traffic stimulation" arrangements that AT&T and others are now complaining about.

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[11] *Id.* ¶ 5.

[12] *Id.*

[13] *Id.* ¶ 14.

[14] *Polices and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-Free Number Usage*, Notice of Proposed Rulemaking, CG Docket No. 04-244, FCC 04-162, released July 16, 2004 ("*Pay-Per Call NPRM*"), at ¶31.

[15] *Id.*

[16] Letter to Hon. Kevin J. Martin from Gary L. Phillips, AT&T, WC Docket No. 07-135, July 30 3007 at **3**.

Therefore, the Commission has already considered and rejected AT&T's core argument that revenue sharing agreements are *per se* unlawful under the Act.

B. Revenue Sharing Is an Ordinary Business Practice

There is a very good reason that the Commission has declined to find that payments from carriers to customers for traffic stimulation are unlawful – they are routine industry business practices that IXCs and other have previously supported. Every volume discount is, in effect, a form of compensation to a customer for stimulating traffic. Other examples of payments to end user customers and others for increasing traffic on, or sending traffic to, the carrier's network, which the Commission has found lawful, include commissions paid to private payphone companies based on revenues generated by 0+ calls;[17] and commissions to so-called traffic aggregators such as hotels, motels, airports, hospitals, private payphones, and others who control the space from which telephone service is offered end users.[18] The Commission has found that payments to traffic aggregators (which are essentially traffic simulating entities) are ordinary business expenses.[19]

In fact, AT&T Corp. previously argued against any "*per se* ban on reciprocal payment arrangements" between carriers and information providers because such arrangements can be "economically efficient" such as when the remuneration from the carrier reflects the "value" or cost of service provided to the carrier.[20] As another example, AT&T Wireless reportedly now

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17 *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd 7135 (rel. November 4, 1992)("*Private Payphone Order*")

18 *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.

19 *NTS Order* at ¶ 9.

20 AT&T Comments, CC Docket No. 96-146, filed August 26, 1996, at 5-9.

pays Apple a portion of monthly fees from AT&T Wireless's iPhone data plan customers.[21] Other carriers have reportedly agreed to a 10% "kickback" to Apple for all revenue from call and data transfers made on iPhones.[22] These payments are essentially compensation to Apple for the marketing and name recognition that motivates customers to switch service to the carrier's network, *i.e.* they are payments for traffic stimulation.

These payments and commissions are an inherent feature of the current partially competitive telecommunications marketplace and will become more prevalent if facilities based competition is achieved in last mile connections. As already explained in presentations to the Commission prior to the *NPRM*, payments to end user customers and others are essentially marketing expenses that are no different than other third-party marketing expenses associated with other LEC services.[23] Carriers are constantly seeking new customers and new ways to increase traffic on their networks. The Commission has previously noted the "legal and beneficial revenue sharing arrangements that exist in the telecommunications industry today."[24] Consequently, revenue sharing is a routine business practice in the telecommunications industry that the Commission should not attempt to change.

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[21] Analyst: Apple get a cut of AT&T iPhone revenue, CNet News.com, http://www.news.com/8301-10784_3-9747031-7.html, viewed November 16, 2007;

[22] European carriers commit to revenue sharing plan for Apple iPhone - T-Mobile, Orange, O2, http://intomobile.com/2007/08/22/european-carriers-commit-to revenue sharing pla..., viewed November 16, 2007.

[23] Letter to Marlene H. Dortch from Mark J. O'Conner Counsel for Earthlink, Inc., WC Docket No. 07-135, August 23, 2007, at 1.

[24] *Pay-Per Call NPRM* n. 83.

C. A Ban on Traffic Stimulation Payments Would Thwart Innovation and Harm Consumers

Even if the Commission were to conclude in theory that some category of payments from carriers to customers should be proscribed, it would be impossible for the Commission to define such a category that could be practically implemented. 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.[25] But the services and arrangements that LECs enter into with these types of business are no different than arrangements that LECs have with other types of end user customers. The myriad of regulated and unregulated relationships that is permitted under the Commission's rules including contract tariffs, special construction arrangements, detariffed provision of CPE and information services, and joint ownership with unrelated or affiliated entities makes it impossible to identify when or what "payments" should be considered impermissible. Every LEC offers or has arrangements with conference bridges and very likely serves some call centers. Consequently, even assuming that payments to these types of businesses were undesirable, which is not the case, the Commission could not feasibly write regulations to identify unlawful traffic stimulation activities and arrangements without implicating a host of routine and normal business activities, arrangements, and joint ventures of LECs with end user customers.

