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	)	

REPLY COMMENTS OF AT&T INC.

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Pursuant to Section 1.415 of the Commission's Rules (47 C.F.R. §1.415), AT&T Inc. ("AT&T") respectfully submits these reply comments in response to the Commission's Notice of Proposed Rulemaking in this proceeding.[1]

INTRODUCTION AND SUMMARY

The comments confirm beyond serious debate that traffic pumping schemes are rampant, that the small ILECs and "rural" CLECs engaged in these schemes are gaming the Commission's rules to evade the core Communications Act mandate of just and reasonable rates and practices, and that rule modifications are urgently needed to stem the resulting public interest harms. The comments likewise confirm the existence of targeted, easily implemented solutions that will hold LECs that engage in access stimulation practices accountable and require them to tariff rates that are more consistent with their vastly increased demand, without burdening LECs that do not.

The central facts that demand prompt Commission action are largely undisputed. Common sense dictates the Commission's tentative conclusion that high switched access rates premised on the low demand typical in rural communities cannot be just and reasonable at the much higher levels of demand experienced by ILECs and CLECs that are engaged in schemes

[1] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176, released Oct. 2, 2007, *published at* 72 Fed. Reg. 64179 (Nov. 15, 2007) ("*NPRM*").

that can generate millions of calls to a single "free" chat or conference number. The NPRM nonetheless invited these LECs to identify with specificity any cost increases associated with their access stimulation practices that could justify maintaining rates premised on much lower demand. Not one of them even attempted to do so.

Nor do the traffic pumping LECs deny that they have been able to exploit the Commission's existing tariff rules both to maintain high access rates and to insulate those rates from effective challenge even as demand increases by orders of magnitude. To the contrary, they boast that they are terminating hundreds of millions of calls at rates premised on low rural demand and claim that the "solution" to the massive access charge burdens associated with adult chat, conferencing, international calling and other "free" services heavily used by a small minority of consumers is for long distance providers to raise rates to *all* consumers.

When the Commission streamlined tariffing for small ILECs and provided rate benchmark safe harbors for rural CLECs, it expected that these conveniences would be used in a manner consistent with the requirements of the Communications Act, not to scam ratepayers. But it is now abundantly clear that many unscrupulous LECs are gaming the rules on an intolerable scale that simply cannot be remedied through case-by-case adjudication. Indeed, the abuses have become so obvious, widespread and extreme that small LECs and the associations that represent them agree that rule changes are needed.

Although the need for immediate reform is clear, AT&T concurs with commenters that caution against overregulation and unnecessarily burdensome rules. The vast majority of small LECs have steered clear of the traffic pumping abuses that prompted this rulemaking proceeding, and carriers that are focused solely on serving the communications needs of the actual residents of rural communities have a legitimate interest in appropriately minimized regulatory burdens.

For that reason, AT&T and other commenters have proposed modest rule changes targeted directly at the wrongdoing.

First, there is broad support for the Commission's proposed requirement of tariff language that would automatically trigger rate reductions in response to extraordinary demand increases. By requiring ILECs that file their own section 61.38 or 61.39 streamlined tariffs and CLECs that benchmark to a rural ILEC rate or claim the rural exemption to include tariff language that will impose new obligations *only* on LECs that actually experience extraordinary demand increases, the Commission can preserve all of the streamlined tariffing options currently available to law-abiding small ILECs and CLECs. There is general agreement that this approach should be implemented with quarterly demand comparisons – total demand in the case of ILECs and demand per line in the case of CLECs – and that the consequence of hitting a prescribed demand "trigger" should be expeditious filing of a new tariff that reflects the increased demand (for ILECs) or a reduced benchmark rate (for CLECs). AT&T and others have submitted extensive data that provides a solid foundation for the proposed triggers and tariff language and refutes unsupported claims that this direct response to traffic pumping abuses would unfairly penalize non-offenders for seasonal demand variations or run of the mill demand growth.

The claims of a few commenters that the Commission lacks authority to "prescribe" these tariff terms or would violate LECs' First Amendment or Due Process rights if it did so are frivolous. The Commission has broad and undeniable authority to determine the timing of tariff filings by rate of return ILECs that seek the advantages of optional streamlined tariffing and the conditions under which particular CLEC rate safe harbors will be available. In any event, Section 205 grants the Commission express authority to prescribe tariff terms upon the "opportunity for a hearing" that it has undeniably provided in this rulemaking proceeding, and the existing record provides ample support for Commission findings that the proposed tariff-refiling provisions are just and reasonable and that, given widespread traffic-pumping abuses, small LEC streamlined tariffs and CLEC tariffs benchmarked to rural rate levels would be unjust and unreasonable without those provisions.[2] Further, such rule changes would regulate conduct without regard to content. It cannot seriously be doubted that a rational basis exists for regulation directed at well-documented traffic pumping abuses, and the Commission's proposed tariff-refiling requirement therefore has no conceivable constitutional implications.

Second, although requiring appropriate "extraordinary demand" tariff language should discourage long-term evasions of the just and reasonable rate requirement, that rule modification alone cannot be counted upon to end traffic pumping abuses. Experience proves that even short duration schemes of these types can be immensely profitable. Indeed, the smallest of LECs have been able to use traffic pumping schemes to generate millions of dollars of inflated access charge billings in a single *month*. Moreover, the Commission's rules do not currently provide it with sufficient information effectively to enforce the tariff-refiling requirement it has proposed. A number of commenters thus join AT&T in proposing modest reporting and certification requirements that will promote the early detection and deterrence of schemes to stimulate traffic to levels inconsistent with LECs' tariffed rates.

Small LEC concerns about potential undue burdens of reporting requirements fail to recognize that the actual proposals simply contemplate quarterly reporting of no more than two figures (access demand and access lines in service) that all LECs track in the ordinary course. And AT&T and others have proposed unambiguous and quite narrow certification language that forecloses claims that a certification requirement would necessarily be so vague as to stifle real

[2] 47 U.S.C. § 205.

innovation or investment in rural communities or discourage legitimate business practices. These modest reporting and certification rules are critically necessary to improve transparency and clarify the consequences of misbehavior, including loss of the ability to shield unreasonable rates behind "deemed lawful" status for even one month when the LEC's conduct is patently inconsistent with the promises upon which the Commission relies in accepting its streamlined tariff filing without suspension.

Third, the Commission should (i) declare access revenue sharing arrangements, in which the LEC is a net payor of money to its purported "customer," to be an unreasonable practice; (ii) declare unjust and unreasonable the increasingly common small LEC practice of inflating access charges by designating an interconnection point with a centralized equal access provider that is scores or even hundreds of miles away from the LEC's actual physical interconnection with the centralized provider; and (iii) to prevent small LECs from attempting to evade the rule changes promulgated in this proceeding by electing price cap treatment, declare that no small LEC may elect price cap treatment without prior Commission approval.

No small LEC addresses either of the latter two proposals. And the comments contain only makeweight objections to a Commission finding that the unique access revenue sharing arrangements between small LECs and their "free" service partners are categorically unjust, unreasonable and detrimental to the public interest. The Commission has already rejected arguments that it has previously ruled that these types of arrangements are just and reasonable, and the pro-competitive arrangements that the traffic pumping LECs cite among companies that do *not* seek to foist their costs on unwilling third parties are not remotely analogous. Indeed, the traffic pumping LECs' principal argument in support of their access revenue sharing arrangements – *i.e.*, that they benefit the customers that make calls to the chat, conference, international and other services at issue by ensuring that their use of these service is paid for by others – only highlights that the arrangements harm all other consumers and are therefore manifestly unjust and unreasonable.

