

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
High-Cost Universal Service Support)	WC Docket No. 05-337
)	
Developing an Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	
Federal-State Joint Board on Universal Service)	CC Docket No. 96-45
)	
Lifeline and Link-Up)	WC Docket No. 03-109

**COMMENTS OF
THE NATIONAL ASSOCIATION OF STATE UTILITY CONSUMER ADVOCATES
AND
THE NEW JERSEY DIVISION OF RATE COUNSEL
ON SECTION XV OF THE NPRM**

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SUMMARY

The implementation by the Federal Communications Commission (“FCC” or “Commission”) of measures to remedy certain distortions in the intercarrier compensation (“ICC”) market is long overdue. Under the present system, some carriers that use voice over Internet protocol (“VoIP”) do not pay their fair share of the cost of the public switched telecommunications network; some carriers fail to include adequate originating call information when they deliver “phantom” traffic to other carriers; and some carriers create business plans that involve unfair “traffic pumping” situations. When carriers do not confront or when carriers do not present accurate pricing signals, consumers are harmed because suppliers base their investment decisions on inaccurate information, and also because some consumers may be financially supporting the underpriced purchases of other consumers who make economically inefficient decisions based on inaccurate market signals. The common theme to these distortions is regulatory inaction in the face of significant changes in the market. The FCC can and should address these narrow issues in a timely manner and then should turn to resolving more complex aspects of comprehensive ICC reform after reform of the separations process.

The National Association of State Utility Consumer Advocates and the New Jersey Division of Rate Counsel urge the Commission to adopt immediate measures to (1) ensure that VoIP traffic is subject to the same intercarrier compensation charges as is other voice telephone service traffic, (2) require the originating provider of calls (including VoIP providers) to provide the calling party’s telephone number, and (3) prevent traffic pumping schemes. The Commission can and should adopt rules soon to address these market distortions. The proposed rules will reduce waste and inefficiencies in the ICC system in the short term while the FCC

contemplates longer term solutions to separations and the overall ICC framework, followed by reform of the universal service support system.

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I. INTRODUCTION

The National Association of State Utility Consumer Advocates (“NASUCA”) as an organization¹ and the New Jersey Division of Rate Counsel (“Rate Counsel”) as an agency

^{1/} NASUCA is a voluntary association of advocate offices in more than 40 states and the District of Columbia, incorporated in Florida as a non-profit corporation. NASUCA’s members are designated by laws of their respective jurisdictions to represent the interests of utility consumers before state and federal regulators and in the courts. Members operate independently from state utility commissions as advocates primarily for residential ratepayers. Some NASUCA member offices are separately established advocate organizations while others are divisions of larger state agencies (e.g., the state Attorney General’s office). NASUCA’s associate and affiliate members also serve utility consumers but are not created by state law or do not have statewide authority.

representing New Jersey consumers and as a member of NASUCA,² hereby submit comments in response to the FCC’s Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (“NPRM”) seeking input on the transformation of the Universal Service Fund (“USF”) and ICC regime.³ These comments address Section XV of the NPRM, which proposes rules specifically designed to reduce “inefficiencies and waste by curbing arbitrage opportunities...”⁴ The NPRM seeks to do so by clarifying the appropriate ICC framework for VoIP traffic, addressing phantom traffic, and reducing access stimulation.⁵

The outcome of this proceeding has immediate and long-term consequences for consumers because ICC rules affect the structure of telecommunications markets, the prices that consumers pay for basic and advanced telecommunications services, and carriers’ investment decisions. Correcting pricing distortions is essential so that carriers cannot “game” the system to their advantage. No traffic, regardless of the technology used to carry it, should be given a “free

²/ Rate Counsel is an independent New Jersey State agency that represents and protects the interests of all utility consumers, including residential, business, commercial, and industrial entities. The Rate Counsel, formerly known as the New Jersey Ratepayer Advocate, is a Division within the Department of the Public Advocate. N.J.S.A. §§ 52:27EE-1 *et seq.*

³ / *In the Matter of Connect America Fund*, WC Docket No. 10-90; *A National Broadband Plan for Our Future*, GN Docket No. 09-51; *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *High-Cost Universal Service Support*, WC Docket No. 05-337; *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45; *Lifeline and Link-Up*, WC Docket No. 03-109, *Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*, rel. February 9, 2011 (“NPRM”).