As noted, AT&T Corp. has previously supported payments to an information providers that reflect the "value" received by the carrier, but it now wants to ban "traffic pumping kickback schemes." AT&T's own waffling and straining over the years to distinguish the payments it wants to be able to make from the ones other companies make that it doesn't like demonstrates

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[25] *NPRM* ¶ 7.

that there is no practical way of identifying a set of practices that should be proscribed without limiting others that no one objects to. This, in turn, would inhibit competitive arrangements that could support new services to consumers, including broadband services. It would be particularly harmful to LECs and their customers in rural areas where service to call centers and the like has been viewed as creating desirable employment opportunities in those areas. In reality, there is no rhyme or reason to IXC complaints about traffic stimulation except that they approve of payment arrangements that benefit them but not others. Consequently, the Commission should not seek to limit or prohibit any category of traffic stimulation arrangements or payments.

D. Revenue Sharing Is Not an Unlawful Rebate

The *NPRM* asks for comments on whether an untariffed payment by a LEC to an entity for traffic stimulation is an unlawful rebate under Section 203 of the Act. Section 203 provides that a carrier shall not "refund or remit by any means or device any portion" of tariffed access charges.[26]

The Commission has already considered and rejected contentions that commissions to private payphone providers[27] and traffic aggregators[28] are unlawful rebates. Of particular relevance to the traffic stimulation arrangements that are the subject of this proceeding is the fact that there is no reduction in tariffed access charges to the customer, *i.e*. to the IXC. The IXC

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[26] 47 U.S.C. § 203(c)(2).

[27] *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd 7135 (rel. November 4, 1992) ("*Private Payphone Order*")

[28] *NTS Order*¶ 12.

pays the full tariffed access charge rate. Therefore, there is no unlawful rebate with respect to any federally tariffed charges involved in these arrangements.[29]

E. AT&T's Request Is Overbroad

Even if AT&T's request for a blanket ban on revenue sharing were otherwise meritorious, it should be rejected in any event because it is too broad. AT&T's request goes beyond "traffic stimulation" by asking that the Commission proscribe arrangements to route traffic to a LEC exchange. This would result in major changes in the ordinary business practices of telecommunications carriers. For example, traffic aggregators receive commissions from a carrier for routing traffic to that carrier instead of another. The same is true for payphone operators. The Commission should be very reluctant to make such a major disruptive decision for any reason and certainly not for AT&T's exaggerated concerns about "traffic stimulation."

In addition, the Commission has already addressed the traffic routing issue in the *Second CLEC Access Charge Order* in connection with wireless originated 8YY calls.[30] The Commission determined that those arrangements did not violate the Act and determined what access charges CLECs may impose for such traffic routed over their exchanges. The Commission should reject AT&T's request to reopen this issue and/or ban 8YY traffic arrangements through the back door of this proceeding. The Commission should specifically reaffirm all its previous determinations concerning wireless originated 8YY traffic and state that any decisions it makes in this proceeding do not apply to wireless originated 8YY arrangements previously addressed.

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[29] *Private Payphone Order* ¶ 10.

[30] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, WC Docket No. 96-262, released May 18, 2004 ("*Second CLEC Access Charge Order*"), ¶¶ 13-21.

III. THE COMMISSION SHOULD RELY ON THE COMPLAINT PROCESS

Apart from misplaced priorities, the Commission has misidentified the best approach to address any issues concerning "traffic stimulation." Rulemaking is the wrong way to approach traffic stimulation issues. Even assuming that some traffic stimulation activities should be discouraged, it will be impractical for the Commission to identify by rule categories of permissible and non-permissible traffic stimulation activities because there is no bright line dividing them. As explained in the previous section, "traffic stimulation" and revenue sharing are standard business practices of carriers, including those carriers now complaining about it. The proposals by BOCs to address "traffic stimulation" are unworkable because it is not possible as a practical matter to regulate traffic stimulation without harming a broad range of LEC marketing and business practices. Nor is it practical to graft on to the benchmark system of regulation applicable to CLECs bits and pieces of rate-of-return regulation without, in effect, subjecting CLECs to rate-of-return regulation.

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.[31] 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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[31] *NPRM* ¶ 33. *See also* Letter to Chief, Wireline Competition Bureau from Donna Epps, Verizon, WC Docket No. 07-135, filed June 8, 2007.

