

**Before the
Federal Communications Commission
Washington, D.C. 20554**

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

REPLYCOMMENTS OF
THE UNITED STATES TELECOM ASSOCIATION

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The United States Telecom Association (“USTelecom”) is pleased to submit its reply comments in support of modifying the current rules governing the tariffing of traffic-sensitive switched access services by local exchange carriers, both Incumbent Local Exchange Carriers (“ILECs”) and Competitive Local Exchange Carriers (“CLECs”), to ensure that interstate traffic sensitive access rates remain just and reasonable.¹

The comments filed in this proceeding uniformly acknowledge the existence of excessive access stimulation (also known as “access pumping” or “traffic pumping”).² Such schemes result in huge increases in call volume which were clearly anticipated by tariff filing entities, were not disclosed and were therefore not part of the calculation of rates which the Commission deemed lawful.

USTelecom is very concerned about the challenge posed by excessive access

¹ USTelecom is the premier trade association representing service providers and suppliers for the telecommunications industry. USTelecom members provide a full array of services, including broadband, voice, data and video over wireline and wireless networks.

² Access stimulation schemes seek to take advantage of a perceived loophole in the Commission’s rules to realize extraordinary profits by charging rates that are far in excess of the just and reasonable level.

stimulation to the continued soundness of the intercarrier compensation system.

Arbitrage schemes, such as the excessive access stimulation addressed in the instant proceeding, harm all carriers by diminishing the integrity of access charges, the most significant component of intercarrier compensation. The vast majority of commenters recognize the need to immediately address this latest form of access arbitrage.

The Access Stimulation Arbitrage Must be Addressed Promptly

Quick action by the Commission to address access stimulation will benefit consumers and preserve the soundness of the access charge regime. The suggestion by several CLEC commenters to defer resolution of this issue until after comprehensive reform of access is a thinly disguised attempt to preserve this arbitrage opportunity.³ USTelecom strongly supports comprehensive reform of the intercarrier compensation system, but there is no reason to let the current system deteriorate until comprehensive reform is adopted. That would be unfair to carriers and customers. Comprehensive reform should be accomplished through a thoughtfully managed process, not by arbitrary destructive attacks on the current system of intercarrier compensation such as the access stimulation arbitrage.

Excessive Access Stimulation Should be Addressed in a Targeted Way

USTelecom believes that solutions tailored to the problem of excessive access stimulation are far preferable to dramatic and far reaching actions that are unnecessary to resolve this arbitrage and that may have unintended consequences. As explained by Embarq “The problems and abuses highlighted by this proceeding clearly have been limited to a very small minority of disreputable carriers and business operators. Any rule

³ See comments of CBeyond Inc. and Integra Telecom as well as Chase Com., Fonpods, Inc., Freeconferencecall.com and HFT Corp.

changes should be narrowly tailored and specifically targeted to the class of LECs whose tariffs are associated with this problem.”⁴

One suggestion that clearly falls outside of the “narrowly tailored” criterion would be for the Commission to forbear from the “deemed lawful” portion of the Communications Act. USTelecom agrees with NECA that “... the Commission should not seek to Forbear from the enforcing the deemed lawful provision of section 204(a)(3) of the 1996 Act.” NECA goes on to say “In making the public interest determination under subsection (a)(3) [of Section 10 – Forbearance], the Commission is required to consider whether forbearance will promote competitive market conditions.” NECA properly points out that “Forbearing from the “deemed lawful” provision of section 204(a)(3), however, would actually increase rather than decrease regulatory burdens on telecommunications carriers.”⁵ Similarly, JSI agrees with USTelecom that forbearance is properly used to promote the pro-competitive goals of the Communications Act, not to aid the Commission in the enforcement of its rules or to punish carriers, and states “JSI believes that such action would be inconsistent with the purpose of the forbearance authority granted to the Commission by section 10(a) of the Act and to effect deregulation.”⁶ The adoption of a reasonable trigger mechanism for a revised tariff filing is sufficient to deal with the problem of access stimulation.

Another unnecessary and harmful proposal is to abolish the simplified tariff filing option offered to small companies under section 61.39 of the commission’s rules. This rule was intended to provide an administratively simple process for the smallest rural local exchange carriers to leave the NECA pool by establishing rates based on historical

⁴ See Embarq comments, page 2

⁵ See NECA comments, page 12

⁶ JSI comments, page 20

traffic levels rather than expensive and time-consuming studies projecting demand for traffic sensitive access services. The historical nature of the calculation was designed to provide an incentive for small companies to reduce their costs over a two year period, after which their new rates would be based on their new history of lower costs and consumers would capture the benefits of the achieved efficiencies. USTelecom recognizes that the use of historical traffic data was merely a “simplified filing mechanism... and [c]arriers remain subject to the Act’s requirement that rates be reasonable and the presumption can be rebutted.” [emphasis added]⁷

