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

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

To: The Commission

REPLY COMMENTS OF FUTUREPHONE.COM, LLC

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Summary

The Commission should not adopt any new regulatory framework that will restrict or prevent the provision of competitive services to the public. This proceeding is based in part on allegations by large interexchange carriers ("IXCs") that high volume traffic and access revenue sharing arrangements with competing service providers cause some local exchange carriers ("LECs") to receive inordinately high rates of return. But, high volume traffic exists because consumers want the economical, alternative services that competitive service providers such as Futurephone offer. The IXCs are facing aggressive competition for high volume traffic because their rates are unreasonably high. Hence, as Futurephone and other commenters point out, the IXCs' motivation in this proceeding appears to be their desire to stifle competition.

Some IXCs allege that revenue sharing arrangements between LECs and their customers are unlawful. But, evidence presented by commenters shows that these arrangements are very common in the communications industry, and that outlawing them would severely disrupt the businesses of many telecommunications carriers, including some large IXCs. The Commission has held on many occasions that revenue sharing is not unlawful. Moreover, revenue sharing arrangements enable carriers to provide economical alternative services to the public. Consequently, these arrangements comport with the Commission's pro-competition policy.

The Commission has held that expenses related to revenue sharing are legitimate business expenses. Business expenses may be included in a LEC's tariffed revenue requirement. Futurephone explains that costs related to high volume traffic revenue sharing are marketing expenses, and enable carriers to provide customers with lower cost services. Accordingly, these

costs comport with the "used and useful" doctrine, and LECs should be able to include them in their revenue requirements.

Some IXCs have contended that access revenue sharing constitutes an unlawful rebate. Again, evidence shows that those allegations are incorrect. Under the arrangements at issue, the LECs pay compensation to high volume traffic producers which are not the parties that make the calls and pay the tariffed rate. Commenters show that, according to Commission precedents, such arrangements do not constitute illegal rebates.

One IXC avers that domestic traffic delivered to Futurephone's Internet portals does not terminate there, but overseas. Futurephone is an enhanced service provider, and use of the public switched telephone network ends at its Internet portals. Legal precedents show that under these circumstances, telecommunications traffic terminates at Futurephone's premises, and LECs properly assessed access charges on IXCs for terminating that traffic.

The Commission can apply a reasonable rate for high volume traffic by enabling LECs to categorize such traffic separately in their tariffs and assess a separate rate for it. A "zone of reasonableness" for such rates could be based on what IXCs charge to originate interstate calls. This would ensure the continuity of competitive services, and sufficiently compensating carriers.

The Commission should declare that IXCs are not permitted to engage in self-help by refusing to pay LECs' legally tariffed access charges. This practice is illegal, and has put some competitive carriers out of business. One IXC states that it may, "in the absence of sufficient Commission action" refuse to provide service to carriers that engage in high volume traffic arrangements. The Commission should prevent such practices by specifically declaring such practices illegal.

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Futurephone.com. LLC ("Futurephone"), by its attorneys and pursuant to Section 1.415 of the Commission's Rules, 47 C.F.R. § 1.415, hereby submits these reply comments in response to the comments filed in the above-captioned proceeding.[1] In support hereof, the following is respectfully shown:

I. Summary of Comments

The Commission commenced this rulemaking to consider changes to its tariff rate rules to ensure that local exchange carriers' ("LECs") terminating access rates remain just and reasonable when they experience high volume traffic.[2] Nearly fifty interested parties submitted comments in this proceeding. Most of these commenters consist of large interexchange carriers ("IXCs"), LECs, alternative service providers such as Futurephone and various trade and consultancy groups.

As Futurephone stated in its initial comments, the Commission has historically promoted competitive services through local exchange tariffs in spite of entrenched IXCs' attempts to stifle

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[1] See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers, Notice of Proposed Rulemaking, FCC 07-176, WC Docket No. 07-135 (Oct. 2, 2007) ("NPRM").
[2] Id. at ¶ 11.

them.[3] The competitive services at issue in this proceeding are made possible in large part through legitimate marketing arrangements between the service providers and LECs wherein compensation is paid for high volume traffic directed to the providers' premises located in the LECs' service areas. Accordingly, Futurephone's initial comments and its reply comments focus on how consumers can be assured of having access to these innovative alternative services through revenue sharing, while ensuring just and reasonable rates for high volume traffic.

