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THE BROADBAND ASSOCIATION

October 8, 2010

WRITTEN EX PARTE

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

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

Dear Ms. Dortch:

On August 30, 2010, representatives from ZipDX, Level 3, Verizon, AT&T, Qwest and USTelecom met with Commission staff to discuss the long-standing and growing practice of traffic pumping.[1] During this meeting, the industry participants presented the staff with the attached consensus proposal for addressing this problem and urged the Commission to take immediate action to adopt rules to stem these arbitrage schemes. This letter responds to questions raised by the staff in the course of that meeting.

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The broad coalition of interests represented at this meeting have come together to urge immediate Commission action addressing the problem of traffic pumping—which has been before it for several years now—rather than delaying adoption of substantive rules through issuance of an additional notice of rulemaking tied to broader inter-carrier compensation reform. Of course, in the 2001 *CLEC Access Charge Order*, the Commission brushed aside concerns that the new rules would encourage such schemes by explaining that "the mechanism that we implement today serves as only a transitional solution" and that, therefore, the "opportunities for arbitrage growing out of" the rules would be mitigated by adoption of broader inter-carrier compensation reform – which the *Order* suggested would be completed in the near future.[2]

[1] While Sprint also attended the August 30 *ex parte* meeting, it is not co-signing the instant letter and has advised that it instead intends to set forth its views on traffic pumping remedies in a separate letter.

[2] *In the Matter of Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC 01-146 at para. 71-72 (rel. April 27, 2001) (*CLEC Access Charge Order*).

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Despite the skepticism expressed in the *CLEC Access Charge Order*, arbitrage schemes based upon free conference calling, chat lines and other services have indeed developed and, in the absence of Commission action to deter them, have thrived. In recognition of the growing number of complaints concerning such arbitrage schemes, the Commission exactly *three years ago* issued a Notice of Proposed Rulemaking to "focus on allegations that substantial growth in terminating access traffic may be causing carriers' rates to become unjust and unreasonable...."[3] That *Notice* specifically teed up questions concerning "the potential for access stimulation by competitive LECs" and recognized that under the current rules CLECs have "the same incentive to stimulate access traffic" as an incumbent LEC.[4] While the Commission took timely and effective action to address ILEC traffic pumping through the suspension and investigation of numerous annual tariff filings,[5] it has thus far failed to address the perceived loopholes in its CLEC access charge rules that are incenting similar schemes by CLECs. This lack of action has encouraged those engaging in these schemes with the result that traffic pumping is today costing carriers – and ultimately consumers – hundreds of millions of dollars every year.

In light of the extensive record already developed by the Commission in this proceeding, the question of *whether* the Commission needs to address the problem of traffic pumping has been answered. The breadth of the coalition of signatories to this letter demonstrates the importance and widespread recognition of this problem. Additionally, both wireless and competitive carriers have urged the Commission to stop traffic pumping.[6] The Iowa Utilities Board has taken measures to stop the practice as it affects intra-state access within its jurisdiction. And even the Rural Independent Carrier Alliance (RICA), the association of rural CLECs, has expressed its support for Commission action.[7]

The *National Broadband Plan* succinctly summarizes the fundamental public policy harms arising from traffic pumping, explaining that "[b]ecause the arbitrage opportunity exists, investment is directed to free conference calling and similar schemes for adult entertainment that ultimately cost consumers money, rather than to other, more productive endeavors."[8] In light of

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3 *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176 (rel. October 2, 2007) (*Traffic Pumping Notice*).

4 *Id.* at para. 34.

5 *See Investigation of Certain 2007 Annual Access Tariffs*, Order Designating Issues for Investigation, 22 FCC Rcd 16109 (2007).

6 *See, e.g., Ex parte* letter from Jennifer McKee, Vice President and Associate General Counsel, National Cable & Telecommunications Association to Marlene Dortch, Secretary, FCC (September 27, 2010); *Ex parte* letter from Tiki Gaugler, Senior Manager & Counsel, XO Communications to Marlene Dortch, Secretary, FCC (September 10, 2010).

