Before the
Federal Communications Commission
Washington, DC 20554

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

REPLY COMMENTS OF THE
NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES

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I. INTRODUCTION AND SUMMARY

Pursuant to the Notice of Proposed Rulemaking ("NPRM") issued by the Federal Communications Commission ("Commission"),[1] the National Association of State Utility Consumer Advocates ("NASUCA"[2]) offers these reply comments regarding the issue of "access stimulation."

Comments were filed by a wide range of industry participants, including mega-carriers,[3] smaller incumbent local exchange carriers ("ILECs"),[4] competitive carriers,[5]

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[1] FCC 07-176, 22 FCC Rcd 17989 (rel. October 2, 2007). The NPRM was published in the Federal Register on November 15, 2007.

[2] NASUCA is a voluntary national association of consumer advocates in more than 40 states and the District of Columbia, organized in 1979. NASUCA's members are designated by the laws of their respective states to represent the interests of utility consumers before state and federal regulators and in the courts. *See, e.g.*, Ohio Rev. Code Chapter 4911; 71 Pa. Cons. Stat. Ann. § 309-4(a); Md. Pub. Util. Code Ann. § 2-205(b); Minn. Stat. Ann. Subdiv. 6; D.C. Code Ann. § 34-804(d). Members operate independently from state utility commissions, as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (*e.g.*, the state Attorney General's office). Associate and affiliate NASUCA members also serve utility consumers, but have not been created by state law or do not have statewide authority.

[3] AT&T Inc. ("AT&T"); Qwest Communications International Inc. ("Qwest"); Verizon Communications Inc. ("Verizon").

[4] CenturyTel, Inc. ("CenturyTel"); Embarq Corp ("Embarq"). The consulting firms Alexicon Telecommunications Consulting ("Alexicon") and John Staurulakis, Inc. ("JSI") filed comments concerning the rural ILECs they represent.

[5] Aventure Communications Technology, L.L.C. ("Aventure"); All American Telephone Co., Inc. et al. ("AATC, et al."); Cavalier Telephone, LLC ("Cavalier"); Cbeyond, Inc. and Integra Telecom, Inc. ("Cbeyond/Integra"); Hypercube, LLC and McLeodUSA Telecommunications Services, Inc.

and their various associations.[6] A few providers of some of the services discussed in the NPRM – conference calling, information hotlines, entertainment services and specialty chat lines – also filed comments.[7] Comments were also filed by the Regulatory Studies Program of the Mercatus Center at George Mason University ("RSP"), and by the Public Utilities Commission of Ohio ("PUCO").

The variety of subjects in the comments ranges far beyond the fairly narrow issue being addressed, concerning the propriety (or lack thereof) of local carrier strategies to inflate their terminating access traffic, resulting in exceedingly high returns to the local carriers. Many of the comments do focus on this issue. Other comments, however, go practically as broad and as deep as the entire issue of intercarrier compensation.

NASUCA submits that the Commission should solve the narrow problem here with a narrow solution; fixing the traffic pumping problem does not require revising the whole contentious intercarrier compensation issue. Yet it is a problem that needs to be fixed, because it involves carriers and others gaming the system to their own advantage. Resolution of this problem should not be delayed, however, while the Commission considers the larger issues involving the intercarrier compensation mechanism.

Based on the examples in the record, the Commission should require carriers that

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("Hypercube/McLeod"); Leap Wireless International, Inc. ("Leap"); MetroPCS Communications, Inc. ("MetroPCS"); TC3 Telecom Inc. ("TC3"); Trans National Communications International, Inc. ("TNCI"); U.S. TelePacific Corp. d/b/a TelePacific Communications ("TelePacific").

[6] Independent Telephone & Telecommunications Alliance ("ITTA"); Iowa Telecommunications Association ("ITA"); National Cable & Telecommunications Association ("NCTA"); National Exchange Carrier Association, Inc. ("NECA"); National Telecommunications Cooperative Association ("NTCA"); Organization for the Protection and Advancement of Small Telephone Companies ("OPASTCO"); the Rural Alliance; Rural Independent Competitive Alliance ("RICA"); Rural Iowa Independent Telephone Association ("RIITA"); TEXALTEL; Texas Statewide Telephone Cooperative, Inc. ("TSTCI"); United States Telecom Association ("USTelecom"); Western Telecommunications Alliance ("WTA").

