

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

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

**REPLY COMMENTS OF CHASE COM, FONEPODS, INC.,
FREECONFERENCECALL.COM AND HFT CORP.**

Chase Com, Fonepods, Inc., FreeConferenceCall.com and HFT Corp. (the “Joint Commenters”) through their undersigned counsel, respectfully submit their reply comments in response to the Federal Communications Commission’s (“Commission” or “FCC”) Notice of Proposed Rulemaking (“NPRM”) in the above-captioned proceeding.¹

The comments in this proceeding overwhelmingly demonstrate that there is no need for the Commission to adopt any rules in response to the issues raised in the NPRM. Virtually all of the commenters, including proponents of the Commission’s proposed rules, acknowledge that the access charge concerns that form the basis of the Commission’s NPRM are limited,² and that those issues already have been—and can be—addressed through the Commission’s formal complaint process.³ Crafting rules to benefit a limited few companies would serve to stymie competition and innovation in rural areas, to the detriment of the public. The Commission must

¹ *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, FCC 07-176, 72 Fed. Reg. 220 (rel. Oct. 2, 2007) (“NPRM”).

² *See, e.g.*, Comments of AT&T at 1; Comments of Verizon at 1; Comments of Cavalier Telephone, LLC at 2-3.

³ *See, e.g.*, Comments of All American Telephone Co., Inc., et al. at 12-14; Comments of CenturyTel, Inc. at 5-6; Comments of Hypercube, LLC McleodUSA Telecommunications Services, Inc. (“Hypercube”) at 10-11; Comments of The Organization for the Promotion and Advancement of Small Telecommunications Companies (“OPASTCO”) at 8.

decline to adopt any rules in response to its NPRM, and can address any legitimate concerns regarding so-called “access stimulation” in its comprehensive intercarrier compensation reform proceeding.

I. The Commission Should Address The Issues Raised In This Docket In The Comprehensive Intercarrier Compensation Reform Proceeding

The Joint Commenters agree with the numerous commenters in this proceeding stating that the Commission should address the issues raised in the NPRM when addressing access charge reform as a whole.⁴ As many commenters have noted, the Commission’s NPRM is directly contrary to its stated goal of access charge reform: to “replace the existing patchwork of intercarrier compensation rules with a unified approach....”⁵ Adopting the proposed rules would add to the Commission’s piecemeal approach and would detract even further from the Commission’s stated goals of a uniform regime. The Joint Commenters agree with TelePacific and other carriers emphasizing that the “unified approach” to which the Commission repeatedly has referred could address any of the concerns that parties raised in response to the NPRM.⁶ Moreover, as discussed below, there is no demonstrated need for the Commission to adopt any of the proposed regulations. Therefore, the Commission should defer addressing these issues until the Commission addresses unified intercarrier compensation as a whole.

⁴ See, e.g., Comments of Aventure Communication Technology, LLC at 5; Comments of CBeyond, Inc. and Integra Telecom, Inc. (“CBeyond”) at 2-3; also Comments of TelePacific Communications (“TelePacific”) at 1-2; Comments of Hypercube at 2; Comments of Leap Wireless at 1.

⁵ *Developing a Unified Intercarrier Compensation Regime*, 16 FCC Rcd 9610, 9612, ¶ 3 (2001); see also Comments of TelePacific at 2.

⁶ See Comments of TelePacific at 2.

II. The Commission Must Not Adopt Rules To Benefit A Few Carriers At The Expense Of The Industry

There is no basis in the record to adopt sweeping regulations that would affect all CLECs and rate-of-return ILECs serving rural areas. As an initial matter, none of the commenters in support of the Commission's proposed rules contend—or have a basis to contend—that the customers served by carriers, such as conference calling providers, are not end users for purposes of the access charge tariffs. To the contrary, the proponents of the Commission's proposed rules indeed recognize that the carriers terminating the interexchange carriers (“IXC”) customers' calls are entitled to receive access charges from the IXCs; the IXCs simply do not want to pay them. The Commission has not relieved IXCs of their obligation to pay access charges to CLECs and rural LECs, and the Commission must remind IXCs that they cannot engage in self-help measures while this proceeding is pending.

A. Concerned Carriers Have Other Remedies Available To Them

As the comments in this proceeding make clear, the Commission should not adopt unnecessary regulatory requirements, particularly in this situation where the proponents of the regulations already have other remedies available to them.⁷ The comments in this proceeding overwhelmingly demonstrate that the carriers engaging in the alleged conduct that is the subject of this proceeding—knowingly stimulating access charges—are limited in number.⁸ Even the proponents admit that their concerns about access stimulation are limited to a small number

⁷ See Comments of the Rural Independent Competitive Alliance at 8-9 (stating that AT&T, Qwest, and Verizon are free to bring their complaints before the Commission, but that the Commission should not adopt regulations that would affect the entire CLEC and rural LEC industry); Comments of Hypercube at 10-11 (stating that even if the Commission were to adopt rules for rate-of-return ILECs, the Commission still should rely on the formal complaint process for CLECs).

