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STAMP AND RETURN

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

In the Matter of	)	
Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls	)	WC Docket No. _____

PETITION FOR A DECLARATORY RULING

Pursuant to Section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, Level 3 Communications, LLC ("Level 3") seeks a declaratory ruling on the legality of certain ongoing practices by some "Inserted CLECs" with respect to wireless-originated toll-free calls. By "Inserted CLECs," we mean CLECs that are retained by CMRS carriers and inserted into the flow between the CMRS carrier and the ILEC tandem transit provider for reasons other than efficient routing or interconnection. Of particular concern to Level 3 are those Inserted CLECs that are used for the purpose of collecting access fees that the CMRS carrier is prohibited from collecting directly from the IXC, and that "kick back" a portion of those access fees to the CMRS carrier. Level 3 asks the Commission to declare that the law with respect to wireless-originated toll-free traffic is and has been as follows:

- Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), preempts the application of intrastate originating access tariffs to wireless

originated toll-free calls when transit is provided by an Inserted CLEC, such that the FCC's CLEC access charge tariffing rules apply to all wireless-originated toll-free traffic handled by the Inserted CLEC.

- In applying the CLEC access charge cap when the Inserted CLEC provides a portion of the switched access used to send traffic to or from an end user not served by the CLEC, a CLEC may not levy charges that in aggregate would result in the CLEC's composite per minute charge (including mileage or zone charges) for tandem switched transport for that traffic that exceed the competing ILEC's. With respect to mileage charges, the Inserted CLECs are not permitted to add mileage that would not have been paid by the IXC if the call had routed through the ILEC, including but not limited to mileage crossing state lines.
- The payment of a kickback of access fees by an Inserted CLEC to a CMRS carrier for wireless-originated toll-free calls is an unjust, unreasonable and unlawful practice under Section 201(b) as a facilitating device for an unlawful tying arrangement.
- The payment of a kickback of access fees (whether called "revenue sharing" or a "marketing" fee) by a CLEC to a CMRS carrier with respect to wireless-originated toll-free calls delivered to the IXC by a CLEC inserted between the CMRS carrier and the ILEC tandem violates Sections 202(a), 203 and 503(a) of the Communications Act.

Level 3 seeks these declaratory rulings to clarify the state of the law. If these practices are proscribed – as they should be – Level 3 and other carriers should not be subject to

the inflated charges created by these practices, which are arbitrage flaws in the market structure for originating access associated with wireless-originated 800 calls. If, on the other hand, these practices are legitimate, then all carriers are entitled to know they can engage in the same practices.

Background

Five years ago, in its *Eighth Report and Order*,[1] the Commission made clear that CMRS carriers and the CLECs they selected could not work together to obtain access payments that exceeded the competing ILEC's interstate rates for portions of a wireless-originated call handled by the CLEC. *Id.* at 9116 ¶ 17; 47 C.F.R. § 61.26(f)("If a CLEC provides some portion of the interstate switched exchange access services from an end user not served by that CLEC, the rate for the access services provided may not exceed the rate charged by the competing ILEC for the same access services.") In that order, the Commission was clear that when a CLEC is providing access (*i.e.* transit) services at the behest of the CMRS carrier, the CLEC cannot use its ability to tariff access charges to charge for functions performed by the CMRS carrier, and not by the CLEC. As the Commission set forth:

> In cases where the carrier serving the end-user had no independent right to collect from the IXC, industry billing guidelines do not, and cannot, bestow on a LEC the right to collect charges on behalf of that carrier. For example, the Commission has held that a CMRS carrier is entitled to collect access charges from an IXC only pursuant to a contract with that IXC. If a CMRS carrier has no contract with an IXC, it follows that a competitive LEC has no right to collect access charges for the portion of the service provided by the CMRS provider.

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[1] *Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers; Petition of Z-Tel Communications, Inc., For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9116 ¶ 17 (2004)("*Eighth Report and Order*").

Eighth Report and Order, 19 FCC Rcd at 9115 ¶ 16. Recalling that it had prohibited CMRS carriers from tariffing federal access charges, *Petitions of Sprint PCS and AT&T Corp., for Declaratory Ruling Regarding CMRS Access Charges*, 17 FCC Rcd 13192, 13197 ¶ 11 (2002)("Following the *CMRS Second Report and Order*, [9 FCC Rcd 1411, 1480 ¶ 179 (1994)] tariffs no longer were available to CMRS carriers; therefore compensation is available only through an agreement.")("*Sprint/AT&T Declaratory Ruling*"), the Commission ruled, "We will not interpret our rules or prior orders in a manner that allows CMRS carriers to do indirectly that which we have held they may not do directly." *Eighth Report and Order*, 19 FCC Rcd at 9116 n. 57.

Notwithstanding the *Eighth Report and Order*, Level 3 continues to be presented with demands by some CLECs, particularly HyperCube, LLC ("HyperCube"), to pay access charges that far exceed the federal access rates that the ILEC would levy for performing the same functions for wireless-originated toll-free traffic. The factual scenario is replicated across many states. Before Inserted CLECs, such as Hypercube, came along, Level 3 received wireless-originated toll-free traffic from the wireless carrier transited through the regional large ILEC's tandem (usually AT&T, Verizon, or Qwest). The CMRS carrier did not charge originating access for the portion of the call that it handled because it was barred from filing a federal access tariff, *CMRS Second Report and Order*, 9 FCC Rcd at 1480 ¶ 178, and because it also could not file intrastate access tariffs, inasmuch as Section 332(c)(3) precluded the states from regulating all "rates charged by any commercial mobile service." The CMRS carriers in these situations also had no agreement with Level 3 whereby Level 3 agreed to pay them access charges. *Sprint/AT&T Declaratory Ruling*, 17 FCC Rcd at 13198 ¶ 12 (CMRS carrier is entitled to

collect access charges from an interexchange carrier "only to the extent that a contract imposes a payment obligation" on the interexchange carrier). Accordingly, when it interconnected with a CMRS carrier indirectly through the ILEC tandem, Level 3, as the toll-free interexchange carrier, paid an originating access charge to the ILEC for whatever functions and distance were necessary to carry the traffic to Level 3 from the CMRS carrier's interconnection point with the ILEC access network. An example of this call flow is depicted in Exhibit 1.