[7] Chase Com, Fonepods, Inc., FreeConferenceCall.com. and Hft Corp. ("Chase, et al."); Futurephone.com, LLC ("Futurephone"); Global Conference Partners ("Global").

drop out of the NECA pool to include in their tariffs a provision that if their traffic significantly increases, on a per-access line basis, they will file a mid-course correction to recognize the increased traffic, before the two-year review period ends. Again, based on the record, "significant increase" should be defined as a fifty-fold increase in traffic. Carriers that see such increases should also be prohibited from returning to the NECA pool for a significant period of time. Further, the Commission should prohibit carriers from including rebates to customers in their costs of service. These tailored remedies should be sufficient to prevent the behavior described in the NPRM.

II. THE "TRAFFIC PUMPING" PROBLEM IS A NARROW ONE AND REQUIRES ONLY A LIMITED SOLUTION.

The briefest of descriptions suffices to identify the problem:

> The NPRM focuses entirely on the increases in switched access demand that occurred for select rural local exchange carriers ("RLECs") and competitive local exchange carriers ("CLECs") which, the Commission tentatively concludes, results in a violation of Section 201(b)'s requirement that carriers' rates be just and reasonable. The Commission contends that because of the increased demand for the few carriers who terminated traffic for chat lines and conference bridge services utilizing these carriers' numbers, the result was rate-of-return levels that were significantly higher than what the carriers were authorized to earn, thus causing the above tentative conclusion.[8]

Or, as NCTA describes it,

> the basic problem is that some rate of return LECs will establish their per-minute access charges based on a predicted level of demand, and then enter into contracts with certain types of customers that are designed to produce a substantially higher amount of traffic, and therefore substantially higher revenues. In some cases, these contracts involve revenue-sharing or other compensation paid by the carrier to customers that are expected to terminate significant amounts of traffic, such as conference calling services. As the Commission recognizes in the *Notice*, prefiling review of these tariffed rates cannot identify this type of situation

[8] Rural Alliance Comments at 2; see also AT&T Comments at 16-17; Verizon Comments at 1.

> and the "deemed lawful" provision of Section 204(a)(3) has the effect of insulating these rates from meaningful review.[9]

NECA points out that "[a]s a general matter, companies operating within the NECA pooling environment have little or no individual incentives to engage in the type of access stimulation activities at issue in this proceeding."[10] It appears clear that it is LECs that have dropped out of the NECA pool who have engaged in these activities.[11] As Embarq states, "the Commission's rules governing these small, rate-of-return LECs access rates presume relatively balanced traffic and low and relatively steady volumes…"[12] The traffic pumping activities at issue here break those presumptions.

As Hypercube/McLeod points put, "Every telecommunications carrier engages in traffic stimulation, another description of which is marketing."[13] It is only when such stimulation effectively breaks the intent of the Commission's rules that it needs to be remedied.

Qwest describes four basic types of these activities: "free" conference calling services, "free" chat lines, "free" international calling, and "free" podcasts.[14] AT&T

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[9] NCTA Comments at 2-3 (footnotes omitted); see also WTA Comments at ii.

[10] NECA Comments at 3.

[11] NTCA Comments at 1.

[12] Embarq Comments at 2. AT&T asserts (AT&T Comments at 1) that these are carriers that have "extraordinarily high access charges…." That does not appear to be the case, although NASUCA agrees that these ILECs' access charges are "falsely premised on assumptions of low traffic volumes typical in such rural areas…." Id.

[13] Hypercube/McLeod Comments at ii.

[14] Qwest Comments at 4-5. "Free" may in some instances be a slight misnomer, because the user may have to pay long distance charges. But there is no additional charge, for example, for the conferencing. AT&T's description of "an endless variety of such schemes" (AT&T Comments at 6) appears to be hyperbole.

offers other examples.[15]

Qwest also details the magnitude of the impact of access stimulation activities:

- Pre-pumping: 49,000 access minutes per month; "mid-pump": 740,000 minutes; "peak pump": 10,000,000 minutes[16]
- Pre-pumping: 27,000 access minutes per month; mid-pump: 1,000,000 minutes; peak pump: 6,400,000 minutes[17]
- Pre-pumping: 90,000 access minutes; peak pump: 12,900,000 minutes[18]
- Pre-pumping: 20,000 access minutes per month; peak pump: 6,400,000 minutes[19]

Embarq provides another example, of a rural LEC whose access minutes went from 121,000 per month to 15 million.[20] And Verizon identifies a group of eight rural ILECs whose access charges to Verizon increased by 76 times after they exited the NECA pool.[21]

In these examples, traffic increased to **75 to 320 times** the pre-pump level. It is difficult to imagine any legitimate reason for such increases. It should be clear that these

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[15] See id. at 8.