Many commenters agree with Futurephone's positions. With the exception of the large IXCs, there is general consensus that access revenue sharing arrangements promote competition, do not constitute unlawful rebates and that the Commission should not ban or restrict them. Also, a number of commenters concur that reasonable access rates for high volume traffic should be implemented without punishing companies that want to provide alternative services and improve the economy in rural areas. Further, there is a real concern that some large IXCs are actively attempting to stifle competition. Several commenters asked the Commission to issue a declaration that any IXC that refuses to pay a LEC's tariffed access charges has violated Section 201(b) of the Communications Act of 1934, as amended (the "Act"), by engaging in illegal "self-help."

II. High Volume Traffic Exists due to Customer Demand; IXCs Seek to Stifle Competition in this Proceeding

In its comments, Futurephone explained that it provided an overseas calling service for a fraction of the price charged by large IXCs; consequently, its service was in high demand. Futurephone received nearly 7 million requests during the four month period it was in business.[4]

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[3] See Comments of Futurephone.com, LLC ("Futurephone Comments") at 4-5.
[4] Id. at 9-10. for traffic routed to its Internet portals in Iowa and Minnesota.[4]

Futurephone was able to provide its low-cost service in large part due to marketing fees from LECs

Other commenters in this proceeding provide various alternative services that compete with IXCs' offerings. Global Conference Partners, for example, provides conference calling services.[5] Chase Com, Fonepods, FreeConferenceCall.com, and HFT Corp. offer information services such as conference calling, information hotlines, entertainment services and specialty chat lines.[6] All of these competitive services are in high demand because of economical pricing made possible through marketing fee arrangements with LECs.[7]

This proceeding is based in part on allegations by a number of large IXCs that filed complaints in various legal forums, contending that high volume traffic and access revenue sharing arrangements with competing service providers cause some LECs to receive an inordinately high rate of return.[8] As Futurephone explains in its comments, IXCs are facing aggressive competition for high volume traffic because their own rates for services are unreasonably high.[9] Legal actions initiated by the IXCs appear mainly to be attempts to snuff out competitive service offerings.[10]

A number of commenters agree with Futurephone. Global Conference Partners points out that the IXCs' pleas for FCC regulatory involvement are thinly veiled attempts to create impediments to competition.[11] All American Telephone explains that there is no evidence that

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[5] See Comments of Global Conference Partners ("GCP Comments") at 7-9.
[6] See Comments of Chase Com, Fonepods, FreeConferenceCall.com, and HFT Corp. ("Chase Com Comments") at 1.
[7] See GCP Comments at 7-9; Chase Com Comments at 2.
[8] See NPRM at ¶ 11 (citations omitted).
[9] See Futurephone Comments at 8-10.
[10] Id.
[11] See GCP Comments at 3.

high volume traffic and revenue sharing are the sources of any harm to the public interest.[12] To the contrary, high volume traffic and revenue sharing promote network efficiency and deployment of advanced services in rural areas.[13] The motivation for these lawsuits appears to be protection of the IXCs' profits arising from their own high priced alternative services.[14]

IXCs are apparently not satisfied with the long distances revenues and/or originating access charges they receive for each call by one of their customers to a competitive service provider.[15] The complaining IXCs earn, on average, six cents per minute on each domestic long distance call, and an additional four cents per minute to originate each call.[16]

The IXCs refuse to admit that any problems they are facing from competitive service providers stem largely from their own rates and practices. Most IXCs have had their long distance profits shrink after offering their customers unlimited long distance calling packages. By eliminating marginal costs to the end-user, the IXCs offering such flat-rate plans are encouraging their customers to make as many calls as possible, which means that more and more calls will be terminated by LECs. As All American Telephone states, the IXCs did this with full knowledge of the access charge regime and other factors affecting their costs.[17] It is not the FCC's job to bail out the IXCs if their business decisions and service offerings do not prove to be as profitable as they have been historically.

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[12] See Comments of All American Telephone Co., Inc. et al. ("All American Comments") at 3-4.
[13] See GCP Comments at 16; Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTO Comments") at 3-4; All American Comments at 3.
[14] See GCP Comments at 9.
[15] Id. at 3-4.
[16] Id. at 18, Futurephone Comments at 9-10, 20-21.
[17] See All American Comments at 4.

