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

In the Matter of	)	
	)	
High-Cost Universal Service Support	)	WC Docket No. 04-36
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link Up	)	WC Docket No. 03-109
	)	
Universal Service Contribution Methodology	)	WC Docket No. 06-122
	)	
Numbering Resource Optimization	)	CC Docket No. 99-200
	)	
Implementation of the Local Competition	)	
Provisions in the Telecommunications Act of 1996	)	CC Docket No. 96-98
	)	
Developing a Unified Intercarrier	)	
Compensation Regime	)	CC Docket No. 01-92
	)	
Intercarrier Compensation for ISP-Bound Traffic	)	CC Docket No. 99-68
	)	
IP-Enabled Services	)	WC Docket No. 04-36
	)	
Establishing Just and Reasonable Rates	)	
for Local Exchange Carriers	)	WC Docket No. 07-135

REPLY COMMENTS OF
HYPERCUBE TELECOM, LLC

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SUMMARY

Hypercube's initial comments proceeded from the premise that while reform is important, *sustainable* reform is critical. Although certain policy objectives might be desirable, the Commission could do more harm than good if it undertook results-oriented reform without a solid statutory and jurisdictional foundation. It appears, however, that other commenters are less concerned with the legal support or the economic or policy rationales for their positions, and would rather the Commission take action to achieve specific outcomes regardless of (or without any reference to) the legal or policy bases for such outcomes. As discussed further herein, the Commission should decline to pursue a path of reform that is both internally inconsistent and unlikely to survive judicial scrutiny.

Similarly, the Commission should proceed with caution in considering how to address concerns with respect to so-called "traffic stimulation." Several commenters urge the Commission to adopt a vague and broad-brush approach that would not only resolve the narrow problem that has been identified but also would prohibit legitimate business practices throughout the industry. To avoid such overreaching and to minimize the possibility of unintended consequences, the Commission should reject these proposals and instead take a targeted approach to resolving any "traffic stimulation" concerns.

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REPLY COMMENTS OF
HYPERCUBE TELECOM, LLC

Hypercube Telecom, LLC ("Hypercube") hereby submits its Reply Comments in response to comments filed regarding the Further Notice of Proposed Rulemaking (the "NPRM") released by the Federal Communications Commission (the "Commission") on November 5, 2008 in the above-captioned proceedings.

I. THOSE IN FAVOR OF ELIMINATING, REDUCING, OR REFORMING ORIGINATING *INTRASTATE* ACCESS CHARGES PROVIDE NO LEGAL BASIS FOR DOING SO.

Only a handful of commenters express support for eliminating, reducing, or reforming originating access charges -- and of these handful of filers, only two discuss in passing the legal basis for such reform. For example, iBasis, Inc. ("iBasis") claims in a footnote that the Commission's reciprocal compensation rule bars originating compensation.[1] But iBasis fails to provide any discussion of what that rule means, how and why it was developed, or why it should now be extended to traffic to which it has never applied before. By contrast, Hypercube devoted substantial discussion in its initial comments to why such an originating compensation prohibition makes sense in the context of locally-dialed traffic under the Calling-Party-Network-Pays ("CPNP") principles that underpin the Commission's intercarrier compensation framework, but would be flatly contrary to those same principles as applied to toll calls (either interstate *or* intrastate).[2]

Similarly, the Texas Statewide Telephone Cooperative, Inc. ("TSTCI") makes the cursory statement that because the Commission would subject all traffic "to the 251(b)(5) structure," it is appropriate to reduce and ultimately eliminate originating access charges.[3] This one-sentence "analysis," however, is sorely lacking in several respects. For example, it presumes (without any explanation or citation) that just because the Commission has determined what *terminating* compensation should apply under a statute that refers to transport *and*

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[1] iBasis Comments at n. 6.

[2] Hypercube Comments at 6-8.