As noted in the *NPRM*, CLECs are subject to Section 201 and 202 nondiscrimination obligations even though they are not subject to detailed access charge regulation.[32] They remain subject to complaints filed under Section 208. The complaint process is adequate for addressing complaints that a LECs' 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.[33] This case will effectively serve as precedent for other ILECs subject to rate-of-return regulation and will be as effective as rules in addressing any concerns about traffic stimulation activities by rural ILECs.

In the recent *AT&T Broadband Forbearance Order* the Commission eliminated detailed price and other regulation of AT&T's broadband common carrier transmission services.[34] The Commission noted that AT&T remains subject to the Act's nondiscrimination obligations and the complaint process.[35] Competitive carriers should not be subject to greater regulation here.

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.

IV. THE PROPOSED REGULATIONS WOULD FAVOR BOCS

The *NPRM* spends pages and pages discussing possible proposals for rate-of-return ILECs and CLECs and one paragraph and no proposals for ILECs subject to price cap

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32 *NPRM* ¶ 37.

33 *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.

34 *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.

35 *Id.* ¶ 35.

regulation.[36] The *NPRM* merely queries whether the Commission needs to do anything with respect to price cap ILECs.[37] Obviously, this approach favors BOCs. The *NPRM* would leave in place price cap regulation for BOCs that would permit them to achieve unlimited earnings for switched access while imposing onerous regulation on other carriers for supposedly excessive earnings.

The Commission's goal is to create a "pro-competitive deregulatory national policy framework" for local telephony competition.[38] The Commission has also sought to achieve reasonable access charges wherever possible through marketplace forces rather than regulation.[39] With respect to the prospect of re-regulating CLEC access charges, 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."[40] The *NPRM*, without even acknowledging them, abandons these goals and seeks to impose a host of new burdensome regulations on competitive carriers -- exactly the wrong direction. Unfortunately, this is consistent with the Commission's recent unbalanced focus on deregulating the BOCs.[41] Instead of the unbalanced, piecemeal steps envisioned in the *NPRM* that favor the BOCs, the Commission should, as noted, establish comprehensive intercarrier compensation reform that

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[36] *NPRM* ¶ 33.

[37] *Id*.

[38] Joint Managers' Statement, S. Conf. Rep. No. 1-4-230, 104th Cong., 2d Sess. 113 (1996)("Joint Explanatory Statement") at 1.

[39] *Access Charge Reform Order* ¶9.

[40] *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.

[41] *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.

could address "traffic stimulation" and other intercarrier compensation issues under a more reasonable approach.

V. 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. For example, the Commission tentatively concludes that a rate-of-return carrier that shares revenue, or that provides other compensation to an end user customer or that directly provides a stimulating activity and bundles those costs with access is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard.[42] Rate-of-return carriers are subject to a number of rules that govern the costs that may be recovered in regulated rates, and it is well within the Commission's discretion to set reasonable parameters on that cost recovery. These companies must comply with a host of cost accounting and allocation rules as well as the "used and useful" standard that will determine what costs are recovered in regulated rates.[43]

Competitive carriers have not heretofore been subject to any such cost requirements. The Commission has made clear that competitive carriers are not subject to any cost accounting or rate structure requirements.[44] Competitive carrier access charges are subject to benchmark regulation. Benchmark regulation establishes a "safe harbor" that permits competitive carriers to tariff charges that are generally no higher than the competing ILEC rate.[45] Benchmark regulation does not specify or determine what costs may be included in competitive carrier

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[42] *NPRM* ¶ 19.

[43] *NPRM* n. 47.

[44] *CLEC Benchmark Order* ¶41.

[45] *CLEC Benchmark Order* ¶¶ *5,40, 46.*

access charges. The Commission stated that "[t]he only requirement is that the aggregate charge for these services, however, described in their tariffs, cannot exceed our benchmark."[46] In contrast to ILECs, the Commission has made clear that competitive carriers additionally have the flexibility to recover access costs from their end user customers.[47] Under benchmark regulation, competitive carriers may apportion access costs between IXCs and end users as long as charges to IXCs do not exceed benchmark levels. In addition, 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"[48] and that "we lack an established framework for translating CLEC costs into access rates."[49] In fact, competitive carriers do not maintain cost accounts in a manner that would permit the Commission to determine how costs of any payments to traffic stimulators are recovered.