⁴ / *Id.*, at paras. 603-677. Arbitrage (the practice of taking advantage of price differences) is not, per se, inefficient (and indeed is a reasonable behavior that can lead to prices converging in competitive markets). The concern that the Notice seeks to address is that prices for the exchange of intercarrier traffic differ for reasons that stem from disparate and ambiguous regulatory treatment of the traffic rather than from competitive market conditions or cost differences. Prices in these different markets cannot converge precisely because of these different regulatory treatments. Some of this regulatory arbitrage is created by regulatory action (or inaction). Other price differences arise from binding statutory constraints --- such as the differences between interstate and intrastate jurisdictions.

⁵ / *Federal Register*, Vol. 76, No. 41, March 2, 2011, at 11632. Reply Comments on Section XV are due April 18, 2011. NASUCA and Rate Counsel also intend to file comments on the remaining issues addressed in the Notice on the respective filing dates: April 18, 2011 and May 23, 2011.

ride” on the public switched telephone network. All calls should carry complete signaling information, and ICC rules should discourage business models that are predicated on “traffic pumping.”

NASUCA and Rate Counsel commend the Commission’s effort to immediately address the inefficient and wasteful arbitrage opportunities that exist in the current ICC regime.⁶ These issues are comparatively straightforward and require simple, targeted rules. Therefore, the FCC should implement rules now, before it completes its more comprehensive ICC reform, which will require more time.

II. INTERCARRIER COMPENSATION OBLIGATIONS FOR VOIP TRAFFIC

The Commission seeks comment on the appropriate intercarrier compensation framework for VoIP traffic.⁷ The continued lack of clarity as to the treatment of VoIP traffic for purposes of intercarrier compensation has led to billing disputes and litigation,⁸ and the Commission acknowledges that, despite opening various proceedings and seeking comments several times on this issue, it has failed to act.⁹ NASUCA and Rate Counsel urge the Commission to resolve unambiguously the treatment of VoIP traffic. As NASUCA and Rate Counsel have stated for many years now, technological innovation should not be a means by which carriers avoid paying

⁶ / NPRM, at para. 603. As noted by the FCC, the National Broadband Plan included a recommendation to reduce arbitrage in advance of intercarrier compensation reform. *Id.* See *Connecting America: The National Broadband Plan*, FCC, released March 16, 2010 (“National Broadband Plan”).

⁷ / NPRM, at para. 608.

⁸ / *Id.*

⁹ / *Id.*, at para. 610.

for their fair share of the cost of the network.¹⁰ The Commission has determined that interconnected VoIP traffic is “telecommunications” traffic whether or not VoIP service is classified as a telecommunications service or an information service,¹¹ and, therefore, the Commission can logically conclude that VoIP traffic should be subject to the same ICC obligations as all other traffic. Compared to the many challenging issues confronting the FCC, this is a regulatory softball, which the FCC should address soon.

The FCC proposes several alternatives for the treatment of VoIP traffic, including: bill-and-keep; VoIP-specific intercarrier compensation rates; future application of ICC rates; and immediate obligation for VoIP traffic to pay current ICC rates.¹² The Commission should reject the use of a regulatorily-imposed bill-and-keep system. Carriers should be free to enter into bill-and-keep agreements. But imposing such a regime will only lead to further distortions in the market as carriers seek to push costs onto other carriers by dumping traffic onto others’ networks, while attempting to prevent traffic from being terminated on their own networks. The Commission should also reject the proposal for VoIP-specific rates. Instead, the Commission should simply clarify that VoIP providers have an immediate obligation to pay ICC rates.¹³

The Commission seeks comment on whether it can continue to refrain from classifying interconnected VoIP service while still requiring interconnected VoIP traffic to pay ICC

¹⁰ / See, e.g., *In the Matter of Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92, Comments of the New Jersey Division of Rate Counsel (December 6, 2006), at 5-6.

¹¹ / NPRM, at para. 615, citing *Universal Service Contribution Methodology*, WC Docket Nos. 06-122, 04-36, CC Docket Nos. 96-45, 98-171, 90-571, 92-237, 99-200, 95-116, 98-170, Report and Order and Notice of Proposed Rulemaking (“2006 Report and Order”), 21 FCC Rcd 7518, 7538-40, paras. 39-41 (2006).