⁸ See, e.g., Comments of the Rural Independent Competitive Alliance at 8 (stating that “there is no showing that the practices [AT&T, Qwest, and Verizon] complain of are rural CLEC industry wide, or even followed by a substantial majority.”).

of carriers and particular situations.⁹ These commenters also acknowledge that they already have pursued other avenues to address what they perceive to be as misconduct, such as filing complaints in court and before the Commission.¹⁰ The Commission already has ruled on one complaint and that complaint serves as precedent and notice to the industry about what the Commission would deem to be lawful conduct;¹¹ there is simply no basis to adopt rules given the existing precedent. The record also demonstrates that there are only a handful of IXC's that have been affected by these so-called handful of bad actors.¹² Given the limited number of parties involved, and the resources, such as the complaint process, available to all of these parties, there is no basis for the Commission to adopt any new rules to address the situations at issue.

B. The Proposed Regulations Would Unduly Hamper CLECs And Rate-of-Return Rural Carriers And The Customers That They Serve

The Joint Commenters agree with those commenters that argue that if the Commission were to adopt the proposed regulations, then it would unfairly hinder rural CLECs and rate-of-return rural LECs. As TelePacific and Hypercube explain, the Commission's proposal would leave in place price cap regulation for the BOCs while modifying the access charge scheme for rate-of-return and rural CLECs.¹³ This system presumably would enable BOCs to realize unfettered gains in access charges while at the same time penalizing rural CLECs and rate-of-

⁹ Comments of AT&T at 1; Comments of Verizon at 1.

¹⁰ *Qwest Commc'ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, EB-07-MD-001 (Oct. 2, 2007) ("*Qwest v. Farmers*").

¹¹ See Comments of Hypercube at 3-5.

¹² See Comments of AT&T at 1; Comments of Qwest at 3-7; Comments of Sprint Nextel Corp. at 2-5; Comments of Verizon at 1.

¹³ Comments of TelePacific at 3; Comments of Hypercube at 11-12.

return rural LECs, which essentially would be uncompensated when their traffic reached certain levels.¹⁴

Adopting the proposed regulations would discriminate against carriers based on the customers that they serve. The proponents of the rules claim that the vast majority of the problem stems from carriers that offer conference calling or chat line services.¹⁵ As many commenters explain, the Commission's proposed regulations unlawfully target companies based on the classes of customers that they serve.¹⁶ Many CLECs serve conference calling providers or other high volume end users. Common carriers are required to provide service on just, reasonable, and nondiscriminatory terms and conditions.¹⁷ Given that obligation, if the Commission were to limit the access charges that a carrier could receive, then that carrier would be forced to service customers that are high volume end users without receiving appropriate compensation. Even if a carrier could identify a particular customer (or potential customer) as a high volume end user, that carrier could not lawfully cease providing service to the end user customer.

The alternative is even more troubling: if the Commission somehow were to permit CLECs and RLECs to discriminate against end users based on their business models, or perceived traffic flow, then end users would be unable to obtain service and would be unable to serve the public. Adopting the proposed regulations could have a particularly harmful effect on the Joint Commenters and other similarly situated customers. The Joint Commenters agree

¹⁴ See, e.g., Comments of TelePacific at 3.

¹⁵ See Comments of AT&T at 1; Comments of Qwest at 3-7; Comments of Sprint Nextel Corp. at 2-5; Comments of Verizon at 1.

¹⁶ See, e.g., Comments of CBeyond at 8-9 (pointing out that the Commission ignores other sources of traffic stimulation such as flat-rated, unlimited long distance bundled packages); Comments of ChaseCom at 1-2; Comments of FuturePhone at 6.

¹⁷ See 47 U.S.C. §§ 201 & 203.

wholeheartedly with the comments of Global Conference Partners that offering competitive conference services is a “win-win” situation for consumers.¹⁸ Conferencing, and other innovative and advanced services are a more efficient, cost-effective and highly versatile method for delivering custom-tailored applications to consumers. Maintaining a “hands-off” approach to burdensome regulation of such services is critical to increase consumer choice and safeguard against regulatory arbitrage by last mile transmission or telecommunications service providers. Stringent regulation could deter carriers from serving conference calling providers and other customers that stereotypically are associated with higher call volumes, which would result in fewer consumer options.

Moreover, adopting the proposed regulations would have a detrimental effect on CLECs and RLECs, including those carriers that did not knowingly engage in access stimulation.¹⁹ The proponents of the adoption of the proposed rules conspicuously fail to acknowledge the harm that the proposed regulations would have on rural carriers that experience unprecedented growth. Indeed, AT&T and Verizon solely focus on the admittedly few carriers that knowingly serve high volume users, but claim that regulations for those carriers also must be applied across the board, just in case those other carriers later decide to engage in purposeful access stimulation. If the Commission were to cap carriers from receiving access charge revenues at a certain level, then carriers serving rural areas that suddenly realized unprecedented growth, for example, due to a new plant in the area that generated so much traffic such that the CLEC had to install additional switching capability, would not be able to recoup their costs. As the comments in this proceeding make clear, there would be no way for the Commission to establish bright-line rules

¹⁸ Comments of Global Conference Partners at 17-19.