Therefore, it would not be possible for the Commission now to apply rate-of-return concepts to CLECs on a going-forward or any basis. This would essentially subject competitive carriers to the same regulation as the most heavily regulated ILECs, contravening the Commission's goals of creating a "pro-competitive deregulatory national policy framework" for local telephony competition.[50] Moreover, as noted, any attempt to establish categories of permissible and non-permissible traffic stimulating activities would be completely unworkable and unenforceable.

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[46] *CLEC Benchmark Order* ¶ 55.

[47] *CLEC Benchmark Order* ¶ 39.

[48] *CLEC Benchmark Order* ¶ 44.

[49] *CLEC Benchmark Order* ¶ 46.

[50] Joint Managers' Statement, S. Conf. Rep. No. 1-4-230, 104th Cong., 2d Sess. 113 (1996)("Joint Explanatory Statement") at 1.

Accordingly, regardless of what it concludes for rate-of-return carriers, the Commission should not determine that it is unlawful for competitive carriers to recover in access charges the costs of any payments to traffic stimulators. The Commission should retain the current benchmark approach under which CLEC benchmark access rates are lawful regardless of what costs they recover.

VI. EXCLUSION OF TRAFFIC STIMULATION COSTS FROM ACCESS CHARGES WOULD EXHAUST THE COMMISSION'S RESPONSIBILITY

The *NPRM* asks if the Commission would have met its obligation to ensure that rates are just and reasonable if any costs of payments to traffic stimulators are excluded from access charges.[51] The answer is yes. As discussed, traffic stimulation in a variety of forms is a normal and routine business activity. If IXCs are not billed for traffic stimulation costs, whether incurred by a third party or directly by the carrier, then their complaints on this issue are no more than complaints about routine and beneficial activities of LECs to increase utilization of their networks that coincidentally result in increased terminating access charges. Therefore, even for rate-of-return carriers, there is no basis for IXCs complaints about traffic stimulation if they are not billed for any of the costs of any such activity.

VII. NO NEW RULES ARE REQUIRED FOR COMPETITIVE CARRIERS

A. Thresholds Should Not Be Adopted for Competitive Carriers

The *NPRM* queries whether the Commission should adopt Verizon's proposal that CLECs relying on the rural exemption to tariff rates higher than the competing ILEC or that benchmark to a rural ILEC rate be required to file quarterly reports of interstate access minutes

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[51] *NPRM* ¶ 20.

which would then be measured against defined thresholds.[52] A CLEC that has a rate higher than the competing ILEC that exceeds the threshold would be required to reduce its rate to the competing ILEC rate. A CLEC that benchmarks to a rural ILEC rate would be required to reduce its rate to the non-rural ILEC rate. The *NPRM* asks how the Commission should calculate any access demand threshold that it might apply to CLECs.[53] The *NPRM* also apparently envisions the possibility of thresholds for all CLECs.[54]

This proposal is problematic in a number of respects. First, it would impose burdensome quarterly reporting 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, thresholds would thwart desirable competitive initiatives and investment. Access minutes can increase dramatically for a number of reasons. For example, a CLEC may enter a new service territory or it might win from the ILEC a large enterprise customer located within its service territory. A rural CLEC may be successful in attracting a call center to its service territory. Any threshold that the Commission might adopt that could be effective in capturing “traffic stimulation” would unfortunately also very likely be triggered by a CLECs success in providing competitive services to new areas or new customers. Verizon’s proposal would thwart competition in addition to addressing “traffic stimulation,” which is perhaps its intended purpose.

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[52] *NPRM* ¶ 35.

[53] *NPRM* ¶ 36.

[54] *NPRM* ¶ 36.

Third, this is not an area in which the Commission is likely to be able to achieve successful line drawing. Possible threshold measures cited in the *NPRM* such as rate of growth of total minutes or average minutes per access lines will vary dramatically between competitive carriers because of their different business plans. Some CLECs serve residential and business customers and some focus on business customers. Those focusing on business customers likely focus on segments within the business market such as SME or large customers. Some CLECs serve primarily ISPs. The rate of growth of access minutes and average minutes per access line for these types of CLECs are not likely to be comparable. Rural CLECs may well differ from urban CLECs in terms of any measure of access minutes or growth. The undersigned carriers are not aware of any data that would permit the Commission to determine what would be a reasonable threshold that could be applied to all or even some class of CLECs. The Commission will not be able to establish a threshold for the competitive industry without imposing inappropriate thresholds on many or most CLECs.

It is worth noting that BOCs' historic monopoly for all categories of customers, their millions of access lines, and their many years of operation potentially provide a basis for developing or determining average access minutes and growth rates for them. 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 that might support development of access minute thresholds or averages.