¹² / NPRM, at paras. 615-618.

¹³ / Similarly, VoIP carriers should be subject to whatever long-ranges changes the FCC orders for ICC.

charges.¹⁴ It can. As a separate matter, NASUCA and Rate Counsel urge the FCC to declare that VoIP is a telecommunications service,¹⁵ but *regardless* of when and whether the FCC makes such a determination, the FCC possesses the authority *now* to require VoIP providers to abide by the same ICC obligations that apply to other voice telephone service traffic, including payments for intrastate access, interstate access, and reciprocal compensation.¹⁶ The Commission is not required to nor should it wait to implement the targeted actions and rules it is contemplating in Section XV of the NPRM while it contemplates the regulatory classification of interconnected VoIP.

As Rate Counsel has previously suggested, the regulatory classification of carriers must be consistent, and to the extent that a carrier seeks interconnection it must also be required to pay for its fair share for the use of the public switched network. Although carriers should be given interconnection rights (which in turn increases options for consumers), they should also share the cost of the network.¹⁷ Similarly, more than two years ago, NASUCA opposed the proposal of the then-Chairman to carve out interconnected VoIP as an information service.¹⁸ NASUCA argued then and continues to assert that the classification of interconnected VoIP is not a

¹⁴ / Id., at para. 618.

¹⁵ / The Commission's continuing punting on the classification of VoIP traffic has created regulatory uncertainty. The Commission should decide this issue, but, in any event, possesses the authority in this proceeding to eliminate the regulatory ambiguity associated with VoIP providers' ICC obligations. See following footnote.

¹⁶ / NPRM, at para. 615, citing 2006 Report and Order, 21 FCC Rcd at 7538-40, paras. 39-41 (2006).

¹⁷ / *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, et al., Comments of the New Jersey Division of Rate Counsel (November 26, 2008) ("Rate Counsel Nov 2008 ICC/USF FNPRM Comments"), at 24-25 (notes omitted).

¹⁸ / *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, et al., Reply Comments of the National Association of State Utility Consumer Advocates on Further Notice of Proposed Rulemaking, December 22, 2008 ("NASUCA Dec 2008 ICC/USF FNPRM Reply Comments"), at 12, 16.

prerequisite for making VoIP traffic subject to ICC rules.¹⁹ The use of a particular technology, regardless of regulatory classification, should not give traffic a free ride over the public switched telephone network.²⁰

Furthermore, the Commission has afforded interested parties ample opportunity to address the treatment of VoIP traffic as such treatment relates to ICC obligations. Now the Commission should issue final rules expeditiously to clarify that traffic carried via VoIP technology is subject to the same ICC obligations as is other voice traffic. As noted above, this should hold true regardless of the more generic decisions the Commission reaches on ICC.

III. RULES TO ADDRESS PHANTOM TRAFFIC

The FCC seeks comment on its proposal to address so-called “phantom traffic,” specifically to require that the calling party’s telephone number be provided by the originating provider and to prohibit altering or stripping call signaling information.²¹ The adoption of such a proposal to prevent phantom traffic is long overdue, and industry has been more than adequately put on notice that such a requirement could occur. The FCC states:

Although our existing rules impose obligations to pass CPN, 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. 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

¹⁹ / Id., at 16.

²⁰ / Interconnected VoIP is no longer a “nascent” technology needing protection; as the Commission’s March 2011 *Local Telephone Competition: Status as of June 30, 2010* report shows (at 1), interconnected VoIP subscriptions represented one-fifth of the Nation’s wireline retail local telephone service connections.

²¹ / NPRM, at para. 626.

PSTN. Specifically, we seek comment on whether our proposed rule revision is sufficient to require service providers originating or transferring traffic using Internet 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. 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."²²

In 2008, despite opposing most other elements of the then-Chairman's ICC/USF reform proposal, NASUCA did not oppose the adoption of the Chairman Martin's Draft Proposal on Phantom Traffic: "NASUCA has long agreed that there is a need for rules to address the issue of phantom traffic. Therefore, NASUCA supports the adoption of both rules requiring identification of traffic and rules that establish financial responsibility for traffic."²³ Similarly, Rate Counsel also supported the FCC's implementation of the signaling requirements in the FCC's 2008 proposals despite opposition to other items in the proposals.²⁴ Rate Counsel stated in its December 18, 2008 comments: "Initial comments, in contrast to the reaction regarding the proposals as a whole, show widespread support for resolving phantom traffic. Rate Counsel reiterates its support for measures that would prevent carriers from shirking their responsibility to contribute to the cost of the public network. Carriers should be required to include information identifying call origin on all calls and should be prohibited from disguising or mis-identifying terminating traffic."²⁵

²² / Id., at para. 629 (cites omitted).

