**Before the**
**FEDERAL COMMUNICATIONS COMMISSION**
**Washington, DC 20554**

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| In the Matter of | ) | |
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| 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 UNITED STATES TELECOM ASSOCIATION**

## I. INTRODUCTION

USTelecom is pleased to comment on the Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking seeking comment on proposals to modernize the Commission's universal service fund and intercarrier compensation system.[1] Per the Commission's instructions, these comments will focus on issues raised in Section XV of

[1] See *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, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, FCC 11-13 (rel. Feb 9, 2011) (*USF/ICC Transformation NPRM*).

the *USF/ICC Transformation NPRM*[2], "Reducing Inefficiencies and Waste by Curbing Arbitrage Opportunities."

The Commission correctly concludes that properly designed and implemented intercarrier compensation reforms could significantly reduce or eliminate opportunities and incentives for arbitrage.[3] The agency also is right to find that it should not allow the troublesome opportunities and incentives to persist during the consideration and implementation of these reforms.[4] While comprehensive reforms are developed, adopted and implemented, it is clearly necessary and imperative for the Commission to immediately address arbitrage and thereby reduce inefficiencies, wasteful use of resources and unfair distributional effects on consumers. Indeed, immediate implementation of rules to address existing arbitrage activity could have the added benefit of providing the Commission and carriers information that could greatly improve the analysis of impact from broader reform.

In an effort to curb arbitrage, the Commission seeks comment on proposals focused on three issues – the appropriate intercarrier compensation framework for Voice over Internet Protocol (VoIP), phantom traffic and access stimulation.[5] USTelecom has consistently advocated for the immediate resolution of these issues on the bases of fairness and efficiency, and because of the valuable baseline information that would be provided to the Commission by an intercarrier compensation system operating without

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[2] See FCC Public Notice released March 2, 2011, *Comment and Reply Comment Dates Established for Comprehensive Universal Service Fund and Intercarrier Compensation Reform Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking*. Comments Due for Section XV: April 1, 2011.
[3] See *USF/ICC Transformation NPRM* at paragraph 603.
[4] *Id.*
[5] See *USF/ICC Transformation NPRM,* paragraphs 604 through 606.

distortions. The Commission is right to deal with these on an accelerated timeframe. Rules addressing these arbitrage schemes should be implemented as soon as possible.

In these comments, USTelecom will address the Section XV issues of phantom traffic and access pumping for which we have had long-standing proposals before the Commission. We will address aspects of the IP compensation issue in our comments on broader reforms.

## II. THE COMMISSION SHOULD IMMEDIATELY AMEND ITS RULES TO ELIMINATE NEW PHANTOM TRAFFIC SCHEMES

Phantom traffic, traffic lacking accurate or complete call signaling information, distorts markets and competition as it gives rise to an improper transfer of funds from the customers of carriers that are being denied the correct amounts of intercarrier compensation. It causes price-cap carriers to lose properly assessed minutes and the associated revenues. Rate-of-return carriers and their customers can be harmed in that their traffic projections upon which rates are based can be distorted by phantom traffic, and such carriers must charge higher intercarrier compensation rates to make up for the lost minutes and/or revenues due to phantom traffic.

From the outset, it should be recognized that USTelecom's member companies themselves bring very different perspectives to this issue. USTelecom members include large companies that own their own tandem switches, small companies that sub-tend foreign ILEC tandems, and mid-size companies that both own tandems and sub-tend other tandems. All of these companies, however, agree that the Commission should not delay in adopting rational reforms that will reduce phantom traffic.

