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January 14, 2009

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 Twelfth Street S.W.
Washington, D.C. 20554

RE: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135

Dear Ms. Dortch:

The Commission should act now to address "traffic pumping" and the harm that it is inflicting on the industry and on the public, regardless of whether the Commission adopts comprehensive intercarrier compensation reform. Recent comments in the intercarrier compensation and traffic pumping dockets,[1] as well as the joint proposal submitted by AT&T and the Rural Independent Competitive Alliance (RICA),[2] demonstrate that there is substantial agreement in the industry as to remedies that the Commission should adopt to stop this arbitrage scheme.

Indeed, the AT&T/RICA Proposal provides a useful starting point toward crafting an appropriate solution for traffic pumping. Its centerpiece – and the remedy on which there is the broadest agreement – is a proposed declaratory ruling confirming that the traffic pumping schemes proliferating in the industry today are unjust and unreasonable in violation of § 201(b). AT&T and RICA also propose the additional step of amending Rule 61.26, the CLEC "benchmarking" rule, to prevent CLECs exceeding certain traffic volumes from benchmarking to National Exchange Carrier Association (NECA) rates or

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[1] *See generally* AT&T Comments, CC Docket No. 01-92 at 32-34 (Nov. 26, 2008) ("AT&T ICC Comments"); Qwest Comments, CC Docket No. 01-92 at 12-13 (Nov. 26, 2008) ("Qwest ICC Comments"); Sprint Comments, CC Docket No. 01-92 at 7-9 (Nov. 26, 2008) ("Sprint ICC Comments"); Verizon Comments, CC Docket No. 01-92 at 67-70 (Nov. 26, 2008) ("Verizon ICC Comments"). *See also* AT&T Comments, WC Docket No. 07-135 at 6-19 (Dec. 17, 2007); Qwest Comments, WC Docket No. 07-135 at 3-10 and Exh. B ¶¶ 6-9 (Dec. 17, 2007) ("Qwest Traffic Pumping Comments"); Sprint Comments, WC Docket No. 07-135 at 2-13 (Dec. 17, 2007) ("Sprint Traffic Pumping Comments"); Verizon Comments, WC Docket 07-135 at 21-28 (Dec. 17, 2007) ("Verizon Traffic Pumping Comments"); Letter from Melissa Newman, Qwest, to Marlene Dortch, FCC, with attachment, WC Docket No. 07-135 (Jan. 6, 2009) ("Qwest Letter").

[2] *See* Letter from Brian Benison, AT&T, and Steve Kraskin, RICA, to Marlene Dortch, FCC, with attachment, CC Docket No. 01-92, WC Docket No. 07-135 (Nov. 25, 2008) ("AT&T/RICA Proposal").

individual rural ILEC rates. Although amending Rule 61.26 is an appropriate response to prevent traffic pumping by CLECs, the AT&T/RICA Proposal needs modification to ensure that traffic pumpers do not continue to abuse the Commission's tariffing rules.

First, several carriers, including Verizon, have already agreed with AT&T and RICA that the Commission should issue a declaratory ruling confirming that when a LEC pays or arranges to pay another entity — a conference-calling company, a chat line, an international-calling service, or the like — to be its "customer" as part of a scheme to increase access revenues, it engages in an unreasonable practice in violation of § 201(b).[3] This is the logical application of the conclusions that the Commission and the Wireline Competition Bureau have already reached. For example, in the *Access Stimulation NPRM*, the Commission suggested that a rate-of-return ILEC violates § 201(b) when it "shares revenue, or provides other compensation to an end user customer . . . and bundles those costs with access."[4] Because rate-of-return ILECs' rates are based on their costs, an ILEC that bundles with access the cost of compensating customers forces interexchange carriers to pay "for the costs of the stimulating service through the higher access charges assessed by the exchange carrier."[5] This is unreasonable because those costs are "primarily for the benefit of the carrier" and do not provide any "customer benefits."[6] This is particularly true when the scheme involves payments from the LEC to its purported customer — in the form of a revenue-sharing agreement, a commission agreement, or any other arrangement with similar effect — that cause net revenue to flow from the LEC to the customer for each additional minute of traffic generated.

