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

In the Matter of	)	
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
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<u>REPLY COMMENTS OF GLOBAL CONFERENCE PARTNERS</u>

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Global Conference Partners ("GCP"), by its attorneys, files these reply comments in response to the above-captioned rulemaking proceeding[1] in which the Federal Communications Commission ("FCC" or "Commission") seeks to examine whether the current rules governing the tariffing of traffic-sensitive switched access services by local exchange carriers ("LECs") should be modified to account for marketing of services that stimulates consumer telephone calling (or "call stimulation") to conference bridges, chat line facilities, call center operations and help desk provisioning centers.

INTRODUCTION AND SUMMARY

As noted in its initial comments, GCP urges the FCC not to modify the current tariffing rule, 47 C.F.R. § 61.26, setting out the access charge rate benchmark for competitive LECs (the "CLEC Benchmark"). The rule changes promoted by the large interexchange carriers ("IXCs") in this proceeding would harm consumers by eliminating competition for conference calling services, and would have the effect of discouraging IXCs from competing in the marketplace by updating their conference calling service offerings to provide consumers with innovative services that are in demand by the public at large.

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[1] *Notice of Proposed Rulemaking*, 22 FCC Rcd. 17989 (2007) ("NPRM").

The comments filed in this proceeding demonstrate that modifications to the CLEC benchmark rule would amount to superfluous rate regulation of a competitive industry. The IXCs failed to explain why they are unable to offer services in competition with the innovative conference calling services offered by companies such as GCP, and failed to establish that call stimulation leads to a market failure. The record in this proceeding demonstrates that only a small minority of LECs engage in call stimulation activities; thus, comprehensive reform of the CLEC benchmark rule is unwarranted. Further, the FCC already has existing statutory enforcement mechanisms in place to address on a case-by-case basis the few instances where terminating access rates are suspected to be unreasonable. The record demonstrates that access stimulation and revenue sharing agreements are not inherently unreasonable; rather, they are standard business practices that provide many public interest benefits, and thus should not be prohibited by regulation. Additional CLEC regulation is not necessary, provided that ILEC rates remain reasonable. When ILEC rates are not reasonable, current FCC enforcement and investigation tools are sufficient to correct these rates. Finally, the record in this proceeding demonstrates that there is no support for the draconian regulatory proposals of AT&T and Verizon; as such, they should be rejected wholly by the Commission.

DISCUSSION

I. THE COMMENT RECORD IN THIS PROCEEDING SHOWS A LACK OF SUPPORT FOR MODIFYING THE CLEC BENCHMARK

The comments filed in this proceeding by a wide cross-section of interested parties reveals a complete lack of consensus on the question of *if and how* the FCC should address concerns of large IXCs towards access stimulation. The record, however, establishes conclusively that access stimulation activities, particularly competitive conference calling services, occur today because these services are in high demand by business, non-profit and residential consumers in the marketplace. Despite this high demand, the IXC commenters go notably mute of explanations that answer why they are unwilling or unable to offer innovative services in competition with the conferencing services provided by companies such as GCP. AT&T was not so shy about its refusal to compete, stating that "[r]ather than upgrading their facilities and making other investments to provide the best possible service to their customers … [the] IXCs are investing millions of dollars to detect and address [access stimulation] practices on a case-by-case-basis."[2]

The complaining IXCs, of course, would rather avoid the expense and uncertainty of continued head-to-head marketplace competition if they can obtain in this proceeding the FCC's adoption of rules that effectively preclude competition. While regulatory protectionism here is certainly in the IXCs' pecuniary interests, it is flatly contrary to the public interest – the consumers and businesses saving money and enjoying enhanced service features being offered by upstart conference service competitors. Indeed, it is standard FCC practice and a basic principle of regulation to refrain from imposing burdensome regulations on participants in a competitive industry.[3] Absent record evidence that the conference calling market is not

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[2] AT&T Comments, at 18.