In short, there is no "market failure" that requires FCC regulation of the type the IXCs are seeking in this proceeding. The IXCs' attempts' to offset the effects of their "all you can eat" basic long distance packages by offering limited, expensive enhanced service offerings created the market niches for alternative, economic services that Futurephone and other carriers provide.[18] The Commission should affirm its pro-competitive policy and support the regulatory environment necessary to ensure that alternative service providers can continue to offer their competitive, economical services to the public. Changes to the status quo, as suggested by the FCC in the NPRM, would be ill-advised and contrary to the public's interest.

III. Access Revenue Sharing is a Legal and Common Business Practice that Promotes Competition

A key topic on which the Commission seeks comment is AT&T's contention that any revenue sharing arrangement between a carrier and a customer violates Section 201 or 202 of the Act.[19] AT&T's proposal has no basis in law or fact and should be rejected.

In the first place, as Futurephone and other commenters have explained, the Commission has held on numerous occasions that access revenue sharing is not unlawful.[20] Many commenters agree that access revenue sharing arrangements are beneficial to the public interest and that the Commission should not curtail them in this proceeding.[21] The public interest

[18] See Futurephone Comments at 8-10; GCP Comments at 19; All American Comments at 4; Comments of TC3 Telecom ("TC3 Comments") at 3; Chase Com Comments at 1.
[19] See NPRM at ¶ 20.
[20] See, e.g. Futurephone Comments at 15-16, citing AT&T Corp. v. Jefferson Telephone Co., 16 FCC Rcd 16130 (2001); AT&T Corp. v. Frontier Communications, Inc., 17 FCC Rcd 4041 (2002); Reform of Access Charges Imposed by Competitive Local Exchange Carriers, 19 FCC Rcd 9108; California Payphone Association, 12 FCC Rcd 14191 (2004); Comments of Hypercube, LLC, McLeod Telecommunications Services, Inc. ("Hypercube Comments") at 2-5 (citations omitted); Comments of the Rural Independent Competitive Alliance ("RICA Comments") at 4 (citations omitted); All American Comments at 8-10 (citations omitted).
[21] See e.g., Futurephone Comments at 15-16; Comments of Embarq Corp. ("Embarq Comments") at 8; All American Comments at 8-12; Comments of Texatel ("Texatel Comments") at 2; Hypercube Comments at 2-9; RICA Comments at 3-8; GCP Comments at 16; Comments of U.S. Telepacific Corp. ("U.S. Telepacific Comments") at 3-

benefits are illustrated by Futurephone's service, which utilized marketing arrangements to provide consumers with additional functionality – international calling - for the price of a domestic long distance call.[22]

Empirical evidence clearly refutes commenters such as AT&T, who claim that revenue sharing should be declared an unreasonable practice under the Act, "because there are no circumstances in which these [arrangements] can serve a lawful purpose."[23]

To the contrary, revenue sharing is embraced by the public due to the competitive services it makes available. Hypercube, for example, explains that revenue sharing is a routine business practice.[24] The Commission itself has acknowledged that the marketplace is replete with "legal and beneficial revenue sharing arrangements" including: (a) compensation arrangements with call aggregators, universities, hospitals, hotels and airports; (b) commissions for calls generated from pay phones, shared residences, etc.; (c) terminating switched access arrangements for high volume, international settlements; and (d) commissions paid by carrier aggregators for operator traffic.[25]

AT&T's statement that revenue sharing agreements can serve no lawful purpose is directly contradicted by its contention in another proceeding that revenue sharing arrangements in which it was (and still is) involved - commissions to call aggregators and international settlements paid by U.S. carriers to foreign carriers - are perfectly legal and that the Commission

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5; Chase Com Comments at 9-12; Comments of John Staurulakis, Inc. ("Starulakis Comments") at 15-16.

[22] See Futurephone Comments at 17 (citation omitted).

[23] See Comments of AT&T, Inc. ("AT&T Comments") at 33.

[24] See Comments of Hypercube, et al. at 6, citing Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services, and Toll-Free Number Usage, Notice of Proposed Rulemaking, 19 FCC Rcd 13461, n.83 (2004) ("Pay-Per-Call NPRM").

