

provider recently estimated that five to eight percent of the traffic terminating on its network is “phantom” or disguised traffic.⁹⁶⁰ Some commenters also contend that there is a particular need to encompass VoIP traffic in any call information rules, although others argue that such rules should be tailored to reflect unique aspects of VoIP services.⁹⁶¹

624. For the reasons detailed below, we agree that traffic lacking sufficient information to enable proper billing of intercarrier compensation charges is not consistent with the public interest, and rules are needed to address this problem. In 2008, the Commission sought comment on possible steps to help ensure proper billing of all traffic.⁹⁶² The record in that proceeding demonstrated more widespread support for certain signaling rules than for other measures described in the *2008 ICC/USF FNPRM*.⁹⁶³ Consequently, our proposal below focuses specifically on rules governing signaling. But, given the increased number of interconnected VoIP lines and minutes,⁹⁶⁴ our rules need to be forward-looking and avoid inadvertently creating another arbitrage opportunity by limiting applicability to signaling for circuit-switched calls. We also seek comment on whether our proposed rules will be flexible enough to address current and future network technologies, and on whether additional measures are necessary to help ensure proper functioning of the intercarrier compensation system during a transition to all-IP networks.

2. Discussion

625. We propose to amend the Commission’s rules as described below to facilitate the transfer of necessary information to terminating service providers, particularly in cases where traffic is delivered through indirect interconnection arrangements. If adopted, these rules would assist in determining the appropriate service provider to bill for any call. We intend for these proposed rules to reflect standard industry practice and for them to remain applicable as providers migrate toward IP networks, and we seek comment on whether they do so.

626. We propose modifying the Commission’s rules to require that the calling party’s telephone number be provided by the originating service provider and to prohibit stripping or altering call signaling information.⁹⁶⁵ The proposed rules reflect the recommendations of commenters that the best way to ensure that complete and accurate information about a call gets to the terminating service provider for that call is to require all providers involved in transmitting a call from the originating to the

⁹⁶⁰ See Letter from Michael D. Saperstein, Jr., Director of Federal Regulatory Affairs, Frontier Communications, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket Nos. 07-135, 05-337, 04-36, CC Docket Nos. 01-92, 99-68, at 1 (filed Dec. 21, 2010).

⁹⁶¹ See NTCA Comments in re NBP PN #25 at 9 (filed Dec. 21, 2009); Voice on the Net Coalition Comments in re NBP PN #25 at 7 (filed Dec. 22, 2009).

⁹⁶² *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6641-49 App. A paras. 326-342; *id.* at 6841-48 App. C paras. 322-338.

⁹⁶³ See, e.g., AT&T 2008 ICC/USF FNPRM Comments at 35 (“By requiring the transmission of specified signaling information to the terminating carrier, the *Draft Order* takes a number of the steps needed to fix the problem”); Broadview, *et al.*, 2008 ICC/USF FNPRM Comments at 7-9; Embarq 2008 ICC/USF FNPRM Reply at 40 (offering support for signaling rules); NRIC 2008 ICC/USF FNPRM Reply at 22 (“The Nebraska Companies agree that incorporating . . . [signaling] rules will facilitate resolution of billing disputes and provide incentive for service providers to ensure that traffic traversing their networks is properly labeled and identified”).

⁹⁶⁴ See, e.g., *Local Telephone Competition: Status as of June 30, 2009*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, at 3 (Sept. 2010) (noting that VoIP subscriptions increased by 10 percent and switched access lines decreased by 5 percent during the first six months of 2009).

⁹⁶⁵ Call signaling information subject to our proposed rule includes, but is not limited to SS7 signaling information, MF signaling, such as ANI, and IP signaling such as signaling within SIP sessions.

terminating provider to transmit the calling parties' telephone number to the next provider in the call path. This transmission will vary with the technology used by providers.

627. For example, to comply with this provision, providers transmitting traffic using Internet protocols would be subject to the rule amendments we propose, and would likely transmit the required information in the Internet protocol signaling messages that set up and terminate calls.⁹⁶⁶ We seek comment on whether our proposed rules will ensure complete and accurate passing of call signaling information as voice traffic migrates increasingly to interconnected VoIP.⁹⁶⁷ We take a cautious approach in considering any new or revised signaling requirements. IP transmission standards and practices are evolving rapidly as service providers migrate to IP networks. Accordingly, although we make clear that our proposed rules apply to traffic originated or transferred using IP protocols, we do not specify how, technologically, providers using IP protocols must comply. In particular we seek comment on ways to ensure that our proposed rules are forward rather than backward-looking, and will remain relevant as technology evolves.

628. For service providers using SS7 to pass information about traffic, the proposed rules require originating providers to populate the SS7 calling party number (CPN) field. When CPN is populated in the SS7 stream for a call by an originating service provider and passed, unaltered, along a call path potentially involving numerous service providers to a terminating service provider, the terminating provider can use the CPN information to help determine the applicable intercarrier compensation. We do not, however, propose making any changes to the designation of particular SS7 fields as mandatory or optional, nor do we otherwise propose changes to industry standards that govern population of the SS7 signaling stream. With regard to SS7 signaling, we note that SS7 was designed to facilitate call setup and routing, and proposals we make in this Notice are not in any way intended to interfere with the ability of calls to reach their intended recipient.⁹⁶⁸

629. Although our existing rules impose obligations to pass CPN,⁹⁶⁹ they currently apply only to service providers using SS7 and only to interstate traffic. Commenters contend that expanding the application of those rules would help to address problems associated with unidentified traffic.⁹⁷⁰ We therefore propose extending these requirements to all traffic originating or terminating on the PSTN, including, but not limited to jurisdictionally intrastate traffic and traffic transmitted using Internet protocols. We seek comment on our authority to apply our proposed rules to all forms of traffic originating or terminating traffic on the PSTN. Specifically, we seek comment on whether our proposed rule revision is sufficient to require service providers originating or transferring traffic using Internet

⁹⁶⁶ These signaling messages would include the SIP From header (RFC 3261), and possibly the P-Asserted-Identity (RFC 3325) and Authenticated Identity Management (RFC 4474) headers.

⁹⁶⁷ *Local Telephone Competition: Status as of June 30, 2009*, Federal Communications Commission, Wireline Competition Bureau, Industry Analysis and Technology Division, at 3 (Sept. 2010) (noting that VoIP subscriptions increased by 10 percent and switched access lines decreased by 5 percent during the first six months of 2009).

⁹⁶⁸ As Verizon Wireless explains, certain SS7 fields are considered mandatory, while others (including CPN, CN, and JIP) are considered optional. See Verizon Wireless Sept. 13, 2005 *Ex Parte* Letter at 2. The distinction is significant because a call will not be completed if a mandatory field has not been populated. See Letter from Thomas Goode, Associate General Counsel, ATIS, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. (filed Feb. 10, 2006).

⁹⁶⁹ See 47 C.F.R. § 64.1601. Although CPN is considered optional in the industry standard, the Commission's rules require service providers to pass CPN in specified circumstances, and our proposal would not alter this requirement. *Id.*

⁹⁷⁰ See Verizon and Verizon Wireless 2008 ICC/USF FNPRM Comments at 64-65; see also Broadview, *et al.*, 2008 ICC/USF FNPRM Comments at 7-8; Missoula Plan for Intercarrier Compensation Reform at 56 (Missoula Plan), attached to Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed July 24, 2006).

protocols to include or transmit information identifying the originating service provider. We seek comment on whether intrastate calls fall within the Commission's jurisdiction for these purposes.⁹⁷¹ Similarly, we seek comment on USTelecom's assertion that the Commission has jurisdiction under Title I of the Act "to apply fundamental obligations to non-carriers that deliver traffic to the PSTN."⁹⁷²

630. We also recognize that some service providers do not use SS7 signaling, and instead rely on MF signaling. To the extent that we propose expanding our rules beyond SS7, we likewise propose amending our rules to require service providers using MF signaling to pass CPN information, or the charge number (CN) if it differs from the CPN, in the Multi Frequency Automatic Number Identification (MF ANI) field. This proposal is intended to ensure that information identifying the calling party is included in call signaling information for all calls. We seek comment on whether this proposal is a necessary and effective measure to address a problem requiring resolution.

631. In addition to CPN, our proposed call signaling rules also address CN, as recommended by a number of commenters.⁹⁷³ As Verizon has explained, in accordance with industry practice, the CN parameter is not populated in the SS7 stream when it is the same as CPN.⁹⁷⁴ But when the CN parameter is populated, CN is included in billing records in place of CPN. The proposed rules would clarify, consistent with industry practice, that populating the SS7 CN field with information other than the charge number to be billed for a call is prohibited. In addition, the proposed rules would prohibit altering or stripping signaling information in the CN as well as CPN field.

632. The proposed call signaling rules are intended to help ensure that signaling information is passed completely and accurately to terminating service providers. These proposed rules are not intended to affect existing agreements between service providers regarding how to "jurisdictionalize" traffic in the event that traditional call identifying parameters are missing, as long as such agreements are consistent with Commission rules or other legal requirements. We seek comment on whether the proposed rules will achieve our goal of helping to ensure complete and accurate passing of call signaling information while not inappropriately disrupting industry practices or existing carrier agreements. Finally, we seek comment on whether we should consider adopting any specific enforcement mechanism to ensure compliance with our proposed rules.

633. The proposed rules contain a few very limited exceptions to accommodate situations, identified in the record, where industry standards permit, or even require, some alteration in signaling information by an intermediate service provider.⁹⁷⁵ As noted above, our proposal is not intended to change industry practice with respect to the content of the signaling stream. Service providers that follow

⁹⁷¹ We note, for example, that the Commission found intrastate call signaling to be within its jurisdiction on the Caller ID context. In particular, when it first adopted rules governing caller ID, the Commission's primary objective was to remove uncertainties impeding the development of valuable interstate services related to caller ID. *See Rules and Policies Regarding Calling Number Identification Service – Caller ID*, CC Docket No. 91-281, Memorandum Opinion and Order on Reconsideration, Second Report and Order and Third Further Notice of Proposed Rulemaking, 10 FCC Rcd 11700, 11728, para. 79 (1995) (*Caller ID Order*). The Commission found that certain state regulations related to end-user blocking of call signaling information would impede attainment of that objective by creating separate federal and state call signaling policies that would be unfeasible to maintain. *See id.* at 11729-30, paras. 84-85. The Commission preempted these state regulations. *See id.* at 11703, para. 5.

⁹⁷² *See* USTelecom Feb. 12, 2008 *Ex Parte* Letter, Attach. at 7.

⁹⁷³ *See, e.g.*, NECA Petition; Letter from Cheryl A. Tritt, Counsel for T-Mobile USA, Inc. to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, Attach. at 6 (filed Feb. 2, 2006); Verizon Phantom Traffic White Paper at 8-10.

⁹⁷⁴ *See* Verizon Phantom Traffic White Paper at 21.

⁹⁷⁵ For example, Verizon states that on a call to a party that has forwarded its number, the called party's service provider will replace the caller's CN with the called party's CN before sending the call to the forward location. *See* Verizon Phantom Traffic White Paper at 9-10.

industry practice in this way would not, under the proposed rules, be in violation of the prohibition on altering signaling information. We also note that the exemptions from the existing call signaling requirements described in section 64.1601(d) remain necessary for their limited purposes, and will continue to apply.⁹⁷⁶ We seek comment on whether the limited exceptions in the proposed rules are necessary and appropriate. And, we seek comment on any other changes the Commission should make to update our rules concerning the delivery of CPN and association information.⁹⁷⁷

634. Although the proposed rules focus on call signaling, USTelecom's proposal also seeks Commission action related to routing traffic, local number portability queries, and providing incumbent LECs with certain rights with regard to the section 251 and 252 negotiation and arbitration processes as additional measures to address phantom traffic.⁹⁷⁸ We invite comment on these proposals to add to or update existing information in the record on these issues.⁹⁷⁹ Specifically, we invite comment on any other actions that the Commission should take or proposals in the record related to unbillable traffic and signaling requirements.⁹⁸⁰

C. Rules to Reduce Access Stimulation

635. In this section, we seek comment on specific revisions to our interstate access rules to address access stimulation, a form of arbitrage that, by some estimates, is impacting hundreds of millions of dollars in intercarrier compensation.⁹⁸¹ The ability to engage in this arbitrage arises from the current access charge regulatory structure as it applies to LEC origination and termination of interstate and intrastate calls.⁹⁸² The Commission has addressed similar arbitrage in the past—including access

⁹⁷⁶ 47 C.F.R. § 64.1601(d).

⁹⁷⁷ In addition to the exceptions described in this section, section 64.1601(b) contains rules regarding the *Privacy* of CPN, section 64.1601(c) contains rules prohibiting *Charges* for providing CPN blocking or delivering CPN to connecting carriers, and section 64.1601(e) contains signaling rules for *Telemarketing*. We ask whether any of these sections should be revised to conform to the changes proposed above to section 64.1601(a).