Inserted CLECs, however, market a "service" to CMRS carriers that results in the CMRS carriers indirectly sharing in access charge revenues that they would not be able to collect directly.[2] HyperCube, for example, affirmatively advertises this service on its website as "Toll Free Origination – Switching and transport services for any carrier or service provider generating outgoing 8YY calls."[3] The Inserted CLEC achieves this result by agreeing with the CMRS carrier to have the CMRS carrier insert the CLEC into the wireless toll-free call flow between the CMRS carrier and the ILEC tandem provider – nominally appearing to be a transit service (although, in the case of HyperCube, it separately identifies its local and national tandem services).[4] An example of this call flow is depicted in Exhibit 2.

The primary purpose served by introducing the Inserted CLEC is to bill and collect access charges from the interexchange carrier providing the toll-free interexchange service, and then to "kick back" a portion of those proceeds to the wireless

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[2] This intentional marketing distinguishes this situation from those instances in which a CMRS provider may have to use multiple tandem providers to reach carriers who do not have direct interconnection with the originating wireless carrier.
[3] http://www.hypercube-llc.com/corporate/markets.html (last viewed May 9, 2009).
[4] *Id.*

carrier.[5] This leads to call-routing decisions by the originating CMRS carriers that appear to be dictated solely by the desire to facilitate the collection of these additional access charges by the Inserted CLEC, part of which are then to be remitted to the CMRS provider. Level 3 has even seen cases in which it is indirectly interconnected with a CMRS carrier via only the ILEC tandem for all traffic, but the toll-free traffic alone is then peeled off by the CMRS provider and routed to HyperCube, and then to Level 3 through an ILEC.

In addition, these Inserted CLEC arrangements are specifically structured so that the interexchange carrier has no choice but to receive traffic from the CMRS provider via the Inserted CLEC. HyperCube, for example, does not directly interconnect with Level 3, but indirectly interconnects with Level 3 using the ILEC as a tandem transit provider – creating double indirect interconnection.[6] This means that Level 3 cannot identify the wireless-originated toll-free traffic (on which no access fee should be collected) and separate that traffic from traffic of the Inserted CLEC's other customers (if any) or from other traffic that originates with or transits the ILEC. Thus, even if it were permitted to do so, Level 3 cannot block CMRS-originated traffic coming from the Inserted CLEC, because it is commingled with all other exchange access traffic received from the ILEC's access tandem. In any event, the Commission has repeatedly made clear that

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[5] In litigation, Hypercube, which is an Inserted CLEC, has admitted that it has "entered into revenue sharing agreements with certain entities, including wireless carriers, and that under those agreements wireless carriers may receive a portion of the revenue [Hypercube] earns by providing services in connection with wireless 8XX calls destined to [IXC's] toll-free customers." *Qwest Communications Corp. v. Hypercube, LLC and KMC Data, LLC*, Case No. 06-CV-6404, Answer, Counterclaim and Jury Demand, at ¶ 17 (D. Ct., City and County of Denver, CO, filed Oct. 31, 2006).

[6] Level 3 and HyperCube have been unsuccessful in reaching an agreement for direct interconnection in large part because HyperCube insists on charging rates that exceed the competing ILEC's.

interexchange carriers are not permitted to block traffic to or from a particular CLEC even if the interexchange carrier has no desire to receive exchange access traffic from that CLEC.[7] Yet Inserted CLECs such as HyperCube also include provisions in their tariffs that require interexchange carriers – to actually implement such blocking in order to reject or cancel the Inserted CLEC's purported "services."[8]

To be clear, Level 3 does not derive any benefit from this double indirect arrangement, which it did not request, even though Level 3 (and not the CMRS provider) is the party that is being called upon to pay for the Inserted CLEC's services. In this instance, Level 3 cannot fairly be said to be the "cost-causer" for this transit arrangement. Level 3 is willing to interconnect directly with Inserted CLECs – so long as it is not required to pay exorbitant rates that exceed the competing ILEC's rates for the same functions.

To further drive up these added access charges, Inserted CLECs such as HyperCube levy intrastate access charges for calls that terminate within the same state, even though Section 332(c)(3) would have precluded the CMRS carrier from tariffing

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[7] *Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, 22 FCC Rcd 11629, 11629 ¶ 1 (2007)("Because the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the explicit goals of the Communications Act of 1934, as amended, (Act), we reiterate here that Commission precedent does not permit unreasonable call blocking by carriers."); *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9932-33 ¶ 24 (2001)("*Seventh Report and Order*").

[8] *See, e.g.*, KMC Data, LLC, Schedule Cal. P.U.C. No. 2-T, §2.1.3.B ("Customers seeking to cancel service have an affirmative obligation to block traffic originating from or terminating to the Company's network. By originating traffic from or originating traffic to the Company's network, the Customer will have constructively ordered the Company's switched access tariff."); KMC Data, LLC, Texas P.U.C. No. 1, § 2.1.3.B (same language as Cal. P.U.C. No. 2-T, § 2.1.3.B). Level 3 has not been able to locate a copy of HyperCube's federal tariff.

intrastate access charges for that same call had it interconnected directly with Level 3 or simply indirectly interconnected via only the ILEC tandem. In so doing, the CMRS carrier and HyperCube seek to evade the FCC's CLEC strict access charge limits, as well as its decision to detariff CMRS access charges.

