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

In the Matter of	)	
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
All American Telephone Co., Inc., e.Pinnacle Communications, Inc, and ChaseCom Petition for Declaratory Ruling	)	EB 09-MDIC-0003

OPPOSITION OF VERIZON[1] AND VERIZON WIRELESS

Petitioners' request for "reconfirmation" that CLEC traffic-pumping schemes are permissible is frivolous and should be denied.[2] Instead, the Commission should issue an order or a declaratory ruling in the existing *Access Stimulation NPRM*[3] proceeding holding that it is an unjust and unreasonable practice in violation of Section 201(b) for any LEC to assess terminating interstate switched access charges on traffic that is subject to a revenue-sharing arrangement. In addition, since the issues raised in the *CLEC Petition* have been addressed in filings responsive to the *Access Stimulation NPRM*, any order or declaratory ruling should result from the record developed in that proceeding – not from a separate petition and docket.

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[1] In addition to Verizon Wireless, the Verizon companies participating in this filing ("Verizon") are the regulated, wholly owned subsidiaries of Verizon Communications Inc.

[2] *All American Telephone Co., Inc., e.Pinnacle Communications, Inc. and ChaseCom Petition for Declaratory Ruling*, File No. EB-09-MDIC-0003, at 2 (filed May 20, 2009) ("*CLEC Petition*" and "Petitioners").

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

Numerous carriers and other parties have documented the growing traffic-pumping phenomenon and the harm that it is inflicting on the industry and on the public.[4] As Verizon and others have explained, these arbitrage schemes involve primarily rural ILECs and CLECs exploiting the Commission's tariff rules to charge excessive access rates while simultaneously increasing the number of calls that appear to terminate on their networks. These LECs form collusive and secretive partnerships with conference and chat-line companies (often providers of pornographic and other sexual-oriented content),[5] in which the LECs provide free or low-cost service and agree to share their access revenues, resulting in net payments to the conference and chat-line providers. The conference and chat-line providers in turn advertise and market their services to the public as "free" in order to drive up demand. The result is that other carriers, and ultimately the ordinary consumers they serve, must subsidize supposedly "free" services that do not benefit them and that they would never voluntarily support.

The Commission already tentatively concluded in the *Access Stimulation NPRM* that such traffic-pumping practices are unjust and unreasonable: A rate-of-return ILEC violates Section 201(b) when it "shares revenue, or provides other compensation to an end user customer . . . and bundles those costs with access." *Access Stimulation NPRM* ¶ 19.[6] Because rate-of-return ILECs' rates are based on their costs, an ILEC that bundles

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[4] *See, e.g.*, Letter from David Frankel, ZipDX, to Marlene Dortch, FCC, WC Docket No. 07-135 (Apr. 17, 2008); Letter from David Frankel, ZipDX, to Marlene Dortch, FCC, WC Docket No. 07-135 (Oct. 16, 2008); Letter from Norina Moy, Sprint, to Marlene Dortch, FCC, WC Docket No. 07-135 (June 9, 2008); Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, WC Docket No. 07-135 (June 4, 2008).

[5] International calling-card service providers have also been identified as participants in particular schemes.

[6] The way these schemes have evolved, it might be more accurate to phrase the problem as one of revenue-sharing with a LEC's *purported* "end-user customer." In

with access the cost of compensating customers is effectively forcing interexchange carriers to pay "for the costs of the stimulating service through the higher access charges assessed by the exchange carrier." *Id.* ¶ 18. This is unreasonable because those costs are "primarily for the benefit of the carrier" rather than providing any "customer benefits." *Id.* ¶ 19.

The Wireline Competition Bureau also took steps to stop this abuse of the Commission's tariff rules in 2007, suspending certain tariffs and designating issues for investigation.[7] The Commission subsequently terminated the investigation on the condition that the involved ILECs either rejoined the National Exchange Carriers Association 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."[8] But the Bureau's actions in these proceedings necessarily applied only to the particular ILECs with suspended tariffs, and only to those specific ILEC tariffs.

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many cases, the LEC's business partners do not qualify as "end-users" as defined by applicable tariffs because they are themselves carriers. The Commission's 2008 *InterCall* decision, for example, strongly suggests that conference-calling companies such as those in traffic-pumping arrangements are providing telecommunications as common carriers. *Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, ¶ 18 (2008).

[7] *July 1, 2007 Annual Access Charge Tariff Filings*, Order, 22 FCC Rcd 11619, ¶ 7 (2007) (concluding that traffic-pumping practices raised "substantial questions" about whether certain ILEC tariffs were lawful); *Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 22 FCC Rcd 16109, ¶¶ 1, 13 (2007) (questioning whether ILECs could properly 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; also noting that a carrier's inclusion of these costs in its access charges forces interexchange carriers to "pay[ ] for the costs of the access stimulating service through . . . higher access charges.").

[8] *Investigation of Certain 2007 Annual Access Tariffs*, Order, 22 FCC Rcd 21261, ¶ 2 (2007).