The Wireline Competition Bureau made a similar observation in June 2007 when it suspended certain ILECs' switched-access tariffs and concluded that their traffic-pumping practices raised "substantial questions" about whether those ILECs' tariffs were lawful.[7] The Bureau designated specific issues for that investigation, including whether the ILECs could include "the costs of any direct payments, sharing of revenues, or other forms of compensation to the provider of an access stimulating service" in their rates.[8] Just as the Commission recognized in the *Access Stimulation NPRM*, the Bureau noted that a carrier's inclusion of these costs in its access charges forces interexchange carriers to "pay[]

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[3] *See* AT&T/RICA Proposal at 3; Qwest Letter, attachment at 2.

[4] *Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, ¶ 19 (2007) ("*Access Stimulation NPRM*").

[5] *Id.* ¶ 18.

[6] *Id.* ¶ 19 n.47 (citing orders applying "the 'used and useful' doctrine and its associated prudent expenditure standard" to determine whether costs can permissibly be used to calculate a carrier's rates).

[7] *July 1, 2007 Annual Access Charge Tariff Filings*, Order, 22 FCC Rcd 11619, ¶ 7 (2007).

[8] *Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 22 FCC Rcd 16109, ¶ 1 (2007) ("*Designation Order*"); *see also id.* ¶¶ 13-14.

for the costs of the access stimulating service through . . . higher access charges."[9] The Commission should confirm these conclusions and issue a declaratory ruling that puts an end to traffic pumping arbitrage schemes, once and for all.

Moreover, the declaratory ruling proposed by AT&T and RICA is narrowly tailored to address the injury caused by traffic pumping schemes and will not burden legitimate business arrangements. Specifically, AT&T and RICA propose that the Commission confirm that it is "an unjust and unreasonable practice for any LEC to assess terminating interstate switched access charges on traffic that is subject to a revenue sharing arrangement."[10] Notably, the ruling proposed by AT&T and RICA would not prohibit a LEC from entering into a revenue sharing agreement, and thus would not prevent LECs from stimulating demand. The ruling would only prevent the LEC from forcing interexchange carriers to "pay[ ] for the costs of the access stimulating service"[11] by prohibiting the LEC from billing switched access charges on the stimulated traffic. AT&T and RICA also limit their proposed ruling to "revenue sharing arrangements" between a LEC and a "calling provider," thereby targeting arrangements with the chat lines, conference services, and international calling services that have fueled the traffic pumping scheme. Finally, the AT&T/RICA Proposal is also limited to arrangements that result in net payments *from* the LEC *to* the calling provider – thereby targeting arrangements where the LEC pays the calling provider to be its customer. These limitations ensure that the AT&T/RICA Proposal is a narrowly targeted remedy for traffic pumping and would not unduly burden carriers' other business arrangements.

Second, the AT&T/RICA Proposal includes amendments to the rural CLEC provisions of Rule 61.26, the CLEC "benchmarking" rules, in a further effort to stop traffic pumping schemes.[12] If the Commission decides to amend the CLEC "benchmarking" rules, the Commission should make certain modifications to AT&T and RICA's proposed amendments to ensure that any rule changes provide a meaningful remedy for traffic pumping. Specifically, the Commission should make clear that any

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[9] *Id.* ¶ 13. The Commission subsequently terminated the investigation because all of the ILECs involved had either rejoined the NECA pool or adopted specific safe-harbor "tariff language that committed them to modify their local switching and transport tariff rates in the event they experience an increase in demand above a threshold level." *Investigation of Certain 2007 Annual Access Tariffs*, Order, 22 FCC Rcd 21261, ¶ 2 (2007) ("*Investigation Order*").