⁹⁷⁸ See USTA Feb. 12, 2008 *Ex Parte* Letter, Attach. at 10-12.

⁹⁷⁹ See, e.g., Broadview, *et al.*, 2008 ICC/USF FNPRM Comments at 8; Windstream 2008 ICC/USF FNPRM Comments at 25; Letter from Henry T. Kelly, Counsel to Peerless Networks to Marlene H. Dortch, Secretary, FCC, CC Docket Nos. 01-92 et al. (filed Sept. 16, 2008); Letter from Charles W. McKee, Director—Government Affairs, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Apr. 16, 2008); Letter from Thomas Cohen and Edward A. Yorkgitis, Jr., Counsel to NuVox Communications, *et al.*, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2-3 (filed Mar. 8, 2008); Letter from Daniel L. Brenner, Senior Vice President, Law and Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Feb. 29, 2008); Letter from Paul Garnett, CTIA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 2 (filed Feb. 25, 2008).

⁹⁸⁰ See, e.g., North Carolina Telephone Cooperative Coalition 2008 ICC/USF FNPRM Reply at 5 (“[T]he Commission should grant State Commission’s the authority to settle [phantom traffic payment] disputes between carriers.”); RNK 2008 ICC/USF FNPRM Reply at 12-19 (proposing that carriers be allowed to block phantom traffic under certain circumstances); Letter from W. Scott McCollough, General Counsel, Feature Group IP, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 1-2 & Attach. (filed Mar. 28, 2007) (proposing a Universal Tele-traffic Exchange specification as “a much better way to answer the demand for information about the identity of the party initiating a call session involving the PSTN at one or more endpoints”).

⁹⁸¹ See *infra* para. 637.

⁹⁸² We also note that there have been allegations of traffic stimulation associated with intra-MTA CMRS telecommunications traffic. See *infra* para. 672. We seek comment below on the nature of these allegations and whether the Commission should take action to reduce such concerns. In the *Local Competition First Report and Order*, the Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. See *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; see also 47 C.F.R. § 24.202(a) (defining the term “Major Trading Area”).

stimulation by certain incumbent LECs in some circumstances—and these actions inform our proposals here. To provide context for our proposed rules, we begin by describing the Commission’s regulatory structure as it applies to LEC origination and termination of interstate telecommunications traffic. We then review prior Commission actions to address arbitrage related to intercarrier compensation rates. We seek comment on each aspect of our proposed rules, and finally, we seek comment on other proposals to address access stimulation.

636. In broad terms, access stimulation is an arbitrage scheme employed to take advantage of intercarrier compensation rates by generating elevated traffic volumes to maximize revenues.⁹⁸³ Access stimulation occurs when, for example, a LEC enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and “free” conference calls.⁹⁸⁴ The arrangement inflates or stimulates the amount of access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the “free” service provider.⁹⁸⁵ Although the conferencing or adult chat lines may appear as “free” to a consumer of these services, the significant costs of these arbitrage arrangements are in fact borne by the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers.

637. Access stimulation imposes undue costs on consumers, inefficiently diverting the flow of capital away from more productive uses such as broadband deployment, and harms competition. Although long distance carriers are billed for and pay for minutes associated with access stimulation schemes, all customers of these long distance providers bear these costs and, in essence, ultimately support businesses designed to take advantage of today’s above-cost intercarrier compensation system. Projections indicate that the annual impact to the industry from access stimulators is significant. TEOCO estimates that the total cost of access stimulation to the industry has been over \$2.3 billion over the past five years.⁹⁸⁶ Verizon estimates the industry impact to be between \$330 and \$440 million per year and as noted above, states that it will be billed between \$66 and \$88 million by access stimulators for approximately two billion wireline and wireless long distance minutes in 2010.⁹⁸⁷ Although these

⁹⁸³ See *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17995-96, paras. 14-15 (2007) (*Access Stimulation NPRM*).

⁹⁸⁴ *Id.* at 17994-95, para. 12. Among other things, it is this active involvement of the LEC in driving high volumes of traffic to particular LEC switches that is not reflected in the underlying rate calculation that differentiates access stimulation from the more normal situation in which the LEC prices its service offerings based on historical trends and expected changes in traffic patterns.

⁹⁸⁵ See, e.g., FuturePhone.com Access Stimulation Comments at 16-18. Some conference providers, in addition to their “free services,” also offer services through the use of an 800 number for which they charge fees and bill customers, as is done in traditional conferencing arrangements. See, e.g., Global Conference Partners Access Stimulation Comments at 5. See also Letter from David Frankel, CEO, ZipDX, LLC, to Ms. Marlene Dortch, Secretary, FCC, WC Docket No. 07-135, at 2 (filed April 8, 2009) (ZipDX April 8, 2009 *Ex Parte* Letter). In one instance involving a rural incumbent LEC entering into an agreement with a “free” conference call company, Qwest reported that the minutes of interstate access traffic it delivered to that incumbent LEC increased from about 49,000 in June 2005 to over 10 million minutes a month at its peak. The effective interstate rate for this particular incumbent LEC was approximately 5.1 cents per minute. In another instance involving a rural ILEC that entered into an agreement with a “free” chat line provider, Qwest stated that the minutes of interstate access traffic it delivered increased from 27,000 in June 2006 to over 6.4 million minutes in November 2006. In this case, the incumbent LEC’s effective interstate rate was approximately 13 cents per minute. Qwest Access Stimulation Comments at 4.

⁹⁸⁶ See TEOCO, ACCESS STIMULATION BLEEDS CSPS OF BILLIONS, at 5 (TEOCO Study), attached to Letter from Glenn Reynolds, Vice President – Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed Oct. 18, 2010).

⁹⁸⁷ See Letter from Donna Epps, Vice President-Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 1 (filed Oct. 12, 2010) (Verizon Oct. 11, 2010 *Ex Parte* Letter).

projections are subject to debate in this proceeding,⁹⁸⁸ and there may be litigation surrounding payment of some of these charges,⁹⁸⁹ the record also suggests that the amount of capital that access stimulation diverts from broadband deployment and other investments that would benefit consumers is substantial.⁹⁹⁰

638. Moreover, access stimulation harms competition by giving companies that offer a “free” service a competitive advantage over companies that charge their customers for the service. As a result, “free” conferencing providers that leverage arbitrage opportunities can put other companies that charge consumers for services at a distinct competitive disadvantage.⁹⁹¹ For example, ZipDX, a conference calling provider, indicates that, although it has not engaged in the access stimulation model to date, it is at a competitive disadvantage vis à vis those providers engaged in access stimulation.⁹⁹²

1. Background

639. As discussed below, access stimulation occurs against the backdrop of a legal framework governing access charges that has facilitated such activity in several ways. We must account for those regulatory frameworks when identifying appropriate measures to respond to access stimulation. Moreover, prior Commission efforts to address arbitrage, including its initial actions to reign in access stimulation, can help inform proposals to address access stimulation more broadly.

a. Access Rate Regulation

640. The methods different types of carriers can use to establish access charges vary. In this section, we provide a high-level background of the framework for access rate regulation and tariffing that applies to incumbent LECs, both price cap and rate-of-return, competitive LECs, and CMRS providers. This discussion will identify the differences in how access regulations apply to each type of carrier, and how these differences, in combination with Commission policies regarding tariffs, call-blocking, and rate integration, set the stage for access stimulation and similar arbitrage opportunities.

641. LEC access charges apply to much of the traffic originating or terminating on their networks. The Commission regulates the rates, terms and conditions of LECs’ interstate access charges, which are rates that IXCs pay a LEC to originate and terminate interstate telecommunications traffic.

⁹⁸⁸ See Northern Valley Oct. 14, 2010 *Ex Parte* Letter at 2 n.4 (questioning the data and analyses underlying the TEOCO Report and Verizon estimates). See also Letter from Ross A. Buntrock, Counsel for Bluegrass Telephone Company, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 1 n.1 (filed Sept. 16, 2010) (arguing that a study by Connectiv Solutions, which claims that access stimulation costs the wireless industry approximately \$190 million a year, is flawed); see CONNECTIV SOLUTIONS, THE IMPACT OF TRAFFIC PUMPING, 2010, <http://www.connectiv-solutions.com/traffic-pumping.html>.

⁹⁸⁹ See, generally Northern Valley Oct. 14, 2010 *Ex Parte* Letter (highlighting litigation regarding payment of access charges).

⁹⁹⁰ See Verizon Oct. 11, 2010 *Ex Parte* Letter at 3; see also Letter from L. Charles Keller, Counsel for CTIA—The Wireless Association, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 6 (filed Aug. 26, 2010) (CTIA Aug. 26, 2010 *Ex Parte* Letter). These claims are consistent with the National Broadband Plan recommendation that the Commission adopt solutions to address access stimulation, noting that “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.” National Broadband Plan at 142. Specifically, the National Broadband Plan recommended 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.” *Id.* at 148.

⁹⁹¹ See, e.g., Letter from Glenn Reynolds, Vice President – Policy, US Telecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 1 (filed Nov. 12, 2010); Letter from David Frankel, CEO, ZipDX LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 2-5 (filed Sept. 21, 2009) (ZipDX Sept. 21, 2009 *Ex Parte* Letter); Letter from Michael B. Fingerhut, Director, Government Affairs, Sprint Nextel to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 2 (filed Apr. 29, 2009).

⁹⁹² Letter from David Frankel, CEO, ZipDX, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1, 3 (filed Nov. 26, 2010).

Currently, LECs use different methodologies to calculate their interstate access rates depending on whether the LEC is a price cap carrier, a rate-of-return carrier, or a competitive LEC. As a result of the different methodologies, a LEC's access rates may or may not reflect its actual costs.

642. *Price Cap Carriers.* Interstate access rates for price cap incumbent LECs are capped based on the individual carriers' price cap indexes after the Commission reduced interstate access charges for price cap carriers in the 2000 *CALLS Order*.⁹⁹³ Under certain conditions, these rates are adjusted annually pursuant to the Commission's price cap rules.⁹⁹⁴ As the Commission observed in the *Access Stimulation NPRM*, as a general matter, complaints regarding access stimulation activities have not directly involved price cap carriers.⁹⁹⁵ The absence of access stimulation complaints against price cap incumbent LECs is not surprising given the low level of price cap LEC interstate access rates relative to other carrier types.

643. *Rate-of-Return Carriers.* Interstate access rates for rate-of-return incumbent LECs are not capped, but rather are designed to provide those carriers the opportunity to earn a rate-of-return by calibrating their interstate access charges to the level of demand for those services.⁹⁹⁶ This linkage, for rate-setting purposes, between rates and demand has the effect of increasing rates as demand (i.e., the number of minutes) declines, or as costs increase. As discussed in greater detail below, many complaints regarding access stimulation activities have involved rate-of-return LECs. In 2007, the Commission took action to address initial concerns regarding access stimulation activity involving rate-of-return LECs.⁹⁹⁷

644. Rate-of-return LECs establish their interstate access rates by filing tariffs with the Commission. Commission rules provide rate-of-return LECs three alternative means for filing interstate access tariffs: (1) participation in the National Exchange Carrier Association (NECA) Tariff No. 5, which sets forth interstate access charges for participating LECs;⁹⁹⁸ (2) filing a tariff pursuant to section 61.38 of the Commission's rules, which would be based on projected costs and demand; or (3) for carriers with 50,000 or fewer lines, filing a tariff pursuant to section 61.39 of the Commission's rules, which would be based on historical costs and demand.

645. Most rate-of-return LECs participate in a traffic-sensitive pool managed by NECA and participate in the traffic-sensitive tariff filed annually by NECA on behalf of participating members.⁹⁹⁹ Interstate access rates in the traffic-sensitive tariff are set based on the projected aggregate costs (or average schedule settlements) and demand of all pool members and are targeted to achieve an 11.25 percent return.¹⁰⁰⁰ Each participating carrier receives a settlement from the pool based on either its costs plus a pro rata share of profits, receives a settlement pursuant to the average schedule formulas. Carriers may enter or leave the NECA pool on July 1 of any year by providing notice to NECA by the preceding March 1.¹⁰⁰¹

⁹⁹³ See *CALLS Order*, 15 FCC Rcd at 12962.

⁹⁹⁴ See 47 C.F.R. §§ 61.41-49.

⁹⁹⁵ See *Access Stimulation NPRM*, 22 FCC Rcd at 18033, para. 33.

⁹⁹⁶ See generally *id.* at 17992-93, paras. 6-8.

⁹⁹⁷ See *infra* para. 657.

⁹⁹⁸ See 47 C.F.R. § 69.601 *et seq.*

⁹⁹⁹ See NECA, Inc., Tariff FCC No. 5, Title Pages 1-68.

