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 a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92

COMMENTS OF T-MOBILE USA, INC.

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April 1, 2011

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T-Mobile USA, Inc. ("T-Mobile") responds to the proposals in the Commission's Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking ("NPRM") to adopt interim rules to curb "traffic pumping" and other arbitrage opportunities and abuses pending comprehensive reform of the Commission's intercarrier compensation ("ICC") and high-cost universal service rules.[1] The arbitrage behavior encouraged by the current ICC regime and addressed by the interim proposals in the NPRM has become so costly and disruptive that it cannot wait for comprehensive reform. The record on these issues is complete, and the Commission would promote consumer welfare and marketplace competition by moving swiftly on the interim proposals.

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[1] *Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, WC Docket No. 10-90, FCC 11-13, ¶¶ 603-677 (Feb. 9, 2011) ("NPRM"), 76 Fed. Reg. 11632 (Mar. 2, 2011).

I. INTRODUCTION AND SUMMARY

At the outset, it is important to emphasize that while the Commission's interim proposals represent significant progress toward addressing several problems that are plaguing the telecommunications marketplace, traffic pumping and "phantom traffic" arbitrage schemes and local exchange carrier ("LEC") efforts to assess access charges on voice-over-Internet Protocol ("VoIP") traffic are symptoms of the antiquated jurisdictional and technological distinctions and above-cost rates that characterize the current ICC regime. These arbitrage behaviors inflict an increasingly heavy and disproportionate burden on competition and consumers, and the Commission should take steps to remedy them now. Any interim remedies, however, are necessarily only temporary band-aids for a dysfunctional ICC regime that is fundamentally broken and will continue to generate other arbitrage schemes.

T-Mobile urges the Commission to remove permanently the incentives for ICC arbitrage by transitioning all ICC rates to bill-and-keep. A default bill-and-keep regime would eliminate carrier incentives to pursue uneconomic goals and force providers to offer transparently priced, unsubsidized services that consumers would be willing to buy. As the simplest, fairest, and most efficient means to implement effective reform, bill-and-keep also would eliminate arbitrage incentives and business plans based on disadvantaging competitors with unavoidable tolls. A bill-and-keep regime would provide a lasting solution to the disputes over traffic pumping, phantom traffic and VoIP access charges and reduce the need for regulatory oversight.

Pending comprehensive reform, the interim proposals in the NPRM are a step in the right direction. In the case of traffic pumping, however, the proposed "revenue sharing trigger" targets arrangements that are difficult to uncover, and the proposed tariff refiling requirements would leave ICC rates still too high. A better solution would be to adopt the traffic imbalance ratio of 3:1 terminating to originating traffic applied to ISP-bound traffic as a trigger. A LEC

meeting the 3:1 trigger in its traffic exchanges with any other carrier should be required to reduce its tariff and contract ICC rates on all traffic exchanged with the other carrier to $0.0007 per minute of use ("MOU"), the approach successfully applied to similar arbitrage behavior with regard to ISP-bound traffic a decade ago.

Further, the Commission should adopt its proposal to apply a bill-and-keep ICC regime immediately to all interconnected VoIP traffic. The Commission has never found that VoIP traffic is subject to any ICC charges, and VoIP providers incur no traffic sensitive costs with respect to SIP servers. Moreover, a bill-and-keep regime would avoid the harm to consumer interests that would result from imposing the antiquated circuit-switched based ICC regime on VoIP for the first time and would also best facilitate the migration to an all-Internet Protocol ("IP") network.

Finally, T-Mobile does not object to the Commission's proposed phantom traffic rules. Because call signaling data was not originally designed for billing and because of the mobility of most wireless services, T-Mobile endorses the Commission's intent that the proposed rules do not affect negotiated traffic allocation factors in interconnection agreements but do retain existing industry standards regarding call signaling data.