[10] AT&T/RICA Proposal at 3; *see also* Qwest ICC Comments at 13 (proposing a substantively similar ruling that it is an unreasonable practice for a LEC "to bill tariffed access charges . . . for traffic that is essentially delivered to the LEC's own business partner.").

[11] *Designation Order* ¶ 13. The Commission subsequently terminated the investigation because all of the ILECs involved had either rejoined the NECA pool or adopted specific safe-harbor "tariff language that committed them to modify their local switching and transport tariff rates in the event they experience an increase in demand above a threshold level." *Investigation Order* ¶ 2.

[12] *See* AT&T/RICA Proposal at 3, § 61.26(d).

volume threshold incorporated into Rule 61.26 does not operate as a "safe harbor" for traffic pumping under that volume level; should adopt a lower volume threshold than proposed by AT&T and RICA; and should include a quarterly certification requirement for CLECs invoking the rural exemption.

Under the current benchmarking rule, a CLEC is generally required to tariff its access rates at or below the rate of the competing ILEC in the relevant study area, (s*ee* § 61.26). The overwhelming majority of traffic pumping CLECs, however, charge a higher rate by invoking the "rural exemption" in Rule 61.26(e) and "benchmarking" to NECA's highest access rate. The rural exemption was based on the assumption that CLECs operating exclusively in rural areas would have cost and demand levels that would justify access rates comparable to the rates of rural ILECs.[13] Other traffic pumping CLECs are located near, and therefore "benchmark" to, a small rural ILEC with high tariffed access rates based on the ILEC's low historical demand. In both cases, because of traffic pumping activities, a traffic pumping CLEC's demand far exceeds that of the ILEC or NECA carriers whose rates it mirrors, making the CLEC's rate unreasonable. [14]

Verizon and others have supported amending Rule 61.26 to include traffic volume limitations as part of the solution for traffic pumping to prohibit CLECs exceeding certain traffic volumes from benchmarking either to the NECA rates or to individual rural ILEC rates.[15] The new rule language proposed by AT&T and RICA provides a useful template for incorporating such a threshold into the rule. If the Commission decides to add a volume limitation in the benchmarking rules, however, it should modify the AT&T/RICA Proposal to ensure that the rule change provides a meaningful remedy.

For example, if the Commission decides to amend Rule 61.26 to include a volume limitation, it should ensure that the rule change is not misinterpreted as an invitation to further abuse by traffic pumpers. Specifically, the Commission should make clear that the new volume threshold is not a "safe harbor" under which carriers may lawfully engage in traffic pumping. Rather, the Commission should make clear that the declaratory ruling discussed above – which will confirm that billing access charges for traffic that is subject to revenue-sharing agreements is an unjust and unreasonable practice under § 201(b) – applies to *all* carriers, including those CLECs with traffic volumes lower than the volume limitation incorporated into the benchmarking rule. As such, a carrier may bring a complaint action against *any* carrier suspected of traffic pumping, even if the suspected traffic pumper's traffic volumes are below the threshold identified in the rule. And, although CLECs above the volume threshold will automatically be barred from benchmarking to rural rates, CLECs with volume levels below the threshold may also be barred from charging rural access rates if they engage in traffic pumping activity.

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[13] *See Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, ¶ 51 (2001).

[14] *See also* Verizon Traffic Pumping Comments at 5, 11.

[15] *See* Verizon Traffic Pumping Comments at 25-28; Sprint Traffic Pumping Comments at 18-19.