¹⁹ *See* Comments of the Rural Independent Competitive Alliance at 8-9.

to distinguish between permissible and impermissible categories of traffic,²⁰ such that any rules would sweepingly affect all CLECs and rural LECs to the detriment of their business operations.

III. Record Evidence Demonstrates That The Commission’s Tentative Conclusions Regarding Switching Costs Are Incorrect

The comments in this proceeding overwhelmingly negate the Commission’s tentative conclusion that the cost of switching varies by traffic volume. In the NPRM, without any record support, the Commission asserted that it is “well established” that the cost of switching varies by volume of traffic.²¹ The Commission leveraged this assumption to propose burdensome and unnecessary regulatory obligations on LECs.²²

Not even the proponents of additional rules—AT&T, Qwest and Verizon—provided sufficient evidence to demonstrate that the Commission’s assumptions regarding switching costs are accurate. In the Commission’s NPRM, the Commission specifically requested that carriers provide evidence to support its tentative conclusions regarding switching costs. Yet, not a single IXC—AT&T, Verizon, and Qwest among them—argues that a LEC’s costs *decrease* with the increase in traffic. Nor have these carriers provided any record evidence to support the Commission’s tentative conclusion that a LEC’s costs do not increase with a greater quantity of traffic. As one example, AT&T simply asserts, without *any record evidence*, that a LEC’s “costs

²⁰ See, e.g., Comments of Hypercube at 10 (stating, “[e]ven assuming some traffic stimulation activities should be discouraged, it will be impractical for the Commission to identify by rule categories of permissible and non-permissible traffic stimulation activities because there is no bright line dividing them”). FreeConferenceCall.com submits, however, that it can identify certain broad categories of traffic, such as conference calling traffic and chat line traffic, and that there are legitimate call volume differences among them. Even though FreeConferenceCall.com, in its experience, might be able to recognize patterns among traffic volumes, it would be exceedingly difficult—if not impossible—for the Commission to capture these distinctions and doing so would unduly penalize end users based on their business plan and carriers based on the customers that they served.

²¹ NPRM ¶ 14.

²² *Id.* ¶ 16.

do not increase materially” with greater traffic volumes.²³ Qwest and Verizon also do not provide any record support, instead simply repeat the Commission’s tentative conclusion—without providing any supporting data—or pointing to the Copeland testimony in *Qwest v. Farmers and Merchants*.²⁴ AT&T’s, Qwest’s, and Verizon’s reliance on Copeland’s testimony is misplaced. In that proceeding, the Commission did not find that a LEC’s switching costs actually decreased as traffic increased; second, the Commission acknowledged that Farmers, the LEC in that case, “failed to produce actual data regarding its costs.”²⁵ Had Farmers actually provided a cost study, the Commission’s analysis may have changed as the Commission would have been able ascertain the specific facts and circumstances leading to the alleged increased rate of return rather than relying on an opinion based upon generic and oversimplified numbers.²⁶

Moreover, a LEC’s actual cost of traffic termination is irrelevant. The Commission never has required a CLEC to provide a cost study to establish a reasonable rate, but instead has relied on market factors. Further, the Commenter’s actual cost of traffic termination is irrelevant. No Commission order has ever required a CLEC to provide a study of its own costs to establish a reasonable rate. Indeed, the Commission has expressly rejected such an effort. “Examining” a

²³ See AT&T Comments at 12. In a footnote, AT&T claims that it has “confirmed that Mr. Copeland’s Farmer’s-specific evidence...extends to all traffic pumping LECs.” *Id.* AT&T, however, does not provide any data for its statement nor does AT&T explain how it was able to “confirm” this information. Therefore, the Commission must not put any weight into AT&T’s statement.

²⁴ See Verizon Comments at 11-13; Qwest Comments at 12-14 (citing *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, Memorandum Opinion and Order, File No. EB-07-MD-001, FCC 07-175 (rel. Oct. 2, 2007)).

²⁵ NPRM ¶ 25 (citing *Qwest v. Farmers*).

²⁶ Comments of the Rural Alliance at 14-17.

CLEC's "costs as the touchstone" would be contradictory to the Commission's "reliance on market factors to dictate the appropriate rates."²⁷

IV. CONCLUSION

For the foregoing reasons, the Joint Commenters respectfully request that the Commission not adopt the proposed rules in the NPRM.

Respectfully submitted,

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²⁷ *AT&T Corp. v. Bus. Telecom., Inc.*, Memorandum Opinion and Order, 16 FCC Rcd 12312, 12321-22, ¶¶ 17-22 (2001) ("BT"); *Access Charge Reform and Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9136, ¶ 57 (2004) (examination of CLEC costs would be "contrary to the Commission's market-based approach").