[16] Qwest Comments at 4.

[17] Id.

[18] Id., Exhibit A at 2.

[19] Id. at 4.

[20] Embarq Comments at 6-7.

[21] Verizon Comments, Buzacott Declaration, ¶ 5

increases are not merely the result of carriers seeking more efficient levels of network usage.[22]

These increases in traffic put OPASTCO's discussion of "normal variations" in traffic into perspective:

> Normal variations in access demand, as well as changes in costs and expenses, will naturally cause fluctuations in a carrier's rate of return from year to year. It would be unreasonable to expect that access rates based on a RoR carrier's projected or historical cost and demand data will produce a rate of return that precisely matches the authorized level in any given year.[23]

Such variations would be overlooked by a high-enough trigger.

Qwest implies that all access stimulation involves revenue sharing.[24] Although revenue sharing is a strong incentive for stimulation, it is not a necessary condition for traffic pumping. On the other hand, revenue sharing arrangements that do not involve pumping may be questionable, but do not unduly burden the IXC or its customers.

NASUCA agrees with CenturyTel that "the Commission should take strong action against carriers who intentionally manipulate the tariff rules to generate revenues far in excess of their authorized rates of return."[25] But NASUCA also agrees that "the 'traffic pumping' schemes were engaged in solely by carriers that utilized the procedures of Rule 61.39, a group of carriers that represents only a small subset of access services and revenues."[26]

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[22] See GCP Comments at 16-17.

[23] OPASTCO Comments at 4.

[24] Qwest Comments at 3.

[25] CenturyTel Comments at 1.

[26] Id.

CenturyTel identifies the prime member of the class of suspects as "a carrier which intentionally inflates costs or underestimates demand to increase revenues beyond a return of 11.25%...."[27] Clearly, such actions need to be addressed, but a carrier that correctly gauges its costs and demand while rates are being set but then subsequently engages in access stimulation also needs to be dealt with. A significantly high enough stimulation threshold resolve both situations.

But CenturyTel also notes that

> [t]here has been no indication that any carriers other than those utilizing the procedures of Rule 61.39 ever engaged in improper access stimulation. Thus, there is no justification for the FCC to address the tariff practices of other carriers.[28]

NASUCA generally agrees (although there are a few exceptions, as discussed below).[29] AT&T says that the target group extends to "dozens of small ILECs with visions of traffic pumping riches [who] sought to exit the NECA traffic sensitive access pool in the most recent annual tariff filing."[30]

Thus a narrowly-tailored requirement is what is needed here. As Embarq states, "Any rule changes should be narrowly tailored and specifically targeted to the class of LECs whose tariffs are associated with this problem."[31]

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[27] Id. at 3.

[28] Id. at 4; see also Qwest Comments at 30, Embarq Comments at 14.; Verizon Comments at 5-6; ITTA Comments at 5: PUCO Comments at 4.

[29] Verizon asserts that some rural ILECs who have reentered the NECA pool continue to be involved in traffic pumping. This deserves further investigation, but does not appear to warrant major changes in the NECA rules.

[30] AT&T Comments at 2. Verizon is slightly more circumspect, saying that the problem involves a "large number of rural ILECs…" Verizon Comments at 7.

[31] Embarq Comments at 3.

For example, in order to avoid seasonal or similar variations, any mechanism should compare access minutes in a calendar quarter to the same quarter in the previous year.[32] Further, although raised in a CLEC context, NCTA's statement captures the issue for ILECs as well:

> To avoid unnecessary regulation of legitimate growth by competitive providers, the Commission should avoid relying solely on changes in a CLEC's total access minutes as the test for determining whether additional regulation is needed. Rather, the Commission should consider alternative measures, such as changes in a CLEC's per-subscriber minutes, that are more focused on identifying the "access stimulation" schemes identified in the *Notice*.[33]

OPASTCO asserts that

> [t]he FCC should also consider the difficulty of establishing an access growth factor that can properly account for a variety of circumstances in a dynamic industry. For example, within a given tariff period a carrier may acquire a new exchange (which includes loops as well as one or more switches) and, as a result, experience a significant increase in access minutes. However, because the carrier's traffic sensitive costs have also increased in proportion to the growth in access minutes, a mid-course tariff filing would not be warranted, even if the growth threshold was exceeded.[34]

A minutes-per-access-line factor would address this concern.[35]

Based on the examples cited by Qwest, it appears that **a stimulation figure of a 50-fold increase per access line over the same quarter in the previous year** would address the problem. At this level, a trigger would excuse "changes in carrier

[32] NTCA Comments at 2, 9-10; RIITA Comments at 5; USTelecom Comments at 4.