¹⁰⁰⁰ In lieu of cost studies, average schedule carriers are compensated by formulas that establish settlements for average schedule carriers that are comparable to the settlements received by comparable cost companies. 47 C.F.R. § 69.606(a). The average schedule settlements are added to the costs of the cost companies to form the revenue requirement for the pool.

¹⁰⁰¹ See 47 C.F.R. § 69.3(e)(6).

646. As an alternative to participating in the NECA tariff, a rate-of-return carrier may file its own access tariff(s) pursuant to the provisions of section 61.38 of the Commission's rules (section 61.38 carrier). Under section 61.38, a carrier is required to file access tariffs in even numbered years to be effective for a two-year period.¹⁰⁰² A section 61.38 carrier files tariffed rates based on its projected costs and demand and targets its rates to earn an 11.25 percent return on its regulated rate base. If a section 61.38 carrier's demand increases above the level projected by the carrier in its tariff filing during the tariff period, it does not share the increased revenues with any other carrier. Accordingly, a section 61.38 carrier retains the increased revenues to the extent they exceed any increase in costs if the rates are "deemed lawful" as discussed below.

647. Finally, a rate-of-return carrier that has 50,000 or fewer access lines in a study area may elect to file its access tariffs in accordance with section 61.39 of the Commission's rules (section 61.39 carrier), which was adopted in the *Small Carrier Tariff Order* to simplify the procedures and reduce the cost of filing tariffs for small LECs.¹⁰⁰³ A carrier choosing to proceed under this rule is required to file access tariffs in odd numbered years to be effective for a two-year period.¹⁰⁰⁴ The initial rates of section 61.39 carriers are set based on historical costs (or average schedule settlements) and associated demand for the preceding year, which the Commission believed to reasonably reflect the costs of these carriers for the next two years.¹⁰⁰⁵ Section 61.39 carriers, therefore, do not have to project future test period costs and demand. These carriers do not pool their costs and revenues with any other carrier. Thus, if demand increases for the section 61.39 carrier, the carrier retains the revenues resulting from the increased demand to the extent they exceed any cost increase if the rates are "deemed lawful" as discussed below.

648. The ability of carriers filing interstate access tariffs under sections 61.38 and 61.39 to retain revenues generated from higher than projected (for 61.38) or historical (for 61.39) traffic volumes without adjusting their rates for the two-year period during which their tariffs are effective provides an incentive to engage in access stimulation activity. In particular, some rate-of-return LECs filing tariffs under section 61.39 could leave the NECA pool and establish rates based on historical demand when their demand was low, thus resulting in a high rate for the two-year effective period of the tariff. Once access charges are set at these levels, the LECs could enter into access stimulation arrangements, leading to and resulting in vastly higher traffic volumes than were used to set the rates and earnings far in excess of the authorized rate-of-return.¹⁰⁰⁶ Then, at the end of that two-year period, the LEC would reenter the NECA

¹⁰⁰² See 47 C.F.R. § 69.3(f)(1).

¹⁰⁰³ See *Regulation of Small Telephone Companies*, CC Docket No. 86-467, Report and Order, 2 FCC Rcd 3811 (1987) (*Small Carrier Tariff Order*).

¹⁰⁰⁴ See 47 C.F.R. § 69.3(f)(2). These carriers have the option of filing tariffs pursuant to either section 61.38 or section 61.39. See 47 C.F.R. §§ 61.38 and 69.3(f)(1).

¹⁰⁰⁵ See 47 C.F.R. § 61.39(b); see also *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, para. 7 (noting that this process "should not permit or provide incentives for small companies to file access tariffs producing excessive returns"). For subsequent tariff filings, cost carriers establish rates based on a cost of service study for Traffic Sensitive elements for the total period since the local exchange carriers' last annual filing, with related demand for the same period, while average schedule carriers establish rates based on an amount calculated to reflect the Traffic Sensitive average schedule pool settlement the carrier would have received if the carrier had continued to participate in the NECA pool, based upon the most recent average schedule formulas approved by the Commission. See 47 C.F.R. § 61.39(b)(2)(ii). Thus, because a section 61.39 carrier does not have to reflect future events affecting its cost or demand levels in the ratemaking process, high access rates are established based on low levels of demand, which, when the tariffed rates are deemed lawful, creates the arbitrage opportunity presented by access stimulation.

¹⁰⁰⁶ See, e.g., *Qwest Communications Corp. v. Farmers and Merchants Mut. Tel. Co.*, EB-07-MD-001, Memorandum Opinion and Order, 22 FCC Rcd 17973, 17980-83, paras. 21-25 (2007) (finding that Farmers' revenues increased many fold during the period at issue, without a concomitant increase in costs, and Farmers vastly exceeded the prescribed rate-of-return), *recon. in part on other grounds*, 23 FCC Rcd 1615 (2008), *further recon. on other grounds*, 24 FCC Rcd 14801 (2009).

traffic-sensitive pool to avoid basing its individual rates for the next two years on the high demand realized as a result of access stimulation.¹⁰⁰⁷

649. *Competitive Local Exchange Carriers.* Unlike rate-of-return LECs, whose interstate access rate levels are linked to their own projected or historical demand and costs, competitive LECs do not tariff interstate access rates based on their own costs. Instead, competitive LECs generally are permitted to tariff interstate access charges at a level no higher than the tarified rate for such services offered by the incumbent LEC serving the same geographic area (the benchmarking rule).¹⁰⁰⁸ The Commission adopted this “benchmarking” policy in response to the practice of some competitive LECs that were tariffing access rates for terminating traffic that were higher than the rates being charged by the incumbent LECs serving the same area. By “benchmarking” competitive LEC access rates to the access rates of the incumbent LEC serving the same area, the rule uses incumbent LEC access rates as a basis to establish a rate level that could be presumed to be just and reasonable. This regulatory framework was adopted to mimic the results of competition by capping rates at the level of the competing incumbent LEC, without the need to subject competitive LECs to detailed accounting and other regulatory requirements traditionally imposed in the context of incumbent LECs’ rates.

650. The Commission established an exemption for rural competitive LECs offering service in the same areas as non-rural incumbent LECs. This exemption permits rural competitive LECs to “benchmark” to the access rates prescribed in the NECA access tariff, assuming the highest rate band for local switching. This exemption was designed to recognize that a rural competitive LEC’s costs would be higher than those of a non-rural price cap LEC that was required to geographically average its access rates across its entire study area. The NECA rate was selected “because it is tarified on a regular basis and is routinely updated to reflect factors relevant to pricing rural carriers’ access service.”¹⁰⁰⁹ Access stimulation, however, undermines this framework, because if a rate-of-return incumbent LEC that the competitive LEC is being benchmarked to were to experience the level of demand increase commensurate with access stimulating competitive LECs, they would be required to lower their access rates, likely quite significantly. Thus, access stimulation activities conducted by competitive LECs using the rural exemption, whose interstate access rates are benchmarked to the NECA tariff rates, exploit the lack of connection between the rates charged by the competitive LEC for providing switched access services (which are not affected by changes in demand) and the rates that would be charged by a rural incumbent LEC for providing such services (which are determined on the basis of a projected demand level).

651. *CMRS Providers.* CMRS providers are prohibited from filing interstate access tariffs.¹⁰¹⁰ Accordingly, CMRS providers are entitled to collect access charges from a long distance carrier only pursuant to contract.¹⁰¹¹ Thus, as a practical matter, CMRS providers generally do not collect access charges for calls that originate or terminate on their networks. Accordingly, because CMRS providers are typically unable to collect access charges for traffic terminated on their networks, the potential incentives to engage in access stimulation are absent.

¹⁰⁰⁷ See July 2007 Annual Access Charge Tariff Filings, Petition of Verizon to Suspend and Investigate Tariff Filings, WCB/Pricing 07-10, at 10 (filed June 19, 2007) (identifying several carriers that have a history of exiting the NECA traffic-sensitive pool and having their access minutes increase significantly and then reentering the pool, after which minutes of use return to pre-exiting levels). See also Verizon Access Stimulation Comments at 7-8, 11.

¹⁰⁰⁸ See 47 C.F.R. § 61.26; see also *CLEC Access Reform Order*, 16 FCC Rcd 9923, 9925, para. 3.

¹⁰⁰⁹ *CLEC Access Reform Order*, 16 FCC Rcd at 9956, para 81.

¹⁰¹⁰ See 47 C.F.R. § 20.15(c).

¹⁰¹¹ See *Petitions of Sprint PCS and AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, WT Docket No. 01-316, Declaratory Ruling, 17 FCC Rcd 13192, 13198, para. 12 (2002) (*Sprint/AT&T Declaratory Ruling*), petitions for review dismissed, *AT&T Corp. v. FCC*, 349 F.3d 692 (D.C. Cir. 2003).

b. Interstate Access Tariffs and Interexchange Carriers

652. The preceding discussion explained how, under the Commission's rules, incumbent LECs and competitive LECs establish interstate access rates. This section provides additional detail about the Commission's tariffing, call blocking and rate integration policies and how these policies affect access stimulation.

653. *Deemed Lawful Status.* Interstate access tariffs provide notice regarding the rates, terms and conditions applicable to interstate access service and provide the Commission and the public the opportunity to review the tariff filings to help ensure that they comply with governing rate regulations. In the 1996 Act, Congress enacted section 204(a)(3), which provides that LEC tariffs filed on seven days notice (when rates are reduced) or 15 days notice (for any other change) are "deemed lawful" following the notice period unless rejected or suspended and investigated by the Commission. In the *Streamlined Tariff Order*, the Commission concluded that a tariff filed pursuant to section 204(a)(3) (a "streamlined" tariff) that takes effect, without prior suspension and investigation, is conclusively presumed to be reasonable under section 201 and is thus protected from retrospective refund liability in a formal complaint proceeding, even if the carrier is ultimately found to have overearned.¹⁰¹²

654. *Call Blocking and Geographic Rate Averaging.* The Commission's prohibition of call blocking and the geographic rate averaging requirement in the Act are part of the background from which access stimulation arose. Commission precedent prohibits an IXC from unreasonably blocking calls to a customer of a LEC, even if that LEC is engaged in access stimulation, because the ubiquity and reliability of the nation's telecommunications network is of paramount importance to the goals of the Act.¹⁰¹³ Meanwhile, geographic rate averaging, which precludes IXCs from charging customers in one state a rate different from that in another state, limits the IXCs' ability to directly pass the generally higher and typically "deemed lawful" tariffed interstate access charges of some mostly rural LECs on to the particular end-users placing calls to a stimulating entity in the LEC's service area.¹⁰¹⁴ Customers initiating calls to access stimulating entities are generally unaware that their calls are part of an access stimulation arrangement and that very high access charges are being assessed on the IXC. IXCs who believe that a LEC's access charges are excessive may invoke the complaint processes to seek relief.¹⁰¹⁵

¹⁰¹² See *Implementation of Section 401(b)(1)(A) of the Telecommunications Act of 1996*, CC Docket No. 96-187, Report and Order, 12 FCC Rcd 2170 (1997) (*Streamlined Tariff Order*).

¹⁰¹³ *Establishing Just and Reasonable Rates for Local Exchange Carriers; Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, 22 FCC Rcd 11629 (2007).

¹⁰¹⁴ See 47 U.S.C. § 254(g); 47 C.F.R. § 64.1801(b) (providing that "[a] provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each U.S. state at rates no higher than the rates charged to its subscribers in any other state."). Geographic rate averaging thus prohibits an IXC from charging customers a surcharge for the higher access charges often associated with access stimulation. The end-user customers therefore have no incentive to choose a LEC that charges low switched access charges, since he or she does not pay the charges directly. See *CLEC Access Reform Order*, 16 FCC Rcd at 9935-36, para. 31.

¹⁰¹⁵ Section 203(c) provides two relevant requirements governing the tariffing of charges for telecommunication services. Section 203(c)(1) provides that no carrier shall "charge, demand, collect, or receive a greater or less or different compensation for such communication... than the charges specified in the schedule then in effect." 47 U.S.C. § 203(c)(1). This requirement is generally known as the filed rate doctrine. See, e.g., *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214 (1998) for a general description of the filed rate doctrine. As a corollary to subparagraph (1), section 203(c)(2) provides that no carrier shall "refund or remit by any means or device any portion of the charges so specified." 47 U.S.C. § 203(c)(2). A LEC that has not been paid its tariffed charges may proceed in federal court to recover the tariffed charges. See, e.g., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges*, Order, 19 FCC Rcd 7457, 7472 n.93 (2004) (long-standing Commission precedent holds that "under sections 206-209 of the Act, the Commission does not act as a collection agent for carriers with respect to unpaid tariffed charges, and that such claims should be filed in the appropriate state or federal courts").