[3] *See,* NPRM, ¶ 10 ("Competitive LECs are considered nondominant carriers and are thus subject to minimal rate regulation."); *Assessing the Communications Marketplace: a View from the FCC: Hearing Before the Committee on Commerce, Science & Transportation, U.S. Senate*, 110th Cong. (Statement of Hon. Kevin J. Martin) (Feb. 1, 2007) ("Faced with such fast-paced technological change, the Commission has tried to make decisions based on a fundamental belief that a robust, competitive marketplace, not regulation, is ultimately the greatest protector of the public interest. Competition is the best method of delivering the benefits of choice, innovation, and affordability to American consumers. Competition drives prices down and spurs providers to improve service and create new products."); *See also, In the Matter of Access Charge Reform*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶ 247 (1999) ("We strongly prefer to rely upon a marketplace solution . . . to constrain CLEC access rates."). *See also In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923, ¶ 45 (2001) (adopting CLEC benchmark

competitive, the IXCs' proposed rule changes should be rejected as superfluous regulation of a competitive industry.

II. THE IXCs OFFER NO EVIDENCE IN THE RECORD DEMONSTRATING THAT ACCESS STIMULATION LEADS TO A MARKET FAILURE

The same large IXCs hoping to convince the Commission that they bear the unrecoverable economic losses of access stimulation have *failed miserably* to present the evidence in this proceeding that would back up this outlandish claim. None of the IXC commenters (AT&T, Verizon, Qwest, Sprint Nextel, and the Independent Telephone & Telecommunications Alliance ("ITTA")) have even claimed that they are actually losing money as a result of access stimulation activities. And for good reason: FCC data show that IXCs earn an average of \$.06 to \$.07 per minute per long-distance call.[4] Thus, if one assumes the LEC charges a terminating access rate at or below NECA rates, the large IXCs are actually earning margins of several cents per minute for each call to a conference bridge that was "stimulated" by the third-party conference service and that used not a single penny of the IXCs' marketing moneys (or any other incremental IXC expenses).[5]

The fact is that access stimulation does not foist losses on the IXCs' long-distance business, nor does it burden unfairly the IXCs' long-distance customers. Rather, competitive conference services are offering consumers *unbundled conference functionality* separate from the

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access rates) ("Our orders addressing ILEC access charges have consistently stated our preference to rely on market forces as a means of reducing access charges.").

[4] *See, Trends in Telephone Service, Industry Analysis and Technology Division, Wireline Competition Bureau*, Report, Table 13.4 (Feb. 2007); *see also, Eleventh Annual CMRS Competition Report*, Report to Congress, 4 (Sept. 26, 2006).

[5] Large IXCs such as AT&T, Verizon, Qwest, and Sprint Nextel effectively pay no originating access charges on calls since their own affiliates are also the originating LECs for the vast majority of calls handled.

long-distance telecommunications service and, in so doing, they are threatening the high-margins of the large IXCs' services such as 800-number service and bundled conference services. That is, consumers are voting with their pocketbooks, and the marketplace is offering consumers an alternative to the IXCs' $.15 cent per minute traditional conference services (which bundle telecommunications and conferencing functionality) and 800-number services. The FCC should, therefore, applaud "call stimulation" that helps consumers make this substitution and allows the marketplace to wring out out-of-date and high-margin telecommunications services. Instead, the NPRM poises the FCC to do the bidding of the large IXCs, and to use regulatory authority to squelch competition to the IXCs' high-margin services.

To the extent that the concern with "call stimulation" boils down to a few incumbent LECs that have charged exorbitant terminating access charges (*e.g.*, rates above $.05 per minute), then GCP agrees that it is conceivably an unreasonable rate. As discussed below, however, those matters have been addressed by the FCC through existing regulatory mechanisms and provide no justification for a rulemaking modification of the CLEC Benchmark.

III. THE RECORD DEMONSTRATES THAT A COMPREHENSIVE RULE CHANGE WOULD BE AN INAPPROPRIATE RESPONSE TO CALL STIMULATION

The comment record in this proceeding reflects that only a small minority of LECs are engaging in call stimulation activities.[6] As such, these limited instances of concern justify, at

[6] *See*, AT&T Comments, at 1 (noting that access stimulation activities are limited to a "small minority" of LECs); *See* Id. at 5 (noting that "the vast majority of . . . ILECs and CLECs . . . have nothing to do with" access stimulation activities); *see*, Sprint Nextel Comments at iii (noting that only a "few bad actors . . . are manipulating the access charge regime to earn and retain windfall profits."); *see*, Independent Telephone & Telecommunications Alliance Comments at i ("The actions of a small minority should not portend sweeping changes that affect adversely the vast majority of carriers that adhere to the relevant regulations. . .") ("ITTA Comments"); *see,* Embarq Corp. Comments at 3 (noting that access stimulation activities have