[33] NCTA Comments at 4; see also NECA Comments at 10.

[34] OPASTCO Comments at 9-10; see also Chase, et al. Comments at 14.

[35] NCTA Comments at 2, 8; RIITA Comments at 6.

circumstances and larger market trends."[36] NECA's data show that no carrier in its pool has experienced demand increases of this magnitude.[37]

As AT&T notes, this would require the affected class of carriers to include language in their tariffs that requires refiling of tariffs if the threshold has been reached.[38] That language would be part of the "deemed lawful" provision required by 47 U.S.C. § 204(a)(3).

A trigger at this level would not really require carriers to "continuously monitor their access minutes."[39] One would imagine that a carrier that experienced an increase of such a magnitude would notice it. As Embarq states, "The NECA 'tariff-hopping' cases brought to the Commission's attention … suggest that where small rate of return LECs experience the dramatic increases in traffic sufficient to meet this trigger, the circumstances usually will not be a surprise to the carrier."[40] And where a carrier overlooks such increases -- presumably in the interest of inflated returns -- the failure to comply with the revised tariff requirement would represent a separate violation of

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[36] OPASTCO Comments at 10.

[37] NECA Comments at 9. NECA's data show that Embarq's proposal for a trigger at a 50% traffic increase (Embarq Comments at 9), like AT&T's proposal for sliding-scale triggers of 50-100% (AT&T Comments at 28) and, even more so, Verizon's proposal for a 25% trigger (Verizon Comments at 3) would likely capture legitimate access minute growth. Likewise, MetroPCS's proposal for change where inbound traffic exceeds outbound by a factor of three to one (MetroPCS Comments at 3, 13) would capture many legitimate LEC business plans.

[38] AT&T Comments at 28-29. As discussed here, AT&T's characterization of the affected class is much broader than NASUCA's.

[39] OPASTCO Comments at 9.

[40] Embarq Comments at 10. As Embarq also points out, under those circumstances, "a relatively short, sixty day deadline [for tariff filing] would seem reasonable." Id. AT&T proposes 45 days. AT&T Comments at 27.

Commission rules, subject to additional penalties. These factors combined might well deter ILECs from engaging in traffic pumping schemes entirely[41].

Another issue arises with the two-year rate cycle. As ITTA states,

> [C]arriers with high access rates based on historically low demand are able to command high rates for high demand for only one tariff cycle before their rates are adjusted downward to reflect actual demand. An unscrupulous carrier, however, could avoid this impact by simply (re)entering 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 to be 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.[42]

Likewise, OPASTCO argues that the Commission should require "those that file tariffs under section 61.39 to remain out of the National Exchange Carrier Association (NECA) traffic sensitive pool for two or, at most, three two-year tariff periods."[43] NASUCA agrees, in general.[44] Yet ITA has a valid point that a carrier that has not "realized significant traffic volume increases" should not be barred from re-entering the pool.[45]

In addition to the stimulation triggers and stay-out provisions just described, NASUCA agrees that the Commission should make clear that the revenues "forwarded"

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[41] Such a standard does not vary the results based on the category of end user served, which concerns Chase et al. Chase et al. Comments at 8-9, 15-17.

[42] ITTA Comments at 6-7.

[43] OPASTCO Comments at 2; see also id. at 10-13; see also Embarq Comments at 3, 13-14; ITTA Comments at 6-7; PUCO Comments at 11; WTA Comments at 11. OPASTCO opines that this action alone would be sufficient to fix the problem under consideration here. OPASTCO Comments at 2. NASUCA disagrees, because it still allows carriers to take advantage of temporary (i.e., less than two-year) pumping.

[44] This is what makes Futurephone's proposal to establish a separate "high volume" tariff counterproductive. Futurephone Comments at 6. A cost-based high-volume tariff would likely be low enough that it would not permit the revenue sharing on which Futurephone and its counterparts depend.

[45] ITA Comments at 5. JSI sets forth legitimate reasons for carriers to leave the pool. JSI Comments at 9-11.

to a partner are not costs of service recoverable under tariffs.[46] As Qwest states, "Access stimulation costs are not marketing expenses."[47] Neither do they fall into any other legitimate category of expense.