[3] TSTCI Comments at 19.

termination, the same rules can just as easily be applied to *originating* compensation.[4] Moreover, TSTCI's position regarding elimination of originating access charges appears to come with a significant caveat -- later in its comments, TSTCI expresses concern about being required to transport calls to IXC networks without compensation, and urges greater protection for rural carriers with respect to such network interconnection obligations.[5] Thus, like others described later in these comments,[6] it appears that elimination of originating access charges is acceptable to TSTCI only provided that it is made whole either through relief of transport obligations or receipt of compensation in some other manner. Finally, as TSTCI itself recognizes elsewhere in its comments,[7] the jurisdictional "fence" established by Section 2(b) of the Communications Act of 1934, as amended (the "Act"),[8] represents a high hurdle that cannot be overcome by citing baldly to Section 251(b)(5).[9] It is unclear how TSTCI can possibly recommend elimination of *all* originating access charges in light of its own contradictory acknowledgment of Section 2(b)'s strict jurisdictional limitations several pages earlier.

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[4] *Compare with* Hypercube Comments at 13-14; Comments of tw telecom inc., One Communications Corp., and Cbeyond, Inc. (collectively, "tw et al.") at 19 (discussing how the transport and termination provisions of Sections 251 and 252 do not apply to, and thus do not confer legal authority with respect to, originating access charges and services); *see also* Comments of the National Telecommunications Cooperative Association ("NTCA") at 22 (discussing how the proposal to eliminate originating access arises "[w]ithout offering any rationale").

[5] TSTCI Comments at 32.

[6] *See* footnote 27, *infra*.

[7] TSTCI Comments at 3.

[8] 47 U.S.C. § 152(b).

[9] *See* Hypercube Comments at 11-14 (discussing the "jurisdictional fence" established by Section 2(b) and confirmed by the United States Supreme Court in *Louisiana v. Pub. Serv. Comm'n*, 476 U.S. 355 (1986)) and tw et al. Comments at 19 (stating that nothing in the Act provides the Commission with authority over intrastate originating access services).

Indeed, those few commenters who favor reducing and/or eliminating originating access make no effort to tackle the difficult legal and jurisdictional concerns associated with reforming originating *intrastate* access charges.[10] Instead, these commenters express normative judgments about why unification of intercarrier compensation is a good idea and raise vague concerns about the "burdens" they will suffer if originating access charges are not eliminated. For example, "for iBasis, originating access charges are as burdensome as terminating charges."[11] Likewise, Global Crossing raises concerns about having to maintain "dual originating and terminating access networks."[12] The purported level of burden "for iBasis," however, hardly constitutes good reason to make a significant and legally unsupportable shift in policy, nor is it clear (and is not explained) how continuation of originating access charges would burden Global Crossing or any other interexchange carrier ("IXC") -- all of whom would still have to maintain originating and terminating access networks to have their toll calls routed to and from their networks even if compensation were reformed.[13]

There is good reason for the lack of meaningful legal argument in these pro-reform/elimination comments -- as demonstrated by Hypercube in its initial comments, there is simply no legal or jurisdictional basis for such actions. Section 2(b) has been characterized as a

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[10] *See, e.g.*, Comments of Global Crossing North America, Inc. ("Global Crossing") at 11; Comments of the Coalition for Rational Universal Service and Intercarrier Compensation Reform (Intercarrier Compensation Comments) (the "Coalition") at 8.

[11] iBasis Comments at 3.

[12] Global Crossing Comments at 12.

[13] As far as Hypercube is aware, nothing in the Commission's proposed intercarrier compensation reforms would eliminate the equal access obligations that currently apply under federal law. Moreover, IXCs will presumably still desire to have LECs deliver their toll-free traffic to them. *See* NTCA Comments at 22; Comments of Sage Telecom, Inc. at 14. Thus, for the foreseeable future, IXCs such as Global Crossing will still expect and demand originating access network services from LECs, and LECs are entitled to payment for serving that demand.

"hog tight, horse high, and bull strong" jurisdictional fence,[14] and it prevents the Commission from preempting state law or engaging in the regulation of purely intrastate telecommunications matters in the absence of a clear Congressional mandate.[15] Moreover, even assuming *arguendo* that Sections 251 and 252 could be read to provide the Commission with jurisdiction to regulate intrastate access,[16] neither of these statutory provisions applies to *origination* and there is certainly no authority under either section for the Commission to compel a rate of zero,[17] which is what would result if originating access charges were eliminated by regulatory fiat. Given the unmistakable divide between regulation of intrastate and interstate affairs under Title II of the Act, and given that not a single commenter has provided *any* legal justification to overcome this jurisdictional divide or any of the other legal impediments with respect to elimination, regulation, or reform of originating intrastate access charges, the Commission must decline to take any such action.