But, where such activities are underway, the IXC must complete the calls and may not charge a higher rate to the caller. Because most interstate access rates today are “deemed lawful,” long distance carriers are not entitled to refunds for tariffed services even if the tariffed rates later are found to be unjust or unreasonable.

c. Prior Commission Action

655. The Commission has previously taken steps to curb arbitrage incentives created by above-cost intercarrier compensation rates. These measures primarily involved dial-up ISP-bound traffic and business schemes designed to generate profits from reciprocal compensation rates that were substantially higher than the carrier’s incremental cost of terminating a call.¹⁰¹⁶ Although these schemes used reciprocal compensation rates, as opposed to access charges, they were, nevertheless, a form of arbitrage designed to stimulate traffic to generate intercarrier revenues.

656. Initial concerns about interstate access stimulation involved rate-of-return LECs, and the Commission took action to address these concerns in 2007. Specifically, the Wireline Competition Bureau suspended and designated for investigation the access tariffs of certain carriers allegedly involved in access stimulation.¹⁰¹⁷ The 2007 *Designation Order* identified two safe harbor provisions that would allow the affected carriers to avoid the investigation if the carrier either: (1) elected to return to the NECA pool; or (2) added language to its tariff that would commit to the filing of a revised tariff if the filing carrier experienced a 100 percent increase in monthly demand over the same month in the prior year. Ultimately, the Wireline Competition Bureau terminated the tariff investigation because all carriers whose tariffs were subject to investigation elected to modify their tariffs consistent with one of the safe harbors.¹⁰¹⁸

657. In 2007, the Commission also initiated a rulemaking proceeding to seek comment on interstate access stimulation and tentatively concluded that rule modifications were necessary to ensure that interstate access charges remained just and reasonable.¹⁰¹⁹ Since 2007, the record indicates that access stimulation activity by rate-of-return LECs has decreased, but that competitive LECs now conduct a significant amount of access stimulation, either by benchmarking to a particular rate-of-return LEC or relying on the rural exemption to benchmark to NECA rates.¹⁰²⁰

¹⁰¹⁶ See *Inter-carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151 (2001) (*ISP Remand Order*); *remanded but not vacated by WorldCom, Inc. v. FCC*, 288 F.3d 429 (D.C. Cir. 2002); see also *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd 6475. The Commission also found “convincing evidence in the record” that carriers had “targeted ISPs as customers merely to take advantage of . . . intercarrier payments” (including offering free service to ISPs, paying ISPs to be their customers, and sometimes engaging in outright fraud). See *ISP Remand Order*, 16 FCC Rcd at 9153, para. 2. It adopted an ISP payment regime to “limit, if not end, the opportunity for regulatory arbitrage.” See *id.* at 9187, para. 77.

¹⁰¹⁷ See *July 1, 2007 Annual Access Tariff Filings*, WCB/Pricing No. 07-10, Order, 22 FCC Rcd 11619 (2007) (*Designation Order*).

¹⁰¹⁸ See *Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, WCB/Pricing File No. 07-10, Order, 22 FCC Rcd 21261 (2007) (*Termination Order*).

¹⁰¹⁹ See *Access Stimulation NPRM*, 22 FCC Rcd 17989. The *Access Stimulation NPRM* sought comment on a variety of related issues, including: (1) whether switched access rates were becoming unjust and unreasonable because of excessive earnings; (2) whether any shared revenues are properly included in a rate-of-return LEC’s revenue requirement; (3) the possible use of growth triggers and tariff language to require the refiling of tariffs upon certain events occurring; (4) the use of LEC certifications that access stimulation was not being engaged in; and (5) possible modification of the benchmarking rules for competitive LECs.

¹⁰²⁰ Parties have also alleged that some competitive LECs appear to be affiliated with rate-of-return LECs. See Letter from Brian J. Benison, Director Federal Regulatory, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 3 (filed Jan. 12, 2010); AT&T Access Stimulation Comments at 10.

2. Discussion

a. Proposed Access Stimulation Rules

658. After considering comments received in response to the 2007 *Access Stimulation NPRM*, and in light of recent filings in the Commission's access stimulation docket, we conclude that it is appropriate to revisit our access charge rules. However, we seek to strike the appropriate balance of addressing the policy concerns outlined above without imposing unnecessary burdens on LECs or inadvertently stifling non-stimulated competition in rural areas. We therefore propose revisions to our interstate access rules and seek comment on whether our proposed revisions achieve our goal of providing a targeted response to address access stimulation while minimizing additional burdens on LECs not engaged in access stimulation.¹⁰²¹

659. *Trigger.* To address access stimulation, we propose to adopt a trigger based on the existence of access revenue sharing arrangements. As discussed below, once a particular LEC meets the trigger, it would be subject to modified access charge rules that would vary depending upon the nature of the carrier at issue. We believe this is the appropriate approach for several reasons. First, as recognized in the *Access Stimulation NPRM*¹⁰²² and the resulting record, access revenue sharing arrangements commonly are used to facilitate access stimulation activity,¹⁰²³ as well as other forms of arbitrage.¹⁰²⁴ Second, the sharing of significant amounts of interstate access revenues with another entity (whether a third party or an entity affiliated with the LEC), raises questions about whether the underlying access rates remain just and reasonable, particularly given the policy concerns discussed above.¹⁰²⁵ Consequently, we propose that if a rate-of-return LEC or a competitive LEC is a party to an existing access revenue sharing agreement or enters into a new access revenue sharing agreement, the revised rules outlined below for interstate switched access charges would become applicable. More specifically, we propose to focus on revenue sharing arrangements between the LEC charging the access charges at issue and another entity that result in a net payment to that other entity over the course of the agreement. For this purpose, revenue sharing includes all payments, including those characterized as marketing fees or other similarly named payments that result in a net payment to the access stimulator. How should we address a revenue sharing arrangement within the same company where an explicit revenue sharing

¹⁰²¹ To limit burdens associated with our proposal, we decline to propose measures suggested in the record to address access stimulation that rely on certifications or additional reporting. *See, e.g.,* AT&T Access Stimulation Comments at 25-26 (proposing certification requirements); Sprint Access Stimulation Comments at 19-20 (proposing self-reporting and certification requirements); Verizon Access Stimulation Comments at 18-19 (proposing certification requirements).

¹⁰²² *See, e.g.,* *Access Stimulation NPRM*, 22 FCC Rcd at 17997, para. 20 (seeking "comment on whether the Commission should examine any such [revenue sharing] payments, and, if the commenters believe that such payments should be examined, . . . [what] actions the Commission can or should take").

¹⁰²³ *See, e.g.,* AT&T Access Stimulation Comments at 6-11; Qwest Access Stimulation Comments at 3-10; Sprint Access Stimulation Comments at 2-10; Verizon Access Stimulation Comments at 8-10.

¹⁰²⁴ *See, e.g.,* Sprint Access Stimulation Comments at 4-5; Level 3 Petition for Declaratory Ruling Regarding Access Charges by Certain Inserted CLECs for CMRS-Originated Toll-Free Calls, CC Docket No. 01-92 at 2, 12-15 (filed May 12, 2009) (Level 3 Declaratory Ruling Petition) (the petition asks for Commission action clarifying the operation of the CLEC benchmark rules).

¹⁰²⁵ *See, e.g.,* *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 91-213, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16619-20, para. 44 (*Access Charge Reform Second Order*) (citing *Competitive Telecomms. Ass'n v. FCC*, 87 F.3d 522, 529 (D.C. Cir. 1996)) (recognizing that "the just and reasonable rates required by Sections 201 and 202 . . . must ordinarily be cost-based, absent a clear explanation of the Commission's reasons for a departure from cost-based ratemaking").

agreement may not exist? For instance, would the prohibition on cross-subsidization in section 254(k) address this concern and, if not, how could the Commission address it?¹⁰²⁶

660. We invite parties to comment on whether there are revenue sharing arrangements that are in the public interest and on revisions that would be necessary to the proposed rules to ensure that such arrangements are not encompassed by the rule.¹⁰²⁷ We also ask parties to comment on the enforceability of this trigger. For example, how easy would it be for parties involved in access stimulation to reconfigure arrangements with their business partners to avoid a revenue sharing agreement trigger? Are there other aspects of such a trigger that would make it difficult to enforce? Alternatively, would enforcement have even more consequences than is the case today because, under the proposed rules, failure to file new tariffs when the trigger is met, or failure to disclose that the trigger is met, would be a violation of Commission rules?

661. *Revenue Requirement Treatment.* As reflected above, we do not propose to declare all payments to third parties as part of access stimulation activity to be *per se* unjust and unreasonable under section 201 of the Act.¹⁰²⁸ Even so, we agree with the tentative conclusion in the *Access Stimulation NPRM* that payments made by a LEC pursuant to an access stimulation arrangement are not properly included as costs in the incumbent LEC's interstate switched access revenue requirement.¹⁰²⁹ Such payments have nothing to do with the provision of interstate switched access service and are thus not used and useful in the provision of such service.¹⁰³⁰ Thus, consistent with the *Access Stimulation NPRM*, we propose to clarify prospectively that "a rate-of-return carrier that shares revenue, or provides other compensation to an end-user customer, or directly provides the stimulating activity, and bundles those costs with access is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard."¹⁰³¹

662. *Participation in NECA Tariffs.* The record indicates that although access stimulation is less likely in the NECA pooling context because the increased revenues must be shared amongst the pool members, it is not necessarily precluded.¹⁰³² To address the possibility of access stimulation activity by a NECA tariff participant, under the proposed rules, a carrier would lose eligibility to participate in the NECA tariffs 45 days after meeting the trigger, or 45 days after the effective date of this rule if it currently meets the trigger. Such a carrier leaving the NECA tariff would have to file its own tariff(s) for interstate switched access, pursuant to the rules set forth for carriers subject to section 61.38. We invite

¹⁰²⁶ 47 U.S.C. § 254(k).

¹⁰²⁷ For example, a number of local telephone companies operate as cooperatives, and as such, may have agreements to share their revenues with their members (who are customers for local service).

¹⁰²⁸ Parties are free to pursue complaints or other Commission action in specific instances if they believe it is warranted, however. This Notice should not be construed to resolve any pending access stimulation complaint addressing alleged access stimulation activity prior to the effectiveness of any final order in this proceeding.

¹⁰²⁹ *Access Stimulation NPRM*, 22 FCC Rcd at 17997, paras. 18-19. For example, in the case of conferencing service, these might include the cost of the conference bridge, the expenses of operating the bridge, and the costs of promotion.

¹⁰³⁰ See Embarq Access Stimulation Comments at 8; ITTA Access Stimulation Comments at 15; Ohio Comm'n Access Stimulation Comments at 6 (recovery of such costs is an unjust and unreasonable practice in violation of section 201(b) of the Act); Qwest Access Stimulation Comments at 15-16 (recovery of such costs is an unjust and unreasonable practice in violation of section 201(b) of the Act); Sprint Access Stimulation Comments at 9 (citing *Access Stimulation NPRM* at 17997, para. 19); Western Telecommunications Alliance Access Stimulation Comments at 13 (recovery of such costs should be prohibited as an unjust and unreasonable practice in violation of section 201(b) of the Act).

¹⁰³¹ *Access Stimulation NPRM*, 22 FCC Rcd at 17997, para. 19.

¹⁰³² See NECA Access Stimulation Comments at 3; Ohio Comm'n Access Stimulation Comments at 4.

comment on the need for this requirement and the impact, if any, it might have on the operation of the NECA pools.

663. *Projected Costs and Demand: Section 61.38.* A carrier filing interstate exchange access tariffs pursuant to section 61.38 of the Commission's rules would be required to file a new tariff within 45 days of meeting the proposed trigger if the costs and demand arising from the new revenue sharing arrangement had not been reflected in its most recent tariff filing. This requirement provides the carrier with the opportunity to show, and the Commission to review, any projected increase in costs, as well as to consider the higher anticipated demand in setting revised rates. In determining a reasonable rate, the carrier would not be permitted to include projected amounts paid to the entity stimulating traffic as a recoverable cost in its revenue requirement calculation, pursuant to section 61.38(b), absent Commission approval. We invite comment on these proposals for addressing carriers subject to section 61.38 of the Commission's rules.

664. *Historical Costs and Demand: Section 61.39.* LECs filing access tariffs pursuant to section 61.39 of the Commission's rules currently base their rates on historical costs and demand.¹⁰³³ Once such a carrier meets the relevant trigger under the proposed rules, it would lose the eligibility to file tariffs based on historical costs under that section. Instead, it would be required to file revised interstate access tariffs using the procedures set forth for carriers subject to section 61.38 of the Commission's rules, establishing its rates based on projected costs and demand.¹⁰³⁴ This rule change would not affect the ability of an eligible carrier to operate under the provisions of section 61.39 if it has not met the defined trigger.¹⁰³⁵ We invite parties to comment on this proposed change and its effectiveness in addressing the access stimulation issue with respect to carriers seeking to use section 61.39 to establish interstate switched access rates.