Thus as Verizon and numerous other carriers have documented, following the Commission's tariff investigation in 2007 much of the traffic-pumping arbitrage activity merely shifted to CLECs claiming to serve rural communities.[9] It is therefore important for the Commission to put an end to these harmful schemes once and for all. Contrary to the CLEC Petitioners' request, the Commission should declare that it is a per se unreasonable practice in violation of the Section 201(b) of the Act for any LEC to assess terminating interstate switched access charges on traffic that is subject to a revenue-sharing arrangement. In other words, the correct result and the result that is consistent with the public interest is just the opposite of what Petitioners request.

For their part, Petitioners do not attempt to justify traffic pumping based on *any* public interest benefits. Rather, Petitioners concoct a legal theory based on faulty logic that purports to explain why traffic pumping is permissible under the Commission's rules and precedent. *CLEC Petition* at 16. Petitioners are wrong on the law. The Commission cannot "reiterate" in a declaratory ruling or elsewhere that any of the modern versions of these CLECs' traffic-pumping schemes are permissible because the Commission has made no such finding in the past. *CLEC Petition* at 28. These schemes constitute illegal arbitrage – nothing more. None of the decisions Petitioners cite reaches a different conclusion.

In *Qwest v. Farmers,* Qwest challenged the revenue-sharing agreements between Farmers, a traffic-pumping rural ILEC, and its conference-calling service "customers."[10]

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[9] *See, e.g.*, Letter from Donna Epps, Verizon, to Marlene Dortch, FCC, WC Docket No. 07-135 (Mar. 14, 2008).

[10] *Qwest Corp. v. Farmers & Merchants Mutual Tel. Co.*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007) ("*Qwest Order*"), partial reconsideration granted

Qwest's primary challenge, however, was to Farmers' rate of return, and the Commission indeed found Farmers' rate unlawful. *Qwest Order* ¶¶ 2, 25. The Commission thus declined to rule on the legality of the agreements in that case. *Id.* ¶ 27 & n.97. In any event, the Commission has now granted partial reconsideration of the *Qwest Order* because newly discovered evidence "raised [questions] . . . about the reliability of Farmers' representations" concerning the very question of whether the ILEC's purported customers had really subscribed to its services. *Qwest Reconsideration Order* ¶ 11 (reopening discovery without ruling on the merits because the ILEC is alleged to have fabricated documents and concealed evidence that certain chat-line companies were its business partners, not its customers).

Likewise, the Commission's 2001 *Jefferson Telephone* decision is not on point.[11] In *Jefferson Telephone*, AT&T challenged the relationship between a traffic-pumping LEC and its purported conference-calling service "customer." AT&T, however, limited its challenge to two arguments that are not dispositive of the legality of modern CLEC traffic-pumping schemes: (1) that the traffic-pumping activity in *Jefferson Telephone* violated a LEC's duty under Section 201(b) to serve its customers "indifferently"; and (2) that the traffic-pumping practice constituted unreasonable discrimination against the LEC's other customers that were not involved in the scheme. *Id.* ¶¶ 7, 15.

Although the Commission did not side with AT&T in *Jefferson Telephone*, the Commission "emphasize[d] the narrowness of [its] holding," limiting it to "the specific facts and arguments presented." *Id.* ¶ 16 (expressing "no view on whether a different

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by *Qwest Corp. v. Farmers & Merchants Mutual Tel. Co.*, Order on Reconsideration, 22 FCC Rcd 1615, ¶ 7 (2008) ("*Qwest Reconsideration Order*").

[11] *AT&T Corp. v. Jefferson Tel. Co.*, Memorandum Opinion and Order, 16 FCC Rcd 16130 (2001) ("*Jefferson Telephone*").

record" or a different arrangement could run "afoul of sections 201(b), 202(a), or other statutory or regulatory requirements."). Even absent this express limitation, however, *Jefferson Telephone* does not speak to an interexchange carrier or other carrier's right to challenge a LEC's traffic-pumping scheme on that carrier's own behalf, as opposed to a challenge – such as AT&T's in that case – based on the interests of the LEC's customers (assuming a traffic-pumping CLEC even has a bona fide end-user customer, which is unlikely). The same analysis applies to the other two decisions Petitioners cite.[12]

Finally, Petitioners offer a badly flawed analysis of Commission precedent supporting its more recent denouncements of traffic pumping in the *Access Stimulation NPRM* and the 2007 ILEC tariff investigation. In *Total Telecomms. Servs., Inc. v. AT&T Corp.*, the Commission condemned as "an unreasonable practice in connection with the provision of access service" a LEC's use of a "sham-CLEC" arrangement "designed solely to extract inflated access charges from IXCs."[13] The Commission held that this sham CLEC scheme was a violation of Section 201(b) of the Act. *Id.* ¶ 18.

Similar to the allegations against Petitioners in the *AT&T Complaint*,[14] in *Total* the sham arrangement was the creation of a CLEC (Total) that was purportedly independent from its ILEC progenitor (Atlas), but in fact was " 'highly intertwined' and

[12] *See AT&T Corp. v. Beehive Tel. Co.*, Memorandum Opinion and Order, 17 FCC Rcd 11641, ¶ 29 (2002) (following *Jefferson Telephone*); *AT&T Corp. v. Frontier Communications of Mt. Pulaski, Inc.*, Memorandum Opinion and Order, 17 FCC Rcd 4041, ¶ 1 (2002) (same).