best, a balanced and case-by-case Commission response. The limited nature of the issue certainly weighs against the imposition of new rate regulation changes on the entire competitive LEC industry. Furthermore, the FCC already has existing statutory enforcement mechanisms in place to address the few circumstances where terminating access rates are believed to be exorbitant and unreasonable. As noted in the Comments filed by CenturyTel, Inc., and the joint comments of Cbeyond, Inc., and Integra Telecom, Inc., before any tariff revision takes effect, Section 204 of the Communications Act[7] ("the Act") subjects all carrier filings to investigation by the FCC. After the tariff is in effect, Sections 207[8] or 208[9] of the Act permit the IXCs or any other interested party to file a complaint with the Commission or in federal district court to find an effective tariff unlawful.[10] The FCC is also free to investigate exiting tariff terms and conditions and to prescribe lawful terms and conditions on its own motion, pursuant to Section 205 of the Act.[11] *See*, CenturyTel Comments at 5; Cbeyond Comments at 6. As such, the proposed regulations are wholly unnecessary to enable the Commission to investigate and correct any tariff rates believed to be unjust and unreasonable.

Furthermore, the record in this proceeding demonstrates that call stimulation and revenue sharing agreements are not inherently unreasonable and should not be prohibited by regulation.[12]

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been limited to "a very small minority" of carriers and business operators) ("Embarq Comments").

[7] 47 U.S.C. § 204.

[8] 47 U.S.C. § 207.

[9] 47 U.S.C. § 208.

[10] *See*, CenturyTel, Inc. Comments, at 5; Cbeyond Inc. and Integra Telecom, Inc. Comments at 6 ("Cbeyond Comments").

[11] 47 U.S.C. § 205.

[12] Notably, the Commission carefully limited its tentative conclusion regarding revenue sharing to rate-of return incumbent LECs only. NPRM, ¶ 19 ("We tentatively conclude that a rate-of-

To the contrary, call stimulation and revenue sharing agreements are standard business practices that provide many public interest benefits, including to keep costs of using the PSTN low and affordable to consumers. Revenue sharing agreements are no more than marketing tools[13] that serve the lawful purpose of encouraging the efficient use of a carrier's networks.[14] Even Dr. Timothy Tardiff, the expert Economist cited in Qwest's Comments, concedes that it is "reasonable for carriers to attempt to increase demand for their services,"[15] and carriers have done so for decades through marketing and incurring marketing expenses. GCP agrees with the Comments of Chase Com, Fonepods, Inc., Freeconferencecall.com, and HFT Corp that "[i]t is in the best interests of rural competitors and the American public, if such carriers can generate more traffic by offering new services, applications, and use their networks more efficiently."[16]

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return carrier that shares revenue, or provides other compensation to an end user customer, or directly provides the stimulating activity, and bundles those costs with access is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard."). Thus, GCP agrees with the Commission that this tentative conclusion would have no application to competitive LECs, which are not regulated on a rate-of-return basis.

[13] *See*, Hypercube Comments, at 2 ("Every telecommunications carrier engages in traffic stimulation—another word for this practice is 'marketing.'") ("Hypercube Comments").

[14] As noted in the All American Telephone Co. Inc., Aventure Communications, Broadview Networks, Great Lakes Communications, Navigator Telecommunications, LLC, Nuvox Communications, Omnitel Communications, and XO Communications, Inc., Comments, "Telecommunications carriers are increasingly using creative techniques, which are becoming commonplace, to stimulate traffic. For example, AT&T's CMRS affiliate, AT&T Mobility entered into an exclusive arrangement with the popular television show 'American Idol' to provide a service that allows viewers to vote for their favorite contestant by text message or cell phone call." *See*, *Id*. at n.8 ("All American Comments). Similarly, as noted in the GCP and Hypercube, McLeodUSA Comments, AT&T Wireless pays Apple a portion of its monthly fees from iPhone data plan customers. *See*, GCP Comments, at 10-11; Hypercube, McLeodUSA Comments, 5-6. ("Hypercube Comments").

[15] *See*, Qwest Communications Comments, at 11 (citing affidavit of Dr Timothy Tardiff, Managing Director of the Huron Consulting Group.) ("Qwest Comments").

[16] *See*, Chase Com, Fonepods, Inc., Freeconferencecall.com, and HFT Corp., Comments, at 15 ("Chase Com Comments").