CenturyTel goes too far (or not far enough) by saying that no new regulations need to be adopted to address the traffic stimulation problem. CenturyTel cites the current process of FCC staff review of tariffs, complaints, and FCC investigations as sufficient.[48] But these processes have clearly not been sufficient to either prevent access stimulation or correct the situation once stimulation has occurred. As stated by AT&T, "[t]he industry and the Commission should not and cannot continue to rely exclusively on case-by-case suspensions, investigation and litigation to combat this problem."[49] NASUCA agrees; what is needed instead is a solution that is a more effective use of regulatory resources.

CenturyTel also asserts that trigger language such as discussed above would (1) violate the "deemed lawful" provision of Section 204(a)(3)[50]; (2) violate the "tradition" that tariffs are "carrier-initiated"[51]; (3) violate the two-year rate of return monitoring period[52]; and (4) violate the carrier's due process rights.[53] ITTA raises similar

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[46] Qwest Comments at 23; Embarq Comments at 3, 8; ITTA Comments at 15; TC3 Comments at 1; PUCO Comments at 7; TSTCI Comments at 3.

[47] Qwest Comments at 23.

[48] CenturyTel Comments at 5-6.

[49] AT&T Comments at 2.

[50] Id. at 6.

[51] Id. at 7.

[52] Id. at 7-8.

[53] Id. at 8.

arguments.[54] Yet requiring carriers to file tariffs that include a review provision **if the original assumptions underlying the tariff are egregiously altered** would not create a "violation" in any of those areas. It should be recalled that this language would apply only to carriers that had voluntarily removed themselves from the NECA pool, and would proceed under rules adopted by the Commission.[55] The narrowness of this change makes CenturyTel's argument about the burden on ILECs (CenturyTel Comments at 9-10) fairly hyperbolic.

III. THE ARGUMENTS OF THE "TRAFFIC-PUMPING PARTNERS" SHOULD BE REJECTED.

A few of the entities that partner with the rural ILECs filed comments in defense of their practices, seeking to be able to continue these lucrative arrangements.

It may be that

> from the consumer's perspective, these arrangement are *identical* to the volume commission arrangements enjoyed by large institutions such as universities, computer technical support lines, and banks: the consumer dials a long-distance number and pays only the ordinary long-distance rates.
>
> In terms of consumer expectations and costs, [these] services are functionally identical to other long-distance calls: a willing consumer knowingly dials a distant area code for an amount of time wholly controlled by the consumer, who is then billed the reasonable and customary charges for the call. As with all long-distance calling, the consumer can keep his or her bills down by (1) not placing the call; or (2) shortening the amount of time on the phone.[56]

[54] ITTA Comments at 12-15.

[55] The fact that these provisions would be included in the rules makes CenturyTel's citation to *Virgin Island Telephone Corp. v. FCC*, 989 F.2d 1231, 1238-1240 (D.C. Cir. 1993) (CenturyTel Comments at 8, n. 21) inapposite; there the FCC used a six-month review period **despite** the fact that the rules dictated a two-year period.

[56] Chase, et al. Comments at 2 (emphasis in original).

GCP describes at length the features of its services, which standing alone appear beneficial.[57]

But from a broader perspective, the advantages of these calling arrangements cannot overlook the fact that they occur only because of the rural ILECs' breaking of the assumptions on which their access charges have been set. And the "competition" that these entities provide,[58] to the extent that it depends on revenue-sharing from ILECs whose rates were based on far different assumptions, it is artificial competition that need not be encouraged.

This is scarcely the "market place success" that commenters refer to.[59] Consumers simply do not "need" any advantage afforded by such arrangements. And prohibiting such arrangements will not violate consumers' First Amendment rights of free speech and free association, despite the overblown arguments of some of the partners.[60]

Other defenses include:

- That traffic pumping harms only "the shrinking IXC market."[61] This ignores the fact that the payment of access charges comes from all carriers, not just stand-alone IXCs.
- That the real problem is caused by IXCs flat-fee unlimited calling plans.[62] These

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[57] GCP Comments at 5-7. Likewise, NASUCA would not attempt to defend the international calling rates that Futurephone competes against. See Futurephone Comments at 9.

[58] Chase, et al. Comments at 5.

[59] Id. at 3; see also id. at 13.

[60] Id. at 11.

[61] Id. at 4-5.

[62] Futurephone Comments at 6.

plans, much-favored by consumers,[63] should not be adjusted or eliminated in order to "permit competitive services such as Futurephone's to enter the market place…."[64]

- That traffic pumping only causes more efficient usage of the network.[65] The issue is not that "these services somehow cause *too much* traffic on[] rural carrier networks…"[66] but that these services cause far more traffic than was assumed when the rates for that traffic were set.
- That preventing traffic pumping will provide disincentives for carriers to serve rural and underserved populations.[67] Such incentives are not appropriate and are not needed.

