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

In the Matter of	)	
	)	
Establishing Just and Reasonable Rates for	)	WC Docket No. 07-135
Local Exchange Carriers	)	FCC 07-176

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION REPLY COMMENTS

NATIONAL TELECOMMUNICATIONS COOPERATIVE ASSOCIATION

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TABLE OF CONTENTS

PAGE

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	)	
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REPLY COMMENTS

The National Telecommunications Cooperative Association (NTCA)[1] files these reply comments in response to initial comments filed December 17, 2007, regarding the Federal Communications Commission's (Commission's or FCC's) October 2, 2007, Notice of Proposed Rulemaking (NPRM) seeking comment on proposed steps to address access traffic stimulation and its effect on traffic-sensitive switched access services provided by local exchange carriers (LECs).[2] NTCA renews its stance that the Commission should not revise the current approach used by the National Exchange Carrier Association (NECA) for average schedule carriers who participate in the traffic-sensitive NECA pools.[3] The Commission must clearly define "traffic stimulation" and apply it prospectively so that non-NECA pool participants can clearly

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[1] NTCA is the premier industry association representing rural telecommunications providers. Established in 1954 by eight rural telephone companies, today NTCA represents over 580 rural rate-of-return regulated incumbent local exchange carriers (ILECs). All of its members are full service local exchange carriers, and many members provide wireless, cable, Internet, satellite and long distance services to their communities. Each member is a "rural telephone company" as defined in the Communications Act of 1934, as amended (Act). NTCA members are dedicated to providing competitive modern telecommunications services and ensuring the economic future of their rural communities.

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

[3] NTCA Comment, pp. 1-2. NTCA silence on any positions or proposals raised by other commenters in this proceeding connotes neither agreement nor disagreement by NTCA with those positions or proposals.

understand the extent and meaning.[4] For those access carriers who do not participate in the NECA traffic-sensitive pool, the Commission should use its existing authority to suspend, investigate and enforce suspected violations of allowed rates of return. Furthermore, the Commission, if it decides to use a tariff trigger to screen claims of improper access stimulation, should use a trigger threshold of greater than 200% per access line measured by a year-over-year quarterly basis, and should allow carriers at least 60 days for tariff refiling.

I. The Commission Should Use Its Existing Authority And A Targeted Approach in Addressing Improper Access Stimulation.

NTCA affirms its stance, supported by Embarq, the Iowa Telecommunications Association, the Independent Telephone & Telecommunications Alliance (ITTA), NECA, the Ohio Public Utilities Commission, the Organization for the Promotion and Advancement of Small Telecommunication Companies (OPASTCO), and USTelecom, that the Commission should not over-regulate and should not eliminate the deemed lawful portions of the Act.[5] NECA accurately observed that narrowly tailored regulatory approaches to handling allegations of traffic stimulation are superior to forbearing from Section 204(a)(3)'s "deemed lawful" provisions.[6] Alexicon Consulting, CenturyTel, and OPASTCO correctly noted that the Commission has existing investigative and enforcement tools, including pre-effective date tariff review and Sections 205 and 208 enforcement powers.[7]

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[4] *Ibid*.

[5] NTCA Comment, pp. 2, 10.; Embarq Comment, pp. 12-13; Iowa Telecommunications Association Comment, pp. 2, 7; ITTA Comment, pp. 7-8; NECA Comment, pp. 2, 10; Ohio Public Utilities Commission Comment, pp. 12-13; OPASTCO Comment, pp. ii, 2, 6; United States Telecom Association (USTelecom) Comment, p. 2.

[6] NECA Comments, p. 2.

[7] Alexicon Consulting Comment, p. 6; CenturyTel Comment, pp. 1-6; OPASTCO Comment, p. 9.

What may appear to be improper traffic stimulation to an interexchange carrier (IXC) may be just a legitimate business activity to an incumbent local exchange carrier (ILEC).[8] The Iowa Telecommunications Association insightfully observed that: "Many [economic development programs] may result in a significant increase in the volumes of traffic given the underlying size of the traffic base."[9] The Commission undertook a case-by-case inquiry of the *AT&T/Reasoner et al.* access stimulation cases using existing legal authority and was able to persuade all 39 rural ILECs to either rejoin the NECA pool or adopt tariff triggers in revised tariffs.[10] The Commission should not go overboard in attempting to address a limited situation. Any rule changes should be targeted to address specific circumstances and should be used with existing legal authority.