In addition, the Commission should not adopt any threshold or trigger for resetting prices because the resulting rates would likely be too low. The Commission adopted the rural exemption based on the well-considered concern that this limited category of CLECs might very well have higher costs than the competing ILEC.[55] Similarly, the Commission permitted non-rural CLECs to tariff the same rate as the competing ILEC, including rural ILECs, because they may have at least the same level of costs.[56]

In fact, CLECs typically have higher costs than ILECs for a number of reasons. The Commission has used cost as a longstanding touchstone to determine whether LEC rates are reasonable.[57] "Incumbent LECs retain material scale advantages with regard to provisioning and operating local circuit switches."[58] CLECs lack of economies of scale enjoyed by ILECs because they "will incur materially greater cost when self-provisioning switching at low penetration levels."[59] CLECs generally experience lower levels of utilization for switching and transport facilities.[60] ILECs have a much greater ability to recoup network costs through services with flat-rated, non-usage sensitive rates than CLECs.[61] CLECs often serve a sparse customer base in comparison to ILECs, serving a fraction of customers, even in suburban and urban areas.[62] In light of these circumstances, it is highly probably that even current benchmark

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55 *CLEC Benchmark Order* ¶ 64, 66.

56 *CLEC Benchmark Order* ¶ 18.

57 *Investigation of Special Access Tariffs of Local Exchange Carriers*, Memorandum Opinion and Order CC Docket 85-166, Adopted October 13, 1988, 4 FCC Rcd. No. 12, Para. 32. ("Costs are traditionally and naturally a benchmark for evaluating the reasonableness of rates.") See also *In the Matter of INFONXX, Inc., Complainant, v. New York Telephone Co., Defendant*. Memorandum Opinion and Order, File No. E-96-26, Adopted October 6, 1997; released October 10, 1997 ¶ 15.

58 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, FCC 99-238, released November 5, 1999 at 260.

59 *Id.*; Direct Testimony of August H. Ankum, Ph.D., Application of McLeodUSA Telecommunications Services, Inc. for Approval of Intrastate Switched Access Rates Pursuant to PURA Section 52.155 and PUC Subst. R. 26.223, Public Utility Commission of Texas, SOAH Docket No. 473-07-1365, PUC Docket No. 333545, May 24, 2007 ('Ankum Testimony") at 81.

60 Ankum Testimony at 66.

61 Ankum Testimony at 69.

62 Ankum Testimony at 73-74.

rates preclude recovery by CLECs of their switched access costs. The Commission should not adopt thresholds that could require CLECs to lower switched access rates even below the ILEC rate because this would produce rates c that would not permit CLECs to recover their costs of service.

Finally, even if there were merit to thresholds for CLECs that, under the rural exemption, charge rates higher than the competing ILEC, or that benchmark to a rural ILEC's rates, there is absolutely no basis for applying a threshold to CLECs that benchmark to non-rural ILEC rates. The *NPRM* notes that complaints about traffic stimulation have generally been directed at Section 61.38 and 61.39 carriers, *i.e*. carriers that charge NECA rates or higher.[63] And, the number of CLEC rural access lines "is entirely overwhelmed" by the total number of access lines reported to the Commission.[64] It follows that if there is no traffic stimulation problem with respect to price cap ILECs, or more broadly with respect to non-rural ILECs, then there can be no problem with respect to CLECs that benchmark to those ILECs since none of these carriers presumably has significant incentives to engage in "traffic simulation" under the rates they charge. Further, if non-rural access rates, such as BOC access rates, create an incentive to engage in traffic stimulation, *i.e*. all ILECs have an incentive to engage in traffic stimulation, the appropriate solution is comprehensive intercarrier compensation reform, not the piece meal regulation envisioned in the *NPRM* for this and all the reasons stated in these Comments.

In addition, non-rural CLECs already must maintain burdensome separate tariff and billing systems when they operate across states such as Florida and North Carolina in which

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[63] *NPRM* ¶33.

[64] *CLEC Benchmark Order* ¶ 68.

several non-rural ILECs provide service. Threshold requirements would impose further unnecessary regulatory burdens. Therefore, the Commission should not adopt any thresholds for CLECs that benchmark to non-rural ILEC rates even assuming that it erroneously adopts thresholds for CLECs that benchmark to section 61.38 and section 61.39 carriers.