665. *Competitive LEC Benchmarking.* The historical justification for the current competitive LEC access charge rules involved a balancing of the need to ensure just and reasonable rates against the burden that would be imposed on competitive LECs from implementing detailed accounting and ratemaking requirements associated with using historical or projected costs as a basis for their interstate access rates. Without abandoning the premise of the existing framework, we believe that the record demonstrates a need to revisit the benchmarking levels once competitive LECs meet the relevant trigger. In particular, we propose that when competitive LECs meet the trigger, they would be required to benchmark to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, if they are not already doing so.¹⁰³⁶ This modification recognizes that competitive LECs that meet the trigger have access demand likely to be more comparable to that of the BOC in the state or of the incumbent LEC with the largest number of access lines in the state, rather than smaller carriers to which they previously could have been benchmarking. The competitive LEC would have to file a revised tariff within 45 days of meeting the relevant trigger, or within 45 days of the effective date of the rule if it currently meets the trigger. We invite parties to comment on the adequacy of this proposal to address access stimulation activities of competitive LECs. We also invite parties to comment on whether competitive LECs that

¹⁰³³ 47 C.F.R. § 61.39.

¹⁰³⁴ 47 C.F.R. § 61.38. For LECs with access sharing agreements, when these rules become effective, new tariffs must be filed within 45 days.

¹⁰³⁵ The Commission's premise in adopting the historical costing approach for smaller incumbent LECs was that rates based on the previous two years' historical cost and demand data would produce just and reasonable access rates going forward and that over-earnings and under-earnings would offset each other over time. *Small Carrier Tariff Order*, 2 FCC Rcd at 3812, paras. 12-13. As discussed above, however, the record reveals that some carriers have exhibited a pattern of gaming this regulatory regime through a process of exiting and subsequently re-entered the NECA traffic-sensitive pool. See *supra* para. 648.

¹⁰³⁶ See generally 47 C.F.R. § 61.26(b), (d), and (e).

engage in revenue sharing should be required to file tariffs that would conform with the requirements of section 61.38. Parties supporting this approach should identify and address the rule changes that would be necessary to implement such an approach. Parties should propose any simplifying steps that could be made to the section 61.38 requirements to address accounting and operational differences that may exist.

666. *Section 204(a)(3) (“Deemed Lawful”) Considerations.* Section 204(a)(3) provides that filed tariffs are “deemed lawful” unless suspended by the Commission within specified time periods.¹⁰³⁷ In practice, deemed lawful status means that a carrier providing service pursuant to a “deemed lawful” tariff cannot be subject to refund liability.¹⁰³⁸ However, the D.C. Circuit has recognized that the deemed lawful provision is not an unqualified right, but may be subject to reasonable limitations.¹⁰³⁹ In this context, whether a LEC has met a proposed access stimulation trigger might not be readily apparent when the tariff is filed. As a result, the LEC could invoke the “deemed lawful” protection to avoid refund liability, and effectively evade the operation of our proposed rules at least for a period of time, such as until a new tariff is filed. We accordingly propose to require LECs that meet the trigger to file tariffs on a notice period other than the statutory seven or fifteen days that would result in deemed lawful treatment. Both competitive LECs and incumbent LECs would be required to file on not less than 16 days’ notice. We seek comment on this analysis of the deemed lawful provision of section 204(a)(3) and our proposed filing requirements. Finally, if a LEC failed to comply with the proposed tariffing requirements, we would find such a practice to be an effort to conceal its noncompliance with the substantive rules proposed above that would disqualify the tariff from deemed lawful status.¹⁰⁴⁰ Such incumbent LECs would be subject to refund liability for earnings over the maximum allowable rate-of-return,¹⁰⁴¹ and competitive LECs would be subject to refund liability for the difference between the rates charged and the rate that would have been charged if the carrier had used the prevailing BOC rate, or the rate of the independent LEC with the largest number of access lines in the state if there is no BOC. We invite parties to comment on this proposal for addressing situations in which a carrier does not make the necessary tariff filings.

b. Other Proposals

667. The record contains other alternatives for addressing access stimulation, on which we seek comment. For these alternatives, we invite parties to address how each approach would be more or less effective in responding to the access stimulation problem than the proposal outlined above. We also invite parties to comment on whether the alternative approaches may be more easily enforced than the revenue sharing agreement trigger. Commenters should also discuss the extent of any regulatory burdens associated with each approach.

668. *Trigger-Based Proposals.* A number of commenters proposed alternative approaches that would apply modified access charge rules to LECs in the case of particular triggering events or circumstances. For example, many of these proposals relied on forms of minutes-of-use triggers. In the case of rate-of-return LECs, many of these proposals suggested a trigger based on a particular percentage

¹⁰³⁷ See 47 U.S.C. § 204(a)(3).

¹⁰³⁸ See *id.*; see also *Streamlined Tariff Order*, 12 FCC Rcd at 2202-03, paras. 67-68.

¹⁰³⁹ In 2002, the United States Court of Appeals for the D.C. Circuit, in reversing a Commission decision that had found a tariff filing did not qualify for deemed lawful treatment and was thus subject to possible refund liability, noted that it was not addressing “the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate-of-return violations.” *ACS of Anchorage, Inc. v. FCC*, 290 F.3d 403, 413 (D.C. Cir. 2002).

¹⁰⁴⁰ The carrier would also be subject to sanctions for violating the Commission’s tariffing rules.

¹⁰⁴¹ 47 C.F.R. § 65.700. An exchange carrier’s interstate earnings are measured in accordance with the requirements set forth in 47 C.F.R. § 65.702.

growth in traffic—such as 25 to 100 percent—over a specified period of time.¹⁰⁴² Once the trigger is met under these proposals, the rate-of-return LEC would need to refile its tariff with reduced interstate access rates¹⁰⁴³ or, under some proposals, the rate-of-return LEC could enter the NECA pool.¹⁰⁴⁴ In the case of competitive LECs, many commenters' proposals recommended a trigger based on the average number of minutes per line per month, with the proposed triggers ranging from a few hundred minutes per line per month to several thousand minutes per line per month.¹⁰⁴⁵ We seek comment on these alternative proposals and the factual basis for adopting a particular trigger. In the case of proposed competitive LEC triggers, how have those proposals accounted for the non-stimulated competitive growth of competitive LECs or the possibility that competitive LECs might have a different mix of customers than incumbent LECs (e.g., business vs. residential), potentially resulting in differences in the average number of minutes per line, even when terminating the same number of minutes? We are concerned that the triggers in the record may be over-inclusive and capture LECs not engaging in access stimulation. Commenters advocating for a minutes or ratio trigger should demonstrate how the proposed trigger would not unnecessarily burden LECs that are not participating in any access stimulation arrangement. How would a minutes-of-use or other trigger be structured to ensure that it adapts to future traffic volumes?

669. We note that the Iowa Utilities Board (IUB) adopted rules to address intrastate access stimulation in Iowa that relied on certain triggering events or circumstances,¹⁰⁴⁶ and that Qwest filed a proposal in the record here, which it describes as based on the IUB's decision.¹⁰⁴⁷ Qwest's proposal

¹⁰⁴² See, e.g., Verizon Access Stimulation Comments at 13, 18 (25 percent increase in traffic compared to the same quarter of the prior year); Qwest Access Stimulation Comments at 20-22 (100 percent increase in traffic compared to average monthly historical volume figures).

¹⁰⁴³ See, e.g., Sprint Access Stimulation Comments at 13-14; Qwest Access Stimulation Comments at 20-22.

¹⁰⁴⁴ See, e.g., Verizon Access Stimulation Comments at 13, 15.

¹⁰⁴⁵ See, e.g., Verizon Access Stimulation Comments at 26-27 (350 minutes of use per line per month); Letter from Glenn T. Reynolds, Vice President for Policy, USTelecom, *et al.* to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 at 4 (filed Oct. 8, 2010) (tie cap to the minutes of use per line of the 99th percentile of NECA Band 8 carriers, 406 minutes of use per line per month based on 2009 data); Letter from Jennifer Bagg, Counsel for Global Conference Partners, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 1 (filed Oct. 7, 2009) (Global Conference Partners Oct. 7, 2009 *Ex Parte* Letter) (1500 minutes of use per line per month); see also Letter from Jeff Holoubek, Director of Legal and Finance, Free Conferencing Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 at 2 (filed Oct. 27, 2010) (Free Conferencing Corp. Oct. 27, 2010 *Ex Parte* Letter) ("Specifically, a High-Volume Access (HVA) rate structure, which applies instead of the highest benchmark rate when telecommunications traffic to a rural area exceeds a pre-determined volume threshold established in the LEC's tariff, appropriately balances the competing interests by restraining IXC costs while allowing competitive carriers to continue enjoying the benefits contemplated in the rural exemption."). The proposals also varied in the regulation that would result once the competitive LEC trigger was met. Under some proposals, for example, the competitive LEC would be required to benchmark to the BOC or largest incumbent LEC in the state. See, e.g., Letter from Brian Benison, Director-Federal Regulatory, AT&T, and Steve Kraskin, Counsel to the Rural Independent Competitive Alliance (RICA), to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 1-2 (filed Nov. 25, 2008) (*ATT/RICA Proposal Letter*); Sprint Access Stimulation Comments at 18. Other proposals would adopt a rate cap at some other specified level. See, e.g., Global Conference Partners Oct. 7, 2009 *Ex Parte* Letter (\$.02 per minute).

¹⁰⁴⁶ *High Volume Access Service*, Docket No. RMU-2009-0009, 2010 WL 2343199 (Iowa Utils. Bd. 2010) (*Iowa Order*). The *Iowa Order* adopted a number of reforms applicable to "high-volume access services" (HVAS), defined as access growth of more than 100 percent in a six month time period. Pursuant to the *Iowa Order*, new obligations may arise when a LEC is adding a new HVAS customer or otherwise reasonably anticipates a HVAS situation, including notice, tariff approval, and good faith negotiation requirements. *Id.* 2010 WL 2343199 at *4-10.

¹⁰⁴⁷ Letter from Melissa E. Newman, Vice President-Federal Relations, Qwest, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed June 17, 2010) (referencing an April 24, 2008, *ex parte* letter initially proposing the approach).

would prohibit a LEC from assessing tariffed switched access charges on an IXC for traffic delivered to a LEC's "business partner." For purposes of this proposal, business partner would be defined as: (1) the LEC itself; (2) any affiliate of the LEC; or (3) any entity that pays the LEC no net compensation, or that receives net compensation from the LEC, in connection with the LEC's delivery of telecommunications traffic to the entity.¹⁰⁴⁸ We seek comment both on the IUB's rules, and on the Qwest proposal based on that approach. In particular, we seek comment on the proposed definition of "business partner." We seek comment on whether this proposed definition would include interstate switched access charges for a toll call to a business office, which we believe should not be part of any such rule. Parties favoring this approach should suggest the rule language that would be needed to implement the proposal. Parties should also explain what procedures would be necessary to address any impasses that might develop in negotiations and the extent to which the Commission should specify the costing standard that should be used. For example, should the incremental cost approach adopted by the IUB be used, or some other standard?¹⁰⁴⁹

670. *Categorical Approaches.* Other commenters have suggested that the Commission adopt a more categorical approach to address access stimulation. For example, some parties propose to modify aspects of the current competitive LEC access charge rules to eliminate the possibility of competitive LECs benchmarking to the highest access rates.¹⁰⁵⁰ Others propose that the Commission issue a declaratory ruling holding that some or all access revenue sharing arrangements are unjust and unreasonable under section 201 of the Act.¹⁰⁵¹ We seek comment on whether, and how, this provision might apply in the context of access revenue sharing, either in the context of LEC access sharing arrangements with third parties, or when a LEC, rather than contracting with a third party, engages in access stimulation activity on an integrated basis. Another party has proposed separate definitions for "traffic pumping" and "access stimulation" and further suggested that while traffic pumping should be prohibited, access stimulation should be recognized as a legitimate practice.¹⁰⁵² We seek comment on this proposal.

671. *Reciprocal Compensation.* We note that the *Access Stimulation NPRM* sought general comment on traffic stimulation in the context of reciprocal compensation.¹⁰⁵³ Recently, parties have alleged that some LECs are also adopting traffic stimulation strategies with respect to reciprocal compensation rates.¹⁰⁵⁴ Parties allege that high reciprocal compensation rates, just like high access charges, provide sufficient revenue streams for revenue sharing, which enables traffic stimulation activity. Unlike the access charge situation that relies on tariffs, however, reciprocal compensation arrangements are often negotiated arrangements between carriers, though they are sometimes set pursuant to state arbitration. As noted above, the Commission has previously taken steps pursuant to our interstate jurisdiction under section 201 of the Act to curb arbitrage involving dial-up ISP-bound traffic (which is

¹⁰⁴⁸ According to Qwest, in a "high volume access" situation under the IUB's rules, IXCs and LECs have the opportunity to negotiate a reasonable rate for the high volume traffic, which would result in an appropriate tariff filing. If no negotiated agreement is reached, the IUB will prescribe a rate for the traffic based on the incremental costs of the LEC in processing the high volume access traffic. *Id.* at 1.