NTCA agrees with ITTA, John Staurulakis, Inc. (JSI), and NECA that Section 10 does not give Commission the authority to remove statutorily given rights to streamlined review and deemed lawful protections.[11] The Western Telecommunications Alliance (WTA)'s view that any regulation the Commission may adopt should be minimal and carefully targeted is the optimal approach.[12] The Rural Alliance, similar to NTCA, advocated carefully crafted action

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[8] Several competitive local exchange carriers (CLECs) raised intriguing theories that a motivation for the access stimulation complaints such as *Reasoner* was because the IXCs lost the high-call volume customers to rural ILECs, making the IXCs' complaints and IXC self-help measures like call-blocking, degradation, and not paying access charges a series of retaliatory moves designed to reduce competition. *See* Aventure Comment, pp. 2-3; Texatel Comment, p. 2.

[9] Iowa Telecommunications Association Comment, p. 6.

[10] NTCA Comment, p. 3; *In the Matter of Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, WCB/Pricing No. 07-10, Order (rel. Nov. 30, 2007) (*Dismissal Order*), ¶ 7.

[11] ITTA Comment, pp. 10-11; NECA Comment, pp. 12-13; JSI Comment, p. 20.

[12] WTA Comment, p. 6.

that will not affect access tariff enforceability.[13] HyperCube and McLeod likewise assured the Commission that the existing complaint process under Section 208 is sufficient to handle marketing disputes such as those created by traffic stimulation.[14]

The Iowa Telecommunications Association and the Rural Iowa Independent Telephone Association concurred with NTCA's view that there is no need to modify NECA traffic-sensitive pool procedures for average schedule or cost carriers.[15] NECA is proactively engaged in modifying and adjusting its tariff formulas given member companies' access growth. Furthermore, the NECA pools provide little if any incentive for companies in the pool to engage in traffic stimulation, and those few examples of high minute levels within the NECA pool occur just prior to or after entry into the pool.[16] NECA reviews unusual activity in connection with settlements and modifies the settlement formulas accordingly. NECA, in its comments, noted that it is proposing changes in its next cycles.[17] Even the Ohio Public Utilities Commission believes that a NECA carrier remaining in the NECA pools has little incentive to engage in inappropriate traffic stimulation activities.[18] With little evidence of need to revise the NECA pools, the Commission should not change the NECA pooling requirements.

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[13] The Rural Alliance Comment, pp. i, 2.

[14] Hypercube, LLC and McLeodUSA Telecommunications Services, Inc. (Hypercube and McLeod) Joint Comments, pp. 10-11.

[15] Iowa Telecommunications Association Comment, p. 3; Rural Iowa Independent Telephone Association (RITTA) Comment, pp. 6-7.

[16] NECA Comment, p. 10, n. 16/ AT&T Comment, Exhs. A-1, A-2.

[17] NECA Comment, p. 8.

[18] Ohio Public Utilities Commission Comment, p. 4.

II. Defining "Traffic Stimulation" For Non-NECA Pool Average Schedule Carriers Using An "XYZ"-Type Formula Will Be Difficult – Where Do You Draw The Line?

The FCC proposes using a tariff trigger with three variables to initially determine whether an increase in access demand reflects improper access stimulation: If an ILEC experiences X% increase in access demand over Y time period, the ILEC must file a new access tariff in Z days. The purpose of creating this "XYZ" trigger is to: 1) put everyone on notice of the consequences of significantly increasing access demand; 2) create a rebuttable presumption that a carrier that exceeding the trigger is engaging in improper traffic stimulation and must revise its tariff or seek a Commission waiver; and 3) maximize FCC enforcement efficiency by screening out complaints of access stimulation that do not meet the trigger threshold.