II. THE PROPOSALS ADDRESSING TRAFFIC PUMPING ARE ON THE RIGHT TRACK, BUT T-MOBILE URGES MORE EFFECTIVE REMEDIES

A. Traffic Pumping Inflicts Increasing Costs On Carriers And Consumers

In the NPRM, the Commission observes that the inflated access revenues resulting from traffic stimulation schemes cost hundreds of millions of dollars annually, a cost that inevitably is passed on to consumers whether or not they use the so-called "free" services subsidized by the

schemes.[2] For wireless carriers, the magnitude of the traffic pumping problem is already significant and continues to grow. Traffic pumping is estimated to have cost the wireless industry more than $150 million in 2010 alone.[3] By the end of this year, the cost to the wireless industry is expected to increase to $170 million annually.[4]

Moreover, the negative impact of these ongoing arbitrage activities is not limited to switched access traffic. T-Mobile has observed traffic stimulation involving intraMTA traffic, resulting from reciprocal compensation rates that exceed the actual costs of terminating traffic. T-Mobile also agrees with the Commission's observation that competitive LECs ("CLECs") are now the primary instigators of traffic pumping schemes (although these CLECs may in some cases be affiliates of rural incumbent LECs ("ILECs")).[5] The NECA rates against which rural CLEC access tariffs are benchmarked are significantly above the traffic-sensitive costs of the stimulated traffic at the high traffic volumes generated by traffic pumping schemes, again providing opportunities for lucrative CLEC arbitrage.

Based on these activities, T-Mobile's termination costs in certain rural CLEC service areas have skyrocketed in just the last two years. For example, one CLEC terminated 6.9 million MOUs of interstate access traffic originated by T-Mobile customers in March 2009 and now terminates 93 million MOUs per month – an increase of 1,247 percent over two years – at a net cost to T-Mobile of roughly $3.5 million per month. T-Mobile's "top five" terminating CLECs now extract more than $5 million every month in interstate terminating access charges from T-

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[2] *Id.* ¶¶ 637-38.

[3] *See* Connectiv Solutions, *The Impact of Traffic Pumping: Overview of 2010*, at 4 (2011).

[4] *Id.* at 5.

[5] *See* NPRM ¶ 657.

Mobile, up from slightly more than $2 million in March 2009 – an increase in intercarrier compensation costs *vis-à-vis* those carriers of 150 percent over a two year period. These CLECs reap such revenues because their termination rates are grossly inflated relative to their tremendous volumes and costs. The CLEC that now terminates 93 million MOUs of T-Mobile interstate traffic charges more than 3.7 cents per MOU of switched access traffic, and one of the "top five" charges more than eight cents per MOU, more than *one hundred times* the ISP-bound rate of $0.0007 per MOU.

The NPRM correctly recognizes that traffic pumping imposes unnecessary costs on consumers and harms competition by diverting investment capital away from broadband deployment.[6] The Commission first acknowledged the traffic pumping problem in 2007.[7] Since then, free conference calling, international bypass calling, free chat lines, rehomed numbers for interMTA calling, and other novel arrangements between certain LECs and their business partners to generate high volumes of terminating traffic have proliferated. The escalation of existing forms of traffic pumping and the advent of new traffic pumping activities have harmed all segments of the telecommunications industry, resulting in widespread litigation and significant costs borne by wireless, interexchange and wireline carriers who do not center their business plans on uneconomic, rent-seeking activities. The Commission thus has a complete record on the competitive and consumer harms caused by traffic pumping and ample authority to justify immediate action aimed at stemming the contagion of these abusive practices.[8]

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[6] *See* NPRM ¶ 637; *see also* FCC, Connecting America: The National Broadband Plan at 145, Rec. 8.1 (Mar. 16, 2010) ("National Broadband Plan").

[7] *See* NPRM ¶ 656.