These arguments do not come close to justifying the activities under examination here.

IV. OTHER ACTIONS NEED NOT BE TAKEN.

After listing some of the broad measures proposed in the NPRM, the Rural Alliance states,

> The Rural Alliance is strongly concerned because, rather than working in a narrow fashion to prevent over-earning by those carriers that are suspected of or may have engaged in access-stimulation activity, such unwarranted proposals would have a far-reaching impact, generally making it more difficult for all ILECs to rely on tariffs as a means of provisioning and receiving compensation for their access services.[68]

[63] See Verizon Comments at 8 ("virtually all wireless customers and 75 percent of wireline customers").

[64] Futurephone Comments at 7.

[65] GCP Comments at 16.

[66] Id. (emphasis in original).

[67] Chase et al. Comments at 13-15.

[68] Rural Alliance Comments at 8.

NASUCA agrees with the Rural Alliance's concern.

To begin, the magnitude of the access stimulation just discussed (and proposed to be solved) means, among other things, that consideration of precision is really not necessary. Therefore, there is no real need for a detailed review of cost and demand relations with regard to the setting of just and reasonable rates for switched access tariffs. The questions of whether there is a large fixed cost to purchasing a local switch and whether the marginal or incremental cost of increasing the capacity of a local switch is low really do not need detailed examination at this juncture.[69] Similarly, the methodologies and conclusion of the May 1, 2007 Qwest Declaration that estimates the incremental costs of adding significant amounts of switched access traffic need not be addressed at this point.[70]

As apparently the primary victim of much of the traffic pumping that has occurred to date, it is understandable why Qwest would want comprehensive regulation to prevent it. According to Qwest, this includes, for ILECs, extensive certifications, automatic tariff expirations, and exclusion of traffic to "business partners" from the category of switched access service.[71] For CLECs, this would include exclusion of all CLECs from benchmarking to the rural ILECs rates.[72] Qwest would also essentially outlaw any

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[69] See Rural Alliance Comments at 10-14.

[70] Id. at 14-17.

[71] Qwest Comments at 1-2.

[72] Id. at 2.

revenue sharing arrangements.[73] AT&T has similar proposals,[74] as does Verizon.[75]

NASUCA appreciates the irony identified by RICA that these mega-carriers, "normally heard asking for less regulation for themselves, allege burdening entire classes of carriers is [now] required…."[76] It is also ironic that these carriers, who are not subject to any review of their earnings, are so concerned about the earnings of certain small carriers.[77] Those are among the reasons for NASUCA's proposal for a limited, targeted remedy for traffic pumping.

With regard to revenue sharing, according to Qwest, "if the rates of a LEC are lawful, there should not be sufficient funds available to pay for the [Free Service Provider] FSP service out of the LEC's access revenues."[78] Putting aside the question of whether intercarrier compensation rates should be based strictly on costs (and on which costs: forward-looking? embedded? including or not including joint, common, and overhead costs?), there is a real question about whether intercarrier compensation rates above those levels are unlawful. Thus NASUCA would not recommend outlawing all revenue-sharing arrangements; there may well be situations where they are appropriate.[79]

That does not mean, however, that access charges set at levels that produce the returns created by traffic-pumping schemes are reasonable. That is where the attack

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[73] Id. at 3,

[74] AT&T Comments at 4-5.

[75] Verizon Comments at 4-6

[76] RICA Comments at i.

[77] See Cbeyond/Integra Comments at 7.

[78] Qwest Comments at 13.

[79] See Embarq Comments at 8; Hypercube/McLeod Comments at 5-9..

should be focused, however, not on the revenue-sharing arrangements.[80] But revenue-sharing arrangements that result in the LEC becoming a net payor to its end user customer do not make sense and could be forbidden.[81]

As the Commission surely knows, NASUCA seldom agrees with USTelecom on much of substance. In this instance, however, USTelecom's view that the Commission should not eliminate the § 61.39 tariff filing option[82]; should not require a filing if an arrangement is entered into that may stimulate traffic[83]; and that carriers should not be required to make certifications[84] are consistent with NASUCA's view that a targeted approach to the traffic pumping problem should be taken. NASUCA also agrees with OPASTCO that there is no need to make the § 61.39 election only a one-way process.[85] Even more importantly, the Commission should not eliminate the § 61.39 option altogether.[86]

The consensus among the carriers is that the Commission should not address this issue through forbearance.[87] NASUCA agrees, especially because of the procedural and constitutional infirmities of the forbearance process.