If the Commission decides to use an access tariff trigger for non-NECA pool participants, the Commission must define clearly "traffic stimulation." The Mercatus Center of George Mason University and others agree with NTCA that defining "traffic stimulation" will be difficult.[19] Any definition will create litigation and challenge, so the definition must be supported by record evidence. The Texas Statewide Telephone Cooperative, Inc. asserted that business arrangements which increase access demand may provide valuable, legitimate economic development opportunities.[20] JSI and others aptly pointed out that there may be valid business reasons for leaving the NECA pool, such as decreased line haul settlements, and that

[19] Mercatus Comment, pp. 1-2; US Telepacific Corp. Comment, p. 4.

[20] Texas Statewide Telephone Cooperative, Inc. Comment, pp. 3-4.

some access stimulation may be in the public interest.[21] Hypercube & McLeod characterized traffic stimulation as marketing, a view that also has some merit.[22]

A Commission-led case-by-case analysis under Section 208 is the preferred method to screen access stimulation complaints.[23] This permits each complaining IXC and respondent to present their evidence to the Commission, but this process takes time and effort by the Commission and the carriers. The Commission's "XYZ" trigger formula is an alternative method to examine questionable activities that exceed a certain threshold of access demand increase per line (the "X" threshold), measured over a set time period (the "Y" component), requiring a new tariff filing in another set time period (the "Z" component). The Commission should recognize that carriers who trigger the "XYZ" formula should be able to seek waivers of the tariff filing requirements for good cause. NTCA affirms that a trigger formula is not necessary for access tariff carriers who remain in the NECA traffic-sensitive pools.[24]

A. The Record Supports Using A Per-Minute Access Line Component And A Tariff Trigger of More Than 200% Increase For The "X" Threshold.

NECA's data supports the use of a per-access line component as part of any access tariff trigger formula the Commission may adopt. NECA has provided the Commission with data on average schedule traffic sensitive settlement per access minute ranging up to 1571 minutes per line for 2007 and has proposed settlement formulas that reflect up to 2000 monthly access

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[21] JSI Comment, pp. iv, 9-11; All American et al. Joint Comments, p. i.

[22] Hypercube and McLeod Joint Comments, pp. ii, 2.

[23] All American Telephone Co., Inc., Aventure Communications, Broadview Networks, Great Lakes Communications, Navigator Telecommunications, LLC, Nuvox Communications, Omnitel Communications, and XO Communications, Inc. (All American et al.) Joint Comment, p. ii.

[24] NTCA Comment, pp. 5-7.

minutes per line for 2008.[25] NECA's pool formulas, which the Commission may choose to use as a comparison for non-pool participants, acknowledge the need to review demand increases based on the number of access lines, not just the overall minutes of use (MOU).

Commenters who suggested using a pure MOU calculation without including a per-access line component, such as AT&T and Qwest, have disregarded the effect that mergers and acquisitions of access lines may have on access demand.[26] AT&T's Exhibits A-1 and A-2 reflect year over year quarterly traffic changes for § 61.38 ILECS (cost companies) and § 61.39 ILECs (average schedule companies). Two cost companies and five average schedule companies exceed a 200% change for the 2Q 2007 estimated industry amount, but these charts appear to reflect just pure MOU without any reflection of per access line growth.[27] AT&T's Appendix B reflects the total number of access lines and minutes for rate of return ILECs reported in 2006, but does not show the per-access line growth percentage in a year over year quarterly format.[28] Using a per-access line calculation, rather than overall access line calculation, will account for ILECs who acquire exchanges and increase the number of their access lines between tariff filings. The Commission should include the per-access line component to avoid penalizing carriers who increase their demand by increasing the number of access lines they serve.

Another critical piece of the "X" threshold is the percentage increase of access demand above which presumably indicates improper traffic stimulation. The record is not well-

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[25] NECA Comments, Exhs. 1, 3, pp. 6-8.

[26] AT&T Comment, p. 28, Exhs. A-1, A-2; Qwest Comment, p. 20.

[27] *Ibid.*

[28] AT&T Comment, Exh. B.

developed on what should be the numerical value for "X." The Commission's *Designation Order* in the AT&T/Reasoner dispute was based on a complaint based on a 12,000% increase in growth in access minutes of use.[29] The Commission has not, however, stated the minimum level of access demand increase that would trigger a tariff refiling.