[25] See Pay-Per-Call NPRM at n.83.

should not ban them.[26]

It is also well known that AT&T pays fees to Apple Computer Corporation ("Apple") for wireless traffic generated by the iPhone that increases call termination volume on AT&T's wireless network.[27] AT&T apparently has a double standard regarding this issue: revenue sharing arrangements are fine when they benefit AT&T, but they should be illegal for everyone else. In any event, the FCC should not curtail revenue sharing. Such sudden regulatory change would cause untold disruptions to the normal business practices of many carriers, including AT&T.

Qwest and AT&T allege that revenue sharing somehow "undermines competition."[28] Commenters show that the facts do not support that argument. For example, due to its marketing payment arrangements with some Iowa and Minnesota-based LECs, Futurephone was able to provide its Internet-based international calling service to U.S. consumers for substantially less than the high international rates charged by IXCs such as AT&T and Qwest.[29] Similar marketing arrangements enabled Global Conferencing Partners to provide competitive and economical conference call services,[30] and permitted Chase Com, Fonepods, and HFT Corp. to provide various information services to the public at low prices.[31]

The Commission has repeatedly stated that competition such as this serves the public interest.[32] Accordingly, the Commission should not outlaw revenue sharing, as it would hinder

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[26] See Policies and Rules Governing Interstate Pay-Per-Call and Other Information Services Pursuant to the Telecommunications Act of 1996, Further Comments of AT&T, CC Docket No. 96-146 (May 12, 2003) at n.22.
[27] See GCP Comments at 10-11 (citation omitted).
[28] See AT&T Comments at 18; Qwest Comments at 10-12.
[29] See Futurephone Comments at 2, 9-10.
[30] See GCL Comments at 4-6.
[31] See Chase Com Comments at 1-2.
[32] See e.g., Specialized Common Carrier Services, 29 FCC 2d 870, ¶ 103 (1971); International Settlements Policy

competition, eliminate competitive services, and create disincentives for providers that serve rural areas.

IV. Marketing Payments may be Included in a Carrier's Revenue Requirements

The Commission seeks comment on its tentative conclusion that a rate-of-return carrier that shares revenue or provides compensation to an end-user customer and bundles those costs with access charges is engaging in an unreasonable practice. The FCC posits that these costs appear unrelated to the provision of service and benefit the LECs instead of customers.[33] The Commission should not adopt that tentative conclusion; these types of payments are legitimate business expenses that benefit customers.

The "used and useful" doctrine, as defined in the NPRM, states that in determining whether a rate is just and reasonable the Commission examines whether an expense promotes customer benefits or is primarily for the benefit of the carrier.[34] That doctrine supports these revenue sharing arrangements. As Futurephone explained in its comments, small LECs found it more convenient to outsource sales, marketing, and enhanced services to Futurephone; they recovered their costs of providing these services via access marketing payments.[35] In turn, IXCs customers benefited by obtaining enhanced international calling services for the same price they pay for interstate calls.[36]

Reform International Settlement Rates, 19 FCC Rcd 5709, ¶ 9 (2004).
[33] See NPRM at ¶ 18, n.47.
[34] Id.
[35] See Futurephone Comments at 17.
[36] Id.

Futurephone agrees with the comments of Hypercube and U.S. Telepacific, to wit, in accordance with Commission precedent payments to entities that provide high volume traffic to LECs are proper business expenses, i.e., marketing expenses.[37] Hypercube points out that a number of carriers (other than AT&T) make payments to Apple in the form of a percentage of revenues from call and data transfers made on iPhones.[38] This constitutes compensation to Apple for marketing and name recognition that motivates customers to switch service to the carriers' networks, in other words, payments for high volume traffic.[39]

The Commission has previously held that AT&T's payments to traffic aggregators are legitimate business expenses.[40] Legitimate business expenses may be included in a LEC's tariffed revenue requirements.[41] Marketing expenses that are used to persuade potential customers to switch to a carrier's service or stay with that service, and to attract the necessary capital to provide services, qualify as permissible business expenses.[42]

As OPASTCO explains, many rural LECs, and rate-of-return carriers' access demand rates have been trending down substantially in recent years.[43] This downward trend in billable access minutes makes it difficult for these LECs to gain access to the capital resources necessary to modernize their services and offer an evolving level of services to their end-user customers.[44]