7 Additionally, Congressmen Boucher and Terry recently introduced legislation in the U.S. House of Representatives that includes a provision expressly determining traffic pumping to be an unreasonable practice in violation of section 201(b) of the Communications Act.

8 *Connecting America: The National Broadband Plan* (rel. March 16, 2010) at p. 142.

this finding, the *National Broadband Plan* specifically recommends that the Commission "adopt rules to reduce access stimulation and to curtail business models that make a profit by artificially inflating the number of terminating minutes."[9]

Nor should there be any dispute about *when* the Commission should act—it should do so immediately. As the *National Broadband Plan* points out, the Commission needs to take interim action on this issue because it is an ongoing problem and will remain so well into the implementation of broad inter-carrier compensation reform. Moreover, as noted above, the Commission placed this issue out for notice and comment three years ago, during which time numerous fixes have been proposed and debated. There simply is no legal or public policy reason for seeking additional comment on this issue.

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The proposal provided to the staff at the August 30 *ex parte* meeting (a copy of which is attached to this letter) is consistent with, and builds upon, previous recommendations that have been considered in this docket.

In order to allow CLECs to file tariffs for interstate access charges without having to go through a complicated cost showing, the Commission in the *CLEC Access Charge Order* adopted proxies pursuant to which it would presume that CLEC access charges were just and reasonable, as required by Section 201 of the Act. Specifically, the Commission allowed CLECs to file tariffs with access rates that are no higher than those charged by the incumbent LEC serving the same area or, in the case of a CLEC serving a rural area also served by a non-rural incumbent LEC, a rate no higher than the highest National Exchange Carriers Association access rate band (NECA Band 8).[10] The latter benchmark, the so-called "rural exemption," was expressly established to address concerns that rural CLECs "experience much higher costs, particularly loop costs, when serving a rural area with a diffuse customer base than they do when serving a more concentrated urban or suburban area."[11] In other words, the rural exemption was established in order to ensure that the rural CLEC rates were benchmarked against carriers with similar costs and revenues, rather than against a large non-rural ILEC with a more diverse customer base. It is also worth noting that the Commission chose to benchmark against the very highest of the NECA rates despite an acknowledged possibility that this rate might over-compensate some rural CLECs in part because it believed – mistakenly as it has turned out – that "the burden [on IXCs] created by choosing the highest rate will be relatively minor, owing to the small number of carriers involved."[12]

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[9] *Id.* at 148.

[10] It is worth noting that CLECs are not prohibited from negotiating for higher access rates. They are simply prohibited from obtaining the regulatory benefits associated with tariffing for such rates. *See, CLEC Access Charge Order* at para. 40-43.

[11] *CLEC Access Charge Order* at para. 66.

[12] *CLEC Access Charge Order* at para. 81.

However, because the Commission's implementing rules did not expressly foreclose the adoption of this very high rate by CLECs with much lower costs and higher minutes of use than the typical NECA rural carrier, some rural CLECs are taking advantage of this perceived loophole to obtain the "presumed lawful" benefits of tariffed access rates *without any check upon whether the proposed rates are just and reasonable for that carrier*. Indeed, in the case of free conferencing services, the entire cost of providing the service generating millions of dollars in access charges every month may consist of nothing more than a router and a few feet of fiber cable.

The attached consensus proposal seeks to address this disconnect in two ways.

First, the proposal seeks to limit the number of minutes of use per line above which CLECs would not be able to take advantage of the rural benchmark in order to ensure that rural exemption CLECs have cost and revenue characteristics with *some minimal* resemblance to those of the NECA rural carriers to which they are being benchmarked. During the August 30 *ex parte* meeting, staff asked whether the industry participants had a single recommendation for the level of such a limit. While some of the companies in attendance at that meeting believe a lower number of minutes would be appropriate and more effective at deterring traffic pumping arbitrage, each of the companies listed in the signature page below are willing to support tying the cap to the minutes of use per line of the 99th percentile (e.g., highest 1 percent of minutes per line) of NECA Band 8 carriers. Such an approach provides more than reasonable flexibility for rural CLEC growth and legitimate business models. Based upon 2009 data, such a benchmark would result in a rural benchmark limit of 406 MOU/line, or nearly three times that of the median for NECA Band 8 LECs: [13]