In short, the Commission has unquestionable authority and a clear obligation promptly to take these modest steps that are necessary to end pervasive gaming of its existing rules that has severely undermined its core mandate to ensure just and reasonable rates and practices. Recognizing as much, the traffic pumping LECs and their service partners devote the bulk of their comments to misdirection and stalling tactics. They complain that chat, conference and other "free" services are used not only by patrons of adult entertainment, but by non-profit institutions and small businesses as well. But no commenter asks the Commission to regulate or make any value judgments about the services themselves; rather, the sole – and plainly legitimate – purpose of this proceeding is to ensure that small LECs that choose to host these services do not charge unjust and unreasonable rates or engage in unjust and unreasonable practices.

The traffic pumping LECs' plea that their exploitation of the Commission's rules is just one of many problems that could be solved with comprehensive intercarrier compensation reform is equally irrelevant. AT&T fully agrees that the Commission should expeditiously and comprehensively reform today's outdated intercarrier compensation regime. But it is well settled that the Commission can and must act incrementally where, as here, it is presented with a severe and discrete problem that requires immediate attention and has a simple, discrete solution that will have no impact on the broader issues in the Commission's long pending intercarrier compensation proceeding.

Not surprisingly, it is the CLECs and their traffic pumping partners that complain the loudest about proposals that threaten illicit traffic pumping profits. As AT&T explained in its opening comments, the majority of the inflated access charge billings associated with traffic pumping now come from CLECs, principally CLECs that invoke the rural exemption to tariff access rates many times higher than the rates of the ILECs with whom they claim to compete. The rural exemption "was designed as a narrow exception to the otherwise market-based rule that ties competitive LEC rates to those of their incumbent competitors" and its sole purpose "was to encourage competitive entry in truly rural markets."[3] When it promulgated the exemption, the Commission was "unpersuaded" on the record then before it that "a rural exemption will cause a proliferation of chat line providers in the territories served by rural CLECs."[4] But it is now clear that the rural exemption has fostered just such a proliferation – indeed, as Verizon points out, *more than 90%* of access charge billings from CLECs using the rural exemption are associated with chat line and other traffic pumping arrangements.

On these facts, there is ample justification for the Commission simply to repeal the rural exemption, which has become a haven for CLECs that were created *solely* to engage in traffic pumping and are not rural competitors in any sense of those words. At a minimum, the record in this proceeding demands that the tariff prescription, reporting, certification and other proposals discussed above be imposed on CLECs as well as ILECs. The Commission would accomplish quite literally nothing if it addressed only ILEC traffic pumping abuses – all of these inherently portable schemes would simply shift to CLECs.

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[3] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, ¶ 37 (2004) ("*CLEC Access Charge Recon. Order*").

[4] *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶ 71 (2001) ("*CLEC Access Charge Order*").

Finally, as detailed below, the Commission should reject the invitation of traffic pumping LECs and their service partners to interject into this proceeding extraneous issues regarding service classification and tariff interpretation that were not raised in the NPRM and that turn on facts that are not before the Commission, are being litigated in other fora, and, in the case of the blanket information service classifications these commenter ask the Commission to make, have broad implications that extend far beyond the issues appropriately raised here.

ARGUMENT

I. THE COMMENTS CONFIRM THAT TRAFFIC PUMPING IS RAMPANT, GROWING AND CAUSING IMMENSE HARM.

Traffic pumping is a serious and growing problem that requires prompt Commission action. Indeed, there is no real dispute that traffic pumping volumes are both large and increasing, and claims that traffic pumping is limited or that the extraordinary demand increases experienced by small LECs engaged in access stimulation are the result of legitimate organic growth are transparently false.[5]

All eight of the small ILECs that left the NECA pool in the 2005-07 tariff cycle experienced dramatic traffic increases. Verizon shows, for example, that while it paid these eight LECs a total of $30,000 for interstate switched access services in May 2005, it paid them more than $2.3 million in April 2007 alone.[6] Analyses of call records proves that these massive traffic increases had nothing to do with legitimate growth in these rural communities; instead, the vast majority of calls were being routed to numbers assigned to "free" chat, conferencing, and international calling services.[7] Moreover, as Qwest shows, these huge traffic increases

[5] *See, e.g.,* Chase Com at 12.

[6] Verizon at 9-10 & Buzacott Decl. ¶ 5.

[7] Verizon at 10 & Buzacott Decl. ¶ 14.

evaporated once the ILECs jumped back into the NECA pool – definitively disproving that the traffic growth was due to normal, organic growth.[8] As AT&T has previously shown, when extrapolated to the interexchange market as a whole, these traffic pumping schemes are already inflating by hundreds of millions of dollars the costs of long distance services. Indeed, one of the "free" conference service operators, Global Conference Partners – which trumpets the fact that its business model is predicated on partnering with traffic pumping LECs – estimates that schemes relying on "free" conferencing services alone generate over 150 million minutes per month in long distance calls.[9]

Nor is there any serious dispute that these enormous volume increases are not accompanied by corresponding cost increases, and that rates premised on the low demand typical in rural communities are therefore patently unjust and unreasonable. As numerous commenters emphasize, the Commission has already credited testimony in the *Qwest* v. *Farmers and Merchants* complaint case that traffic pumping ILECs do not experience cost increases that are even remotely proportional to their enormous increases in traffic.[10] The Commission thus found the conclusion "inescapable" that Farmers' access rates, which assumed historical levels of demand, "vastly exceeded the prescribed rate of return" when applied to the increased volumes generated by its traffic pumping schemes.[11] Qwest's expert testimony further confirms this

[8] Qwest, Tardiff Decl. ¶ 8.

[9] GCP at 17.

[10] *Qwest Communc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, 22 FCC Rcd. 17973, ¶ 24 (2007) ("*Farmers and Merchants Order*") (finding the Copeland testimony "persuasive"); *see also* RICA at 11 ("per unit switching costs generally decline as volume increases"); JSI at 5 ("JSI has reviewed the data filed by issuing carriers for JSI Tariff FCC No.1" and that data shows that "switched access costs are relatively insensitive to changes in demand"); USTA at 4 ("average per minute switching costs do not increase proportionately to average per minute revenues as access demand increases"); Verizon at 12; Qwest at 13.

[11] *Farmers and Merchants Order*, 22 FCC Rcd. 17973, ¶ 25.

reality, explaining that a "key component" of the arbitrage opportunity inherent in these schemes is the "mismatch between the predominantly per-minute charges and the underlying [fixed] costs."[12] Indeed, Global Conference Partners unwittingly concedes this point when it acknowledges that "[t]o achieve the savings for the consumer," it has formed partnerships with "rural LECs and CLECs with *excess network capacity*."[13] Although some small LECs speculate that it may be theoretically possible that even the enormous increases in volume that would trigger a new tariff filing under the rules proposed here could be associated with significant cost increases, they offer no explanation or record support as to how that could happen in any real world scenario. And, in the extremely unlikely event that it did, the affected LEC could always reflect both the increased costs and the increased demand in a new tariff filing (or obtain a waiver of any rule that would prevent it from doing so) if it could indeed demonstrate cost increases of such extraordinary magnitude.[14]

The comments also show that there is a particularly urgent need to reform the rules to prevent traffic pumping by CLECs. The Commission recently dealt a temporary setback to *ILEC* traffic pumping efforts when it suspended the tariffs of the unprecedented number of ILECs that attempted to leave NECA to pursue traffic pumping schemes in mid-2007. That action has only accelerated the migration of traffic pumping schemes to CLECs, however, and it is now clear that traffic pumping has become a CLEC problem even more than an ILEC problem. AT&T demonstrated that about three quarters of the traffic pumping minutes on its network are now

[12] Qwest Tardiff Decl. ¶ 7.

[13] GCP at 8 (emphasis added); *see also id.* at 9 (GCP's traffic pumping scheme uses "capacity that would otherwise have been idle and wasted").