¹⁰⁴⁹ See *Iowa Order*, 2010 WL 2343199 at *6-9.

¹⁰⁵⁰ See, e.g., Letter from David Frankel, CEO, ZipDX, LLC, to Sharon Gillett, Chief, Wireline Competition Bureau, FCC, WC Docket No. 07-135 at 6 (filed Nov. 6, 2009).

¹⁰⁵¹ See, e.g., AT&T Access Stimulation Comments at 32; Qwest Access Stimulation Comments at 15; CTIA Aug. 26, 2010 *Ex Parte* Letter, Attach. at 5.

¹⁰⁵² See Free Conferencing Corp. Oct. 27, 2010 *Ex Parte* Letter at 1-2.

¹⁰⁵³ *Access Stimulation NPRM*, 22 FCC Rcd at 18004-05, para. 38.

¹⁰⁵⁴ 47 U.S.C. § 251(b)(5). See e.g., Letter from Tamara L. Preiss, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed July 28, 2010); CTIA Aug. 26, 2010 *Ex Parte* Letter, Attach.

interstate traffic) and business schemes designed to generate profits from reciprocal compensation rates that were substantially higher than the carrier's incremental cost of terminating a call.¹⁰⁵⁵

672. In particular, CTIA alleges that traffic stimulation involving reciprocal compensation rates between CMRS providers and competitive LECs is increasing.¹⁰⁵⁶ According to commenters, this can occur with intraMTA calls when the terminating carrier takes steps to stimulate traffic volumes to create a positive revenue stream from the reciprocal compensation payments.¹⁰⁵⁷ To address these concerns, CTIA urges the Commission to adopt rules to curtail traffic stimulation by adopting the following trigger: if a LEC's terminating to originating traffic exceeds a 3:1 ratio, it would be subject to bill-and-keep.¹⁰⁵⁸ We invite parties to quantify the extent of this problem today, and the steps that could be taken to address the stimulation activity, including the CTIA proposal. We also ask whether our proposals for comprehensive reform discussed above mitigate concerns about such activities in the reciprocal compensation context.

673. We seek comment on the impact, if any, of the Commission's recent *North County* decision.¹⁰⁵⁹ We ask commenters to explain specifically how and to what extent the decision has had any impact on traffic stimulation. We seek comment on whether, as an interim measure, the Commission should adopt any procedural or substantive rules governing competitive LEC-CMRS compensation arrangements under section 20.11 of the Commission's rules.¹⁰⁶⁰ For example, should the Commission establish a default rate for all such traffic, such as the .0007 rate proposed by Verizon,¹⁰⁶¹ or provide a federal methodology such as the pricing methodology applicable to reciprocal compensation under Part 51 of the Commission's rules?¹⁰⁶² Should the Commission clarify that carriers may only assess a charge under section 20.11 after an agreement has been signed?

674. We also invite parties to comment on whether our proposed rules to address access stimulation would also be appropriate in the reciprocal compensation stimulation context. Alternatively, should the Commission, as CTIA suggests, adopt a trigger or rules to identify these types of stimulation arrangements, and if so, which trigger or rules, and what remedy should be adopted for such stimulation arrangements? Does the Commission have authority to do so? If so, who would resolve disputes that a stimulation arrangement exists: the Commission, states, or courts? Elsewhere, we seek comment on whether the Commission has authority to apply a bill-and-keep methodology to traffic that is within the scope of section 251(b)(5).¹⁰⁶³ Would this authority also support a rule to impose bill-and-keep on a subset of such traffic such as in the CTIA proposal? For CMRS traffic, could we, subject to section 201

¹⁰⁵⁵ See *supra* para. 655. The Commission has found that reciprocal compensation rates whether "inefficiently structured or set too high, do not simply compensate the terminating network, but also appear to generate profits for each minute that is terminated." See *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9616, para 11. The Commission adopted rules to address the arbitrage, but the scope of the decision was limited to dial-up ISP traffic.

¹⁰⁵⁶ CTIA Aug. 26, 2010 *Ex Parte* Letter, Attach. at 5.

¹⁰⁵⁷ See Leap Wireless Access Stimulation Comments at 3, 5; MetroPCS Access Stimulation Comments at 5-6 (noting that, "[t]hese incentives have caused carriers to adopt one-way traffic business models purposefully designed to generate inbound-only traffic from CMRS carriers and other telecommunications carriers").

¹⁰⁵⁸ See CTIA Aug. 26, 2010 *Ex Parte* Letter, Attachment at 5.

¹⁰⁵⁹ *North County Communications Corp. v. MetroPCS California, LLC*, Memorandum Opinion and Order, 24 FCC Rcd 3807 (Enf. Bur. 2009), *pet. for recon. granted in part and denied in part*, 24 FCC Rcd 14036 (2009), *pet. for rev. pending sub nom.*; *MetroPCS California, LLC v. FCC*, No. 10-1003 (D.C. Cir. filed Jan. 11, 2010).

¹⁰⁶⁰ See 47 C.F.R. § 20.11.

¹⁰⁶¹ See Letter from Tamara Preiss, Vice President, Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135 at 3 (filed June 28, 2010).

¹⁰⁶² See 47 C.F.R. Part 51.

¹⁰⁶³ See *supra* Section XI.

or 332 of the Act and the rationale adopted in the *ISP Remand Order*, establish traffic stimulation triggers or rules?¹⁰⁶⁴ We invite parties to comment on these proposals or to suggest other approaches, explaining why such approaches might be more appropriate.

675. *Intrastate Access Stimulation.* Some states, such as Iowa, have taken action to curb access stimulation associated with intrastate access rates.¹⁰⁶⁵ We seek comment on the scope and magnitude of any intrastate access stimulation. We seek comment on actions other states may have taken to address intrastate access stimulation.¹⁰⁶⁶ We are especially interested in any lessons that we can learn from the results of those state efforts.

676. *Potential Public Interest Benefits.* Some commenters have recently asserted that access stimulation is good public policy because, for example, it generates revenues that LECs can use to fund broadband deployment, or to provide Internet service and other benefits to Tribal lands.¹⁰⁶⁷ Some commenters also claim that the free services, such as conference calling, made possible through revenue sharing in access stimulation arrangements are a public good.¹⁰⁶⁸ As a threshold matter, we note that the Commission previously indicated that the use of access charges to subsidize chat lines or similar services would not be consistent with the policies underlying its access charge rules.¹⁰⁶⁹ Similarly, we note that section 254(k) of the Act provides that a “telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition.”¹⁰⁷⁰ However, we seek comment on these assertions, and, whether we should, as a result of them, consider alternative approaches to address access stimulation from those contained in our proposed rules. In addition, we seek comment on the potential negative impact of access stimulation practices on the development of sustainable, ubiquitous networks capable of supporting Tribal economic development, education, health care, public safety, and other needs.

677. Finally, we invite parties to comment on other regulatory and policy implications of access stimulation. For example, we invite parties to comment on whether Commission actions in the context of tariff reviews or enforcement proceedings have altered any of the relationships between LECs and access stimulators. We also seek comment on whether any other specific regulatory or policy considerations should inform our rules, such as the ban on off-tariff rebates in section 203(c) of the Act.¹⁰⁷¹ If a LEC is providing tariffed service to a customer and enters into an access revenue sharing

¹⁰⁶⁴ See *ISP Remand Order*, 16 FCC Rcd at 9187-88, para. 79 (adopting a rebuttable presumption that traffic delivered to a carrier that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic).

¹⁰⁶⁵ See *supra* para. 669.

¹⁰⁶⁶ See NARUC, Resolution Supporting Expedient FCC Action of Traffic Pumping Schemes at 2 (2010), at <http://www.naruc.org/Resolutions/Resolution%20Supporting%20FCC%20Action%20on%20Traffic%20Pumping.pdf> (acknowledging “the need for the FCC to act immediately to address the issue of traffic pumping and not wait for the finalization of comprehensive inter-carrier compensation reform”).

¹⁰⁶⁷ See Hypercube & McLeodUSA Access Stimulation Comments at 8; Futurephone Access Stimulation Reply at 4; Letter from Dr. Alan Pearce, President, Information Age Economics, Inc. to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. 5-6 (“Fact Report: The Economic Impact of Free Conference Calling Services”) (filed March 1, 2010); Letter from Dave Butts, Founder, Harvest Prayer Ministries, to Marlene Dortch, Secretary, FCC, WC Docket No. 07-135 (filed Oct. 12, 2010).

¹⁰⁶⁸ See Global Conference Partners Access Stimulation Comments at 4-7; Rural Iowa Independent Telephone Association Access Stimulation Comments at 2-3; Chase Com, *et al.* Access Stimulation Reply at 5-6; Futurephone Access Stimulation Reply at 5-8.

¹⁰⁶⁹ See *Access Stimulation NPRM*, 22 FCC Rcd at 17994-95, para. 12.

¹⁰⁷⁰ 47 U.S.C. § 254(k).

¹⁰⁷¹ 47 U.S.C. § 203(c), which provides that “no carrier shall...refund or remit by any means or device any portion of the charges so specified [in the filed schedules].” The penalties applicable to carriers who provide untariffed rebates and to customers who accept them are spelled out in section 503 of the Act. 47 U.S.C. § 503.

agreement with that same customer, but not other similarly situated customers, would such an arrangement violate section 203(c) or any other provision of the Act?¹⁰⁷² We note that the prohibition on rebates has long been an important guard against rate discrimination,¹⁰⁷³ and that the Commission has been vigilant in its review under section 203(c).¹⁰⁷⁴ We also note that section 203(c) claims have been asserted by carriers in the context of access stimulation disputes.¹⁰⁷⁵ We seek comment on whether the refund prohibition in section 203(c) of the Act has a prohibitive effect on revenue sharing arrangements between LECs and access stimulating entities, or, if there are aspects of these relationships that fall outside the scope of this statutory provision.

XVI. INTERCONNECTION AND RELATED ISSUES

678. In this section, we seek comment on several issues related to intercarrier compensation reform, including other steps we can take to promote IP-to-IP interconnection, network edges and points of interconnection (POIs), transiting, and disputes that have arisen over other technical issues in intercarrier compensation rules and carrier practices.¹⁰⁷⁶ For each of these issues, we ask whether the Commission should address the issue as part of comprehensive intercarrier compensation reform, and if so, at what stage of reform it should be addressed, and what actions the Commission should take. We also seek comment on whether there are any other outstanding technical issues related to intercarrier compensation reform that the Commission should address, and, if so, when and how the Commission should address them.

679. *Additional Steps to Encourage IP-to-IP Interconnection.* As discussed above, we seek to encourage the deployment of more efficient technologies and interconnection. In addition to intercarrier compensation reforms considered above, are there other ways to address disincentives to move to IP-to-IP interconnection or any other specific actions that the Commission should take to encourage transitions to IP-to-IP interconnection? For example, we note that interconnection for circuit-switched voice traffic is governed by section 251 of the Act. At the same time, there historically have not been Commission rules governing IP interconnection for the exchange of Internet traffic. As networks evolve, however, it may make little sense for providers to maintain different interconnection arrangements for the exchange of VoIP and other forms of Internet traffic. We therefore seek comment on how IP-to-IP interconnection arrangements for the exchange of VoIP traffic fit within existing legal and technical interconnection

¹⁰⁷² 47 U.S.C. § 203(c).

¹⁰⁷³ *AT&T Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 222-223 (1998).

¹⁰⁷⁴ See, e.g., *Revisions to AT&T Communications Tariff F.C.C. No. 1, Hospitality Network Service*, Transmittal No. 1046, 3 FCC Rcd 975, 976, para. 10 (CCB 1988) (suspending tariff revisions pending investigation of tentative conclusion that payment plan represented an illegal rebate), *terminated as moot*, Order, 3 FCC Rcd 3961 (CCB 1988) (investigation terminated due to withdrawal of tariff transmittal).

¹⁰⁷⁵ See, e.g., *N. Valley Commc'ns, LLC v. Qwest Commc'ns Corp.*, 711 F. Supp. 2d 1018, 1026 (D. S.D. 2010) (rejecting motion to dismiss claim alleging that payment of marketing fees to conference calling companies may represent an illegal rebate under § 203(c)(2)), *case stayed pending referral*, No. 09-1004, slip op. at 6-7 (D. S.D. Sept. 29, 2010).