B. Certifications Should Not Be Adopted for Competitive Carriers

The *NPRM* asks whether, based on AT&T's proposal, 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.[65] As already explained, there is no practical way to distinguish "traffic stimulation" activities that the BOCs are complaining about from normal business activities that BOCs and other LECs and IXCs engage in. It would be impossible for any carrier to certify that it is not engaging in "traffic stimulation" without effectively terminating essential, normal business activities. Certification requirements are, therefore, unworkable. In addition, any such certification requirement would do no more than implement BOCs' self-interested, arbitrary view of what network utilization practices are acceptable. Accordingly, the Commission should not adopt any certification requirements.

VIII. CLECS SHOULD NOT BE SUBJECT TO REDUCED BENCHMARK RATES BECAUSE OF ILEC "TRAFFIC STIMULATION"

The *NPRM* asks whether a CLEC that benchmarks against an ILEC should be affected by any of the changes in the ILEC's tariffs that are the result of the ILEC's access stimulation activities.[66] The theoretical basis expressed in the *NPRM* for requiring a LEC to reduce access charges because of traffic stimulation is that "if the average revenue per minute remains constant

[65] *NPRM* ¶ 37.

[66] *NPRM* ¶ 37.

as demand grows, but the average cost per minute falls ...then profits will rise" leading to excessive earnings.[67] But even if this proposition is correct generally, it 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 even if there were some basis for requiring the ILEC engaging in traffic stimulation to do so. To the extent the Commission adopts any rules applicable to ILECs that would require them to reduce rates because of traffic stimulation, the Commission should determine that CLECs benchmarking to the ILEC rate may continue to charge the unreduced ILEC rate. Further, to the extent the ILEC does not reestablish previous unreduced rates within one year, the Commission should permit the CLEC going forward to adjust prices upward at least by a reasonable measure of inflation.

IX. ANY DETERMINATIONS CONCERNING CLECS MUST BE PROSPECTIVE ONLY

Although the Commission should not make any finding that “traffic stimulation” arrangements are unlawful in any respect, the undersigned carriers remind the Commission that if it were to do so, it may not apply any such determination to CLECs’ existing benchmark rates. Under current rules, CLEC benchmark rates create a “safe harbor” and “[t]he only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark.”[68] The Commission may give new rules prospective effect only.[69] And this is not a case where the existing rules require clarification, since the benchmark rules are specific and

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[67] *NPRM* ¶ 14.

[68] *CLEC Benchmark Order* ¶ 55.

[69] Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988).

unambiguous – "[a]n agency is not allowed to change a legislative rule retroactively through the process of disingenuous interpretation of the rule to mean something other than its original meaning."[70] Further, an agency may not give retroactive effect to an interpretation of an existing rule if the parties have relied on a different, equally reasonable, interpretation of the rule, particularly where, as here, the result of such retroactive application would alter the past legal consequences of the parties' past actions,[71] or "impose new duties with respect to transactions already completed."

Therefore, to the extent that it concludes that traffic stimulation arrangements are unlawful to any extent it must make clear that this determination applies to CLECs only on a going-forward basis and that benchmark rates established under current rules are lawful notwithstanding any traffic stimulation arrangements.

The undersigned carriers note that the Commission may not adopt any rules applicable to intrastate access charges of any LEC because, under Section 2(b)(2) of the Act, jurisdiction over intrastate communications is reserved to the states. State rate setting authority does not generally fall within the "impossibility" exception that could form a basis for preemption by the Commission in some other areas of regulation. *Louisiana Pub. Serv. Comm. v. FCC*, 476 U.S. 355 (1986).

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[70] Caruso v. Blockbuster-Sony Music Entertainment Center, 193 F.3d 730, 737 (3d Cir. 1999) at 737, quoting Kenneth Culp Davis and Richard J. Pierce, Jr., Administrative Law Treatise, § 6.10 at 283 (1994).

[71] Georgetown Hospital at 219 (Scalia, J. concurring); Celtronix at 588.

X. CONCLUSION

The Commission should terminate this proceeding without adoption of any new rules applicable to competitive carriers.

Respectfully submitted,

/s/ James Mertz
James Mertz
Vice President, Government Affairs
Hypercube, LLC
Bldg 300 Suite 330
5300 Oakbrook Parkway
Norcross, GA 30093

/s/ William A. Haas
William A. Haas
Deputy General Counsel
McLeodUSA Telecommunications
Services, Inc.
6400 C Street, S.W.
McLeodUSA Technology Park
Cedar Rapids, IA 52406

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