[14] *See, e.g.*, Verizon at 15; AT&T at 13.

associated with CLEC traffic pumping schemes;[15] Sprint showed that it has incurred more than a 5000 percent increase in bills associated with CLEC traffic pumping;[16] Qwest documented multiple specific examples of CLECs whose traffic pumping activities have increased monthly traffic volumes from Qwest by as much as 3800 percent;[17] and Verizon showed that *more than 90%* of the traffic billed by CLECs claiming the rural exemption to the Commission's ILEC rate benchmarking rule now comes from carriers that are engaged in traffic pumping schemes.[18] Indeed, it is abundantly clear that many of these so-called "rural" CLECs were created (and located in rural areas) for the sole purpose of traffic pumping.[19] For these reasons, there is broad agreement that it is critical that the Commission take immediate steps to close the gaps in its rules for *both* ILECs and CLECs. And, while many rural ILECs now support reform, the primary opponents of the necessary rule changes are now CLECs and their traffic pumping partners (who concede that they are now dealing primarily with CLECs).[20]

Furthermore, the comments confirm that these traffic pumping schemes are causing serious disruptions and collateral harms to the public interest. As USTA explains, such schemes undermine the entire intercarrier compensation system and foist additional costs onto all other long-distance customers.[21] For example, it is clear that such schemes are already putting substantial pressure on smaller carriers such as Leap Wireless that rely heavily on all-you-can-

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[15] AT&T at 12.

[16] Sprint at 17.

[17] Qwest at 9.

[18] Verizon at 1, 24.

[19] Verizon at 24.

[20] *See, e.g.*, GCP at 8; Chase Com at 2 (acknowledging arrangements with CLECs); *see also* Leap Wireless at 5.

[21] *See* USTA at 1-2; *see also* AT&T at 18.

eat pricing plans; Leap Wireless has many customers using its service to call these traffic pumping LECs and as a result it has experienced network congestion that has forced it to augment its capacity to accommodate these users (and to pass the costs on to all of its customers).[22] And as AT&T and others have previously shown, many of these services make pornographic chat-lines available free to minors with a simple long-distance phone call, thus undermining the Congressional and Commission policies preventing such unimpeded access.

The Commission can no longer reasonably rely on the existing rules and case-by-case tariff suspensions and complaint proceedings to address this problem. As numerous commenters recognize, the existing rules were designed to provide administratively simple streamlined procedures and tariffing benchmarks for the benefit of small ILECs and rural CLECs, which the Commission assumed would be used only for legitimate purposes.[23] Recent experience, however, demonstrates that a growing minority of small ILECs and most self-proclaimed "rural" CLECs are abusing those rules.

The Commission expressly reserved the right to revisit those rules if its assumptions were not borne out, and events have confirmed that the time has come to adopt modest rule changes. The only alternative would be an ever growing number of individual tariff investigations and complaint cases, which would not only require an unreasonable investment in Commission resources, but also would be largely ineffective because: (1) such LECs can impose unjust and unreasonable rates during the time it takes to root out each scheme, (2) after-the-fact litigation is complicated by the LECs' assertion of a "deemed lawful" defense, and (3) CLECs especially

[22] Leap Wireless at 5-6 (noting also increased interexchange and reciprocal compensation costs in routing massive outbound calling to traffic pumping LECs).

[23] Verizon at 7-8, 21-23; Qwest at 7-8; AT&T at 15-18.

have the ability easily and continuously to start new CLECs and initiate new schemes to replace the ones that fall prey to litigation.[24]

Unable to refute these facts, some traffic pumpers desperately try to argue that their schemes are actually beneficial, that they promote more "efficient" use of rural networks, or that the Commission should not make value judgments about services such as the explicit sex chat lines that are the mainstay of many of these schemes.[25] These attempts to smear lipstick onto a pig miss the point. No one objects to rural LECs making more efficient use of their networks by attracting more traffic. But that does not alter the LECs' responsibility to adhere to just and reasonable rates and practices as their traffic volumes increase or the Commission's responsibility to ensure that they do so and to fine-tune its rules to discourage evasion of that core Communications Act mandate.

Similarly, no one objects to companies such as Global Conference Partners designing innovative conferencing or chat-line services, nor would any of the proposals under consideration prevent such companies from offering such services or locating their platforms in rural exchanges if they wish. But again, the Commission has a responsibility to ensure that their rural LEC partners charge just and reasonable rates and to prevent long distance customers that want nothing to do with these schemes from having to subsidize them.[26] In that regard, the traffic pumping websites' claim that the IXCs' true fear is competition from innovative new conferencing services (as if these websites had hit upon a sound new business model for offering such services for "free" by forcing other companies' customers unwittingly to subsidize them) is

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[24] AT&T at 11.

[25] *See, e.g.*, GCP at 16-19; Chase Com at 14-15; Cbeyond at 8-9.

[26] *See, e.g.*, RIITA at 3 (issue is reasonableness of rates, not the legitimacy of the conferencing or chat services *per se*).

particularly outrageous. No one is trying to shut down "competitive" conferencing providers that have a viable business plan; IXCs and their customers simply do not want to fund all of the costs of these conferencing services' businesses.

In all events, the traffic pumpers' attempts to analogize their "free" calling and chat-line schemes to the birth of MCI forty years ago or to other arrangements (such as hotel 0+ aggregator arrangements or AT&T's iPhone arrangements) that do not seek to foist costs on other carriers are absurd.[27] As Professor Tardiff's declaration for Qwest explains, the traffic pumpers' revenue sharing arrangements are fundamentally unsound as a matter of basic economics. Because such schemes "shield the real consumers of the service . . . from prices that reflect the actual cost of the services that they consume," and instead depend on "involuntary cross-subsidies from shareholders and consumers of third-party firms such as AT&T and Qwest," they undermine "efficient competition and hence consumer welfare."[28]

Indeed, these "free" calling services locate themselves in rural areas and purposely use inefficient routing solely to take advantage of a regulatory arbitrage opportunity; otherwise, "conference call services would utilize efficient routing, rather than sending traffic to high-rate rural areas."[29] For these reasons, the traffic pumpers' "revenue sharing arrangements differ radically from reasonable promotional activities, such as incentives for sales agents to sign up high-volume customers," because the traffic pumping entities' schemes do not represent "competition on the merits."[30] Indeed, futurephone.com candidly admits that it can provide reduced costs to its customers only by "recovering some of its costs through the sharing of access

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[27] *See, e.g.*, GCP at 10-11; Chase Com at 2; futurephone.com at 7-8.

[28] Qwest Tardiff Decl. ¶ 2.

[29] *Id.* ¶ 6 n.6.

[30] *Id.* ¶ 15.

charges with the terminating LECs" – which simply confirms that these schemes are inherently parasitic and work only by harming all other consumers.[31]

The Commission should also reject the traffic pumpers' attempts to forestall the needed reforms by arguing that the Commission should act only in the context of comprehensive intercarrier compensation reform.[32] To be sure, AT&T strongly supports expeditious resolution of the Commission's pending rulemaking on fundamental reform of intercarrier compensation. The Commission has repeatedly recognized, however, that it has a responsibility to act in advance of general intercarrier compensation reform where, as here, a discrete serious industry problem concerning access charges demands immediate attention.[33] The record here is clear that the harms from traffic pumping schemes are substantial and, in the absence of quick and decisive Commission action, threaten to grow out of control.

In fact, the case for prompt reform is so clear that small LECs and their associations have acknowledged that some rule changes are needed.[34] The main concern that rural ILECs have voiced in this proceeding is not that reform is unnecessary but that such reforms should not unduly burden the majority of LECs that have no intention of engaging in these unlawful

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[31] Futurephone.com at 17; *see also* Chase Com at 9 ("[t]he Commission knows that [conference bridge] providers cannot offer their services at the reasonable and customary long distance rates without accepting some form of remuneration from the carrier").

[32] *See, e.g.*, Chase Com at 5-7, 17; Cbeyond at 2-8; *see also* Leap Wireless at 7-10.