The problem of phantom traffic was first brought to the Commission's attention nearly 6 years ago. Since then, a number of different proposals have been urged upon the

Commission, virtually all with the common foundation of stronger Commission rules for in-stream provision of calling party identifying information. There has been broad agreement at a high level to address certain phantom traffic concerns through changes to call signaling rules.[6] Many carriers report that the amount of traffic being received by terminating carriers without calling party identifying information has continued to grow. Although by its very nature, the volume and nature of phantom traffic is difficult to quantify, some carriers have attempted to do so. Frontier Communications recently estimated that five to eight percent of the traffic terminating on its network is phantom traffic.[7] Others have estimated numbers that are multiples of that level. Regardless of the actual number, which would only be completely knowable upon implementation of effective rules ending phantom traffic, the problem is significant for many carriers.

Phantom traffic also distorts the sizing of the total amount of intercarrier compensation attributable to each jurisdiction and thus complicates efforts to reform such compensation. Implementation of rules addressing phantom traffic would provide a better baseline for transition to a new rate structure, help rationalize such transition and promote fair competition.

The benefits of implementation of rules addressing phantom traffic need not wait for adoption and implementation of comprehensive reform of intercarrier compensation. As a matter of fact, as noted above, such benefits would help inform the Commission as it

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[6] All of the following parties (and more) have filed in WC Docket 001-92 in support of improved call signaling rules: USTelecom, NECA, ITTA, CTIA, NCTA, NARUC, NuVox, XO Communications, One Communications, OPASTCO, Western Telecommunications Alliance, Qwest, The Rural Alliance, Cavalier Communications, COMPTEL, GCI, iBasis, Pac-West Telecom, RCN Telecom, VON Coalition, Time Warner Telecom, T-Mobile, USA Datanet, Verizon, Alaska Telephone Association, Sprint/Nextel and Frontier.

[7] *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. 01-982, 99-68, at 1, (filed Dec. 21, 2010).

decides and implements the best path forward. The Commission has a more than a sufficient record to adopt and implement rules to address phantom traffic. Moreover, so long as the Commission's proposed rules are limited to common-sense obligations, they will remain necessary and appropriate irrespective of the direction the Commission chooses to take on broader intercarrier compensation reform. In that respect, addressing phantom traffic will in no way reduce the incentives of any particular segment of the industry to participate in these broader reform efforts.

Specifically, the Commission should seek to adopt phantom traffic rules in advance of, or at least in conjunction with, its promulgation of rules in compliance with the Truth in Caller ID Act of 2009.[8] That Act was signed into law by President Obama on December 22, 2010, and mandated Commission issuance of implementing regulations within six months of the law's enactment.[9] Both sets of rules would be placed in Subpart P--Calling Party Telephone Number; Privacy, Subsections 64.1600 through 64.1604 of the Commission's rules. Both sets of rules address the proper identification of the origin of calls – with the Truth in Caller ID rules establishing that extra penalties should apply when it can be established that an entity failed to properly identify calls due to "an intent to defraud, cause harm, or wrongfully obtain anything of value." Concurrent adoption of Truth in Caller ID and phantom traffic rules would be mutually reinforcing.

In its expedited consideration of proposed phantom traffic rules, the Commission should be sure to give appropriate consideration to constructive modifications to the proposed phantom traffic regulatory regime. For example, to facilitate the proper billing of the traffic, the Commission should extend the principle of the T-Mobile decision and

[8] *Truth in Caller ID Act of 2009*, Pub. L. No. 111-331, codified at 47 U.S.C. Sec. 227(e).
[9] *Id*., 227(e)( 3).

provide incumbent local exchange carriers the ability to invoke the negotiation/arbitration process in Sections 251 and 252 of the Act with other carriers with which they exchange traffic.[10] The legal grounds cited in the T-Mobile Order support extending this decision to ILEC-CLEC negotiations. There, the Commission expressed concern that its prior interpretation of section 251(b)(5) of the Act created asymmetrical obligations that were detrimental to the Act's preference for negotiated agreements between carriers to establish reciprocal compensation arrangements. Specifically, the Commission acknowledged that its previous rules, which imposed obligations on ILECs but not CMRS carriers, may have created a lack of incentive for CMRS carriers to enter into such agreements.