Level 3 has also found that Inserted CLECs construe the FCC's requirement that it charge only "the rate charged by the competing ILEC for the same access services" in a manner that eviscerates the limitation even for traffic that crosses state lines.[9] Using HyperCube as an example, its interstate tandem transit rates, even excluding 8YY database dip fees, far exceed the competing ILEC's.[10]

Chart 1
Hyper Cube and Pacific Bell California Access Rates Compared

Pac Bell Interstate - California		HyperCube Interstate - California	
Tandem Switching	$0.000512/min[11]	$0.001042/mi[12]	SCAB - tandem switching
Tandem Termination	$0.000075/min[13]	$0.000130/mi[14]	SCAB - Tandem Switched Termination
Tandem Facility Per Mile Per Minute	$0.000015/ min/mile[15]; 10 miles = $0.000150/min.	$0.000250/mi[16]	Tandem Switched Facility - Non-Mileage Sensitive

[9] 47 C.F.R. § 61.26(f).
[10] The network locations for which those fees are assessed are illustrated in Exhibit 2.
[11] Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.C.2 (Rate Zone 1).
[12] Rate for this element as it appears in HyperCube's April 2009 bill to Level 3. The Usage Rate appears in Field position 99 in bill information transmitted in SECAB VERSION 12 EMI format. This rate appears to equal Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.C.2 C for Rate Zone 2, but the HyperCube Switch in the LERG is shown to be collocated at a Rate Zone 1 Pac Bell End Office.
[13] Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.C.1 (Rate Zone 1).
[14] Rate as it appears in HyperCube's April 2009 bill to Level 3, field position 99 (SECAB VERSION 12 EMI format). The rate appears to equal Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.C.1 for Rate Zone 2, but the HyperCube Switch in the LERG is shown to be collocated at a Rate Zone 1 Pac Bell End Office.
[15] Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.C.1 (Rate Zone 1). For the purposes of constructing the average rate, an average mileage of 10 miles is used.

Dedicated Tandem Trunk Port (converted from per month charge)	$0.000327/min[17]	$0.004712/mi[18]	SCAB - Common Tandem Trunk Port
Tandem End Office Multiplexing	$0.000098/min[19]	$0.000098/mi[20]	SCAB - Tandem Switching Multiplexing
Composite Average Per Minute	$0.001162/min	$0.006232/min	Composite Average Per Minute
Query Charge Per Call	$0.004777/call[21]	$0.005000/call[22]	Query Charge Per Call[23]

The result is that HyperCube bills Level 3 far more for handling a minute of CMRS-originated toll-free traffic than would the ILEC performing the same functions.

I. Because Section 332(c)(3) Precludes States from Regulating Rates Charged by CMRS Carriers, the Commission's CLEC Access Charge Rules Apply to All Wireless-Originated Inter-MTA Toll-Free Traffic.

Even though the FCC has made clear that it will not construe its rules and policies to permit CMRS carriers to do indirectly that which they may not do directly, *Eighth Report and Order*, 19 FCC Rcd at 9116 n. 57, that is precisely what Inserted CLECs such as HyperCube seek to do when they bill intrastate access charges for handling wireless-

[16] Rate as it appears in HyperCube's April 2009 bill to Level 3, field position 99 (SECAB VERSION 12 EMI format).
[17] Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.F.3 (Rate Zone 1), assuming a Dedicated DS-0 Port handles 10,416 MOUs per month. The 10,416 MOUs per month per dedicated port is derived as follows: A DS-1 dedicated port is commonly assumed by telecommunications engineers to handle 250,000 MOUs per month, although in Level 3's experience actual traffic loadings are significantly higher; those 250,000 MOUs/month are then divided by 24 DS-0s per DS-1, to yield 10,416 MOUs/DS-0 port.
[18] Rate as it appears in HyperCube's April 2009 bill to Level 3, field position 99 (SECAB VERSION 12 EMI format).
[19] Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.2.F.2.
[20] Rate as it appears in HyperCube's April 2009 bill to Level 3, field position 99 (SECAB VERSION 12 EMI format).
[21] Pacific Bell Telephone Company Tariff F.C.C. No. 1 Tariff, § 6.8.12.
[22] Rate as it appears in HyperCube's April 2009 bill to Level 3, field position 99 (SECAB VERSION 12 EMI format).
[23] Rate as it appears in HyperCube's April 2009 bill to Level 3, field position 99 (SECAB VERSION 12 EMI format).

originated toll-free traffic and then pay kickbacks to their wireless carrier partners. Section 332 could not be clearer: states may not regulate the "rates charged by any commercial mobile service." 47 U.S.C. § 332(c)(3). Thus, wireless carriers cannot file state access tariffs. Yet Inserted CLECs such as HyperCube have said that once a wireless carrier hands traffic off to a CLEC of its choice, the traffic ceases to be wireless traffic, intrastate access rates may be applied and the wireless carrier can indirectly receive a portion of those access charges through a kickback from the Inserted CLEC, even though the interexchange carrier has not requested or assented to the Inserted CLEC's service. That cannot be squared with either Section 332(c)(3) or the precedent.

Courts have routinely held that wireless traffic does not change its wireless character when it is handed off to a transit carrier. In *Atlas Communications v. Okla. Corp. Comm'n*, 400 F.3d 1256, 1264 (10th Cir. 2005), in considering whether CMRS traffic became subject to access charges, rather than reciprocal compensation, once it left the CMRS network, the Tenth Circuit held, "Nothing in the text of these provisions provides support for the [rural telephone companies'] contention that reciprocal compensation requirements do not apply when traffic is transported on an IXC network." Similarly, the United States Court of Appeals for the Eighth Circuit, in *Rural Iowa Independent Telephone Association v. Iowa Utilities Board*, 476 F.3d 572, 576 (8th Cir. 2007), rejected the rural carriers' argument that they "should be allowed to collect access charges from [the transit carrier] for inbound [i.e., CMRS-originated] intraMTA wireless calls."

There is no reason to interpret more narrowly the scope of Section 332(c)(3)'s preemption in this context. Section 332(c)(3) excludes from state regulation all rates

charged by CMRS carriers, without limitation – a preemption also confirmed in Section 2(b), 47 U.S.C. § 152(b). Any access charges levied by an Inserted CLEC such as HyperCube at the invitation and behest of its wireless carrier customer and then paid to a CMRS carrier in the form of a kickback is no less of a rate charged by the CMRS carrier than if the CMRS carrier had levied the rate itself.[24] To hold otherwise would be to countenance evasions of Section 332's clear and broad preemption – in essence allowing a CMRS carrier to indirectly do that which it cannot directly do and choose when it would be subject to, and benefit from, state pricing regulation.