[33] *See, e.g., Implementation of Local Competition Provisions of Telecomms. Act of 1996, Intercarrier Compensation for ISP-Bound Traffic*, Order on Remand and Report and Order, 16 FCC Rcd. 9151, ¶ 2 (2001); *CLEC Access Charge Order*, 16 FCC Rcd. 9923, ¶¶ 1, 8; *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt From Access Charges*, Order, 19 FCC Rcd. 7457, ¶ 2 (2004); *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling And Report And Order, 20 FCC Rcd. 4855 (2005).

[34] *See, e.g.*, RIITA at 5; ITA at 6; NTCA at 3; WTA at 1-2; OPASCO at 10-11; ITTA at 5-7; Ohio PUC at 8-10; TEXALTEL at 4-5; TSTC at 5-6.

schemes.[35] AT&T fully agrees with these commenters that the Commission should not enact unnecessarily burdensome rules, and that is why AT&T has proposed reforms that are carefully designed directly to address the behavior of the minority of small LECs that choose to engage in traffic pumping abuses and to minimize the burden on, and preserve the flexibility of, all other LECs. As detailed below, these targeted proposals, which have broad support from other commenters, will have almost no impact at all on honest LECs.

II. THE COMMISSION SHOULD ADOPT MODEST CHANGES TO ITS RULES TO PREVENT THE ENORMOUS HARMS CAUSED BY ILEC AND CLEC ACCESS STIMULATION SCHEMES.

There is widespread agreement among commenters of all types – IXCs, wireless carriers, cable companies, small LECs, associations, PUCs and others – that the Commission should promptly adopt a modest set of interrelated rule changes to prevent small ILECs and "rural" CLECs engaged in traffic pumping schemes from gaming the existing rules to evade their statutory obligation of just and reasonable rates and practices.[36] First, the Commission should adopt a mandatory tariff re-filing mechanism that will require a new tariff filing by any such LEC when its actual traffic volumes far exceed those on which its rates are premised. Second, the Commission should require these LECs to report to the Commission quarterly demand and (for CLECs) line count data, to allow the Commission and customers effectively to monitor demand and ensure compliance with the tariff re-filing requirements. Third, the Commission should adopt mandatory certification requirements for these LECs to be filed with every tariff

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[35] *See, e.g.,* RIITA at 5; Ohio PUC, at 5 (rules should be generally applicable, not unduly complex and readily enforceable).

[36] *See, e.g.,* AT&T at 27-32; Verizon at 13-18, 25-28; Qwest at 18-22, 27-29; Sprint at 13-14; RIITA at 5; USTA at 8; NTCA at 8-9; Embarq at 9; ITA at 6; NTCA at 3; WTA at 1-2; OPASCO at 10-11; ITTA at 5-7; Ohio PUC at 8-10; TEXALTEL at 4-5; TSTC at 5-6; Leap Wireless at 1-2; MetroPCS at 1-4.

stating that the LEC will not engage in traffic pumping (based on a very specific and narrow definition, as discussed below).

These proposed rule changes will impose no significant additional burdens on LECs engaged in legitimate business activities. The proposed tariff re-filing obligations would be triggered by traffic volume increases that are so far above historical norms that no LEC will be required to make a mid-course tariff refiling unless it experiences truly extraordinary demand increases. The data reporting requirement merely requires LECs to submit to the Commission on a quarterly basis very limited information that would not fill a single page and that the LECs already maintain for billing and other purposes. And, the proposed certification requirement is a single page form that merely states that the LEC will not engage in very specific conduct that would be flatly inconsistent with its tariffed rates.

A. The Comments Confirm That The Commission Should Adopt Tariff Re-Filing Mechanisms For ILECs and CLECs.

There is strong support for an automatic tariff re-filing mechanism that will trigger tariff filings when a LEC experiences truly extraordinary traffic increases.[37] Only CenturyTel and ITTA categorically oppose such triggers, but their objections are based on frivolous claims that the Commission lacks authority to adopt such rule changes.[38] The Communications Act gives the Commission broad authority to regulate interstate communications services, and to adopt rules to govern the tariff process to ensure that rates and other terms for such services are just

[37] *See, e.g.* ,AT&T at 27-32; Verizon at 13-18, 25-28; Qwest at 18-22, 27-29; Sprint at 13-14; RIITA at 5; USTA at 8; NTCA at 8-9; Embarq at 9; ITA at 6; NCTA at 3; Ohio PUC at 8-10; TEXALTEL at 4-5; TSTC at 5.

[38] *See* CenturyTel at 6-8; ITTA at 12-15.

and reasonable.[39] This broad authority includes the power to establish a system of rate-of-return regulation, and to specify under such a system when tariffs are to be filed and the period in which the rate of return is to be calculated.[40] The existing rules already require LECs to file new tariffs every two years, prescribe a specific allowable rate of return, and dictate numerous other aspects of how LECs are to determine what rate they will charge, but no one would suggest that the existence of these rules is contrary to either the principle of carrier-initiated rates or the "deemed lawful" status of existing tariffs. The NPRM's proposals would simply modify these rules to require new tariff filings (and end the existing monitoring period) upon certain additional triggering events that indisputably indicate that existing rates are no longer just and reasonable. The Commission thus has ample authority to adopt rules establishing the conditions under which LECs that choose streamlined tariffing options – or seek to rely upon Commission-established rate safe harbors[41] – must update their tariffs.

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[39] *Permian Basin Area Rate Cases*, 390 U.S. 747, 776 (1968) ("legislative discretion implied in the rate making power necessarily extends to the entire legislative process, embracing the method used in reaching the legislative determination as well as that determination itself").

[40] *See, e.g.*, *Nader* v. *FCC*, 520 F.2d 182, 203-04 (D.C. Cir. 1975); *Regulatory Reform For Local Exchange Carriers Subject To Rate Of Return Regulation*, 8 FCC Rcd. 4545, ¶ 25 (1993) (selecting two-year rather than one-year mandatory tariff filing interval is "a lawful exercise of our statutory discretion to tailor our regulatory systems"); *Regulation of Small Telephone Companies*, 2 FCC Rcd. 3811, ¶¶ 20-21 (1987); 47 U.S.C. § 154(i).

[41] Just as the Commission clearly had authority to adopt tariffing rules setting "safe harbor" access rates for CLECs (and otherwise to mandatorily detariff CLEC access rates) in the *CLEC Access Charge Order*, the Commission has authority to modify those safe harbors and corresponding tariff filing requirements. The safe harbor rates adopted in the *CLEC Access Charge Order*, which allow CLECs to set rates based on ILEC benchmark rates, were based on the assumption that the CLEC's operations would be similar to those of the ILEC(s) to which the CLEC's rates are benchmarked. *Id.* ¶ 51. But that assumption is clearly wrong in the case of traffic pumping CLECs, rendering the existing safe harbor access rates inappropriate for such CLECs. The Commission therefore clearly has the authority to and should exercise that authority to update its CLEC tariff filing rules to address CLEC traffic pumping.

Claims that the proposed tariff refiling requirement would necessarily be an unlawful prescription are particularly misguided. It is well settled that the Commission can satisfy section 205's requirement for a hearing by conducting notice and comment rulemaking procedures.[42] Accordingly, the Commission can use this proceeding to make all of the findings needed to support tariff language that will trigger new tariff filings in response to extraordinary demand growth, and the record provides ample support for such findings. Notably no LEC has even attempted to argue that the *substance* of the proposed tariff terms is in any way inconsistent with the statutory mandate to charge just and reasonable rates.