II. THE COMMENTS DEMONSTRATE THAT THERE IS NO ECONOMIC OR POLICY JUSTIFICATION FOR ELIMINATING OR REFORMING EITHER ORIGINATING *INTERSTATE* OR ORIGINATING *INTRASTATE* ACCESS CHARGES.

As Hypercube explained in its initial comments, the imposition of originating access charges is consistent with the CPNP principles that form the foundation of the intercarrier

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[14] *Iowa Utils Bd. v. FCC*, 120 F.3d 753, 800 (8th Cir. 1997).

[15] *See, e.g., Louisiana Pub. Serv. Comm'n.*, 476 U.S. at 374-76.

[16] Again, this is a point that no commenter specifically addressed with respect to originating access, and is a point that Hypercube would not concede. *See, e.g.*, Comments of CityNet, LLC, et al. (collectively, "CityNet et al.") at 2-8 (discussing the reasons that Sections 251 and 252 do not provide the Commission with authority to issue regulations with respect to intrastate access traffic).

[17] *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 385 (1999) (holding that the Commission's authority under Section 252(d) is limited to establishment of a pricing methodology).

compensation framework.[18] Even if terminating *rates* were reformed as the Commission proposes, the underlying intercarrier compensation structure (rightfully) still presumes that the carrier receiving compensation from the user placing the call will pay other carriers whose networks are used to complete that call.[19] Eliminating originating access charges, by contrast, would be inconsistent with CPNP principles, as this would result in a third-party IXC paying one carrier who helps that IXC complete a toll call for its customer (the terminating local exchange carrier ("LEC")) while allowing the same IXC a free ride on the network of another carrier (the originating LEC) who provides similar, if not identical, support in the context of that call.[20]

Not a single commenter who supported elimination or reduction of originating access charges makes any mention of the CPNP framework. As with the dearth of legal authority to support their arguments, their silence in this regard is telling. Instead, these commenters focus on the mere aesthetics of payment flows -- the overly simplistic notion that intercarrier compensation cannot be considered "unified" if a local call would require payment of only a terminating charge while a toll call would require payment of both originating and terminating charges.[21] But this of course ignores the application of CPNP principles; as Hypercube has

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[18] Hypercube Comments at 4-10.

[19] The reciprocal compensation provisions of the Act expressly contemplate a CPNP framework by requiring that compensation be based upon the "additional costs" of transport and termination caused by a call that is placed by another carrier's customer. *See* 47 U.S.C. § 252(d)(2)(A)(ii).

[20] *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4694 (2005), at ¶ 17; *see also* Patrick DeGraba, *Bill and Keep at the Central Office as the Efficient Interconnection Regime*, OPP Working Paper No. 33, Federal Communications Commission, Office of Plans and Policy (2000) at ¶ 14; Charles B. Goldfarb, *Intercarrier Compensation: One Component of Telecom Reform*, Congressional Research Service Report for Congress, dated April 28, 2005 ("*CRS Report*"), at 16-17. In fact, originating LECs may do more than terminating LECs in the context of any given toll call depending upon network configurations and the types of calls involved (e.g., SMS database look-ups for toll-free traffic).

[21] *See, e.g.*, Coalition Comments at 8 (". . . in the interest of rate unification, the reciprocal compensation structure of sent-paid termination charges should be the surviving one."); TSTCI Comments at 19 ("We believe that originating access should be transitioned at the same time and in the same manner as the rates for terminating traffic.").

explained in its initial comments (at pages 7 through 9), a truly "unified" intercarrier compensation framework is one that *uniformly* applies such principles. Indeed, it would be arbitrary and capricious to adopt an intercarrier compensation system premised upon a single economic theory (*i.e.*, the CPNP principles) that applies under a single statutory framework (*i.e.*, Sections 251 and 252) to all kinds of carriers and traffic patterns except for one -- originating access charges.[22] Just as they provide no basis for overcoming serious legal and jurisdictional concerns, unsubstantiated cries of "burden" and "arbitrage,"[23] and blanket assertions that originating access charges are "outdated and artificial,"[24] do not provide adequate or even reasonable policy grounds for selective departure from the economic theory that otherwise underpins the Commission's intercarrier compensation structure.