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[37] See Hypercube Comments at 2, 5-6; Comments of U.S. Telepacific Corp. at 4, citing National Telephone Services, Inc., 8 FCC Rcd 654, ¶ 9 (Com. Car. Bur. Rel. Jan 28, 1993) ("NTS").
[38] See Hypercube Comments at 5-6.
[39] Id.
[40] See NTS at ¶ 9.
[41] See Amendment of Part 65 of the Commission's Rules to Prescribe Components of the Rate Base and Net Income of Dominant Carriers, 3 FCC Rcd 269, ¶ 74 (1987).
[42] Id. at ¶¶ 76-78; NTS at ¶ 9.
[43] See Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies ("OPASTCO") at 2-3 (citations omitted).
[44] Id. at 4.

These negative trends can be reversed when carriers can recover marketing costs that lead to increases in their billable access minutes. And, the increase in number of service providers that provide customers with lower cost services benefits the public and carrier customers. Accordingly, these expenses comport with the "used and useful" doctrine and should be included in LECs' revenue requirements.

V. Access Revenue Sharing is not an Unlawful Rebate

Another issue the Commission submitted for comment is AT&T's contention that a LEC that shares access revenue with a customer providing high volume traffic is engaging in an unlawful rebate under Section 203 of the Act.[45] Qwest echoes AT&T's assertion, and adds that revenue sharing arrangements are discriminatory.[46] Futurephone disagrees with AT&T's and Qwest's assertions.

As Futurephone explained in its comments, the Commission has already held that revenue sharing arrangements such as AT&T's payment of commissions to hotels and other traffic aggregators, do not constitute an unlawful rebate.[47] Futurephone agrees with Hypercube that LECs' marketing payments to high volume traffic producers are not unlawful rebates.[48] The Commission has held that a rebate, by definition, is paid to an end-user customer of the carrier's tariffed service.[49] A high volume traffic producer such as a traffic aggregator is a subscriber of the carrier's service, not the customer for purposes of rebate analysis, because it is not the party

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[45] See NPRM at ¶ 20.
[46] See Qwest Comments at 15.
[47] See Futurephone Comments at 18, citing Telesphere International, Inc. v. AT&T, 8 FCC Rcd 4945, ¶ 12 (1993).
[48] See Hypercube Comments at 8, citing AT&T's Private Payphone Commission Plan, 7 FCC Rcd 7135 (1992).
[49] See Telesphere at ¶ 12.

that makes the call and pays the tariffed rate.[50] As long as end-user customers do not receive commissions, there is no unlawful rebate, according to FCC precedents.[51] Because Futurephone's marketing arrangements (and, based on the comments submitted, similar arrangements at issue in this proceeding) do not entail commissions to calling parties, they are not unlawful rebates.

Moreover, there is no merit to Qwest's contention that revenue sharing arrangements between LECs and their customers are discriminatory. To the contrary, as Global Conference Partners explains, it would be discriminatory for the Commission to single out payments by high volume traffic producers as unlawful, while allowing IXCs to continue paying commissions to other customers such as traffic aggregators.[52]

VI. Terminating Access Tariffs Apply to Futurephone's Service

Some large IXCs suggest that the Commission should stifle competition by severely restricting the services LECs can provide in their tariffs. For instance, Qwest urges the Commission to declare that an entity that engages in revenue sharing with a LEC cannot be classified as a customer in the LEC's tariff.[53] AT&T alleges that in overseas calling arrangements such as Futurephone's, the LECs' traffic should be deemed to terminate in a foreign country instead of in the local exchanges.[54] Both of these arguments are erroneous, and contradicted by Commission precedents.

The Commission has held that carriers should afford their customers the option of

[50] Id.
[51] Id.
[52] See GCP Comments at n.12.
[53] See Qwest Comments at 17.

obtaining new services through reasonable terms in their tariffs, in order to meet the public demand "for new and diverse sources of supply and competition" in the communications marketplace.[55] Consequently, the Commission should not restrict a LEC's ability to enable customers to access Futurephone's competitive overseas calling services, and other alternative services.