The only other objection voiced to an automatic tariff re-filing mechanism is that it might unduly burden honest LECs by triggering tariff refiling obligations for ordinary traffic increases associated with legitimate business practices.[43] But the tariff re-filing mechanisms proposed by AT&T and others fully address this concern. Foremost, as discussed below, the proposed triggers apply only where a LEC's traffic volumes have increased by levels that are far outside historical norms. Moreover, the proposed mechanisms all include a waiver option, whereby a LEC could seek a waiver by demonstrating that its extraordinary traffic growth did not render its current rates unjust and unreasonable (*e.g.*, where a LEC purchases a new local exchange).[44] In addition, for ILECs, AT&T supports Verizon's proposal that an ILEC may, as an alternative to

[42] *See, e.g., International Settlement Rates*, 12 FCC Rcd. 19806, ¶ 300 (1997) (noting that the Supreme Court has held that the notice and comment provisions of the APA (5 U.S.C. § 553) satisfy section 205's hearing requirement); *United States* v. *Florida East Coast Ry. Co.*, 410 U.S. 224, 239 (1973); *AT&T* Co. v. *FCC*, 572 F.2d 17, 22 (2d Cir. 1978).

[43] *See, e.g.,* U.S. Telepacific at 6; Hypercube at 15-16; Ohio PUC at 10-11.

[44] In the rare instances in which events unrelated to traffic pumping cause a huge increase in traffic (such as the opening of large plant with thousands of employees), it would still be appropriate to require the LEC to re-file its access tariff to reflect that added traffic (and any associated added costs). NPRM ¶ 21; *see also* USTA at 6; Verizon at 15; AT&T at 25.

re-filing a tariff, re-enter NECA.[45] These safeguards ensure that the proposed tariff re-filing triggers will place no significant additional burdens on LECs engaged in legitimate business practices.

The record evidence shows that small ILECs year-over-year quarterly traffic volumes have generally remained flat or even decreased for at least the past ten years,[46] and traffic volume increases for typical (*i.e.*, non-traffic pumping) ILECs very rarely reach 20%.[47] Moreover, the record shows that historical year-over-year increases in demand are smallest for the largest LECs.[48] The evidence therefore confirms that even a tariff re-filing trigger for ILECs set at 20% year-over-year quarterly growth in traffic volumes would rarely subject ILECs engaged in legitimate business practices to the tariff re-filing obligations. AT&T has proposed a highly conservative tiered trigger approach, with higher triggers for lower volume LECs and lower triggers for higher volume LECs.[49] And other commenters have demonstrated that under current conditions the trigger thresholds legitimately could be set significantly lower than AT&T has proposed without ensnaring honest LECs that have experienced transient or run of the mill organic demand growth. For example, Verizon's and Sprint's proposed tariff re-filing trigger –

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[45] Verizon at 15. AT&T also agrees that a carrier that chooses to enter the NECA pool should be allowed to exit the pool at a later date only if it files a tariff under Rule 61.38, to avoid gaming the system and the kind of "pool hopping" that has occurred during the last few cycles.

[46] AT&T at 27; Verizon at 13 (citing Buzacott Decl. ¶ 21); Sprint at 15.

[47] AT&T at 27 (ILEC demand almost never increases by more than 20% in one year); Verizon at 14 (citing Buzacott Decl. ¶ 21) (for the non-traffic pumping ILECs among the more than 1,100 Tier 2 and Average Schedule Companies from 2002 through 2006, the average increase in traffic volume for ILECs in the 95th percentile for growth was only 20.56 percent in any single year); Sprint at 15 ("in a mature, declining market such as the interstate switched access market, a 25% growth rate would be incredible, and certainly a sign of something other than simply the marketplace at work").

[48] *See* AT&T at 28.

[49] *See id*.

25% year-over-year quarterly growth in traffic volumes[50] – would be appropriate for higher volume LECs.

For CLECs, there is no publicly available data to assess ordinary historical variations in traffic volumes. However, as multiple commenters point out, the benchmark rate safe harbor rules assume that rural CLEC and rate-of-return ILEC operations should be similar, and thus it is reasonable to look to variations in monthly per-line traffic volumes for rate-of-return ILECs.[51] The rate-of-return ILECs' per line monthly access minutes in 2006 averaged 215 and almost never exceed 1,000.[52] The median per line minutes for all NECA ILECs in 2006 was 203 minutes, while the 95th percentile of NECA ILECs' per line minutes of use was 387. Based on these data, AT&T's proposed tariff re-filing trigger for CLECs of 2,000 minutes per line per month, if anything, provides far too much room for abuse – it permits CLECs to generate per line traffic that exceeds that of the typical ILEC against which its rates are benchmarked by nearly 1100 percent. Verizon's proposed trigger of 400 minutes per line per month, which still is almost double historic norms of small ILECs, is a more appropriate solution.[53]

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[50] *See* Verizon at 13-14; Sprint at 14; *see also* Embarq at 9 (proposing a trigger of 50% annual quarterly growth rate in minutes of use); Ohio PUC at 9 (proposing a trigger of 30% for year-over-year monthly volumes); TSTC at 5 (proposing triggers of 300%, 100%, 50% and 25% for ILECs depending on initial traffic volumes).

[51] *See, e.g.,* AT&T at 30-32; Verizon at 27-28; Sprint at 18; Qwest at 24; USTA at 8-9; NTCA at 8.

[52] *See* AT&T at 30-31.

[53] AT&T also supports Verizon's proposal that the Commission adopt a secondary trigger for CLECs that rely on the rural exemption (to the extent the rural exemption is not eliminated altogether). Verizon showed (at 26) that 95 percent of NECA Band 8 ILECs bill less than 1.3 million minutes per month, and therefore it is reasonable to conclude that a rural exemption CLEC should be required to re-file its tariff at a reduced benchmark rate if its traffic exceeds 1.3 million minutes per month, because rural ILEC costs and rates plainly are not appropriate proxies for a CLEC with such large traffic volumes.

The commenters also agree that the Commission should adopt certain requirements for the re-filed tariff. For ILECs, the rates in the re-filed tariff should be developed based on a cost study or projected demand as set forth in Rule 61.38, because the Rule 61.39 procedures cannot be relied upon to produce just and reasonable rates where an ILEC has experienced significant growth in traffic volumes.[54] Rule 61.39 permits ILECs to set rates based on either traffic volumes for the most recent twelve months or using the NECA average schedule formulas. If an ILEC's demand has increased by the high percentages in the proposed triggers, that ILEC's historic traffic volumes have strayed far above the zone in which it would be reasonable to assume that the ILEC's historical traffic volumes are a reasonable proxy for the future demand; nor would it be reasonable to assume that the average schedule formula would yield just and reasonable rates in these circumstances.[55]

For rural CLECs, the comments confirm that the Commission should modify its rules to make clear that where traffic volumes are so high as to trigger a tariff re-filing, a CLEC will no longer be permitted to file a tariff that is benchmarked to a rural ILEC or that is based on the rural exemption, because in such circumstances the CLEC's operations are clearly very dissimilar to that of a small rural ILEC. Such CLECs therefore should have the following options: to offer services on a mandatorily detariffed basis (as is true now of CLECs that want to offer services above the benchmark rates) or to file new tariffs benchmarked to either (1) the competing ILEC's rate, if the CLEC is using the rural exemption, or (2) the NECA band 1 rate, if the CLEC is benchmarked to a rural ILEC's rate.[56]

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[54] *See, e.g.,* Verizon at 15-18; Qwest at 19-20; AT&T at 29.

[55] *See, e.g.,* Verizon at 15-27; AT&T at 29; Qwest at 19-20.

[56] *See, e.g.,* AT&T at 29-32; Verizon at 28; Sprint at 17-18.

Indeed, as other commenters demonstrate, the Commission could easily justify repealing the rural exemption altogether given the showing that virtually *all* traffic being billed by CLECs that use the rural exemption is associated with traffic pumping schemes. The purpose of the rural exemption was to facilitate CLEC entry into rural areas to compete for the provision of services to legitimate customers,[57] and the Commission predicted that it would not "cause a proliferation of chat line providers in the territories served by rural CLECs" "as a means of increasing the [C]LEC's access traffic."[58] But that is precisely what has occurred. The record shows that the rural exemption today is used almost exclusively by CLECs for the purpose of engaging in traffic pumping schemes.[59]

The comments further confirm that the LEC tariff re-filing mechanisms should include procedures to protect customers during the lag time between the triggering of the tariff re-filing requirement and the actual filing of the new tariff.[60] The mechanism set forth by AT&T is the most straightforward: the LEC will be allowed to collect its existing rates until the new tariff becomes effective, at which time the LEC will issue refunds equal to the difference between the charges paid by the customers under the existing tariffs and those contained in the revised tariffs for each day during that interim period.