In light of its decision there to prohibit the establishment of ILEC tariffs to ensure proper compensation for termination of traffic subject to reciprocal compensation, the Commission modified its interpretation of section 251(b)(5) to ensure that ILECs have the equal and symmetrical ability to compel negotiations and arbitrations under section 252 as CMRS providers.

## III. THE COMMISSION SHOULD IMMEDIATELY ADOPT RULES TO END ACCESS STIMULATION

Access stimulation, also known as traffic pumping or access pumping, harms all law-abiding carriers and the customers of those carriers. USTelecom, which represents a diverse group of providers, wrote the Commission in the summer of 2007, condemning this arbitrage and attaching a letter from 15 prominent leaders of small and mid-sized ILECs similarly expressing concern.[11] The business plans and operations of facilities-

[10] See 47 U.S.C. sections 251 and 252.

[11] See *ex parte* letter of June 6, 2007, from Walter B. McCormick, Jr., President and CEO of USTelecom, attaching an *ex parte* letter of April 30, 2007 from 15 Incumbent LEC Executives.

based carriers are based on being able to charge and collect payments for the use of their facilities, and this arbitrage scheme undermines the integrity of the existing intercarrier compensation system, threatening carriers' ability to recover the costs of constructing and deploying network assets. As the Commission correctly notes, "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."[12]

Providers engaging in access stimulation are extremely high-volume, low-cost carriers, but they charge intercarrier compensation rates designed to fairly compensate low-volume high-cost carriers for their costs of terminating traffic. Competitive Local Exchange Carriers (CLECs) accomplish this scheme by (1) locating CLEC operations in areas subject to the rural exemption from the CLEC access rate benchmark or benchmarking to a particular high-cost rate-of-return ILEC[13], and (2) using revenue sharing arrangements with chat lines and other services to multiply extraordinarily the terminating traffic that a LEC serving that rural market would generally experience. Tariff filing entities' prior disclosures to the Commission would not have anticipated this huge increase in call volume, so rates deemed lawful by the Commission would not have been calculated in response to the new volume.

Employing a "Robin Hood" argument, some commenters have asserted that permitting access stimulation is good public policy because access stimulation generates revenues that LECs can use to fund broadband deployment or provide Internet service to Tribal lands.[14] Such claims should be dismissed. First, access stimulation improperly

[12] See *USF/ICC Transformation NPRM*, paragraph 637.
[13] See *USF/ICC Transformation NPRM*, paragraph 657.
[14] See Global Conference Partners Access Stimulation comments at 4-7, Futurephone Access Stimulation Reply at 5-8, Chase Com, *et al*, Access Stimulation Reply at 5-6.

taxes all other users of services that involve intercarrier compensation payments for the exclusive benefit of the access stimulators. Second, there is no way of tracking or verifying these claims of beneficence. Finally, access stimulation schemes are a clear violation of section 254(k) of the Act which provides that a "telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition."[15]

### A. Access Stimulation Should Be Addressed Immediately

Access stimulation has developed and thrived in the absence of Commission action to deter it. The Commission issued a Notice of Proposed Rulemaking concerning traffic pumping in October of 2007,[16] but the arbitrage continues to exist and grow. As the Commission states, "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."[17] Verizon estimates the industry impact to be between $330 and $440 million per year.[18]

The Commission has an extensive record on access stimulation issues and will receive further input in the instant proceeding. There is no reason to let this obvious and harmful arbitrage continue one day longer. Access stimulation can and should be decided immediately, even before comprehensive reform is decided and implemented. Or if not adopted immediately, access stimulation rules at least should be included in a promptly-

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[15] 47 U.S.C. Sec. 254(k).
[16] See *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers,* WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176 (rel. October 2, 2007) (*Traffic Pumping Notice*).
[17] See *USF/ICC Transformation NPRM*, paragraph 637 and TEOCO, ACCESS STIMULATION BLEEDS SCPs OF BILLIONS, at 5, attached to Letter from Glenn Reynolds, Vice President – Policy, USTelecom to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed October 18, 2010).
[18] 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 October 11, 2010 *Ex Parte* Letter).

adopted comprehensive intercarrier compensation reform order and the rules should be enforced on day one of implementation of such reform.