In asserting that LECs should not be permitted to classify entities with which they share revenue as customers in their tariffs, Qwest rehashes an argument that the Commission rejected in the recent Farmers and Merchants decision.[56] Qwest alleges that any entity that provides high volume traffic to a LEC in exchange for compensation is a "business partner," and that that entity cannot be considered a customer of the LEC for the purpose of assessing access charges.[57] In Farmers and Merchants, the Commission considered this argument and determined that a LEC's payment of marketing fees to companies that provide high volume traffic "does not affect their status as customers, and thus end-users, for the purposes of [the LEC's] tariff."[58] Consequently, the Commission should reject Qwest's proposal.

AT&T's argument that traffic delivered to Futurephone's Internet portals "terminates" overseas is also flawed. In its comments, Futurephone provided a detailed description of its service, and explained at length how and why calls to its Internet portals in Iowa and Minnesota terminated domestically, not overseas.[59]

Futurephone did not charge for its service, and consequently, it cannot be classified as a

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[54] See AT&T Comments, Declaration of Adam Panagia ("Panagia Declaration") at 7.
[55] See Specialized Common Carrier Services, 29 FCC 2d 870, ¶ 103 (1971).
[56] See Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company, 22 FCC Rcd 17973 (2007).
[57] See Qwest Comments at 16-17.
[58] See Farmers and Merchants at ¶ 38.

telecommunications service.[60] Because use of the public switched telephone network ("PSTN") ceased when the calls were delivered to Futurephone's Internet portals (Futurephone's server converted the calls from voice protocol to Internet protocol and sent them overseas via the Internet), the calls did not "originate and terminate" on the PSTN, which is a key element in determining whether a service should be subject to end-to-end analysis.[61]

Futurephone is an enhanced service provider ("ESP").[62] The U.S. Court of Appeals for the D.C. Circuit has affirmed that ESPs are the called parties regarding telecommunications services delivered to them by LECs, and that such traffic terminates on their premises.[63] Hence, AT&T's conclusory end-to-end "analysis" is inapplicable to Futurephone's service. Futurephone was the called party for IXC traffic, which LECs terminated at Futurephone's Internet portals. The LECs properly assessed access charges on the IXCs for terminating traffic at Futurephone's premises.

VII. The Commission can Apply a Reasonable Rate for High Volume Traffic

The main purpose of this rulemaking, as stated in the NPRM, is for the Commission to ensure that its rules provide for just and reasonable tariff rates when LECs experience high volume traffic.[64] The Commission solicited comments to help it determine whether certain high volume arrangements should be disallowed, or whether just and reasonable rates for high volume traffic could be implemented without disrupting carriers' business activities, while encouraging

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[59] See Futurephone Comments at 12-15.
[60] See 47 U.S.C. § 153 (46); Pulver.Com's Free World Dialup, 19 FCC Rcd 3307, ¶ 10 (1997).
[61] See AT&T's Phone-to-Phone IP Telephony, 19 FCC Rcd 7457, ¶¶ 1, 10-13 (2004) ("IP in the Middle"); Regulation of Prepaid Calling Cards, 21 FCC Rcd 7290, ¶¶ 18-20 (2006).
[62] See Futurephone Comments at 14, citing IP in the Middle at ¶ 12.
[63] See Bell Atlantic Telephone Companies v. FCC, 206 F.3d 1, 6-7(D.C. Cir 2000).
[64] See NPRM at ¶ 11.

competition.[65]

The IXCs argue that high volume traffic arrangements cannot result in just and reasonable rates under any circumstances. Qwest contends that "successful high volume traffic arrangements" are "totally dependent" on unjust and unreasonable access rates, because a LEC should not have sufficient funds to pay marketing fees or other compensation to customers for high volume traffic.[66] Sprint makes the same argument, contending that, "[E]ven without detailed knowledge of LEC cost structures or costing models, it is obvious that LECs engaged in [high volume traffic arrangements] must be charging rates far in excess of their costs; otherwise they could not afford to share their access revenues."[67] AT&T alleges that high volume traffic arrangements necessarily result in "excessive rates" that far exceed access costs.[68]

A number of commenters (including Futurephone) disagree with the IXCs; they opine that reasonable access charges can be applied to high volume traffic without disrupting the business plans of carriers that depend on revenue sharing.

Telepacific, for example, notes that the Commission has achieved reasonable access charges through marketplace-friendly regulation, and it should do the same in this proceeding.[69]

[65] Id. at ¶¶ 18-20.
[66] See Qwest Comments at 12-14.
[67] See Sprint Comments at 12-13.
[68] See AT&T Comments at 16.
[69] See Telepacific Comments at 2-3, citing Access Charge Reform, 12 FCC Rcd 15982, ¶ 9 (1997).