Finally, AT&T supports proposals that the Commission deny "deemed lawful" status to any tariff filed pursuant to the re-filing mechanism (*e.g.*, by suspending the re-filed tariffs).[61] As the Commission notes in the NPRM, the Commission has only a brief time to review tariff

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[57] *CLEC Access Charge Order*, 16 FCC Rcd. 9923, ¶ 65.

[58] *Id.* ¶ 71.

[59] *See, e.g.,* Verizon at 1, 24 (showing that more than 90% of billed minutes from rural CLECs are traffic pumping minutes).

[60] *See* AT&T at 29-32; Verizon at 18; Sprint at 17.

[61] Sprint at 15-16; Qwest at 29-30.

filings and it must do so using limited, existing data provided by the LEC. In circumstances where the re-filing requirement is triggered, there are necessarily concerns as to whether the re-filed tariffed rates are just and reasonable, and it would therefore be inappropriate to protect such a LEC from paying refunds in the event those rates are in fact later determined to be unlawful.[62]

B. The Comments Confirm That the Commission Should Adopt Modest Quarterly Reporting Requirements.

The comments further establish that certain reporting requirements are a necessary component to implementing and policing the tariff re-filing mechanism.[63] For ILECs that file their own tariffs under Rules 61.38 or 61.39, the Commission should require quarterly reporting of traffic volumes (to enable the Commission and customers to monitor year-over-year quarterly demand growth), and, for CLECs, the Commission should adopt quarterly reporting of traffic volumes and line counts (to enable the Commission and customers to monitor CLEC traffic volumes per line). Absent such reporting, the Commission would have to rely on the traffic pumping LECs to monitor their own traffic and implement the remedial measures discussed above, or the Commission would have to rely on incomplete information from LEC customers and initiate complex and time consuming investigations or audits of carriers on a case-by-case basis. Neither of these alternatives can realistically be expected to result in efficient or effective policing of Commission rules designed to ensure just and reasonable rates. Even small LECs support limited reporting requirements.[64]

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[62] Sprint at 17; Qwest at 29-30.

[63] AT&T at 20-21; Verizon at 17; Sprint at 13-14.

[64] *See, e.g.,* ITA at 1 & 6 (small ILEC association whose members include “[n]early all of Iowa’s” small ILECs – affirmatively supports “reporting out of norms traffic”).

C. The Comments Confirm That The Commission Should Adopt A Certification Requirement.

The tariff re-filing and reporting requirements discussed above are designed prospectively to address traffic pumping schemes that already have been implemented. But a traffic pumping LEC's returns prior to the triggering of the tariff re-filing requirement will greatly exceed just and reasonable levels. If a LEC is protected by "deemed lawful" status from paying refunds for those periods, LECs still retain incentives to engage in traffic pumping even for those short times, and customers may have no mechanism by which to recover their substantial damages from LECs that engage in such conduct.[65] To address this issue, AT&T and others have proposed certification requirements that should deter traffic pumping schemes that are inconsistent with tariffed rates and that should help customers to recover damages in the event a LEC does engage in such activities.[66]

In particular, the Commission should require all ILECs that file their own tariffs pursuant to Rules 61.38 or 61.39 and all rural CLECs to submit in connection with any switched access tariff filing a statement by an executive officer of the LEC certifying that the LEC is not stimulating traffic and will not do so during the tariff period.[67] The Commission should make clear that if such a LEC fails to submit its certification with a streamlined tariff application, the Commission will either reject or suspend the tariff and set it for investigation, thus eliminating the "deemed lawful" status of the tariff.

Contrary to the claims of certain commenters,[68] this certification requirement is necessary for multiple reasons. The certification requirement can act as a partial substitute for the need to

[65] AT&T at 13-18; Sprint at 14, 17; Qwest at 29; Verizon at 19.

[66] AT&T at 22-26; Verizon at 18-19; TSTC at 6.

[67] AT&T at 22-26; Verizon at 18-19.

[68] *See, e.g.,* USTA at 7; Embarq at 10; RIITA at 6.

conduct a more searching review of these LECs' tariffs filed on a streamlined basis. A certification from an officer of the LEC can provide greater comfort to the Commission and access customers that the tariffed rates are likely to be reasonable. If the LEC later violates the conditions in the certification, the Commission can justifiably deny the rates "deemed lawful" status and permit ratepayers to obtain damages back to the filing of the certification.[69] Such a certification requirement, which the Commission has used in other contexts,[70] would likely deter most LECs from even trying traffic pumping schemes.[71]

AT&T agrees with commenters that emphasize the importance of adopting certification language that clearly articulates the prescribed conduct. Accordingly, AT&T (at 22) has proposed the following specific certification language for ILECs:

> I hereby certify that [name of LEC] has not entered into, and will not enter into during the term of this tariff, any agreement or arrangement that: (i) directly or indirectly compensates a third party or third parties, including any entity affiliated with [name of LEC], for stimulating calls to or through [name of LEC]'s exchange(s), and results in compensation to such third parties that exceeds the revenues [name of LEC] receives from the customers to which it terminates the calls stimulated by the arrangement, or (ii) has the effect of increasing the amount of access traffic terminated by the [name of LEC] by more than [X][72] percent in any quarter compared to the amount of access traffic terminated by [name of LEC] during the same quarter in the prior year.

AT&T's proposed certification for CLECs is identical except that part (ii) states as follows: "[name of CLEC]'s monthly average terminating minutes per active access line shall not exceed [X][73] minutes during the term of this tariff."

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[69] *See* AT&T at 23-24; Verizon at 18-19.

[70] *See, e.g., Regulation of Prepaid Calling Card Services*, 21 FCC Rcd. 7290, ¶ 31 (2006).

[71] *See* AT&T at 23-24; Verizon at 18-19.

[72] This percentage would be equal to the tariff refiling trigger for the ILEC discussed above.

[73] This percentage would be equal to the tariff refiling trigger for the CLEC discussed above.

This precise certification language fully addresses arguments that a certification merely prescribing "traffic stimulation" would be too vague,[74] and that a vague certification could inadvertently proscribe legitimate conduct.[75] The proposed certification by its terms does not prohibit ordinary activities designed to attract customers and traffic. The certification is merely a promise that the during the term of a tariff that does not reflect the demand associated with traffic stimulation activities that necessarily inflate demand without corresponding cost increases, the LEC will not engage in such activities.[76]

D. Limitations on Pool Hopping Alone Are Insufficient to Prevent and Deter Traffic Pumping Schemes And Benchmarking Access Rates To Competitive Retail Long Distance Services Would Be Inappropriate.

Contrary to the claims of certain commenters,[77] ILEC traffic pumping cannot adequately be addressed merely by restricting an ILEC's ability to engage in "pool hopping" – *i.e.,* exiting the NECA pool, charging unjust and unreasonable rates, and then re-entering the pool before rates are adjusted to reflect the increased traffic pumping demand. First, the record shows that traffic pumping schemes typically produce revenue increases of thousands (and even tens of thousands) of percent. Therefore, ILECs would still find it extremely profitable to traffic pump for the first monitoring period after leaving NECA and then cease traffic pumping for the remaining periods, because the profits from the first monitoring period (when demand is very high) would far outweigh any relatively small losses incurred in subsequent monitoring periods

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[74] *See, e.g.,* RIITA at 6; NTCA at 7; Embarq at 10-11; Hypercube at 20.

[75] *See, e.g.,* ITA at 4; RIITA at 6; U.S. Telepacific at 4; Alexicon at 5; NTCA at 7.