¹⁰⁷⁶ See, e.g., *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4737-48, paras. 120-43; *Pleading Cycle Established for Petition of Blue Casa Communications, Inc. for Declaratory Ruling Concerning Intercarrier Compensation for ISP-Bound VNXX Traffic*, WC Docket No. 09-8, Public Notice, 24 FCC Rcd 2436 (2009) (*Blue Casa VNXX Petition Public Notice*); *Pleading Cycle Established for Petition of ASAP Paging, Inc. for Preemption of the Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers*, WC Docket No. 04-6, Public Notice, 19 FCC Rcd 936 (2004) (*ASAP Paging Petition Public Notice*); *Comment Sought on Sprint Petition for Declaratory Ruling Regarding the Routing and Rating of Traffic by ILECs*, CC Docket No. 01-92, Public Notice, 17 FCC Rcd 13859 (2002) (*Sprint Rating and Routing Petition Public Notice*).

frameworks.¹⁰⁷⁷ Does this present any challenges or otherwise have any implications for the actions the Commission should consider in the context of this proceeding?¹⁰⁷⁸

680. *Points of Interconnection and Network Edges.* In past intercarrier compensation rulemaking items, the Commission sought comment on requirements and methods for establishing POIs and on proposed rules for network “edges.”¹⁰⁷⁹ With regard to network edges, proposals to treat traffic under a bill-and-keep methodology typically assume the existence of a network edge, beyond which terminating carriers cannot charge other carriers to transport and terminate their traffic. This approach requires that the calling party’s service provider transmit, route and otherwise perform all the network functions necessary to deliver traffic to the network edge of the called party’s service provider. Both the ICF¹⁰⁸⁰ and Missoula¹⁰⁸¹ plans generally proposed that the edge be set at the tandem switch for incumbent LECs with hierarchical networks, and at the local switch for CMRS, competitive LEC, and rural LEC networks. In the *2008 ICC/USF FNPRM*, the proposed network edge was the location of the called party’s end office, mobile switching center (MSC), point of presence, media gateway, or trunking media gateway unless that location subtended a tandem switch owned or controlled by that service provider, in which case the tandem was the network edge.¹⁰⁸²

¹⁰⁷⁷ See, e.g., Letter from Mary C. Albert, Assistant General Counsel, COMPTTEL, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51, WC Docket No. 10-143 at Attach. (filed Nov. 1, 2010); Letter from Kathleen Grillo, Senior Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, GN Docket No. 09-51 at 3-4 (filed Jan. 13, 2010).

¹⁰⁷⁸ The National Broadband Plan recommended that the “FCC should carefully monitor compensation arrangements for IP traffic as the industry transitions away from per-minute rates, particularly in areas where there is little or no competition, to ensure that such arrangements do not harm the public interest.” National Broadband Plan at 150.

¹⁰⁷⁹ See *Inter-carrier Compensation FNPRM*, 20 FCC Rcd at 4728-29, paras. 92-94 & nn.303-05; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6493, para. 40; *id.* at 6619-20, App. A, para. 275; *id.* at 6818-19, App. C, para. 270.

¹⁰⁸⁰ Regulatory Reform Proposal of the Intercarrier Compensation Forum (ICF Proposal), attached to Letter from Gary M. Epstein and Richard R. Cameron, Counsel for the Intercarrier Compensation Forum, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, App. A, at 4-9 (filed Oct. 5, 2004).

¹⁰⁸¹ Missoula Plan for Intercarrier Compensation Reform at 42-46 (Missoula Plan), attached to Letter from Tony Clark, Commissioner and Chair, NARUC Committee on Telecommunications, Ray Baum, Commissioner and Chair, NARUC Task Force, and Larry Landis, Commissioner and Vice-Chair, NARUC Task Force, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed July 24, 2006).

¹⁰⁸² See *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6619-20, App. A, para. 275; *id.* at 6818-19, App. C, para. 270. The primary difference between the two edge interconnection proposals contained in the appendices to the *2008 Order and ICC/USF FNPRM* was consideration of a “rural transport rule” that would have limited the transport and provisioning obligations of a rural rate-of-return regulated incumbent LEC to its meet point when the non-rural terminating carrier’s point of presence is located outside of the rural rate-of-return incumbent LEC’s service area. Compare *id.* at 6619-20, App. A, para. 275 with *id.* at 6818-19, para. 270. Support for these proposed network edge rules varied greatly in the record. See, e.g., Verizon and Verizon Wireless 2008 ICC/USF FNPRM Comments at 53-58 (supporting the proposed edge rules but not the rural transport rule); CTIA 2008 ICC/USF FNPRM Comments at 29-33 (also supporting the proposed edge rules but not the rural transport rule); AT&T 2008 ICC/USF FNPRM Reply at 17-18 (defending the proposed network edge rules); Comcast 2008 ICC/USF FNPRM Reply at 7-8 (arguing that the proposed network edge rules “fail to account for the complexity of existing interconnection arrangements and ignore current network configurations designed to achieve network efficiencies”); NTCA 2008 ICC/USF FNPRM Reply at 29 (asking the Commission to dismiss the AT&T Edge proposal and seek further comment); Paetec Communications, Inc., et al. 2008 ICC/USF FNPRM Reply Comments at ii (urging the Commission to reject the proposed network edge rules).

681. Several parties maintain that the edge proposals currently in the record do not acknowledge or contemplate IP-based interconnection.¹⁰⁸³ We invite comment on whether the Commission should address POI and network edge issues as part of comprehensive intercarrier reform, and, if so, when they should be addressed and what actions the Commission should take to address them.¹⁰⁸⁴ If commenters believe we should address the edge as part of comprehensive reform, we seek comment on how we should define the edge for purposes of the reform proposals described herein. If we ultimately adopt bill-and-keep, we ask parties to identify the specific network facilities, functions and services that would be subject to that methodology. With regard to access charges, parties should identify what access rate elements would be subject to bill-and-keep and whether such definitions should change depending on the reform approach adopted by the Commission. We also seek comment on how an edge definition may need to be adjusted as IP technology replaces circuit-switched technology, and as networks evolve.

682. In prior proceedings, the issue of mandatory POIs has been raised,¹⁰⁸⁵ and certain parties, including incumbent LECs, have argued that carriers should be required to establish a minimum number of physical POIs, or at least establish a physical POI in a geographic area they intend to serve.¹⁰⁸⁶ Under section 251(c)(2)(B), an incumbent LEC must allow a requesting telecommunications carrier to interconnect at any technically feasible point.¹⁰⁸⁷ The Commission has interpreted this provision to mean that competitive LECs have the option to interconnect at a single POI per LATA.¹⁰⁸⁸ We seek comment

¹⁰⁸³ See, e.g., Comcast 2008 ICC/USF FNPRM Comments at 21 (maintaining that these proposals are based on “an already outdated circuit-switched network hierarchy” and that such an approach “would likely have a significant negative effect on provider investment and deployment decisions”); COMPTTEL 2008 ICC/USF FNPRM Comments at 23 (noting that, given the conversion from circuit-switched to IP-based networks, the default edge rules may be irrelevant by the time they take effect); NCTA 2008 ICC/USF FNPRM Comments at 20-21 (explaining that the 2008 edge proposals do not seem to contemplate the interconnection of IP networks or the exchange of traffic in IP format).

¹⁰⁸⁴ The record suggests that there is disagreement as to whether the Commission must address edge and related interconnection issues concurrent with implementation of rate reform. Compare, e.g., COMPTTEL 2008 ICC/USF FNPRM Comments at 20 (stating that the Commission need not adopt network architecture rules to implement reform) with AT&T 2008 ICC/USF FNPRM Reply at 19 (contending that default interconnection rules are a critical component of any reform plan).

¹⁰⁸⁵ See *Intercarrier Compensation NPRM*, 16 FCC Rcd at 9650-52, paras. 112-14; *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4725-30, paras. 87-97; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6619-20, App. A, para. 275; *id.* at 6818-19, App. C, para. 270. See also *infra* note 1092 (discussing competitive carrier concerns that the certain edge proposals would affect statutory interconnection rights and obligations).

¹⁰⁸⁶ See, e.g., Michigan Exchange Carriers Association Intercarrier Compensation NPRM Comments at 44; SBC Intercarrier Compensation NPRM Comments at 18-19; Letter from Daniel Mitchell, Vice President, Legal and Industry, NTCA, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 at 3 (filed Nov. 21, 2008); Verizon Sept. 12, 2008 *Ex Parte* Letter, Attach. at 2.

¹⁰⁸⁷ See 47 U.S.C. § 251(c)(2)(B). We note that rural telephone companies are exempt from 251(c) obligations by virtue of what is termed the “rural exemption.” See 47 U.S.C. § 251(f)(1)(A) (stating that “[s]ubsection (c) of this section [251] shall not apply to a rural telephone company until (i) such company has received a bona fide request for interconnection, services, or network elements, and (ii) the State commission determines (under subparagraph (B)) that such request is not unduly economically burdensome, is technically feasible, and is consistent with section 254 (other than subsections (b)(7) and (c)(1)(D) thereof”).

¹⁰⁸⁸ See *Application by SBC Communications Inc., Southwestern Bell Tel. Co. And Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services In Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18390, para. 78 n.174 (2000).

on whether the transition from circuit-switched to IP networks may affect our rules concerning POIs.¹⁰⁸⁹ We also seek comment on whether information in the record concerning POIs and “edges” is still relevant or useful, or if the underlying issues have changed.¹⁰⁹⁰ If the issues have changed, we invite parties to provide current information to identify issues that the Commission should consider. In this regard, we note that under the existing interconnection system, situations arise where carriers are financially responsible for network design or interconnection decisions that they do not control.¹⁰⁹¹ We invite parties to address the extent to which the definition of the edge or POI should align the payment responsibility with the control of the design, provisioning, and cost incurrence. Recognizing that interconnection and network architecture may change over time, we also ask parties to comment on the extent to which the location of a POI should be defined in a competitively neutral location for all networks. Parties supporting such an approach should address the appropriate definition of a “competitively neutral location.” One approach may be to locate the POI where interconnecting carriers have competitive alternatives—other than services or facilities provided by the terminating carrier—to transport traffic to the terminating carrier’s network. We seek comment on these questions.

683. *Transiting.* Transiting occurs when two carriers that are not directly interconnected exchange non-access traffic by routing the traffic through an intermediary carrier’s network. The Commission has previously sought comment on issues that arise under the intercarrier compensation rules when calls involve a transit service provider.¹⁰⁹² Specifically, the Commission sought comment on whether there is a statutory obligation to provide transit service under the Act and if so, what rules the Commission should adopt to advance the goals of the Act.¹⁰⁹³ Numerous parties commented on transit issues in response to the 2005 FNPRM¹⁰⁹⁴ and 2008 ICC/USF FNPRM.¹⁰⁹⁵ More recently, the record in

¹⁰⁸⁹ For example, two parties suggest that the Commission establish default interconnection and intercarrier compensation rules applicable to packetized voice traffic. See Letter from Kathleen O’Brien Ham, Vice President, Federal Regulatory Affairs, T-Mobile USA, Inc. and Charles W. McKee, Vice President, Government Affairs, Federal and State Regulatory, Sprint Nextel Corp., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, at 2-3 (filed Jan. 21, 2011) (urging the Commission to adopt initial interconnection rules regarding the establishment of POIs for the exchange of traffic using Session Initiated Protocol (SIP), with long term interconnection rules based on recommendations from a Technical Advisory Committee, and to establish default rules establishing providers’ respective financial obligations for transporting and terminating packetized voice traffic).

¹⁰⁹⁰ For instance, in 2008, some competitive carriers voiced concern that the proposed edge rules would alter the statutory interconnection rights of carriers or displace voluntary interconnection arrangements. See, e.g., Broadview Networks, Inc., et al. 2008 ICC/USF FNPRM Comments at 46-47; Citynet, LLC, et al. 2008 ICC/USF FNPRM Comments at 13-14; COMPTTEL 2008 ICC/USF FNPRM Comments at 20-21; Embarq 2008 ICC/USF FNPRM Comments at 51; NCTA 2008 ICC/USF FNPRM Comments at 18-19. But see AT&T 2008 ICC/USF FNPRM Reply Comments at 17-18 (discussing these positions and refuting these claims).

¹⁰⁹¹ For example, one party alleges that competitive LECs are being unnecessarily inserted into the traffic flow between CMRS carriers and incumbent LEC tandem transit providers to collect access fees from interexchange carriers. See Level 3 Declaratory Ruling Petition at 1-7.

¹⁰⁹² See *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4737-44, paras. 120-33; *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6650, App. A, para. 347; *id.* at 6849, App. C para. 344.

¹⁰⁹³ See *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4737-44, paras. 120-33.

¹⁰⁹⁴ See, e.g., Allied National Paging Association Comments Intercarrier Compensation FNPRM Comments at 6; BellSouth Intercarrier Compensation FNPRM Comments at 32-38; Cincinnati Bell Intercarrier Compensation FNPRM Comments at 15-16; Coalition for Capacity-Based Access Pricing Intercarrier Compensation FNPRM Comments at 28-29.