The Enforcement Bureau's decision in *North County Communc'ns. Corp. v. MetroPCS California*, DA 09-719, 24 FCC Rcd 3807 (2009)("*North County*"), does not compel or suggest a different conclusion. Significantly, the issue in *North County* was not rates charged directly or indirectly by the CMRS carrier for CMRS-originated traffic, but the rate being charged *to a CMRS carrier* by the terminating CLEC. The Commission has long held that the *termination* rates of any LEC, whether ILEC or CLEC, are not covered by Section 332(c)(3), because that section does not preempt state regulation of rates *charged to* CMRS providers, rather than rates "charged by" CMRS providers. *Id.* at 3810 ¶ 9; *Developing a Unified Intercarrier Compensation Regime; T-Mobile et al. Petition for Declaratory Ruling Regarding Incumbent LEC Wireless Termination Tariffs*, Declaratory Ruling and Report and Order, 20 FCC Rcd 4855, 4861 ¶10 n. 41 (2005). Here, in contrast, it is a rate that is indirectly being charged by the

[24] This is distinct from the situation in which the CMRS carrier and the IXC both choose to interconnect indirectly via a single transit provider (usually the ILEC). In that case, the tandem transit provider's access charge is not necessarily equivalent to the CMRS carrier levying the charge itself.

CMRS provider, by virtue of its contract with the Inserted CLEC, that is at issue, and thus falls within the scope of Section 332(c)(3)'s preemption.

With Section 332(c)(3) preempting application of state access tariffs for wireless-originated traffic transited via an Inserted CLEC selected by the CMRS carrier, the only means available for the CLEC to establish transit rates other than through direct agreement with the interexchange carrier is via the CLEC's federal tariff. But the FCC's CLEC access charge rules establish limits: any CLEC may only tariff rates for access services used to send traffic "to or from an end user not served by that CLEC" if those rates do not "exceed the rate charged by the competing ILEC for the same access services." 47 C.F.R. § 61.26(f). Those rates are established in the competing ILEC's interstate tariffs. *See* 47 C.F.R. §§ 61.26(a)(1)-(2).

Accordingly, because Section 332(c)(3) preempts all state regulation of rates charged by CMRS carriers without limitation, the rates charged by an Inserted CLEC selected by the wireless carrier to transit traffic to an ILEC transit provider and then to a toll-free interexchange carrier must be subject to the Commission's CLEC access charge rules and limited to the rates charged by the competing ILEC for the same services.

II. The "Same Services" Requirement Precludes a CLEC from Adding Charges in a Manner that Results in the Cumulative Average Per Minute Charge Exceeding the Competing ILEC's.

In its disputes with HyperCube, Level 3 has found that HyperCube is assessing interstate access charges for its superfluous transit function at composite rates that exceed the ILEC's for the same functionalities. As illustrated in Chart 1, above, excluding the fees for dipping the 8YY database, HyperCube in California, for example, charges Level 3 more than five times the competing ILEC's rate – a composite average of $.006232 per minute for transit, while the ILEC charges a composite average of $.001162 per minute

for the same functionality.[25] This is a patent violation of 47 C.F.R. § 61.26(f) and the *Eighth Report and Order*, 19 FCC Rcd at 9116 ¶ 17 ("the rate a competitive LEC charges for access components when it is not serving the end-user should be no higher than the rate charged by the competing incumbent LEC for the same functions").

In discussions with HyperCube and other carriers, however, those carriers have asserted that their rates may exceed the ILEC's composite average rates for a host of shifting reasons – sometimes having to do with CLEC assertions that they cover multiple ILEC zones, sometimes having to do with port charges, sometimes because the CLEC may decide to haul to traffic to a far distant tandem. For wireless-originated toll-free traffic, however, where the entire bill is paid by the receiving interexchange carrier, those rationalizations mock rule 61.26(f). Although the *Eighth Report and Order* noted that "competitive LECs continue to have flexibility in determining the access rate elements and rate structure for the elements and services they provide," *id.* at 9116 n. 58, that flexibility goes to how the CLEC chooses to assess elements and services within the overall cap, ***not how to calculate the cap***. The CLEC does not have to mimic the ILEC's rates structure, but the *result* must be that the Inserted CLEC charges no more than the ILEC would when the ILEC is performing the same function.

Nor is it permissible for an Inserted CLEC to increase its access charges by purporting to "blend" the rate with the competing ILEC's other rate zones or with other ILECs' rates. As the FCC has made clear, "there is only one 'competing ILEC' and one 'competing ILEC rate' for each particular end user." *Id.* at 9131 ¶ 47. Any blended rate

[25] Indeed, the ILEC is arguably providing greater functionality because the ILEC is the transit provider actually delivering the traffic to Level 3's point of interconnection, which Hypercube does not do.

is only reasonable "if it does not result in revenues that exceed those the competing incumbent LECs would receive from IXCs for access to those customers." *Id.* at 9132 ¶ 48. But that is exactly what is happening with Inserted CLECs such as HyperCube. Moreover, although the FCC's discussion in the *Eighth Report and Order* regarding the rate to be used when there are multiple incumbent LECs focuses on the end user's location, when the CLEC does not serve the end user, the far better interpretation of the *Eighth Report and Order* is that the competing ILEC rate is the one that is based on the locations of the functions actually provided by the CLEC – in this case, the tandem transport being provided by the Inserted CLEC. Otherwise, an Inserted CLEC could receive revenues far in excess of those that the competing ILEC would receive for providing the same functionality, and would not "approximate the rate that an IXC would have paid to the competing incumbent LEC." *Id.* at 9132 ¶ 48 ("Competitive LECs that impose such charges should calculate the rate in a manner that reasonably approximates the competing incumbent LEC rate."); *see also id.* at 9118 ¶ 21.

This is the only reading of rule 61.26(f) consistent with the *Eighth Report and Order*. As the Commission stated, "A primary objective of the *CLEC Access Reform Order* is to ensure that competitive LEC access charges are more closely aligned with incumbent LEC access rates." *Id.* Further, it stated, "our long-standing policy with respect to incumbent LECs is that they should charge only for those services that they provide. . . . We believe that a similar policy should apply to competitive LECs." *Id.* The Commission then announced, "Accordingly, we clarify that the competing incumbent LEC switching rate is the end office switching rate when a competitive LEC originates or terminates calls to end-users and the tandem switching rate when a

competitive LEC passes calls between two other carriers." *Id.* This clarification would be undone if the CLEC could compute the competing ILEC tandem switching rate by adding charges not charged by the ILEC when it provides tandem switching between the same carriers, or create "blended" rates that increase the CLEC's access revenues far above what the competing ILEC would have received for handling the same traffic.