By contrast with the narrowly-targeted approach discussed above, some

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[80] But see discussion above that shared revenues are not legitimate costs of providing access service.

[81] See AT&T Comments at 32-33.

[82] USTelecom Comments at 2; see also OPASTCO Comments at 14.

[83] USTelecom Comments at 6.

[84] Id. at 7; see also Rural Alliance Comments at 7-8, Embarq Comments at 10; ITA Comments at 4.

[85] OPASTCO Comments at 13.

[86] Id. at 14,

[87] See OPASTCO Comments at 6-8, USTelecom Comments at 2, Qwest Comments at 30, n. 43; NECA Comments at 2, 12-13; Embarq Comments at 3, 11-13; ITTA Comments at 7-12; ITA Comments at 7; WTA Comments at 17-18. See also PUCO Comments at 12-13.

commenters propose allowing self-help by the IXCs to be the rule. This is literally the case with the Mercatus Center, which proposes that

> the Commission should forbear from enforcing the mandatory interconnection rules when a long-distance carrier has evidence that access stimulation is occurring. Alternatively, in situations where access stimulation occurs, the Commission should forbear from enforcing the rules that prevent long-distance carriers from passing termination and interconnection charges through directly to the customers who made the calls.[88]

This would put all of the capabilities in the hand of the IXCs, which would be the sole judges of when access stimulation is occurring (and what evidence is enough[89]), and would allow charges to be passed through to end users without notice or opportunity to challenge the charge.[90] NASUCA agrees with those who assert that such self-help should not be permitted.[91]

Finally, Qwest also discusses arrangements that create drastic increases in **originating** traffic from rural LECs.[92] It appears that these arrangements are far less common than the "classic" traffic pumping arrangements; it would likely be appropriate for the Commission's current enforcement mechanisms to be given the opportunity to address these issues.

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[88] Mercatus Center Comments at 2; see also Qwest Comments at 31,.

[89] Despite the Mercatus Center's assertion that any criterion for requiring the filing of a revised tariff would be arbitrary (id. at 8), under its proposal the Commission would be required to establish a (non-arbitrary?) criterion for when the self-help would be allowed. Id. at 9, n.65.

[90] For example, how would a consumer be able to verify that the amount charged is correct? Given that toll calling is detariffed, in fact, it would seem that all of an IXCs' end use customers would have to agree to pay such charges before a bill could be rendered.

[91] GCP Comments at 12-15; Futurephone Comments at 21-22; ITA Comments at 8; Aventure Comments at 2-3.

[92] Qwest Comments at 5-7.

V. CLEC ARBITRAGE SHOULD ALSO BE ADDRESSED.

In the situations described above, ILECs have taken advantage of rates that do not reflect actual experience to reap inordinate profits. The same sort of arbitrage can occur with CLECs, where their access charges are not based on their own costs but rather on the costs of the ILEC in whose territory the CLEC operates. Qwest provides examples of this arbitrage.[93] AT&T states that "CLECs now account for more than three quarters of the traffic pumping minutes being billed to AT&T"[94] and Verizon asserts that "more than 90 percent of the traffic billed to Verizon by CLECs claiming the 'rural exemption' came from carriers that are engaged in traffic pumping schemes."[95]

Qwest acknowledges that CLEC access stimulation arrangements require a separate approach.[96] Once such approach is addressed by USTelecom:

> 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 currently benchmark their interstate traffic sensitive rates to the tariffed rate of the rate of return ILEC serving that area. CLECs serving in these areas that trip the access stimulation trigger should submit a tariff reflecting the lowest rate band in the NECA traffic sensitive tariff (band 1).[97]

Qwest's proposal that CLEC benchmarks for tariffing be established based on the rates of the nearest non-rural ILEC[98] makes little sense. On the other hand, however, Qwest's

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[93] Id. at 9-10.

[94] AT&T Comments at 3.

[95] Verizon Comments at 1.

[96] Qwest Comments at 7.

[97] USTelecom Comments at 8-9.

[98] Qwest Comments at 24.

alternative proposal to base CLEC rates on "the settlements specified in the extended average schedules published by NECA"[99] at least has some logical nexus with the costs of the rural carrier in whose territory the CLEC operates.