### B. The Commission's Proposed Rules Are a Major Step Forward in Addressing Access Stimulation

The Commission's proposal to address access stimulation is a major step forward. While USTelecom believes the Commission would be best served by adopting the Consensus Proposal submitted last summer by ZipDX, Level 3, Verizon, AT&T, Qwest and USTelecom,[19] USTelecom, nonetheless, is pleased that the Commission here is proposing to adopt reforms that clearly recognize the mismatch between rates and costs for companies engaging in access stimulation and proposes changing rates for such companies down to a more rational level.[20] The Commission's proposal is correctly based on the concept that companies charging intercarrier compensation and also engaging in revenue sharing should not have the advantage of a rate structure designed for low-volume, high-cost carriers located in rural areas.

USTelecom concurs with the Commission's analysis in support of its proposed access stimulation rules. The Commission is correct to find that access revenue sharing

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[19] See Letter from Glenn T. Reynolds, Vice President – Policy, USTelecom Association, Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, Melissa E. Newman, Vice President – Federal Regulatory, Quest Communications Intl., Inc., David Frankel, CEO, Zip DX, LLC, Brian Benison, Director – Federal Regulatory, AT&T Services, Inc., and John M. Ryan, Assistant Chief Legal Officer, Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 at 1 (filed Oct. 8, 2010) (*Consensus Proposal Letter*).

[20] In addition to requesting a declaratory ruling that prohibits inter-carrier compensation from being assessed on traffic that is subject to a revenue sharing arrangement, the *Consensus Proposal* sought to limit the number of minutes of use per line above which CLECs would not be able to take advantage of the rural benchmark. This would ensure that rural exemption CLECs have traffic, cost and revenue characteristics that bear at least some minimal resemblance to those of the NECA rural carriers to which they are benchmarked. The Consensus Proposal recommended a cap per minutes of use per line of the 99th percentile of NECA Band 8 carriers, which is equivalent to 406 minutes of use per month per line, nearly triple that of the median for NECA Band 8 LECs. Minutes of use per line is clearly tied to the traffic characteristics that drive the costs intended to be recovered through intercarrier compensation rates. As such, use of a cap on minutes of use per line helps ensure that tariffed rural CLEC rates remain within the bounds of reasonableness, as is required by the Communications Act.

arrangements commonly are used to facilitate access stimulation and that the sharing of significant amount of such 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.[21] The Commission also correctly identifies the three possible types of sharing arrangements – between the LEC and an unaffiliated third party; between the LEC and an affiliated third party; and within the LEC itself where revenues are shared between services, not entities.

The rules must cover all types of revenue sharing situations, including instances where a formal revenue sharing agreement does not exist; otherwise they will not be effective. There very well may be revenue sharing arrangements that are in the public interest, but since the compensation paid by the exchange carrier to the access stimulating entity is unrelated to the provision of exchange access, such charges are unjust and unreasonable in violation of Sections 201(b) and 254(k) of the Act. The Commission, accordingly, is correct in its tentative conclusion in the Access Stimulation Notice of Proposed Rulemaking[22] 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 service revenue requirement.[23]

Given this finding, USTelecom observes that the Commission does not need to address eligibility for participation in NECA tariffs in its access stimulation rules. If the revenue-sharing trigger is met, an access stimulating carrier would have two choices – stop engaging in the access stimulating activity or file its own tariff with rates excluding payments to the entity stimulating traffic as a recoverable cost in its revenue requirement

[21] *Id*.
[22] See *Access Stimulation NPRM*, 22 FCC Rcd at 17997, paras. 18 and 19.
[23] See *USF/ICC Transformation NPRM* at paragraph 661.

calculation. If it chose the former, there is no need to expel it from pool participation. If it chose the latter, it would have to make the decision on its own to leave the pool – an action that should be permitted outside the usual window for notifying NECA.[24] There is, therefore, no need to compel such action.