Although USTelecom originally proposed to the Commission the tariff filing option embodied in Sec. 61.39 and appreciates the Commission’s tentative conclusion to preserve the rule, several commenters have suggested a useful modification to its operation to address the issue of excessive access stimulation. While the vast majority of small, rural carriers are utilizing the flexibility inherent in the rule for its intended purpose, and benefitting consumers as the Commission intended, there is the potential for abuse. Therefore the Commission should restrict re-entry to the NECA pool for six years (including the two years that the study area would be out of the pool). As correctly noted by ITTA, “An unscrupulous carrier, however, could avoid this impact [the self correcting nature of Section 61.39] by simply reentering the NECA pool during the next tariff cycle, thereby preserving its heavy traffic while shielded by its participation in the NECA pool. A remedy to this would be to bar Section 61.39 carriers that experience dramatic increases in access traffic from reentering the NECA pool during the next three tariff cycles (six years), absent waiver.”⁸ Embarq, the Ohio Public Utilities Commission

⁷ Id at para. 14.

⁸ See ITTA comments at page 7

and OPASTCO make similar suggestions.⁹ This is a reasonable approach which preserves the viability of Section 61.39 for the benefit of consumers while helping eliminate its contribution to the excess demand stimulation arbitrage.

The Commission Should Continue to Use the Safe Harbors Adopted in November 2007

Most commenters agree with USTelecom that excessive levels of growth in a calendar quarter would result in rates in excess of those considered to be just and reasonable and that such excessive growth can be defined by comparing the minutes of use in a calendar quarter to the minutes of use in the same quarter in the previous year. USTelecom believes that the Commission should continue using the same trigger that it used with the carriers exiting the NECA pool in June 2007.

Rate of Return ILECs Should be Barred from Including Payments to Access Stimulators in Their Revenue Requirement

USTelecom believes that it is unnecessary at this point for the Commission to adopt potentially broad prohibitions on potential arrangements between carriers and customers. However, in the case of rate of return ILECs, such carriers should be barred from including payments to access stimulators in their revenue requirements. As noted by the Ohio PUC “... the Ohio Commission believes traffic stimulation through access charges (i.e. such costs are not included in the revenue requirement calculation) the carrier should not be prohibited from entering into contracts that include offering some otherwise legal form of discount, credit or offset to the customer, or be prohibited from offering services themselves that may generate increases in traffic...”¹⁰

⁹ See Embarq comments at page 2, Ohio PUC comments at page 11, and OPASTCO comments at page 2

¹⁰ See comments of Ohio PUC at page 7, also ITTA at page 15 and Embarq at page 2

The Commission Must Address Access Stimulation by CLECs

Because CLECs are much more lightly regulated than ILECs, an effective remedy for ILEC arbitrage through excessive access stimulation is much more obvious than for CLECs and requires a different solution. USTelecom has addressed the ILEC problem above by recommended a trigger for a tariff refilling, as well as a restriction on pool re-entry by 61.39 tariff filers. The potential for CLEC access stimulation arbitrage is also real and needs to be addressed.

CLEC TNCI acknowledges the potential for CLEC access stimulation, “TNCI does not dispute the fact that CLECs could engage in unfair artificial traffic stimulation.”¹¹ However, TNCI goes on to say, “But this remains a speculative premise. To the extent that CLECS may engage in artificial traffic stimulation, current safeguards and enforcement action already provides adequate protection for the few disreputable competitive carriers that could engage in this practice.”¹² The current examples of excessive access stimulation do not apply exclusively to ILECs, so TNCI is wrong that the problem is “speculative”.

USTelecom’s comments proposed development of a trigger for CLECs by establishing a usage baseline benchmarked on minutes per line/per quarter using NECA data for ILEC pool members charging the highest monthly NECA traffic sensitive rate (band 8).¹³ The same trigger to determine instances of excessive access stimulation that applies to ILECs would then apply to CLECs.

Since Section 61.26 of the Commission’s rules benchmarks CLEC access rates

¹¹ See TNCI comments at page 5

¹² See TNCI comments at page 5

¹³ This is the same NECA rate band used by rural CLECs to benchmark their interstate traffic sensitive rates.

from ILEC rates, modified rates charged by CLECs tripping the access stimulation trigger should also be benchmarked from ILEC rates. USTelecom proposes that CLECs that provide service in rural portions of price cap company areas which avail themselves of the rural exemption and thus benchmark to the highest NECA traffic sensitive rate (band 8) should lose their rural exemption and modify their rates to mirror the interstate traffic sensitive rates of the price cap carrier. CLECs providing service in rural areas served by rate of return carriers that trip the access stimulation trigger should submit a tariff reflecting the lowest rate band in the NECA traffic sensitive tariff (band 1).

Conclusion

The Commission should promptly adopt rules applicable to both ILECs and CLECs to address the excessive access stimulation arbitrage. This will help ensure that traffic sensitive interstate access rates are just and reasonable. There is no reason to diminish the integrity of the current system while awaiting comprehensive reform of intercarrier compensation.

Respectfully submitted,

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