In addition, the AT&T/RICA Proposal should be amended to include a lower volume limitation; the proposed limit of 1500 interstate access minutes of use per working line per month is too high to provide meaningful relief. Any new traffic volume threshold should ensure that the rural exemption, as well as benchmarking to a competing rural ILEC, applies only when the CLEC's demand level is roughly in line with the demand of rural carriers whose rates the CLEC mirrors. The Commission should therefore look to the actual interstate access demand of rural ILECs that are not engaged in traffic pumping to determine what a reasonable volume limitation should be. Verizon has proposed setting the threshold at 400 interstate access minutes of use per working line per month; 95% of the carriers in the NECA pool would fall below this threshold.[16] Sprint has also proposed using rural carriers' actual demand to determine the appropriate threshold. Under Sprint's proposal, the threshold would be set at NECA carriers' average monthly interstate access minutes of use per line per month, plus 25%. In 2006, NECA carriers averaged approximately 220 interstate access minutes of use per working line per month.[17] Either of these proposed thresholds would ensure that rural rates (either NECA rates or competing rural ILEC rates) can be invoked only by CLECs with demand levels that are in line with the rural ILECs on which those rates are based.

By contrast, AT&T and RICA's proposed threshold of 1500 interstate access minutes of use per working line per month is almost *four* times higher than the demand of 95% of NECA members, and almost *seven* times higher than the average for NECA members. The Commission should not establish a volume limitation that would still permit a CLEC to benchmark to rural rates when the CLEC's demand level so dramatically exceeds the demand of a rural ILEC. To ensure that the new limitation is meaningful, the Commission should modify the AT&T/RICA Proposal to include a volume threshold consistent with those proposed by Verizon and Sprint.

Finally, the Commission should also modify the AT&T/RICA Proposal to require each CLEC invoking the rural exemption to certify each quarter that either (1) its demand is consistent with the volume threshold incorporated in the rule, or (2) its demand exceeds the volume threshold in the rule and the CLEC will file a revised tariff within the next 30 days. As Verizon and others have noted, certifications would enable the Commission to ensure compliance and would impose only a minimal

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[16] *See* Verizon Traffic Pumping Comments at 28. In its original comments on traffic pumping solutions, Verizon proposed slightly different thresholds for CLECs invoking the rural exemption and CLECs benchmarking to competing rural ILECs. For CLECs invoking the rural exemption, Verizon's threshold was based on traffic volumes for 95% of NECA's Band 8 carriers, because the rural exemption permits benchmarking to Band 8 rates. For CLECs benchmarking to competing rural ILECs, Verizon's threshold was based on the slightly higher traffic volumes for 95% of all NECA carriers. For simplicity, however, Verizon proposes setting a single volume threshold based on 95% all NECA carriers, or 400 interstate switched access minutes of use per working line per month.

[17] *See* Sprint Traffic Pumping Comments at 18; *see also* Verizon Traffic Pumping Comments, attached Declaration of Alan Buzacott ¶ 34 (relying on 2006 NECA data published by the Universal Service Administrative Company).

administrative duty on any rural exemption CLECs that are not engaged in traffic pumping.[18] Indeed, the AT&T/RICA Proposal includes a certification requirement for CLECs benchmarking to a competing rural ILEC, yet fails to extend that requirement to CLECs invoking the rural exemption.[19] If the Commission decides to amend the rural CLEC provisions of Rule 61.26 to include a traffic volume limitation, it should make sure that its limitation is enforceable by imposing a simple certification requirement on *all* CLECs benchmarking to rural rates. Consideration of any of AT&T and RICA's proposed amendments to Rule 61.26 should not, however, delay the Commission from immediately issuing the declaratory ruling discussed above, which many carriers already support.[20]

Please do not hesitate to contact me with any questions.

Sincerely,

Donna Epps

cc: Dana Shaffer
Al Lewis
Victoria Goldberg

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[18] *See* Verizon Traffic Pumping Comments at 18-19; Sprint Traffic Pumping Comments at 19-20; *see also* Letter from Norina Moy, Sprint, to Marlene Dortch, FCC, WC Docket 07-135 (Aug. 21, 2008).

[19] *See* AT&T/RICA Proposal at 3, § 61.26(d).

[20] *See also* Qwest Traffic Pumping Comments at 12-14 (also proposing that the Commission immediately declare traffic pumping to be an unreasonable practice, while considering additional rule changes as well).