Furthermore, USTelecom endorses the Commission's proposal to have carriers meeting the trigger file interstate exchange access tariffs under Section 61.38 of the Commission's rules within 45 days regardless of whether their current tariff was filed under Section 61.38 (which uses projected costs and demand) or Section 61.39 (which uses historical costs and demand).[25] Section 61.39 is a well-intentioned rule providing incentives for rate-of-return carriers to become more efficient and its misuse in access stimulation situations is unfortunate. USTelecom supports the Commission's proposal to prevent LECs participating in access stimulation from filing tariffs under Section 61.39.

Finally, USTelecom agrees with the Commission's proposal to have CLECs that meet the trigger to benchmark their rates to the rate of the Bell Operating Company (BOC) in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines if there is no BOC in the state.[26] Alternatively, the Commission could consider ruling that CLECs that meet the trigger are mandatorily detariffed. If there is market demand for CLEC services, then commercially negotiated rates are the best solution. Mandatory detariffing would limit the drain on

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[24] If this measure were not permitted, a carrier would lack the ability to file its own tariff appropriate to its cost and revenue situation.
[25] *Id* at paras. 663 and 664.
[26] *Id* at para. 665.

scarce Commission resources and comport with the access pumpers' argument that the market can address the rates.[27]

The CLEC "rural exemption" rate – whereby CLECs may file tariffs with access rates that are no higher than those charged by the incumbent LEC serving the same area, or in the case of a CLEC serving a rural area also served by a non-rural incumbent LEC, a rate no higher than the highest NECA access rate band (Band 8) -- was expressly established to ensure that rural CLEC rates were benchmarked against carriers with similar costs and revenues, rather than against a large non-rural CLEC with different cost, traffic and revenue characteristics. However, the Commission's implementing rules did not expressly foreclose the adoption of this very high rate by CLECs with traffic, cost and revenue characteristics very different than the typical carrier participating in the NECA traffic sensitive pool. Some rural CLECs are taking advantage of this to obtain the "presumed lawful" benefits of tariffed access rates without any check upon whether the proposed rates are just and reasonable for that carrier. As noted in the *Consensus Proposal Letter,* "[i]ndeed, in the case of free conferencing services, the entire cost of providing the service generating millions of dollars in access charges every month may consist of nothing more than a router and a few feet of fiber cable."[28]

The Commission properly asks about intrastate access stimulation.[29] This could certainly be a problem, particularly in states with large populations. As the Commission moves towards uniform rates for intercarrier compensation, it should apply the legal authority used for such rate unification to address intrastate access stimulation as well.

[27] See FreeConferencing Corp. *ex parte* file January 31, 2011, "market driven solutions have already solved the pricing problem."
[28] See *Consensus Proposal Letter* at page 4 of 6.
[29] See *USF/ICC Transformation NPRM* at paragraph 675.

## IV. CONCLUSION

The Commission should immediately adopt and implement rules to end phantom traffic and access stimulation. Addressing these arbitrage opportunities is essential throughout the transition to a new intercarrier compensation regime. Adoption and implementation of rules addressing these issues will not inhibit the development of a reformed intercarrier compensation regime. To the contrary, resolution of these issues demonstrates the Commission's ability to act in the area of intercarrier compensation and will help inform the Commission of actual traffic and revenue flows, which will be helpful in designing rational transition mechanisms to an end-state regime.

Respectfully submitted,

UNITED STATES TELECOM ASSOCIATION

By: ______________________________

David Cohen
Jonathan Banks
Its Attorneys
607 14th Street, NW, Suite 400
Washington, D.C. 20005
202-326-7300

April 1, 2011