[8] *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, Notice of Proposed Rulemaking, 22 FCC Rcd 17989 (2007). *See also*, *e.g.*, Letter from Donna Epps, V.P., Federal
(continued on next page)

B. An Effective Trigger Mechanism Would Deter Traffic Pumping Activities

T-Mobile generally supports the thrust of the traffic pumping proposals described in the NPRM but urges the Commission to modify the "trigger" mechanism used to identify and address traffic pumping schemes. The NPRM proposes that a LEC sharing its access revenue with another service provider – thereby meeting a "revenue sharing trigger" – be required to revise its interstate access tariff to reduce its rates and proposes requirements for such refiled tariffs.[9] This proposed revenue sharing trigger is administratively unfeasible and unenforceable, and the proposed tariff refiling requirements in some cases are too lenient, inviting even more traffic pumping through regulatory endorsement.

The fundamental problem with a revenue sharing trigger is a lack of visibility into the "access stimulation" side of the market, which makes these activities difficult for affected carriers to detect in the first instance. Revenue sharing between a LEC (especially in the case of largely unregulated CLECs) and an unregulated service provider is difficult to uncover and prove. In fact, most known revenue sharing agreements have been uncovered only after extensive discovery. In the *Farmers* case, Qwest was required to engage in multiple rounds of discovery at both the federal and state level in order to prove that an ILEC had fabricated evidence of a tariffed carrier-customer relationship.[10] A revenue sharing trigger could serve

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Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 07-135 (Dec. 6, 2010) (detailing costs of traffic pumping).

[9] NPRM ¶ 659.

[10] *Qwest Commc'ns Corp. v. Farmers and Merchants Mut. Tel. Co.*, Second Order on Reconsideration, 24 FCC Rcd 14801, 14804 ¶ 9 (2009) (*"Farmers Second Reconsideration Order*") (subsequent history omitted). Despite the Commission's finding of liability in the *Farmers* case, it remains unclear whether damages are available to injured carriers in all instances of traffic pumping. Because LEC access tariffs are typically filed under Section
(continued on next page)

primarily to inspire further creativity and obfuscation in traffic pumping arrangements, rather than preventing traffic pumping.

An effective safeguard against traffic pumping requires a clearer and administratively simpler trigger, such as a specified traffic imbalance ratio between a LEC and another carrier or a specified spike in LEC access traffic during a specified period (either a percentage increase or a threshold level of traffic overall or per line). Carrier billing and other systems can monitor traffic balances with other carriers. The 3:1 ratio of terminating to originating traffic used for ISP-bound local traffic has been successful in halting CLEC traffic termination arbitrage based on arrangements with ISPs, and the same ratio could be used as a reasonable trigger to impose traffic pumping remedies.[11] Moreover, a traffic ratio could be applied to all traffic exchanged between carriers, including interconnected local calls subject to reciprocal compensation. In T-Mobile's experience, a 3:1 ratio is sufficiently non-routine that it would be a useful proxy for traffic stimulation, and it would provide a transparent, enforceable trigger.

C. Effective Remedies Are Required To Deter Traffic Pumping Activities

Once a LEC meets the specified trigger, the remedies applied must be sufficiently stringent to discourage future traffic pumping activity. In particular, requiring a CLEC meeting the trigger to reduce its access rates to the level charged by the Regional Bell Operating Company ("RBOC") in the same state or, if there is no RBOC, the largest independent ILEC, as proposed, would leave CLEC access rates far too high at the inflated traffic volumes generated

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204(a)(3) of the Act, they are given "deemed lawful" status if they are allowed to take effect without suspension and investigation, precluding any damages award in a subsequent formal complaint case. *See* NPRM ¶ 653.

[11] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9157 ¶ 8 (2001) ("*ISP Remand Order*") (subsequent history omitted).

by traffic pumping schemes.[12] As the *Farmers* case demonstrates, in the typical traffic pumping scheme, the service providers involved in revenue sharing arrangements with the LEC are not "end users," and, therefore, the "[LEC's] transport of traffic to them [does] not constitute 'switched access.'"[13] There is thus no reason that a CLEC engaged in such a scheme should receive access charges, even at the lower RBOC or ILEC rates.