Accordingly, the Commission should declare that in computing and applying the CLEC access charge cap in this context, when the CLEC provides a portion of the interstate switched access used to send wireless-originated toll-free traffic to an interexchange carrier, a CLEC must cap its own charges at the competing ILEC's composite per-minute rate level for the same functions, regardless of how the CLEC structures those charges, without manufacturing additional mileage, zone charges or other charges that do not apply when the ILEC handles the call.

III. Paying Kickbacks of Access Charges Collected When the Kickback Recipient Ties Originating Access to the CLEC's Unnecessary Transit Service is an Unjust and Unreasonable Practice Violating Section 201(b).

The kickbacks paid by HyperCube and other Inserted CLECs to wireless carriers should be declared to be an unjust and unreasonable practice in violation of Section 201(b) because the kickbacks serve only to increase total access charges levied for delivering toll-free traffic to the interexchange carrier, with no pro-competitive justification. What is occurring is the unlawful tying of a product over which the CMRS provider has market power – originating exchange access on its customers' calls to toll-free numbers – with the Inserted CLEC's transit service through which the interexchange carrier must receive traffic. The Inserted CLEC serves as the collection vehicle for this anticompetitive exercise of market power, collecting unlawfully high transit fees and then remitting part of those ill-gotten monopoly rents to the CMRS carrier.

It is beyond dispute that, when rates can be set unilaterally and enforced downstream through tariffs and mandatory indirect interconnection, originating carriers control access to each individual end user. As the Commission found in the *Seventh Report and Order*, "both the terminating and originating access markets [consist] of a series of bottleneck monopolies over access to each individual end user. Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user." 16 FCC Rcd at 9935 ¶ 30. When the CLEC establishes rates by tariff rather than through agreement with the interexchange carrier, "although the end user chooses her access provider, she does not pay the provider's access charges. Rather the access charges are paid by the caller's IXC, which has little practical means of affecting the caller's choice of access provider... and thus cannot easily avoid the expensive ones." *Id.* at 9935 ¶ 31. Moreover, for toll-free calls particularly, because the long distance carrier bills the called party and not the calling party, "the party causing the costs" – *i.e.*, the CMRS carrier that "chooses the high-priced LEC" – "has no incentive to minimize costs." *Id.* "Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider." *Id.* at 9936 ¶ 31.

For CMRS carriers acting alone, without an Inserted CLEC partner, the FCC's mandatory access detariffing eliminates the CMRS carrier's market power over originating access by requiring the CMRS carrier to negotiate agreements for payment of access charges rather than unilaterally establishing access rates using tariffs. That lack of market power remains as long as the CMRS provider delivers traffic either directly to the

IXC or to the IXC indirectly via the ILEC's tandem because the CMRS carrier cannot gain any benefit by selecting a high priced tandem provider to transit toll-free traffic to the CMRS carrier. The ILEC bills the interexchange carrier its rate, and the CMRS carrier gets no kickback.

But by inserting a CLEC such as HyperCube between the CMRS carrier and the ILEC tandem, and then requiring all interexchange carriers to receive traffic routed through the Inserted CLEC's transit service before being routed through the ILEC's tandem service, the CMRS carrier and the Inserted CLEC together are able to use the Inserted CLEC's purported ability to file tariffs to reestablish market power over the CMRS-originated traffic. Structuring the traffic flow so that traffic can neither be identified nor blocked (were such action even permitted) ties the Inserted CLEC's transit service to the CMRS carrier's originating access, and the CMRS carrier and the CLEC thereby ensure that an interexchange carrier cannot bypass the Inserted CLEC's transit, either using the ILEC to interconnect with the CMRS provider or by interconnecting directly with the CMRS provider, and cannot combat the exercise of market power by refusing to accept the traffic. It is this tying of the originating access service with the Inserted CLEC's tandem transit that reestablishes the ability to use the tariff mechanism to exercise market power.

It is well established that tying a non-competitive product to a competitive product in order to generate monopoly rents and exclude competition in the tied product is per se anticompetitive. *Eastman Kodak Co. v. Image Tech. Services*, 504 U.S. 451, 461 (1992)("A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least

agrees that he will not purchase that product from any other supplier....Such an arrangement violates § 1 of the Sherman Act if the seller has 'appreciable economic power' in the tying product market and if the arrangement affects a substantial volume of commerce in the tied market.")(citations omitted); *see also id.* at 487 ("where the tying arrangement is backed up by the defendant's market power in the 'tying' product, the arrangement is adjudged in violation of § 1 of the Sherman Act, 15 U. S. C. § 1 (1988 ed., Supp. II), without *any* inquiry into the practice's actual effect on competition and consumer welfare.")(Scalia, J., dissenting). Here, the CMRS carrier's originating exchange access is the tying product, and the Inserted CLEC (*e.g.*, HyperCube's) transit service is the tied product.

Moreover, although no inquiry into procompetitive justifications is necessary when the seller has market power in the 'tying' product, there can be none here. Unlike situations in which a rebate might be paid to induce an end user to change or maintain local exchange service providers, *see e.g.*, *Eighth Report and Order*, 19 FCC Rcd at 9142 ¶ 70 ("the primary effect of the commission payments appears to be to create a financial incentive for the institutions to switch from the incumbent to a competitive service provider"); *AT&T Corp. v. Jefferson Telephone Co.*, 16 FCC Rcd 16130 (2001), the access kickback here serves to frustrate, rather than promote competition. When an end user selects a LEC, it can select only one service provider, and the LEC that wins the customer necessarily ousts other LECs. Here, however, HyperCube and similarly-situated Inserted CLECs do not oust anyone: they are simply inserted between the CMRS carrier and the ILEC tandem transit provider in order to exercise market power and collect access charges to fund a kickback scheme. The Inserted CLEC is, in essence,

"buying" wireless 8YY minutes from the CMRS provider and forcing the IXC to accept its costly service – increasing the access charges to be paid many-fold. The ultimate job of indirect interconnection – delivery of the CMRS-originated traffic to Level 3's point of interconnection – is performed by the ILEC, and not HyperCube.