Band 8 LECs	2009 MOU	2009 Lines	2009 MOU/Line
TOTAL	1,483,092,023	749,281	165
Median	1,667,572		143
95th Percentile	11,691,583		286
99th Percentile	23,667,675		**406**

We emphasize that this proposal is not meant to be punitive or to single out those engaging in any specific type of activity for special tariff treatment. To the contrary, it is meant simply to ensure that tariffed rural CLEC rates remain within the bounds of reasonableness, as is commanded by the Communications Act. Of course, a CLEC and an IXC are free to enter into a contract for interstate access with different prices and conditions.

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[13] An even less restrictive benchmark, but one which seems less connected to the NECA Band 8 rate allowed under the rural exemption, would be the 99th percentile (highest 1 percent of minutes per line) of *all* NECA carriers. Based upon 2009 MOUs, that benchmark would result in a cap of 469 MOU/Line as compared to the 406 MOU/Line cap based upon Band 8 LECs.

The other key plank of the proposed fix is a declaratory ruling that prohibits inter-carrier compensation from being assessed on traffic that is subject to a revenue sharing arrangement.[14] As the Commission stated in the *Traffic Pumping Notice*, "[o]n its face, the compensation paid by the exchange carrier to the entity stimulating the traffic is unrelated to the provision of exchange access."[15] By definition then, such charges – whether shared with a third party or used to support a LEC's own traffic stimulating services – are unjust and unreasonable in violation of Sections 201(b) and 254(k) of the Act. The proposal provided to staff during the August 30 *ex parte* includes narrowly tailored language for addressing this aspect of traffic pumping arbitrage schemes supported by each of the signatory companies to this letter.

The Commission's declaratory ruling should also address a LEC's own traffic stimulation services (*i.e.*, free conference or chat line services provided by the LEC itself) and situations where a LEC's owners may have cross-ownership interest in a traffic-stimulation service.[16] In these situations, there is *de facto* revenue sharing even in the absence of an agreement. For example, one USTelecom member company has a current traffic pumping dispute with a LEC that serves an adult chat line provider. The LEC does not appear to have a formalized revenue sharing arrangement with the provider; instead, the companies appear to have cross-ownership interests. Because the two companies' revenues apparently flow up to the same individuals, the chat line provider is able to offer some of its services for free. Once callers connect, they also have the option to enter a credit card number and pay for enhanced "services." LECs should be precluded from charging for inter-carrier compensation in these and similar situations as well.

To be clear, the proposal here is not intended to prohibit revenue sharing agreements or to otherwise constrain legitimate business arrangements. The prohibition would only extend to charging inter-carrier compensation on such "pumped" minutes.

* * * * *

Traffic Pumping – which the National Broadband Plan recognizes to be an arbitrage scheme with harmful consequences to broadband investment – is a rapidly growing problem. The Commission initiated a proceeding to address this problem three years ago and has been presented with multiple solutions within this docket. The instant proposal represents a single and intelligible approach to resolving this problem. In short, there is no reason for the Commission not to issue rules to stop traffic pumping at the earliest possible date.

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[14] "Inter-carrier compensation" includes, but is not limited to, tariffed exchange access and compensation for transport and termination of traffic pursuant to Section 251(b)(5) of the Act.

[15] *Traffic Pumping Notice* at para. 19.

[16] This situation is not directly addressed in the proposed declaratory ruling language but should nonetheless be addressed in the Commission's Order.

Sincerely,

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Revised Rule: 47 CFR 61.26

§ 61.26 Tariffing of competitive interstate switched exchange access services.

(a) Definitions. For purposes of this section 61.26, the following definitions shall apply:

(1) CLEC shall mean a local exchange carrier that provides some or all of the interstate exchange access services used to send traffic to or from an end user and does not fall within the definition of "incumbent local exchange carrier" in 47 U.S.C. 251(h).

(2) Competing ILEC shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. 251(h), that would provide interstate exchange access services, in whole or in part, to the extent those services were not provided by the CLEC.