[76] Some small ILEC commenters expressly denounce access revenue sharing. *See, e.g.,* RICA at 4-5 ("RICA does not endorse sharing of access revenues and that is not the way its members [CLECs] have designated their businesses").

[77] *See, e.g.,* JWI at 21; WTA at 10-12; OPASCO at 11-12; ITTA at 6-7.

(when demand drops back to the extremely low levels associated with calls of the actual residents of the rural community).

Further, if ILECs are required to exit NECA for more than two monitoring periods, the ILEC could profitably engage in traffic pumping for most of that time period. It could traffic pump immediately after exiting NECA, then cease traffic pumping for the second monitoring period and incur relatively small losses that are far outweighed by the profits from the first monitoring period. Then in the third monitoring period the ILEC could re-initiate traffic pumping, when its rates will be set based on the relatively low demand from the previous 12 months when it was not engaged in traffic pumping. Moreover, these ILECs would always have an incentive to traffic pump during the last monitoring period during which they are excluded from NECA, because they would be allowed to re-enter NECA after that period. Indeed, ILEC holding companies could simply rotate traffic pumping activities among their subsidiaries such that the traffic was always served by an ILEC in its last monitoring period before it is allowed to re-enter NECA. Accordingly, as discussed above, while limitations on re-entry (or exiting NECA) may be appropriate *in addition* to the tariff re-filing trigger, data reporting and certification requirements discussed above, they are not an adequate substitute for those measures.[78]

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[78] AT&T also supports the Commission's proposal (¶ 31) to clarify Rule 61.39(b)(2)(ii) to require average schedule carriers to set rates in their July tariff filings to reflect the most recent Commission-approved average schedule formulae using the most recent 12-month data. For example, the July 2008 average schedule LEC tariffs, which are filed in June, should use the average schedule formula approved by the Commission in May or June of 2008 and the most recent 12 month data (*i.e.*, from June 2007 through May 2008). Such a requirement ensures that the most recent developments for improving the accuracy of the average schedule formulas and the most recent data are used to develop rates. For example, the most recent NECA average schedule formulas reduce the extent to which traffic volume increases result in overstated traffic sensitive cost increases (although even this most recent formula continues significantly to overstate traffic sensitive cost increases associated with traffic volume increases).

III. TERMINATING ACCESS CHARGE SHARING ARRANGEMENTS BETWEEN A LEC AND A PUTATIVE "CUSTOMER" THAT IS THE NET RECIPIENT OF FUNDS SHOULD BE DECLARED AN UNREASONABLE PRACTICE.

Several traffic pumping proponents argue that the Commission should not declare their revenue sharing arrangements to be an unreasonable practice under Section 201(b). These arguments are meritless.

First, AT&T and others have proposed declaring revenue sharing to be an unreasonable practice only in a very limited set of circumstances: *i.e.*, the Commission should only ban "any LEC arrangement to pay a communications service provider to direct calls to or through a LEC's exchange that can be expected over the life of the arrangement to produce net payments from the LEC to its communications service 'customer.'"[79] Arrangements fitting this description serve no legitimate purpose and are patently unreasonable practices. Indeed, as a number of commenters have explained, arrangements within this definition are fundamentally different from normal marketing or sales incentive arrangements, because as an economic matter the fundamental purpose and effect of the defined arrangements are to facilitate involuntary cross-subsidies between the customers of third party carriers and the users of the communications services offered by the LEC's "customer."[80] Revenue sharing arrangements within this narrowly defined class thus violate fundamental principles of economic efficiency and cost causation and thus are necessarily "unreasonable" within the meaning of Section 201(b). As experience has shown, their only function is to facilitate unjust and unreasonable access rates.

It is not true, as several traffic pumping entities argue,[81] that the Commission has already held that access charge revenue sharing arrangements are lawful in cases like *Jefferson Tel. Co.*[82]

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[79] *See, e.g.*, AT&T at 32; NPRM ¶ 20 n.49.

[80] *See* Qwest Tardiff Decl. ¶¶ 7-8.

[81] Hypercube at 3-5; All American at 9-10; futurephone.com at 16.

In those cases the Commission considered only one very specific argument against such revenue sharing agreements: that they violated a LEC's duty as a common carrier to hold its services out indifferently. The Commission specifically noted in those cases that AT&T had argued that the revenue-sharing arrangement "violated section 201(b) *solely* because it allegedly breaches common carriage duties," and on that basis it held that the LEC had not violated those duties because it had delivered calls indifferently to all customers and had not attempted to steer traffic to any particular customer.[83] The Commission "emphasize[d] the narrowness of [its] holding" in those cases,[84] and acknowledged that such arrangements might violate § 201(b) or be otherwise unlawful for other reasons. That is why the Commission, in its recent *Farmers and Merchants Order*, expressly found that its previous cases did not foreclose a holding that revenue sharing agreements of the sort that the traffic pumping LECs have entered into violate Section 201(b).[85]

The other cases that traffic pumping proponents cite provide no support for the notion that revenue sharing arrangements of the type at issue here are lawful.[86] For example, in *AT&T's Private Payphone Commission Plan*, 7 FCC Rcd. 7135, ¶¶ 8-10 (1992), the Commission held merely that commissions that AT&T paid to payphone operators did not constitute an unlawful rebate under Section 203, because AT&T's only customer was the person using the payphone; the payphone operator did not purchase any service from AT&T. Similarly, in *National Telephone Services*, Inc., 8 FCC Rcd. 654, ¶ 9 (1993), the Commission held that commissions

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[82] *AT&T Corp. v. Jefferson Tel. Co.*, 16 FCC Rcd. 16130, ¶¶ 7-15 (2001); *see also AT&T Corp. v. Beehive*, 17 FCC Rcd. 11641, ¶ 29 (2002); *AT&T Corp. v. Frontier*, 17 FCC Rcd. 4041 (2002).

[83] *Jefferson Tel. Co.*, 16 FCC Rcd. 16130, ¶¶ 13, 15.

[84] *Id.*, ¶ 16.

[85] *Farmers and Merchants Order*, 22 FCC Rcd. 17973, ¶ 19.

[86] *See* Hypercube at 5.

paid to traffic aggregators (such as hotels) were not rebates and need not be tariffed for much the same reason – *i.e.*, AT&T's customer was the person making the call, not the aggregator.[87]

Finally, Hypercube suggests (at 9) that AT&T's proposal is "overbroad" because it would prohibit not just revenue sharing but routing arrangements, and that the Commission has already approved such routing arrangements in the *CLEC Access Charge Recon. Order*. Hypercube misunderstands both AT&T's proposal and the Commission's order. Under AT&T's proposal, websites would be free to arrange for their traffic to be routed through rural exchanges; only any access revenue sharing arrangement associated with such routing arrangements would be prohibited. But in all events, in the *CLEC Access Charge Recon. Order*, the Commission did not rule that analogous 8YY routing arrangements were necessarily lawful, but merely that it did not then have enough evidence that such arrangements would harm the public interest.[88] The record here is abundantly clear, however, that the traffic pumping and revenue sharing arrangements at issue here are imposing substantial harm on the public interest, and such revenue sharing arrangements should thus be declared an unreasonable practice.

IV. THE COMMISSION SHOULD REJECT THE ATTEMPTS TO INJECT EXTRANEOUS ISSUES INTO THIS PROCEEDING.

Finally, several traffic pumping LECs (and their partners) have urged the Commission to address issues that were not raised in the NPRM and that have been raised only in pending federal district court litigation that AT&T and other interexchange carriers have brought against

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[87] Hypercube also falsely asserts that AT&T once argued that reciprocal payments between carriers and information providers should be categorically permitted. *See* Hypercube at 5 (quoting AT&T Comments in Docket No. 96-146, filed August 26, 1996, at 5-9). In fact, in the cited passage, AT&T specifically argued that the types of reciprocal payment arrangements at issue here – "scams in which carriers filed unjustifiably high tariffs, and then pass a portion of their proceeds to an [information provider] that ostensibly provides a 'free' service" – should be unlawful.