In this situation, the Commission should declare that the facilitating device of the exercise of market power – the kickback of access charges from the Inserted CLEC to the CMRS provider – is unjust and unreasonable in violation of Section 201(a). Without this facilitating device, the CMRS provider would have no incentive to route traffic via the Inserted CLEC simply to add access charges to be paid by the IXC for wireless-originated toll-free traffic. Moreover, the CMRS carrier would be economically agnostic as between the CLEC or the ILEC as full tandem transit providers, and between tandem transit providers and direct interconnection with an IXC such as Level 3. Declaring the kickbacks here to be unjust and unreasonable facilitating devices for unlawful tying would eliminate the incentive to exercise market power in this manner, improve consumer welfare, and remove barriers to competition.

IV. KICKBACKS OF ACCESS FEES BY INSERTED CLECs TO CMRS CARRIERS WITH RESPECT TO WIRELESS-ORIGINATED TOLL-FREE CALLS VIOLATE THE COMMUNICATIONS ACT'S PROHIBITIONS ON DISCRIMINATORY PREFERENCES

The Communications Act contains several specific formulations of the basic principle that every common carrier must serve the public at large on the same terms and conditions. Section 201 requires every common carrier to provide service to all upon reasonable request, and upon terms and conditions that are "just and reasonable." 47 U.S.C. § 201(a), 201(b). Section 202 makes it unlawful for a common carrier to "make any unjust or unreasonable discrimination in charges, practices, classifications,

regulations, facilities, or services for or in connection with like communications service, directly or indirectly, by any means or device," or to accord any preferential treatment to any particular user or locality. 47 U.S.C. § 202(a). Section 203 prohibits any common carrier from providing service on terms and conditions other than those set forth in a duly published tariff, and specifically bans rebates or other preferential terms:

> [N]o carrier shall (1) charge, demand, collect, or receive a greater or less or different compensation for such communication, or for any service in connection therewith, between the points named in any such schedule than the charges specified in the schedule then in effect, or (2) refund or remit by any means or device any portion of the charges so specified, or (3) extend to any person any privileges or facilities in such communication, or employ or enforce any classifications, regulations or practices affecting such charges, except as specified in such schedule.

47 U.S.C. § 203(c). "Regardless of the carrier's motive—whether it seeks to benefit or harm a particular customer—the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services. It is that anti-discriminatory policy which lies at 'the heart of the common-carrier section of the Communications Act.'" *Am. Tel. & Tel. Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998)("*AT&T v. Central Office Telephone*") (quoting *MCI Telecommunications Corp.* v. *American Telephone & Telegraph Co.*, 512 U.S. 218, 229 (1994)).

The non-discrimination principle, and the specific anti-rebate rule it supports, is so fundamental that the Communications Act prohibits *customers* from *accepting* such rebates. 47 U.S.C. § 503(a) (prohibiting customers from receiving "directly or indirectly, by or through any means or device whatsoever . . . any sum of money or any other valuable consideration as a rebate or offset against the regular charges for transmission of

such messages"). The language of section 503(a) makes clear that it is the economic substance of the arrangement that matters, notwithstanding any attempts by company lawyers to dress it up as a marketing fee of some sort.

These elementary principles of common carriage are not new. In fact, the Supreme Court has often invoked the same principles in ruling on the Interstate Commerce Commission's regulation of rail service, which formed the model for so much of the Communications Act. *See AT&T v. Central Office Telephone*, 524 U.S. at 222 (noting that the anti-rebate provision of the Communications Act, section 203(c), is modeled after the similar provisions of the Interstate Commerce Act). For example, in *Baltimore & Ohio R. Co. v. United States*, 305 U.S. 507 (1939), the Court held that interstate carriers at the Port of New York violated the anti-discrimination and anti-rebate provisions of the Interstate Commerce Act when they attempted to boost their own shipping traffic by offering below-cost warehousing facilities to customers who lacked their own warehouses in the New York area. The Court recognized "the carriers' struggle to obtain line haul traffic," *id.* at 523. But the ICA required "the maintenance of rail transportation tariffs without rebate, discrimination or preference," *id.*, which made it illegal for the carriers to pursue their private economic advantage by subsidizing some of their shipping customers to the disadvantage of others. *Id.* at 524.

Furthermore, the Supreme Court has strictly applied the anti-rebate principle even where the parties go to great lengths to disguise the rebates. For example, in *Union Pac. R. Co. v. United States*, 313 U.S. 450 (1941), the Court confronted a plan by Union Pacific to boost its shipping traffic by relocating the main produce market of the Kansas City area from the Missouri side of town to the Kansas side of town, where Union Pacific

had the only tracks. *Id.* at 457. Union Pacific was willing to pay its produce-shipping customers to move, but such payments would have been an illegal rebate. Conversely, city officials in Kansas were legally permitted to offer financial incentives, but they lacked the cash. *Id.* at 457-58. Consequently, Union Pacific found ways to divert money to the city with the understanding that the city would pass that money along to the produce shipping customers who needed to be enticed. In this way, the city and the railroad acting together could implement a rebate scheme that was otherwise illegal for one of them and impossible for the other. But the Court found the entire scheme constituted illegal discrimination in favor of the shippers who were being urged to take their business to Kansas. Similarly, Inserted CLECs like HyperCube team up with CMRS providers to obtain access payments that would be illegal for one of them to charge and impossible for the other to charge. The Inserted CLEC kickback scheme is just as plain, and just as illegal, as the one condemned in *Union Pacific.*

On a few occasions, the Commission has declined to find that access charge rebates are inherently discriminatory and unlawful. *See, e.g., AT&T v. Jefferson Telephone Co.*, 16 FCC Rcd at 16130.[26] But *Jefferson Telephone* expressly did not reach the question raised here. *Jefferson Telephone* involved traffic *terminated to* the rebating LEC's customer, rather than traffic *originated by* the rebating LEC's CMRS customer who could have delivered the traffic without involving the Inserted CLEC, and AT&T's entire argument against the kickback arrangement was that it "caused Jefferson to have a

[26] The Commission applied the holding of *Jefferson Telephone* on two later occasions: *AT&T v. Beehive Telephone Co.*, 17 FCC Rcd 11641 (2002); and *AT&T v. Frontier Communications of Mt. Pulaski*, 17 FCC Rcd 4041 (2002). In neither case, however, did the Commission engage in any substantive analysis not found in the original *Jefferson Telephone* decision. *See Beehive*, 17 FCC Rcd at 11655; *Frontier*, 17 FCC Rcd at 4042. Accordingly, we discuss only *Jefferson Telephone* in the text.

direct, and greater, economic interest in delivering calls to one set of destination telephone numbers in its service area than to other destination numbers." *Id.* at 16134 ¶ 9. The Commission responded that Jefferson's *interest* was not really the relevant point, and there was no evidence that Jefferson actually treated the kickback recipient's traffic any differently than anyone else's traffic. And as the Commission pointedly observed, "AT&T explicitly disavowed any claim that the terminating access rate charged by Jefferson was unjust and unreasonable under section 201(b). . . . We express no view on the reasonableness of Jefferson's rates." *Id.* at 16136 n.37.