[13] *Total Telecomms. Servs., Inc. v. AT&T Corp.*, Memorandum Opinion and Order, 16 FCC Rcd 5726, ¶ 16 (2001), *aff'd in relevant part*, *AT&T Corp. v. FCC*, 317 F.3d 227 (D.C. Cir. 2003) ("*Total*").

[14] *Informal Compliant of AT&T Corp. Against All American Tel. Co., e-Pinnacle Communications, Inc., and ChaseCom*, FCC, ¶ 6 (filed April 15, 2009) ("*AT&T Complaint*").

'symbiotic'": Total had the same senior management as Atlas, operated in the same geographical area, shared the same facilities, and had received a $20,000 startup loan from Atlas's pension fund. *Id*. ¶¶ 3, 16. Total's "sole business activity was to provide interexchange carriers with terminating access to a single [chat-line operator] . . . at rates significantly higher than those charged by Atlas for terminating access to every other customer in the area." *Id*. And Total paid "50 to 60 percent" of its terminating switched access revenues to the chat-line operator; those payments were the operator's only source of revenue. *Id*. ¶ 7 Based on these facts, the Commission found that "the arrangement between Total and Atlas," under which Total claimed to be an independent CLEC, "serves only to create a superficial distinction intended to enable Atlas to increase its fees for interexchange access for calls to the . . . chat line." *Id*. ¶ 18.[15]

Petitioners suggest that *Total* can be distinguished from the CLEC traffic-pumping schemes of today because the Commission closed the "*Total* loophole" that allowed such arbitrage in its new CLEC access charge rules "requiring that CLECs mirror the rates of the regulated incumbent LECs." *CLEC Petition* at 21. This is nonsense. The same or very similar sham-CLEC schemes at issue in *Total* are still possible today – and are almost certainly contributing to the overall traffic-pumping fraud.

Take for instance a hypothetical rate-of-return rural ILEC that wants to establish a traffic-pumping scheme. The ILEC has the "disadvantage" of the Commission's 2007

[15] The Commission distinguished *Total* in the *Qwest Order* but did so in part on the basis that "Qwest ha[d] not alleged that revenue-sharing arrangements between Farmers and the conference calling companies violate section 201(b) *per se*." *Qwest Order* ¶ 27. It thus left the door wide open for a ruling in a proper case that traffic-pumping LECs' arrangements *do* violate Section 201(b).

tariff investigation precedent and various limitations on its ability to base its high access rates on (pre-traffic pumping) historically low access demand data.[16] But if the same ILEC creates a sham CLEC that "competes" with the ILEC, the CLEC's rates will generally be capped at the ILEC's high rate but are not affected by Commission rules requiring ILECs to reset their access rates to reflect/account for material increases in demand[17] – such as a huge spike in traffic caused by revenue-sharing arrangements with "free" chat lines or conferencing services. Thus, the sham CLEC could continue traffic pumping indefinitely.

For the foregoing reasons, the *CLEC Petition* should be denied and the Commission should issue an order or declaratory ruling that ends illegal traffic-pumping schemes once and for all.

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[16] *See, e.g.*, Letter Donna Epps, Verizon, to Thomas Navin, FCC, *Proposals to Address Traffic Pumping Schemes*, WC Docket No. 07-135, at 2 (June 8, 2007).

[17] *Id*.

Respectfully submitted,

By: ______________________

Michael E. Glover, *Of Counsel*

Karen Zacharia
Christopher M. Miller
VERIZON
1320 North Courthouse Road
9th Floor
Arlington, VA 22201-2909
(703) 351-3071

John T. Scott, III
Tamara L. Preiss
VERIZON WIRELESS
1300 I Street, NW
Suite 400 West
Washington, DC 20005
(202) 589-3760

Attorneys for Verizon
and Verizon Wireless

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CERTIFICATE OF SERVICE

I, Jennifer Pelzman, hereby certify that, on behalf of Verizon and Verizon Wireless, I caused a copy of the foregoing Opposition to be mailed on June 1, 2009 via first-class postage prepaid mail to the following:

Ms. Marlene H. Dortch*
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Jonathan E. Canis
Katherine Barker Marshall
Aswathi Zachariah
Arent Fox LLP
1050 Connecticut Avenue, N.W.
Washington, DC 20036

Counsel for Petitioners All American Telephone Co., Inc., e.Pinnacle Communications, Inc., and ChaseCom

Matthew Robert Sutherland
General Attorney
AT&T Services, Inc.
1120 20th Street, N.W.
Suite 1000
Washington, D.C. 20036

Michael J. Hunseder
David Lee Lawson
James F. Bendernagel
Sidley Austin LLP
1501 K Street, N.W.
Washington, DC 20005

Counsel for AT&T

Jennifer Pelzman

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