[88] *CLEC Access Charge Recon. Order*, 19 FCC Rcd. 9108, ¶¶ 69-72 (2004).

these LECs and their partners. But these issues are entirely irrelevant to this proceeding, and their resolution depends on facts that are not before the Commission.

First, in the pending federal district court proceedings, AT&T and other IXCs have contended that the LEC defendants have violated the terms of their tariffs by seeking to collect access charges for the provision of services that are *not* "access services" within the meaning of the applicable tariffs of these LECs. In these proceedings, AT&T and other interexchange carriers will develop the relevant facts, which include determination of whether calls are in fact terminated to the LEC partners within these LEC exchanges and whether the partners of the traffic pumping LECs were in fact "end users" or "customers" of the LEC within the meaning of these tariffs. The answers to these factual questions will determine whether the services at issue are properly classified as "access services," as "transiting services," or as some other kind of service.

However, the LECs and their traffic pumping partners have now asked the Commission to address the proper regulatory classifications of these services in the abstract and to construe tariffs that are not even before the Commission in this rulemaking proceeding. For example, certain traffic pumping participants ask that the Commission determine that they are "end users" or "customers" within the meaning of various ILEC and CLEC tariffs. But these issues were not raised in the NPRM and are far outside the scope of this proceeding. Moreover, the issues are intensely factual and cannot be resolved on the record in this proceeding. As the Commission is now well aware, inquiries into these issue have shown that many of the traffic pumping partners that purport to be customers of traffic pumping LECs did not, in fact, ever subscribe to services from the LEC in question and thus cannot be "customers" or "end users" under the relevant tariffs. In other instances, purchase agreements were manufactured after the fact and backdated, which should either preclude a finding of a customer relationship or, at a minimum, would require further factual investigation and analysis of the terms of the relevant tariff. In short, resolution of even the question whether a customer relationship existed would require that the Commission now obtain and examine tariffs, contracts, bills, and other documents which are not in the record, and any attempt to collect the relevant materials for all possible traffic pumping LECs would be well beyond the scope of this rulemaking proceeding.

The inappropriateness of these LECs' proposals is underscored by the Commission's decision in *Qwest v. Farmers*, 22 FCC Rcd. 17973 (2007). In that formal complaint proceeding, the Commission, after developing a factual record, found that the Farmers' termination of conference calls was an access service only following the conclusion of extensive discovery and only on the basis of what appeared to be uncontroverted (and now appears to have been fabricated) evidence that "the traffic at issue is all routed to conference bridges in Farmers' exchange" and that Farmers and its conference service partners had in fact subscribed to Farmers' local exchange service as end user customers.[89] Further, the Commission cautioned that a different outcome could be reached on a different record.[90] The reality here is that none of the facts that are required to determine the proper classification of the services provided by other LECs are in this record, and these are facts that will be developed in federal court and other proceedings and that exceed the scope of this rulemaking.[91]

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[89] *Id.* ¶ 32 n.109.

[90] *Id.* ¶ 27 n.98.

[91] GCP's assertion (at 13) that this proceedings implicates "[Inter]net neutrality principles is absurd. Foremost, the issues raised in this proceeding related to the public switched telephone network, not the Internet. Moreover, the call blocking issues that GCP claims implicate net neutrality issues already have been addressed in a separate proceeding and are not relevant to the issues raised in this proceeding. *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, Declaratory Ruling and Order, 22 FCC Rcd. 11629 (WCB 2007).

Similarly, the Commission should reject the requests of Futurephone and others that the Commission rule in a vacuum that their international, conference and other calling services are information services. Those questions, too, depend upon facts about individual services that are not before the Commission. Moreover, any such regulatory classification plainly could have implications and unintended consequences far beyond the narrow traffic pumping issues in this proceeding. For example, the Commission is in other proceedings "continu[ing] to consider whether interconnected VoIP services are telecommunications services or information services as those terms are defined in the Act,"[92] yet Futurephone asks the Commission in this proceeding, to make a blanket determination that so-called international "VoIP" services – none of which the Commission has examined – are information services, a decision that could have far reaching industry-wide implications.

Second, traffic pumping LECs and their partners have sought to inject other extraneous issues into this proceeding. For example, Global Conference Partners has asked the Commission to rule that AT&T and other IXCs engaged in "illegal self-help" in violation of Section 201 of the Act when they refused to pay in full the access bills rendered by certain traffic pumping LECs.[93] But this issue, too, was not raised in the NPRM and is extraneous to this proceeding. In all events, Global Conference Partners is simply wrong that withholding payment of purported access bills has been held to be a *per se* violation of Section 201 of the Act. The Commission expressly refused to reach that conclusion in *Qwest v. Farmers*, 22 FCC Rcd. 17973, and in the

[92] *Telephone Number Requirements for IP-Enabled Services Providers; Local Number Portability Porting Interval and Validation Requirements; IP-Enabled Services; Telephone Number Portability; CTIA Petitions for Declaratory Ruling on Wireline-Wireless Porting Issues; Final Regulatory Flexibility Analysis; Numbering Resource Optimization*, FCC 07-188, WC Docket Nos. 07-243, 07-244, 04-36, CC Docket Nos. 95-116, 99-200, ¶ 18, n.50 (rel. Nov. 8, 2007).

[93] GCP at 13-15; *see also* futurephone.com at 21-22; ITA at 8.

other case cited by Global Conference Partners,[94] the Commission merely held that where there is *no dispute* that the LEC provided access services and where the relevant tariff does not allow for withholding of payment for undisputed access charges, an access customer is generally required to pay the tariffed rate.[95] By contrast, in the pending litigation, AT&T (and other IXCs) dispute that the traffic pumping LECs provided the access services they billed, and pursuant to the express terms of the tariffs under which the IXCs purchase service from the LECs, the IXCs have chosen to withhold payment pending resolution of that dispute.[96] Thus, far from constituting "illegal self-help," AT&T's actions were authorized by the LECs' tariffs and fully consistent with Commission precedent. Indeed, to prohibit AT&T from withholding payment pursuant to the express terms of these tariffs would not only be bad policy – encouraging traffic pumping and other abuses by unscrupulous LECs – but would itself violate the filed tariff doctrine. In short, there is no reason or basis to address this issue in this rulemaking proceeding.[97]

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[94] *MGC Commc'ns. v. AT&T Corp.*, 14 FCC Rcd. 11647, ¶ 27 (1999).

[95] *Id.* ¶ 27.

[96] *See, e.g.*, National Exchange Carrier Association, Inc. Tariff F.C.C. No. 5, § 2.4.1(D)(1) ("if the customer withholds the disputed amounts, it must identify the account number under which the bill has been rendered, the date of the bill and the specific items on the bill being disputed to permit the Telephone Company to investigate the merits of the dispute."); Aventure Communication Technology LLC, Tariff F.C.C. No. 1, § 2.4.10 ("If the dispute is resolved in favor of the Customer, and the Customer has withheld the disputed amount, no interest credits or penalties will apply").

[97] Similarly baseless is the request of RICA (at 12-13) that the Commission revisit its decision to mandatorily detariff CLEC access rates when set above the safe harbor levels established in the *CLEC Access Charge Order.* This issue is outside the scope of this proceeding. Further, the market conditions that led the Commission to impose this requirement (*CLEC Access Charge Order*, 16 FCC Rcd. 9923, ¶¶ 2 & 84) not only continue to exist today, but are vividly confirmed by the fact that IXCs have needed to seek judicial and regulatory protection from traffic pumping schemes of CLECs.

CONCLUSION

For the reasons stated above, the Commission should adopt the foregoing changes to its tariffing regime for ILECs and CLECs to preclude traffic pumping abuses, and should issue declaratory rulings that practices described above are unjust and unreasonable practices in violation of Section 201(b) of the Communications Act.

Respectfully submitted,

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