Perhaps the best indication of the results-oriented posture of such comments is the recommendation that originating access charges be reduced at the same pace as terminating access charges, followed by outright elimination of originating access charges at the end of the transition period.[25] On the one hand, such comments express concern about delaying action with respect to originating access charges because "there is nothing in the record to justify the

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[22] Some suggest splitting the hair further by subdividing originating access charges based upon regulatory classifications and the structure of certain retail service offerings. Although Hypercube concurs with the comments of the Coalition that "800-type calls" should continue to be eligible for originating compensation, the Coalition bases this position solely on the regulatory classification (as "terminating") of the access services provided at the "open" end of such calls. Coalition Comments at 9. This is certainly one valid basis -- but not the only basis -- for retaining compensation for the origination of "800-type calls." As explained above and in Hypercube's initial comments, the consistent application of the CPNP economic underpinnings of intercarrier compensation require that originating access charges should continue to apply to *all* long distance (both 1+ and "800-type") calls. This is true regardless of how the Commission chooses to classify the type of toll service that the IXC provides or the access services provided by a LEC to an IXC.

[23] *See* iBasis Comments at 3.

[24] *See* Global Crossing Comments at 11.

[25] *See, e.g.,* TSTCI Comments at 19; iBasis Comments at 4; Global Crossing Comments at 11.

disparate treatment of originating access."[26] Yet these commenters contradict themselves by proposing precisely such disparate treatment *at the end of the transition period* -- when originating access charges would be eliminated altogether. Such recommendations confirm that the goal is neither regulatory or economic integrity nor logical consistency, but rather the elimination of originating access charges as quickly as possible by any means possible.[27]

Finally, more attention to the economic and policy implications of reforming or eliminating originating access is required. Indeed, the Commission cannot justify monumental reform of originating access compensation based upon a few lines in a larger NPRM addressing many other issues, together with the cursory cheers of a handful of commenters whose transparent objective is minimizing their own obligations to pay for use of other providers' networks. In the past, when the Commission has sought to reform access charges, it has done so through a careful, focused, and deliberate process.[28] For example, the Commission resolved a number of complaint cases and considered evidence arising from other proceedings and petitions

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[26] iBasis Comments at 4.

[27] Other commenters appear not to oppose reform or elimination of originating access as long as they are made whole in the process. *See* Comments of the Organization for the Promotion and Advancement of Small Telecommunications Companies and the Western Telecommunications Alliance (collectively, "OPASTCO") at 20-21 (supporting the alternative proposal to reduce and eliminate originating access charges only if rate-of-return carriers receive supplemental Universal Service Fund compensation and are no longer responsible for any transport beyond their meet-point locations); Comments of the National Exchange Carrier Association at 26 ("NECA supports unifying interstate and intrastate originating and terminating access charges, while providing alternative sources of revenue recovery for affected [incumbent LECs]."); TSTCI Comments at 32. To these commenters, complex questions surrounding the legal or jurisdictional authority or economic or policy basis for reform or elimination of originating access charges are of secondary importance to whether their own revenue streams are preserved. Preservation of revenue streams should not be a factor in determining whether or how to reform originating access, particularly when only certain carriers would be entitled to such preservation.

[28] *See, e.g.*, *Access Charge Reform*, First Report and Order, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997); *Access Charge Reform*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*Seventh Report and Order*"); *Access Charge Reform*, CC Docket No. 96-262, Eighth Report and Order, 19 FCC Rcd 9108 (2004) ("*Eighth Report and Order*").

before concluding in the *Seventh Report and Order* that a further regulatory response was necessary to ensure that interstate access charges would be just and reasonable going forward.[29]