¹⁰⁹⁵ See, e.g., Coalition for Rational Universal Service and Intercarrier Reform 2008 ICC/USF FNPRM Comments at 6 (seeking a definition of transit obligations); Comcast 2008 ICC/USF FNPRM Comments at 28-30 (asking the Commission to affirm that transit arrangements are subject to the section 251/252 negotiation and arbitration process); Embarq 2008 ICC/USF FNPRM Comments at 64-65 (arguing that transit service should be subject to negotiation); Integra Telecom 2008 ICC/USF FNPRM Comments at 4 (seeking regulation of transit rates using a (continued....)

this proceeding indicates that a competitive market for transit services exists.¹⁰⁹⁶ In light of these changes in the transit market, we invite parties to refresh the record with regard to the need for the Commission to regulate transiting service, and the Commission's authority to do so.¹⁰⁹⁷ We also ask parties to comment on whether the proposed reforms under consideration here would impact the provision of transit service and if so, how.

684. *Other Pending Issues.* Below, we seek comment on other pending items and ask whether any of these issues may be rendered moot by proposed reforms under consideration here. If pending issues need resolution, parties should explain how such proposals may be implicated by the reforms proposed today, and parties may refresh the record in this proceeding regarding: (1) interpretation of the intraMTA rule,¹⁰⁹⁸ (2) disputes regarding rating and routing of traffic,¹⁰⁹⁹ and (3) the appropriate intercarrier compensation regime applicable to virtual central office code calls to distant ISPs.¹¹⁰⁰ We also invite comment on any other outstanding technical or policy issues related to intercarrier compensation reform that the Commission should address.¹¹⁰¹ Parties commenting on other outstanding

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forward-looking methodology); T-Mobile 2008 ICC/USF FNPRM Comments at 3, 14-15 (stating that incumbent LECs should be required to provide tandem transit services upon request and that rates should be reduced to cost-based levels); AT&T 2008 ICC/USF FNPRM Reply at 20-22 (urging the Commission to refrain from regulating transit service or rates); TW Telecom, Inc., et al. 2008 ICC/USF FNPRM Reply at 14 (seeking regulation of tandem transit rates).

¹⁰⁹⁶ See, e.g., Letter from Russell M. Blau, Counsel for Neutral Tandem, Inc., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 07-135, Attach. A at 3 (filed Sept. 23, 2010); AT&T 2008 ICC/USF FNPRM Reply Comments at 21-22 (stating that transit has become a competitive service).

¹⁰⁹⁷ In 2008, we sought comment on a proposal related to call signaling information that would have, among other things, obligated transit service providers, in certain circumstances, to take financial responsibility for traffic they receive for delivery via transit service. See *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6647-48, App. A, para. 337; *id.* at 6846-47, App. C, para. 333.

¹⁰⁹⁸ 47 C.F.R. 51.701(b)(2). In the *Local Competition First Report and Order*, the Commission stated that traffic to or from a CMRS network that originates and terminates within the same Major Trading Area (MTA) is subject to reciprocal compensation obligations under section 251(b)(5), rather than interstate or intrastate access charges. See *Local Competition First Report and Order*, 11 FCC Rcd at 16014, para. 1036; see also 47 C.F.R. § 24.202(a) (defining the term "Major Trading Area").

¹⁰⁹⁹ Under the current system, wireline carriers often determine whether a phone call is local or toll by comparing the rating points associated with the originating and terminating NXX codes. To give wireless customers the same inbound local calling area that these customers have with their wireline phones, CMRS providers obtain NXX codes that are rated in the customer's wireline rate center. In some cases, however, the routing point for the wireless number, which indicates the geographic point to which calls to the wireless number should be routed, is located outside of the customer's rate center. Specifically, because CMRS providers will generally connect with small LECs indirectly through a BOC's tandem, the routing point specified for these NXXs often is a BOC tandem. In these situations, CMRS providers obtain NXX codes with different rating and routing points. See, e.g., *Sprint Petition for Declaratory Ruling*, CC Docket No. 01-92 (filed May 9, 2002) (*Sprint Petition*).

¹¹⁰⁰ Virtual central office codes, sometimes referred to as virtual NXX codes, are central office codes that correspond to a particular geographic area, but are assigned to a customer physically located in a different geographic area. See *Inter-carrier Compensation NPRM*, 16 FCC Rcd 9610, 9652 n.188. Competitive LECs typically assign virtual NXX codes to business customers that receive significant amounts of traffic, including Internet service providers. When a virtual NXX number is assigned, the NPA/NXX is no longer associated with the specific geographic location, i.e., rate center, in which the customer is located. As a result, a call from one rate center or local calling area to another may appear to be within the same rate center or local calling area based on a simple comparison of the NPA/NXX codes. Previously, the Commission sought comment on whether the LEC using the virtual NXX code should be required to provide transport from the central offices associated with those NXX codes. See *Inter-carrier Compensation NPRM*, 16 FCC Rcd at 9652, para. 115.

technical issues should also identify what action the Commission should take, and when during the comprehensive reform process the action should be taken.

685. With regard to the intraMTA rule, the Commission previously sought comment on a number of issues related to this rule, including whether it should be eliminated, particularly in light of intercarrier compensation reform proposals that would eliminate distinctions between wireline and CMRS traffic.¹¹⁰² We invite comment on whether the Commission should prioritize addressing this issue as it addresses comprehensive reform that would remove the underlying distinctions that contribute to disputes arising from this rule. If so, when and how should the Commission address this issue?

686. In addition, there are pending disputes regarding the assignment of telephone numbers with separate, and geographically distant, rating and routing points.¹¹⁰³ The Commission has sought comment on these disputes and related issues over the course of this proceeding.¹¹⁰⁴ We invite parties to refresh the record on these issues, and, in particular seek comment on whether the issues raised in the Sprint, ASAP and @ Communications petitions still require resolution through Commission action, and if so, what actions the Commission should take and when.

687. We also seek comment on whether Commission attention is still required to resolve issues regarding intercarrier charges applicable to calls to Internet service providers located outside of the originating caller's local calling area. Specifically, carriers do not agree on the appropriate intercarrier compensation regime applicable to ISP traffic delivered to an ISP located in a distant exchange outside the originating local calling area.¹¹⁰⁵ We ask parties to comment on whether the Commission's 2008 order addressing the intercarrier compensation rate for ISP-bound traffic has any impact on, or moots any of the underlying issues.¹¹⁰⁶ Furthermore, we seek comment on whether market developments, including the decline in dial-up Internet service usage and commercial agreements regarding compensation, have changed the need for Commission action.

688. *Effect of Intercarrier Compensation Reform on Existing Agreements.* Finally, we seek comment on the effect of our intercarrier compensation reforms on certain types of existing agreements. With respect to interconnection agreements, we do not intend for our proposed reform to disturb the processes established by section 252 of the Act.¹¹⁰⁷ We seek comment on whether the reforms we propose would constitute a change in law, recognizing that interconnection agreements may contain

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¹¹⁰¹ For example, Arizona Dialtone and IDT filed petitions for reconsideration of the Commission's 2006 *Prepaid Calling Card Order*. Arizona Dialtone, Inc., Petition for Reconsideration, WC Docket No. 05-68 (filed Aug. 31, 2006); IDT Corp., Petition for Reconsideration, WC Docket No. 05-68 (filed Aug. 31, 2006). See *Regulation of Prepaid Calling Card Services*, WC Docket No. 05-68, Declaratory Ruling and Report and Order, 21 FCC Rcd 7290 (2006), vacated in part sub nom. *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007). See also, e.g., Letter from Tamar E. Finn, counsel for IDT et al., to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92; WC Docket No. 05-68; GN Docket No. 09-51 (filed Jan. 14, 2011) (asking the Commission to clarify that the 2006 *Prepaid Calling Card Order* does not require the application of access charges to prepaid calling card calls placed using a locally-dialed number).

¹¹⁰² See *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4744-46, paras. 134-38.

¹¹⁰³ See generally Sprint Petition; ASAP Paging, Inc., Petition for Preemption of Public Utility Commission of Texas Concerning Retail Rating of Local Calls to CMRS Carriers, WC Docket No. 04-6 (filed Dec. 22, 2003).

¹¹⁰⁴ See *Sprint Rating and Routing Petition Public Notice*, 17 FCC Rcd at 13859 (2002); *Pleading Cycle Established for Comments on @Communications Petition for Declaratory Ruling*, CC Docket No. 02-4, Public Notice, 17 FCC Rcd 1010 (2002); *ASAP Paging Petition Public Notice*, 19 FCC Rcd at 936; *Intercarrier Compensation FNPRM*, 20 FCC Rcd at 4747-48, paras. 141-43.

¹¹⁰⁵ See, e.g., *Blue Casa VNX Petition Public Notice*, 24 FCC Rcd 2436 (2009).

¹¹⁰⁶ *2008 Order and ICC/USF FNPRM*, 24 FCC Rcd at 6478-89 paras. 6-29.

¹¹⁰⁷ See 47 U.S.C. § 252.

change of law provisions that allow for renegotiation and/or may contain some mechanism to resolve disputes about new agreement language implementing new rules.¹¹⁰⁸ We also seek comment regarding the impact our proposed reforms may have on contracts in “evergreen” status, which Verizon describes as “contracts that have reached the end of their terms but remain in effect pending entry into new contracts.”¹¹⁰⁹

689. As discussed above, the intercarrier compensation reforms we propose may require carriers to make certain changes to their tariffs relating to carrier-to-carrier charges, and potentially also SLCs. We seek comment on whether these proposed reforms should abrogate existing contracts or otherwise allow for a “fresh look” with regard to existing commercial agreements.¹¹¹⁰ As the Commission has recognized, for example, early termination provisions can be mutually beneficial by giving providers greater assurance of revenue recovery, and giving customers (whether wholesale or end-users) discounted and stable prices over the relevant term.¹¹¹¹ Indeed, allowing for a fresh look could result in a windfall for customers that entered long-term arrangements, in exchange for lower prices, as compared to other customers that avoided early termination fees by electing shorter contract periods at higher prices.¹¹¹² We seek comment on whether such issues should be left to any change of law provisions in these commercial arrangements, or to commercial negotiations among the parties, or, alternatively, if we should provide an opportunity for re-negotiation of affected commercial agreements in light of comprehensive intercarrier compensation reform.¹¹¹³

¹¹⁰⁸ See *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 01-338, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978 at 17403-04, para. 700 (2003) (*Triennial Review Order*). Although section 252(a)(1) and section 252(b)(1) refer to requests that are made to incumbent LECs, we have interpreted that in the interconnection agreement context to mean that either the incumbent or the competitive LEC may make such a request, consistent with the parties’ duty to negotiate in good faith pursuant to section 251(c)(1). See *Triennial Review Order*, 18 FCC Rcd at 17405, para. 703 n.2087; see also 47 U.S.C. §§ 251(c)(1), 252(a)(1), (b)(1). We believe that this adequately addresses concerns about existing interconnection agreements that do not include express change of law provisions.

¹¹⁰⁹ See, e.g., Verizon Sept. 12, 2008 *Ex Parte* Letter, Attach. at 5–6 (urging that any new intercarrier compensation regime displace such contracts).

¹¹¹⁰ In the past, commenters requested that the Commission give them a fresh look at existing contracts. See, e.g., Letter from Richard R. Cameron and Teresa D. Baer, Counsel for Global Crossing, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 08-152; CC Docket Nos. 01-92, 99-68, 96-45 at 2 (filed Sept. 18, 2008) (asking that the Commission “provide an 18-month window within which carriers can reconfigure their interconnection facilities without incurring reconfiguration charges or early termination liabilities under existing transport contracts”); Ad Hoc 2008 ICC/USF FNPRM Comments at 22–24 (arguing that customers should be allowed to opt out of existing contracts); Earthlink 2008 ICC/USF FNPRM Reply at 7 (arguing that end-users should have the opportunity to negotiate different terms and, if renegotiation is not possible, be permitted to terminate existing contracts without liability).

¹¹¹¹ See, e.g., *Triennial Review Order*, 18 FCC Rcd at 17400, 17402–03, paras. 692, 697–99; see also, e.g., AT&T 2008 ICC/USF FNPRM Reply at 17–19 (arguing against giving end-users a fresh look at existing contracts). To the extent that there is evidence that particular termination penalties are inappropriate, the Commission can resolve such a matter through an enforcement proceeding. See *Triennial Review Order*, 18 FCC Rcd at 17403, para. 698.

¹¹¹² See *Triennial Review Order*, 18 FCC Rcd at 17403, para. 699.

¹¹¹³ This situation is thus different than cases where the Commission found that certain contract provisions might adversely affect competition or where end-user customers would be denied the benefits of new Commission policy absent a fresh look opportunity. See, e.g., *Local Competition First Report and Order*, 11 FCC Rcd at 16044-45, para. 1094; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Second Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 7341, 7350, para. 21 (1993) (allowing a fresh look at agreements in “situations where excessive termination liabilities would affect competition for a significant period of time”); *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report and (continued....)