RICA states that reasonable access rates can be implemented that would prohibit volatile rate increases, without punishing companies that want to grow their business and improve the economy of rural areas.[70] RIITA notes that in a market economy, companies that can develop new services, better marketing, etc. will gain customers, and increasing customers is "generally considered rational economic behavior."[71] Accordingly, any rule change should be tailored to ensure that a rate-of return carrier is making a reasonable rate of return, not to limit the number of its customers or reduce the volume of its traffic.[72]

In its comments, Futurephone suggested a market-friendly proposal that would permit innovative companies to continue to provide service, while ensuring reasonable access rates. Futurephone explained that in the NPRM the Commission had identified a type of high volume traffic that gave rise to the "unreasonableness" charges; LECs should be permitted to categorize this traffic separately in their tariffs and apply a reasonable access rate to it.[73] A "zone of reasonableness" for such an access rate could be based on what IXCs/ILECs charge on average to originate interstate calls, approximately four cents per minute.[74] As long as the rates are reasonable, IXCs should have no reason to object if a LEC shares the terminating charges with another service provider.[75] By adopting Futurephone's proposal, the Commission would enable competitive services such as Futurephone's to continue, while ensuring that all carriers involved are sufficiently compensated.

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[70] See RICA Comments at 3.
[71] See RIITA Comments at 3, 6.
[72] Id. at 3.
[73] See Futurephone Comments at 20 (citations omitted).
[74] Id. at 20-21 (citations omitted).
[75] Id. at 21.

VIII. IXCs Should not be Permitted to Engage in Illegal Self-Help

In its comments, Futurephone explained why the Commission should hold in this proceeding that IXCs may not engage in the illegal self-help practice of refusing to pay LECs' legally tariffed access charges.[76] Specifically, many IXCs have illegally refused to pay tariffed access charges out of "protest" to increased charges caused by high volume traffic.[77] This unlawful practice put Futurephone out of business, while decreasing consumers' choices in overseas service providers.

Qwest's comments illustrate why a declaration by the Commission is necessary. Qwest states that, in the absence of sufficient Commission action, it should be able to take the law into its own hands and refuse to provide service to carriers that engage in high volume traffic arrangements.[78] The Commission has stated that an IXC's refusal to pay tariffed access charges is tantamount to denying service, in violation of Section 201 of the Act.[79] It appears as if Qwest may be intending to continue to withhold access charge payments if the Commission does not decide this proceeding to Qwest's satisfaction.

If the Commission does not affirmatively declare that this type of self-help is illegal, it is likely that at least some IXCs will continue to flout the Act and refuse to make required access charge payments. Many commenters consider this matter such a serious threat that they have asked the Commission to issue a declaration that no carrier may refuse to pay legally tariffed access charges.[80]

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[76] Id. at 21-22 (citations omitted).
[77] Id.
[78] See Qwest Comments at 31.
[79] See AT&T & Sprint Petitions for Declaratory Ruling on CLEC Access Charges, 16 FCC Rcd 19158, ¶ 15 (2001).
[80] See e.g., Aventure Comments at 2-3, 5 (calling for an investigation of IXCs that engaged in illegal self-help); Iowa Telecom Association Comments at 8; GCP Comments at 12-15.

IX. Conclusion

For all the foregoing reasons, Futurephone requests the Commission adopt rules and guidelines to promote and encourage Futurephone's and similar service providers' competitive service offerings. The Commission has historically promoted competitive services through tariff interpretations; it can do that here. Futurephone's access revenue sharing arrangement with the LECs is entirely proper and enables Futurephone to provide these enhanced services; this practice should be deemed "just and reasonable" and in accordance with the Communications Act.

The FCC should also clarify in this proceeding that domestic terminating access tariffs apply to services such as Futurephone's, and that inbound calls to Futurephone's Internet portal terminate in the U.S. The Commission should also consider adopting Futurephone's proposed rate for high-volume traffic, which would promote regulatory symmetry and avoid undue regulatory burdens on LECs.

Finally, the Commission should prevent vexatious litigation by declaring that IXCs' may not engage in illegal self-help by refusing to pay LECs' legally tariffed access charges.

Respectfully submitted,

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