Further, GCP also agrees with the comments of Embarq that "[a]ll carriers should promote usage of their networks. Increased usage ordinarily tends to reduce costs for all users of the network, supports network investments and upgrades, and may reduce the need for high-cost universal support."[17] As noted, the focus of the Commission's inquiry should not be on whether a revenue sharing agreement in fact exists, but rather whether a carrier's rates are reasonable in light of the specific facts and circumstances facing that carrier, which entail fact-specific judgments that can only be made in an adjudicatory or investigatory context. *See*, Embarq Comments, at 8.

IV. WITH ILEC RATES AT REASONABLE RATES, THERE IS NO NEED FOR ADDITIONAL CLEC REGULATION

Even aside from the lack of record, precedential or policy support for modification of the CLEC Benchmark, there is no need to interpose additional rate regulation on competitive LECs because the FCC has already effectively reigned in the ILECs charging exorbitant access rates. As the Commission staff is well aware, the recent FCC tariff investigation of several rural ILECs following the IXCs' call-blocking incidents provided the ILECs with two means of terminating the investigation: (1) by filing "tariff language committing them to modify their local switching and transport rates in the event they experience an increase in demand above a threshold level," or (2) by rejoining the NECA pool, and adjusting their rates in conformity with NECA rates.[18] All carriers being investigated except for one chose to adopt one of these "safe harbors."[19] As such, the FCC terminated its investigation of these ILEC rates, determining the rates to be "just and reasonable, and therefore lawful."[20]

[17] *See*, Embarq Comments, at 8.

[18] See, *Investigation of Certain 2007 Annual Access Tariffs*, Order, FCC 07-210, ¶ 2 (2007).

[19] *See*, *Id*., ¶ 2.

[20] *See*, *Id*., ¶ 1.

This FCC tariff investigation illustrates that the FCC already has the enforcement tools needed to investigate and terminate carrier rates that are suspected to be unreasonable. Moreover, through this same ILEC investigation, the FCC effectively precluded excessive CLEC rates as well, without imposing new regulation on CLECs. With respect to the ILECs who chose the certification option, the effect on adjoining CLECs was that in the event that ILEC access traffic exceeded the threshold level, than the ILEC rate – and effectively the CLEC rate – would be modified to a reasonable rate. Similarly with respect to the ILECs who rejoined the NECA pool, the effect on adjoining CLECs was that they, too, could only charge the NECA rate – a rate the FCC considers reasonable.

Thus, as exemplified by this recent FCC tariff investigation, there is no need to impose additional rate regulation upon CLECs since the presumption of lawfulness of the CLEC rate depends wholly on the neighboring ILEC's rate, or the highest rate in the NECA tariff, under the rural exemption. Through the tariff investigation and formal complaint process, the ILECs' rates can be effectively kept at or below reasonable levels and, in so doing, an effective constraint ensuring reasonable CLEC rates is accomplished, as well.

V. THE RECORD IN THIS PROCEEDING SHOWS NO SUPPORT FOR DRACONIAN RATE REGULATION AND CERTIFICATION PROPOSALS OF AT&T AND VERIZON

The Commission should recognize that AT&T's efforts here to promote adoption of an over-inclusive FCC position prohibiting call stimulation or revenue sharing have been rejected by the Commission before, and should be rejected again in this proceeding. Specifically, the Commission has considered revenue sharing agreements on several occasions and has concluded that the payment of marketing fees to third-parties in order to stimulate traffic on the carrier's network is not an unjust or unreasonable practice.[21] Indeed, AT&T has previously embraced revenue sharing arrangements when they suit its needs. As noted in the Hypercube Comments, AT&T "previously argued against any '*per se* ban on reciprocal payment arrangements' between carriers and information providers because such arrangements can be 'economically efficient' such as when the remuneration from the carrier reflects the 'value' or cost of the service provided to the carrier."[22] In addition, the FCC has considered and rejected AT&T's "call stimulation" Siren Song previously in the rulemaking proceeding that led to the CLEC Benchmark regulation.[23] Since then, the CLEC Benchmark regulation has worked well and been a stable and efficient guidepost for the competitive industry. Nothing in the current record would provide any rationale to alter this rule, or for the Commission to second-guess its prior rulemaking decision not to regulate revenue sharing arrangements.