(3) Interstate switched exchange access services shall include the functional equivalent of the ILEC interstate exchange access services typically associated with following rate elements: local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.

(4) Non-rural ILEC shall mean an incumbent local exchange carrier that is not a rural telephone company under 47 U.S.C. 153(37).

(5) The rate for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) Rural CLEC shall mean a CLEC that:

(i) does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(a) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(b) An urbanized area, as defined by the Census Bureau; and

(ii) neither originates nor terminates more than [XX] minutes of use of interstate switched exchange access traffic per working loop per month.

(7) Rural ILEC shall mean an incumbent local exchange carrier that is a rural telephone company under 47 U.S.C. 153(37).

(8) Working loop shall have the same definition as in 47 C.F.R. § 54.307(b), and a physical connection to a customer premise shall count as a single working loop without regard to the capacity of that connection or its capability to transmit multiple simultaneous calls.

(b) Except as provided in paragraphs (c) and (d) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the benchmark rate. The benchmark rate for a CLEC's interstate switched exchange access services will be the rate charged for similar services by the competing ILEC.

(c) Rural exemption. Notwithstanding paragraph (b) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching. In addition to that NECA rate, the rural CLEC may assess a presubscribed interexchange carrier charge if, and only to the extent that, the competing ILEC assesses this charge. Any rural CLEC that files a tariff pursuant to this exemption shall, no later than the 30th day after the end of each quarter for which it ceases to meet the requirements of the exemption, submit to the Commission a revised tariff based upon the competing ILEC's rates.

(d) Limitation on Use of Rural ILEC as a Benchmark. Notwithstanding paragraph (b) of this section, if a CLEC's competing ILEC is a rural ILEC, the CLEC may benchmark to the competing rural ILEC only if the CLEC terminates [XX] or fewer minutes of use of interstate switched exchange access traffic per working loop per month. Any CLEC benchmarking to a competing rural ILEC shall, no later than the 15th day after the end of each quarter, certify to the Commission either:

> (i) that the CLEC continues to qualify as a CLEC entitled to benchmark to the competing rural ILEC pursuant to this paragraph based on the CLEC's average switched exchange access minutes of use per working loop per month for the preceding quarter and that the CLEC will retain the documentation necessary to support its certification for at least three (3) years and will provide that documentation to the Commission on demand; or
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> (ii) that the CLEC is no longer eligible to benchmark to the competing rural ILEC pursuant to this paragraph based on the CLEC's average switched exchange access minutes of use per working loop per month for the preceding quarter and that the CLEC will file a revised tariff within 30 days that prices its interstate switched exchange access services no higher than the rate charged by [a]the Bell Operating Company as defined in 47 U.S.C. 153(4) serving the CLEC's state, or the largest ILEC in the state, possession or territory if there is no Bell Operating Company (based on number of lines within the state).
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> (iii) A CLEC billing a customer for interstate switched exchange access under this section of the Rules may not tariff rate elements or charges for any switched access service function (e.g., tandem switching or local end office switching) that it does not provide.
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> (iv) A CLEC required to file a new tariff under subsection (ii) hereof may not benchmark its interstate switched access rates to a rural ILEC for a minimum of one (1) year after the new tariff complying with subsection (ii) has been filed.

(e) If a CLEC provides some portion of the interstate switched exchange access services used to send traffic to or 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.

Separate Revenue Sharing Provision

To be stated in an FCC order:

> It shall be an unjust and unreasonable practice for any LEC to assess intercarrier compensation—including, for example, access charges, reciprocal compensation charges, or charges assessed under 47 C.F.R. § 20.11 arrangements—on traffic that is subject to a revenue sharing arrangement. A "revenue sharing arrangement" is any arrangement between a LEC and a calling provider whereby (i) the LEC compensates a calling provider to direct calls to or through a LEC's local exchange and (ii) the arrangement can be expected over its term to produce net payments from the LEC to the calling provider. "Calling provider" means any entity, including any affiliate of a LEC, that promotes or advertises to end users telecommunications services or information services and that provides or uses a LEC's telephone numbers for such services to be routed to or through a LEC's local exchange.