T-Mobile also is concerned that providing an access charge "safe harbor" for CLEC traffic pumping by permitting CLECs to charge the RBOC or ILEC access rates would encourage, rather than shut off, traffic pumping. This concern is underscored by traffic stimulation strategies with respect to reciprocal compensation. Reciprocal compensation rates were high enough to generate arbitrage in the case of ISP-bound traffic and are still high enough to generate traffic stimulation schemes; the much higher RBOC and large ILEC access rates are certainly too high to be an effective remedy for traffic pumping.

It is essential that the Commission devise a prophylactic safeguard that prevents all forms of traffic pumping. In order to redirect investment incentives toward broadband deployment and away from traffic pumping activities, T-Mobile urges the Commission to adopt a traffic imbalance ratio trigger of 3:1 between a LEC and any other carrier. This trigger should encompass all traffic exchanges between the LEC and the other carrier, including interconnected local traffic subject to reciprocal compensation. Moreover, a trigger mechanism can be effective only if the resulting rates are cost-based. Thus, T-Mobile urges the Commission to adopt a rate cap under which a LEC meeting the 3:1 trigger would be required to reduce its tariffed and contract ICC rates, preferably to bill-and-keep or, in the alternative, to a level that is no higher

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[12] *See* NPRM ¶ 665.

[13] *See Farmers Second Reconsideration Order*, 24 FCC Rcd 14813 ¶ 26.

than the cap the Commission adopted for ISP-bound traffic (*i.e.*, $0.0007 per MOU).[14] As demonstrated in Part III below, terminating LECs no longer incur any traffic sensitive costs with end office switching. Bill-and-keep is thus a perfectly appropriate rate for traffic exceeding the 3:1 ratio. Alternatively, a terminating rate of $0.0007 per MOU has been effective in halting arbitrage in ISP-bound traffic, which, like traffic pumping, also was "driven by regulatory opportunities that disconnect costs from end-user market decisions."[15] There is significant record evidence supporting either bill-and-keep or $0.0007 as a cost-based terminating rate.[16] Imposing bill-and-keep or, in the alternative, $0.0007 per MOU, on all traffic exchanged between the LEC and another carrier when the traffic imbalance exceeds a 3:1 ratio would be a clear, effective, fair remedy for traffic pumping.

III. INTERCONNECTED VOIP TRAFFIC SHOULD BE SUBJECT TO BILL-AND-KEEP

A. Bill-And-Keep Is Superior To Other Alternatives Being Considered By The Commission

The National Broadband Plan presents a compelling rationale for a rapid transition to a bill-and-keep regime – namely, that the current above-cost payment system deters innovation

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[14] *ISP Remand Order*, 16 FCC Rcd at 9156 ¶ 8.

[15] *Id.* at 9155 ¶ 5.

[16] For example, in T-Mobile's experience, the vast majority of RBOC agreements provide for terminating rates at or below $0.0007 per minute. The termination provisions for wireless and most competitive LEC agreements are based upon bill-and-keep, and the remaining competitive LECs charge termination rates in the $0.0007 range, with a few outliers. Further, the majority of traffic being exchanged is already at or below the $0.0007 rate. Thus, adopting bill-and-keep or a $0.0007 rate simply recognizes current market conditions. Other carriers have made similar observations in the past. *See*, *e.g.*, Letter from Norina Moy, Dir., Gov't Affairs, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 04-36, (filed Sept. 26, 2008).

and frustrates the migration to all-IP networks.[17] Of the range of alternatives presented in the NPRM, bill-and-keep represents the best way to facilitate the migration to all-IP networks, as well as the most coherent outcome from an economic and legal perspective.

Both this Commission and state commissions have recognized that, in deploying modern switching facilities, LECs no longer incur any traffic sensitive costs with end office switching.[18] Data gathered by parties in the *ICC Reform* proceeding showed that, as of 2006, some rates for unbundled local switching were as low as $0.00004 per minute.[19] With modern switching technology, "the additional costs for terminating a telephone call [are] approximately zero," requiring a reciprocal compensation rate of zero (*i.e.*, bill-and-keep).[20] Moreover, the same

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[17] National Broadband Plan at 142.