By contrast, the "Inserted CLEC" scenario at issue here discriminates directly on price, and it discriminates not just in theory but in practice. To the extent the Inserted CLEC has non-CMRS end-user customers that are not paid a kickback, the payment of kickbacks to the CMRS customer constitutes direct price discrimination in favor of the CMRS carriers and against the Inserted CLEC's other customers. To the extent that the Inserted CLEC strikes kickback deals with multiple CMRS carriers, there may well be price discrimination between those carriers, with some receiving higher kickbacks than others.[27] Such *ad hoc* arrangements are flatly inconsistent with the obligations of common carriage. Regardless of the particulars for any one CLEC in any one jurisdiction, kickbacks from *any* Inserted CLEC for wireless-originated toll-free traffic clearly have the effect of making some customers pay the Inserted CLEC for the very

[27] The Commission made a similar observation in *Establishing Just and Reasonable Rates for Local Exchange Carriers,* Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17998 ¶ 20 (2007) (asking, "to the extent that an entity engaged in access stimulation is a customer of the LEC tariffed services, and that LEC is paying compensation to that entity for stimulating traffic," whether "this untariffed compensation is an unlawful rebate under section 203 of the Act.")

same toll-free connectivity that the Inserted CLEC *pays CMRS carriers to deliver to them.*

Regardless of whether the monetary elements of these arrangements are dressed up as "revenue sharing" or "marketing fees" or some other euphemism, they are in substance kickbacks of access fees which the CMRS provider cannot collect from the IXC directly, based on traffic the Inserted CLEC does not actually originate, and which the Inserted CLEC carries on terms available to none of its other customers. The Commission should declare the practice to be unlawful *per se.*

CONCLUSION

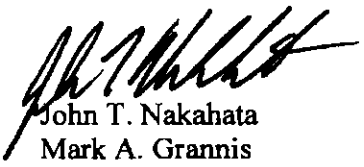
For the foregoing reasons, the Commission should make the following declarations:

- Section 332(c)(3) of the Communications Act, 47 U.S.C. § 332(c)(3), preempts the application of intrastate originating access tariffs to wireless originated toll-free calls when transit is provided by an Inserted CLEC, such that the FCC's CLEC access charge tariffing rules apply to all wireless-originated toll-free traffic handled by the Inserted CLEC.
- In applying the CLEC access charge cap when the Inserted CLEC provides a portion of the switched access used to send traffic to or from an end user not served by the CLEC, a CLEC may not levy charges that in aggregate would result in the CLEC's composite per minute charge (including mileage and zone charges) for tandem switched transport for that traffic that exceed the competing ILEC's. With respect to mileage charges, the Inserted CLECs are not permitted to add mileage that would not have been paid by the IXC if the

call had routed through the ILEC, including but not limited to mileage crossing state lines.

- The payment by an Inserted CLEC of a "kick back" of access fees to a CMRS carrier for wireless-originated toll-free calls is an unjust, unreasonable and unlawful practice under Section 201(b) as a facilitating device for an unlawful tying arrangement.
- The payment of a kickback of access fees (whether called "revenue sharing" or a "marketing" fee) by a CLEC to a CMRS carrier with respect to wireless-originated toll-free calls delivered to the IXC by a CLEC inserted between the CMRS carrier and the ILEC tandem violates Sections 202(a), 203 and 503(a) of the Communications Act.