²³ / NASUCA Nov 2008 ICC/USF FNPRM Comments, at 23, citing 01-92, NASUCA Reply Comments (July 20, 2005), at 47-48.

²⁴ / See, e.g., Rate Counsel Dec 2008 ICC/USF FNPRM Reply Comments, at 3.

²⁵ / Rate Counsel Dec 2008 ICC/USF FNPRM Reply Comments, at 22 (citation omitted).

Indeed, the record in this proceeding demonstrates ample support for these rules and they should be implemented quickly.²⁶ The NPRM recognizes that the current proposal is similar to the November 2008 plan “which had support from many stakeholders.”²⁷

NASUCA and Rate Counsel agree with the Commission’s observation that the industry has changed since November 2008, most notably the increase in interconnected VoIP subscriptions,²⁸ underscoring the need for the timely implementation of rules and the application of those rules to VoIP traffic. The FCC seeks comment on whether the proposed signaling rules should apply to Internet Protocol traffic. NASUCA and Rate Counsel agree that the application of the rules to VoIP traffic “will best ensure that [the FCC’s] rules will be an effective, technologically neutral, and forward-looking solution to the problem and will not introduce unintended consequences.”²⁹ The guiding principle should be that providers should pay for their use of the public switched telephone network. The FCC should expeditiously implement rules to eliminate phantom traffic.

IV. RULES TO REDUCE ACCESS STIMULATION

The FCC also seeks comment on proposed revisions to its interstate access rules to address access stimulation, a scheme that enables providers to “take advantage of intercarrier

²⁶ / See, e.g., the November 26, 2008 comments of Broadview, et al., CPUC, Qwest, Verizon and Verizon Wireless, and Embarq.

²⁷ / NPRM, at para. 620 (citation omitted).

²⁸ / Id., citing January 2011 Local Competition Report (showing interconnected VoIP subscriptions increased by 22% between 2008 and 2009).

²⁹ / NPRM, at para. 620.

compensation rates by generating elevated traffic volumes to maximize revenues.”³⁰ The FCC cites evidence that access stimulation is “impacting hundreds of millions of dollars in intercarrier compensation.”³¹ The FCC proposes to rely on the existence of access revenue sharing arrangements to “trigger” the application of “modified access charge rules.”³² The proposed rules prohibit an incumbent LEC from including payments made as a result of a revenue sharing agreement in its interstate switched access revenue requirement. Further, the FCC states: “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.’”³³

NASUCA did not support prohibiting all revenue sharing arrangements in 2008, and NASUCA, as well as Rate Counsel, continues to oppose such a prohibition.³⁴ By way of explanation, NASUCA stated in January 2008:

Qwest implies that all access stimulation involves revenue sharing. Although revenue sharing is a strong incentive for stimulation, it is not a necessary condition for traffic pumping. On the other hand, revenue sharing arrangements that do not involve pumping may be questionable, but do not unduly burden the IXC or its customers.³⁵

³⁰ / Id., at para. 636. The NPRM describes traffic pumping as an “arbitrage scheme.” However, it is not the magnitude of the termination rates that produces the incentive for traffic pumping, but, rather, the fact that rates are above cost. Furthermore, reducing differences in termination rates among carriers does nothing to address the specific problem of access stimulation. Price differences, in this case, do not matter.

³¹ / Id., at para. 635.

³² / Id., at para. 659.

³³ / Id., at para. 661 (citation omitted).

³⁴ / See *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carrier*, WC Docket No. 07-135, Reply Comments of the National Association of State Utility Consumer Advocates (January 16, 2008) (“NASUCA 2008 Traffic Pumping Reply Comments”), at 16.

³⁵ / Id., at 6.