By contrast, here there is no indication of any "failure" in the originating access market or assertion that specific rates (or the very structure of originating access itself) would be unjust or unreasonable. Instead, parties urge reform and elimination of originating access charges based upon the simplistic notion that such action serves the objective of "unifying" intercarrier compensation. To exercise properly its authority under Sections 201 and 205 to regulate originating interstate access services, the Commission must consider and determine (as it did in the *Seventh Report and Order*) whether the rates for such services are just and reasonable; it cannot reduce or eliminate these rates by regulatory fiat and without some well-grounded tether to the statutory basis of its authority.[30] Moreover, as several commenters have noted, the implications of reducing or eliminating originating access charges could be quite severe and should not be taken lightly.[31] Thus, even if the Commission is determined to reform originating access charges notwithstanding the statutory, jurisdictional, economic, and policy hurdles, the current record provides no basis to do so, and more thorough and careful consideration is required before such action can be taken.

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[29] *Seventh Report and Order*, 16 FCC Rcd at 9926-9930, ¶¶ 10-20, 9935-9936, ¶¶ 31-34, and 9940, ¶ 44.

[30] Of course, as discussed above and in HyperCube's initial comments, neither of Sections 201 nor 205 provides the Commission with any authority to regulate or prescribe rates for originating *intrastate* access services.

[31] *See, e.g.,* Comments of the Missouri Public Service Commission at 6 (expressing concern about the financial impact of reducing or eliminating originating access charges at the same time the Commission would also mandate substantial terminating access charge reductions); OPASTCO Comments at 20-21 (claiming that make-whole mechanisms are necessary to protect carriers from the impact of reductions in originating and terminating access charges).

III. ANY RULES INTENDED TO ADDRESS TRAFFIC STIMULATION MUST BE NARROWLY TAILORED.

The Commission should target any rules to address traffic stimulation toward abusive conduct and should ensure that such rules do not have unintended consequences on legitimate business practices throughout the industry. For example, narrow "trigger and certification" safeguards such as those proposed by Sprint Nextel would appropriately deter unreasonable "traffic stimulation" by focusing on those competitive LECs ("CLECs") who "base their rates on either the rural benchmark or the rural exemption."[32] By contrast, other carriers, such as AT&T and Qwest, tout the specter of "traffic pumping" to justify proposals that would go far beyond addressing abusive conduct and prohibit legitimate competitive business practices such as revenue sharing.[33] These proposals are at once unnecessary, ambiguous, and overreaching, and should therefore be rejected.

For example, Qwest argues that the sharing of access revenues by a LEC with a "business partner" on the basis of traffic volumes should be "*prima facie* evidence of an unreasonable practice under Section 201(b) . . . ."[34] Although this proposal might capture so-called "traffic pumping" schemes in which some rural LECs may engage, it would also broadly and inappropriately sweep up the legitimate business arrangements of all LECs, including "innocent CLECs" -- notwithstanding Qwest's own express prior admonition that any rules adopted should *not* reach so far.[35] AT&T (joined by the Rural Independent Competitive Alliance) takes a similar

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[32] Comments of Sprint Nextel Corporation at 8, n.8.

[33] Comments of AT&T Inc. ("AT&T") at 32-34; Comments of Qwest Communications International, Inc. ("Qwest") at 11-14.

[34] Qwest Comments at 13.

[35] *See Ex Parte* Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, FCC, Docket No. 07-135, Attachment, at 1-2 (filed May 21,

tack, proposing a "Revised Rule" that appears to be somewhat narrowly tailored to address abusive traffic stimulation -- but then adding a proposed "Separate Revenue Sharing Provision" that would, like Qwest's proposal, have the overly broad effect of prohibiting all revenue sharing arrangements relating to terminating access charges.[36]

There is simply no basis to go beyond addressing the perceived problem of *rural* LECs (incumbents and competitors) who might manipulate lower traffic and higher cost assumptions that were previously used to set the access rates of rural incumbent LECs.[37] In effect, AT&T and Qwest propose to take a regulatory "sledgehammer' to an arbitrage "fly" -- identifying a concern arising in limited areas with respect to the particular way in which *rural* LEC rates are set and converting that into a broad nationwide prohibition on conduct by *all* LECs that has nothing to do with the problem at hand. Indeed, other than blanket assertions that such aggressive steps are needed as a "preemptive" measure,[38] AT&T and Qwest provide no rationale for taking such a broad brush to such an isolated concern, and there is no evidence in the record to support modifying the rules for CLECs who do not avail themselves of the rural LEC rate exemption.[39]

The Commission has previously found on several occasions that revenue sharing or commission payments are not "per se" unlawful arrangements.[40] Hypercube and others have

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2008) (advocating a traffic stimulation solution that addresses the charges of rural LECs and avoids any impact on "innocent" competitors).