Respectfully submitted,



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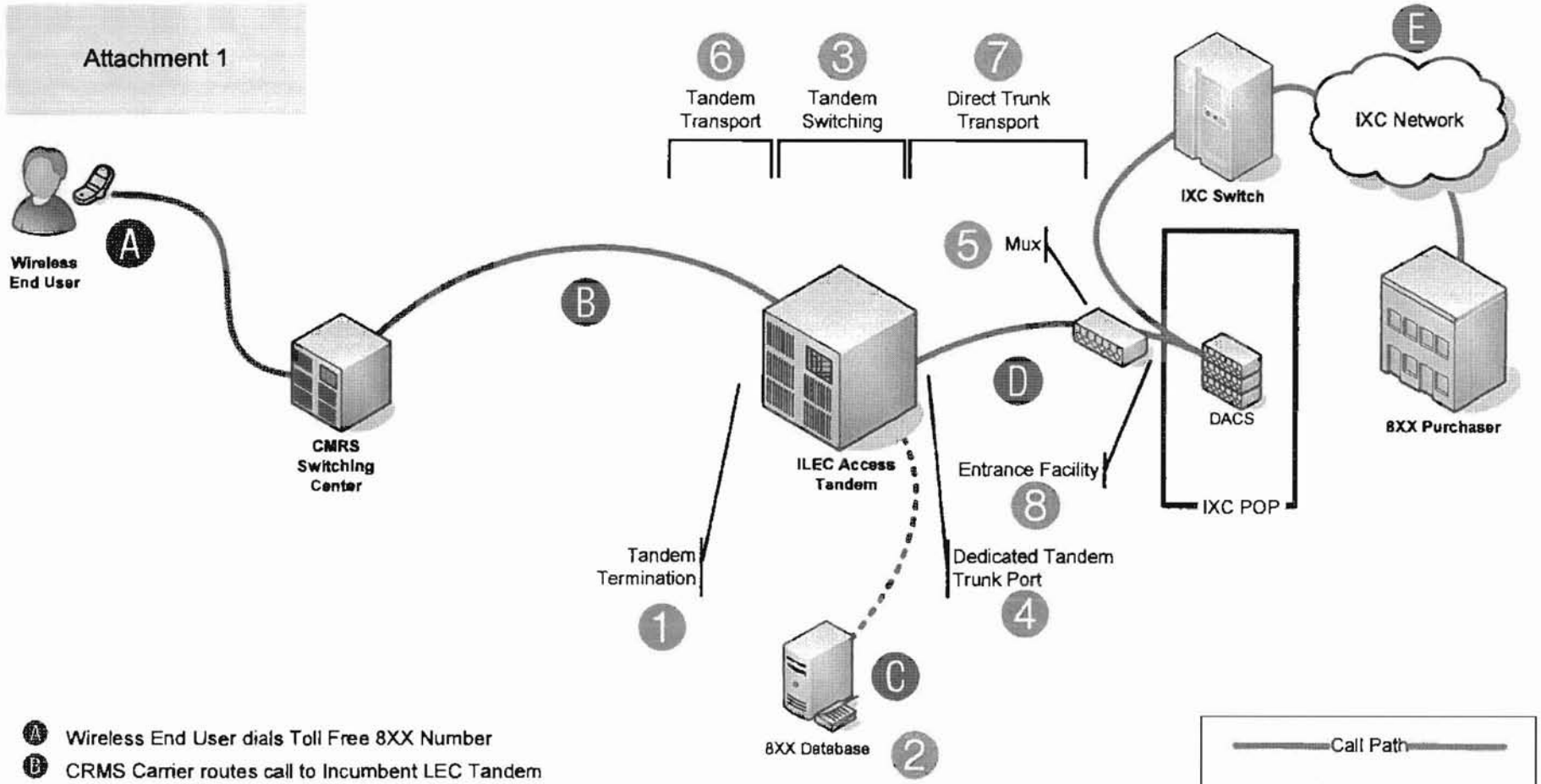
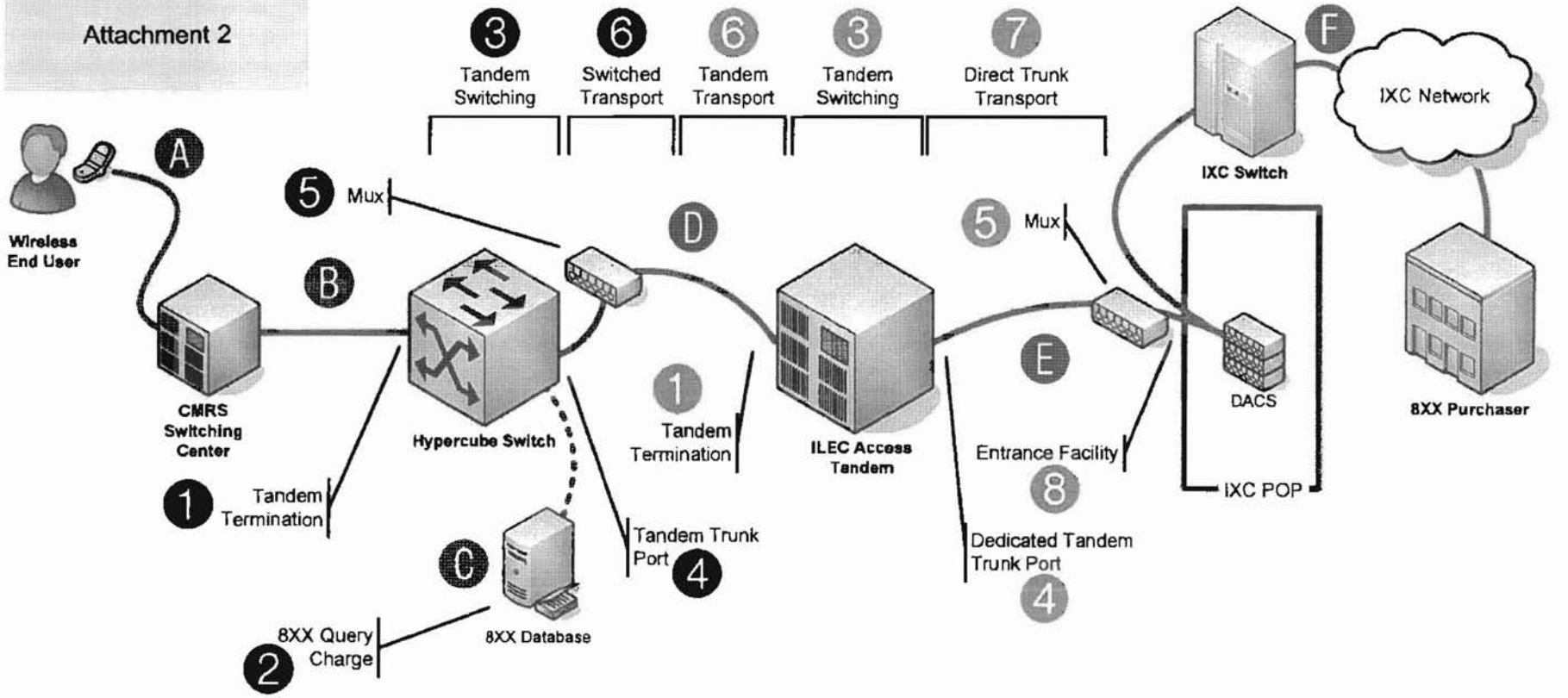
Attachment 1



- A Wireless End User dials Toll Free 8XX Number
- B CRMS Carrier routes call to Incumbent LEC Tandem
- C ILEC queries the SMS 800 Database to get the Carrier Identification Code (CIC) associated with the Toll Free 8XX Number
- D Call is handed to IXC via Feature Group D Trunks that IXC accepts calls from all LECs on
- E Call is routed to IXC POP and then on to the Customer of the Toll Free 8XX Number

Attachment 2



- A Wireless End User dials Toll Free 8XX Number
- B CRMS Carrier routes call to Hypercube
- C Hypercube queries the SMS 800 Database to get the Carrier Identification Code (CIC) associated with the Toll Free 8XX Number
- D Call is routed to the Incumbent LEC Tandem
- E Call is handed to IXC via Feature Group D Trunks that IXC accepts calls from all LECs on
- F Call is routed to IXC POP and then on to the Customer of the Toll Free 8XX Number