Again, borrowing from NECA's data provided in this docket, NECA's Exhibit 4 shows that from 2006 to 2007, NECA pool member demand changes fluctuated between a range of -70% to +200%, with 11 study areas experiencing growth from 100% to 200%, the maximum band.[30] It seems reasonable, therefore, to focus on access carriers whose access minute demand increases by more than 200%, since that is beyond the experience range of the NECA pool. Commenters have proposed using increase demand triggers as low as 25%.[31] These comments, however, are not based on adequate supporting data, unlike NECA's traffic sensitive pool tariff formulas, and the Commission should disregard these low level recommendations.

As one commenter mentioned, carriers, especially competitive local exchange carriers (CLECs), may experience exponential growth during the early stages of deployment.[32] A 200% increase over a set time interval is reflected in the NECA data and is realistic and reasonable. The Commission should base a demand trigger by reference to NECA pool data, not supposition, and should not require access tariff refiling unless access demand per access line has grown *more than 200%* over the measurement period.

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[29] NTCA Comment, p. 9; *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184 and WCB/Pricing No. 07-10, Order Designating Issues for Investigation, DA 07-3738 (rel. Aug. 24, 2007) (*Designation Order*), ¶ 9, n. 29.

[30] NECA Comment, p. 9, Exh. 4.

[31] Sprint Nextel Comment, p. iii, 14; Verizon Comment, p. 13.

[32] TC3 Telecom Comment, p. 2.

B. The Record Reflects Consensus On Using A Quarterly Reporting Period, Rather Than A Monthly Reporting Period For The "Y" Component.

ATT, Embarq, Sprint, USTelecom, Verizon, and others agree with NTCA that using a quarterly interval to judge whether access stimulation has occurred is appropriate.[33] Using a quarterly interval, rather than a single month, will smooth out inconsistencies and eliminate temporary peaks and valleys. NECA, in its comments, said that its data reflects carriers who have a significant increase one month, reduction in second month.[34] USTelecom suggested that a quarter should be long enough to absorb exogenous demand due to special events, yet brief enough to address traffic stimulation issues.[35] NTCA agrees with this rationale and urges the Commission to adopt a three-month/quarterly period as the "Y" component in an access tariff trigger.

C. The Commission Should Use At Least 60 Days For The "Z" Tariff Filing Component.

The third component of the non-NECA pool access tariff trigger is the time in which a carrier has to refile its access tariff. Revising tariffs can be an expensive process for small rural ILECs, and some may need as much as 60 days for the revision. NTCA supports giving carriers at least that much time, and other carriers agree.[36] The "Z" component for the access tariff trigger should be at least 60 days.

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[33] AT&T Comment, p. 20; Embarq Comment, p. 9; Ohio PUC Comment, p. 8; RITTA Comment, p. 5; Sprint Nextel Comment, p. iii, 14; Verizon Comment, p. 13.

[34] NECA Comment, p. 9, n. 15.

[35] USTelecom Comment, p. 5.

[36] Embarq Comment, p. 10; Sprint Nextel Comment, p. iii, 14.

III. Conclusion.

For these reasons, the Commission should not require NECA traffic-sensitive pool participants to adhere to an access trigger formula as the NECA pool formulas provide no incentive for individual gain through improper traffic stimulation. The Commission must clearly define "traffic stimulation" and apply it prospectively so that non-NECA pool participants can clearly understand the extent and meaning. For those access carriers who do not participate in the NECA traffic-sensitive pool, the Commission should use its existing authority to suspend, investigate and enforce suspected violations of allowed rates of return. Furthermore, the Commission, if it decides to use a tariff trigger to screen claims of improper access stimulation, should use a trigger threshold of greater than 200% per access line measured by a year-over-year quarterly basis, and should allow carriers at least 60 days for tariff refiling.

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CERTIFICATE OF SERVICE

I, Adrienne L. Rolls, certify that a copy of the foregoing Reply Comments of the National Telecommunications Cooperative Association in WC Docket No. 07-135, FCC 07-176, was served on this 16th day of January 2008 by first-class, United States mail, postage prepaid, or via electronic mail to the following persons:

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