NASUCA supports the FCC's concern over access revenue sharing arrangements that result in a net payment to another entity as an indicator of "access stimulation."³⁶

The FCC should also adopt a trigger based on a fifty-fold increase in traffic.³⁷

NASUCA, in January 2008 comments, recommended that the FCC adopt a traffic-based trigger. Under that proposal, if a carrier drops out of the NECA pool, the carrier must include a provision in its tariff that upon significant increases in traffic (on a per-access line basis) the carrier would file a "mid-course correction" before the two-year period of review ends. NASUCA defined "significant increase" as fifty-fold increase in traffic and recommended that carriers that had significant increases in traffic should be prohibited from going back to the NECA pool for a "significant" period of time and that the FCC should not allow carriers to include customer rebates in their cost of service.³⁸ NASUCA also stated in its January 2008 Traffic Pumping comments: "It appears clear that it is LECs that have dropped out of the NECA pool who have engaged in these activities."³⁹

NASUCA and Rate Counsel do support some specific items in the Commission's proposed rules including those regarding the deemed lawful considerations⁴⁰ and also the strict prohibition on recovering the "cost" of the shared revenues in a carrier's revenue requirement.⁴¹

³⁶ / NPRM, at para. 659.

³⁷ / See NASUCA's discussion of this proposal in its Traffic Pumping Reply Comments. .

³⁸ / NASUCA 2008 Traffic Pumping Reply Comments, at 3.

³⁹ / Id., at 4.

⁴⁰ / NPRM, at para. 666. See NASUCA 2008 Traffic Pumping Reply Comments, at 11-12.

⁴¹ / See NASUCA 2008 Traffic Pumping Reply Comments, at 11. See also, NPRM, at para. 663, stating that under Section 61.38 (projected costs and demand) a carrier would not be allowed to use projected amounts paid to other entity in revenue requirement filing "absent Commission approval."

NASUCA and Rate Counsel certainly support the Commission’s efforts to prohibit competitive local exchange carriers (“CLECs”) from engaging in access stimulation. The FCC proposes 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.”⁴² Arbitrage can occur when a CLEC’s access charges are based on those of the ILEC in whose territory the CLEC operates instead of the CLEC’s own costs. However, NASUCA opposed Qwest’s proposal that the CLEC benchmark for tariffing purposes be based on the nearest non-rural ILEC in 2008.⁴³ Instead, NASUCA and Rate Counsel favor the alternative put forth by Qwest that CLECs base their rates on “the settlements specified in the extended average schedules published by NECA.”⁴⁴ The larger issue is whether CLEC access charges should be benchmarked to ILEC access charges at all (which evokes a problem similar in effect as the USF identical support rule).⁴⁵

NASUCA and Rate Counsel disagree with those parties that assert that access stimulation is good public policy because it generates revenues that LECs can use for public goods, such as, for example, to fund broadband deployment, or to provide Internet service and other benefits to Tribal lands, or those who assert that the free services, such as conference calling, made possible through the use of access stimulation arrangements are a public good.⁴⁶ Certainly NASUCA and Rate Counsel support broadband deployment in unserved areas, but oppose the use of such cross-

⁴² / NPRM, at para. 665 (cite omitted).

⁴³ / NASUCA 2008 Traffic Pumping Reply Comments, at 20.

⁴⁴ / Id., at 20, citing Qwest Comments, at 24.

⁴⁵ / NASUCA 2008 Traffic Pumping Reply Comments, at 20.

⁴⁶ / NPRM, at para. 66 (citations omitted).

subsidies to achieve this goal. Instead, pricing signals for intercarrier compensation should provide accurate information about underlying costs, and providers should not be able to “game” the system. Public goods that will not be made available through private capital markets should be funded explicitly. Any purported advantages of revenue sharing agreements are overshadowed by the inefficiency of access stimulation. Ultimately, consumers do not “benefit” from such artificial competition.⁴⁷

V. CONCLUSION

NASUCA and Rate Counsel urge the FCC to correct distortions in the existing intercarrier compensation system without further delay. The FCC should require carriers to include complete call signaling information on all traffic, impose intercarrier compensation obligations on VoIP traffic, and adopt the measures proposed here to address access stimulation. The rules that the FCC proposes should come as no surprise to industry. Therefore, carriers have had ample opportunity to modify their business and investment plans in anticipation of rules and in anticipation of the FCC’s elimination of any lingering ambiguity about these matters.

Respectfully submitted,

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⁴⁷ / See NASUCA 2008 Traffic Pumping Reply Comments, at 13.

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