[36] AT&T Comments at 33 (citing *Ex Parte* Letter from Brian Benison, Director – Federal Regulatory, AT&T Services, Inc. and Steve Kraskin, Legal Counsel, Rural Independent Competitive Alliance, to Marlene H. Dortch, Secretary, FCC, Docket Nos. 01-92 & 07-135 (filed Nov. 25, 2008)).

[37] Qwest Comments at 11-12.

[38] *See* AT&T Comments at 33.

[39] *See Ex Parte* Letter from William A. Haas, Vice President Regulatory & Public Policy, PAETEC, to Marlene H. Dortch, Secretary, FCC, Docket No. 07-135 (filed June 12, 2008) at 1.

[40] *See, e.g., AT&T Corp. v. Jefferson Tel. Co.*, File No. E-97-07, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001); *see also Eighth Report and Order*, 19 FCC Rcd at 9142-44, ¶¶ 70-71.

previously explained how revenue sharing is a common and valid business practice in the telecommunications market.[41] Yet the AT&T and Qwest proposals, if adopted, would shut down such existing business arrangements and impair, if not fatally harm, the legitimate operations of carriers who depend upon them to compete effectively with larger incumbents. Indeed, as noted in Hypercube's initial comments, depending upon how "revenue sharing" is defined and the use of terms such as "net payor" or "business partner," larger carriers such as AT&T and Qwest may very well be able to skirt new restrictions through the use of different corporate affiliates, while smaller carriers who do not maintain such diverse corporate operations would be caught up by such prohibitions.[42] For example, Qwest's suggested definition of "business partner" is vague, raising questions of how corporate affiliates may qualify as such partners and how "net compensation" would be (or could be) tracked among affiliates.[43] Hypercube has previously explained how the ambiguity of AT&T's "net payor" terminology gives rise to similar concerns.[44]

In short, the AT&T and Qwest proposals are unnecessary to address the root cause of the problem at hand, and the overly broad and ambiguous nature of these proposals is likely only to stymie legitimate business practices and engender more industry disputes -- which the Commission will undoubtedly be called upon to resolve. AT&T and Qwest have provided no basis to justify such a broad application of any new rules or prohibitions. Indeed, even in a recent filing supporting AT&T's proposal, Qwest continues to refer to this as a problem arising

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41 *See, e.g.,* Hypercube Comments at 15-16; CityNet et al. Comments at 37-39.

42 Hypercube Comments at 16.

43 *See* Qwest Comments at 13.

44 *See* Hypercube Comments at 16.

from "access stimulation by *rural* CLECs."[45] Thus, if it believes any action is warranted, the Commission should focus on corrective action specifically with respect to abusive "traffic pumping" by rural LECs who take advantage of loopholes in the regulatory rate-making process, and it should decline to take any broader action with respect to revenue sharing arrangements that could have unintended consequences across the telecommunications industry.

IV. CONCLUSION

The comments filed in this proceeding confirm that there is no legal basis or economic or policy justification for the elimination, reduction, or reform of originating access charges. Furthermore, the proposals of AT&T and Qwest with respect to so-called "traffic stimulation" are anticompetitive, overly broad, ambiguous, and unnecessary to address what is by all accounts a relatively isolated problem involving rural carriers in certain serving areas. Thus, if it believes that any action is warranted with respect to traffic stimulation, the Commission should adopt targeted rules that address the specific concerns at hand, and should decline to take broader action that could have unintended negative consequences on the legitimate business practices of carriers throughout the industry.

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[45] *Ex Parte* Letter from Melissa E. Newman, Qwest, to Marlene H. Dortch, dated Dec. 4, 2008, at 2 (emphasis added).

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Respectfully submitted,

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