AT&T's proposal for the Commission to issue a declaratory ruling that "any LEC arrangement to pay a communications service provider to direct calls to or through a LEC's

[21] *See*, GCP Comments at 9; All American Comments, at 9-10 ("In *Jefferson*, the FCC stated very plainly, after reviewing the billing and so-called revenue sharing arrangement in that case involving a conference calling company, that 'AT&T has not met its burden of demonstrating that Jefferson's practice here is unjust and unreasonable.'"). Further, as noted in the All American Comments., the Commission declined to find that the prevalence of marking agreements paid to carriers to stimulate traffic that were based upon minutes of use or revenue levels were unjust or unreasonable, unlawful or illegitimate. *See*, Id., at 10-11 (*citing Access Charge Reform*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd. 9108, n.257 (2004) ("*Access Charge Reform Order on Reconsideration*"); *California Payphone Assoc.*, Memorandum Opinion and Order, 12 FCC Rcd. 14191, ¶¶ 1,5,35, n.87 (2004) (Commission finds lawful a 32% revenue sharing agreement for payphone usage between a municipality and the ILEC providing the phones.)).

[22] *See*, Hypercube Comments, at 5 (*citing* AT&T Comments, at 5-9, CC Docket No. 96-136 (Aug. 26, 1996)).

[23] *See*, *Access Charge Reform Order on Reconsideration*, n.257 (2004) ("We also decline to find that all revenue-sharing agreements between a competing LEC and its customers based on minutes of use or access revenues generated by the customer are an unjust and unreasonable practice in violation of 201(b) because such a finding is beyond the scope of this proceeding.").

exchange that can be expected over the life of the arrangement to produce net payments from the LEC to its communications service 'customer'"[24] is absurdly overbroad. Accordingly, it received almost no support among the commenters, even those commenters that are otherwise disposed toward regulation. Such a Commission ruling would regulate how all carriers and their holding companies use their revenues, and would render many marketing or promotional sales agreement entered into between a carrier and a third-party unlawful, even if the rates charged by the carrier would not be deemed unreasonable in a Commission compliant proceeding. Such a proposed rule would only inure to the benefit of large incumbent providers, as smaller carriers, including competitive and rural LECs, can oftentimes compete better using the marketing resources and savvy of third-party providers. As noted in the Hypercube Comments, under AT&T's proposal, "there is no practical way of identifying a set of practices that should be proscribed without limiting others that no one objects to."[25]

Furthermore, GCP urges the FCC to reject AT&T's proposal to: require CLECs to report their access traffic and access lines quarterly; certify upon filing of a tariff that they will not enter into a "traffic pumping" agreement; include in all tariffs a commitment to revise the tariff and reduce rates in the event traffic exceeds specific thresholds; and make appropriate refunds to access customers injured before the reduced rates become effective.[26] Additionally, GCP urges the Commission to reject Verizon's proposal to eliminate or substantially narrow the rural CLEC exemption.[27] Competitive carriers should be encouraged to stimulate call traffic as a means of supporting their facilities-based networks, provided that their access rates remain reasonable, as

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[24] *See*, AT&T Comments, at 32.

[25] *See*, Hpyercube Comments, at 8.

[26] *See*, AT&T Comments, at 4.

[27] *See*, Verizon Comments, at 23.

provided under the current CLEC benchmark. AT&T's proposals, however, would discourage CLECs from investing in networks and facilities, from making efficient use of their networks, and from offering competitive services in rural areas. AT&T conceded in its comments that only a "small minority" of LECs are engaging in access stimulation activities;[28] imposing onerous regulatory requirements on the entire CLEC industry, when only the rates of a few LECs are being investigated amounts to the height of over-regulation of a competitive industry.

Finally, GCP urges the Commission to reject Sprint Nextel's proposal for the Commission to "require rather than request" the competitive carriers "identified in various court and complaint proceedings as having engaged in [access stimulation] activities [to] provide information on their compensation arrangements" with their customers. *See*, Sprint Nextel Comments, at 9. This proposal is merely another attempted end-run around extant federal court orders and procedures limiting the scope of discovery in these various federal court proceedings. The FCC lacks the statutory authority to interfere with discovery in federal court proceedings, and such an action would violate basic Constitutional principles of separation-of-powers. As such, the FCC should wholly reject Sprint Nextel's proposal.

[28] *See*, AT&T Comments at 1.

CONCLUSION

For the foregoing reasons, GCP urges the Commission not to adopt additional rate regulation of competitive LECs and, instead, to promote conference services that interject price competition and innovation into the American communications marketplace.

Respectfully submitted,

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