But the fundamental issue is whether CLEC access charges should continue to be benchmarked to ILEC access charges at all.[100] Verizon states, "These data show that, contrary to the Commission's assumptions in adopting the rural exemption, the exemption has functioned primarily as a conduit for traffic pumping and has thus *encouraged* the very arbitrage the Commission sought to eliminate."[101]

This is the same problem seen with the universal service fund, where, as the Commission knows, the Federal-State Joint Board on Universal Service has recently recommended elimination of the so-called "identical support" rule, which bases CLEC universal service support on the costs -- whether embedded or forward-looking -- of the underlying ILEC.[102] The arguments of the CLECs[103] do not really provide much basis for maintaining the current rules.

VI. THERE IS A LONG LIST OF ISSUES THAT THE COMMISSION NEED NOT ADDRESS -- AT LEAST IN THIS PROCEEDING.

Among the issues that need not be addressed here are other flaws in the access charge system. This would include the possibilities of ILECs under-earning as the result

[99] Id.

[100] Verizon proposes that the rural exemption be eliminated in its entirety. Verizon Comments at 5, 23.

[101] Verizon Comments at 24 (emphasis in original). Verizon does propose compromises if the Commission does not want to eliminate the exemption. Id. at 25-27.

[102] *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, *In the Matter of Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Recommended Decision, FCC 07J-4 (rel. November 20, 2007), ¶ 35.

[103] See, e.g., generally Hypercube/McLeod Comments; RICA Comments.

of overall declines in access minutes.[104] This would also include phantom traffic and other ways in which carriers avoid their access compensation obligations.[105] The Commission will, of course, have to address these issues eventually. The Commission can address these narrow issues here, and need not await the broader, more complex, and certainly more contentious resolution of the entire intercarrier compensation issue, as some recommend.[106]

Similarly, AT&T's issue regarding ILECs' manipulating points of interconnection to artificially inflate access charges is beyond the scope of the NPRM.[107] AT&T's issue regarding small and mid-sized ILECs opting in to price cap regulation is also not appropriately considered here.[108]

The Commission should not adopt RIITA's proposal to preempt state action on the traffic pumping issue.[109] Variations in the specifics of traffic pumping in the states can best be dealt with by the states.

Further, the Commission need not use this proceeding to address various entities' special interests. For example, the Commission need not "clarify that carriers may not

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[104] See OPASTCO Comments at 4; Rural Alliance Comments at 1, 6-7.

[105] Rural Alliance Comments at 4, 6-7; Embarq Comments at 15; ITTA Comments at 15-16; WTA Comments at 20-23. WTA notes "the estimated $2.0 billion per year of deliberately unidentified or misidentified 'phantom traffic' dumped by wireless, toll and other carriers upon rural ILECs for termination without payment of any compensation." WTA Comments at 3.

[106] Chase et al. Comments at 6; GCP Comments at 20-21; TelePacific Comments at 1. It is difficult to see how the arrangements entered into by the "traffic pumping partners" could continue under a truly reformed intercarrier compensation system.

[107] See AT&T Comments at 38.

[108] Id. at 38-40.

[109] RIITA Comments at 7.

file tariffs to assess termination charges for non-access traffic…."[110] And the Commission should not use this proceeding to "clarify … that domestic terminating access tariffs apply to services to Futurephone's, that Futurephone is an ISP or an ESP, and that inbound calls to Futurephone's portals terminate in the U.S."[111] Such actions are neither a necessary nor a sufficient precondition for solving the traffic pumping problem.

VII. CONCLUSION

Although traffic pumping needs to be addressed by the Commission, this should be done in a narrowed, tailored fashion. These stimulation arrangements are not in the public interest.

That said, it is important for the Commission not to go too far on this issue. For example, Qwest exaggerates by asserting that access stimulation "constitutes a form of anti-competitive conduct whereby an entity seeks to profit by increasing the costs of others, rather than by offering its services in a pro-competitive manner."[112] Claims that the rural ILECs and CLECs involved in these arrangements are serious competition for Qwest need not be taken seriously. That does not mean that the Commission should condone such arrangements, of course.

Likewise, AT&T asserts that "the annualized harm to customers and the public has already mushroomed to hundreds of millions of dollars per year."[113] Although NASUCA is on record here as opposed to the sort of gaming that these access stimulation

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[110] NCTA Comments at 2, 4-7.

[111] Futurephone Comments at 10.

[112] Qwest Comments at 10.

[113] AT&T Comments at 11.

schemes represent, it is not clear that customers (or the public) are directly harmed by these practices. Nonetheless, they are not in the public interest, and should be remedied.

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