[18] *See Petition of WorldCom, Inc. Pursuant to Section 252(e)(5) of the Communications Act for Preemption,* 18 FCC Rcd 17722, 17903-04 ¶¶ 463-65 (2003). *See also id.* at 17877 ¶ 391, 17911-13 ¶¶ 484-89 (LECs using digital circuit switches do not incur any traffic sensitive costs because "modern switches typically have large amounts of excess central processor and memory capacity") ("*Virginia Arbitration Order*"); *Petition for Arbitration of Unresolved Issues in a Section 251(b)(5) Agreement with T-Mobile USA*, Case No. TO-2006-0147, 2006 Mo. PSC LEXIS 342 *9 (Mo. PSC Mar. 23, 2006) ("switching costs are no longer traffic sensitive"); *Hamilton County Telephone Co-op, et seq. Petitions for Arbitration to Establish Terms and Conditions with Verizon Wireless*, Docket No. 05-0644, 2006 Ill. PUC LEXIS 5 at *94-95 (Ill. Comm. Comm'n. Jan. 25, 2006) (finding that rural ILEC switches have no traffic sensitive costs and that as a result, their rate for termination should be set at zero); *Investigation into Reciprocal Compensation Rates*, 2003 Minn. PUC LEXIS 99 at *6 (Minn. PUC Sept. 24, 2003) (Minnesota Public Utilities Commission found, in setting a reciprocal compensation rate of zero, that "usage-based pricing of local switching . . . lacked adequate evidentiary support . . . and carried the risk of anti-competitive impacts"), *recon. denied*, 2003 Minn. PUC LEXIS 144 (Minn. PUC Dec. 24, 2003), *vacated sub nom. Ace Tel. Ass'n v. Koppendrayer*, 2004 U.S. Dist. LEXIS 24632 (D. Minn. Dec. 6, 2004), *rev'd Ace Tel. Ass'n v. Koppendrayer*, 432 F.3d 876, 881 (8th Cir. 2005) ("*Ace*").

[19] Chairman's Draft Proposal, ¶ 254, attached as App. A to *High-Cost Universal Service Support*, Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6610 (2008).

[20] *Ace*, 432 F.3d at 880.

network functions are performed terminating a local or a long distance call.[21] A "'terminating minute is a terminating minute' with regard to an end office switch."[22] It is also clear that VoIP providers incur no traffic sensitive costs with respect to SIP servers.[23] The National Broadband Plan confirms that, in an all-broadband Internet Protocol world, payments for the exchange of IP traffic are not traffic-sensitive, but instead are typically based on charges for the amount of bandwidth consumed per month.[24] Saddling interconnected VoIP with non-zero per minute termination rates thus cannot be justified under any applicable standard.

The NPRM sets forth several proposals that would subject interconnected VoIP to varying ICC rates.[25] The Commission has never determined that VoIP traffic should be subject to access charges under the current rules, and it would harm public and consumer interests to impose legacy circuit-switched rates on such traffic for the very first time. To do so would be especially inappropriate when the Commission is finally undertaking ICC rate reform for time-division multiplexing ("TDM") traffic. Reform of the ICC regime applicable to TDM traffic is acknowledged to be overdue. No rationale exists for applying such a system, or even a variation on that system, to packet-switched, all-jurisdiction IP traffic. Moreover, VoIP users' locations are becoming increasingly irrelevant and unknowable, precluding the application of a

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[21] *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 16012, ¶ 1033 (1996) (subsequent history omitted).

[22] *Virginia Arbitration Order*, 18 FCC Rcd at 17913 ¶ 489.

[23] For example, Cisco Systems, Inc. has introduced a new router with so much capacity that it can transfer the entire collection of the U.S. Library of Congress in 4.6 seconds. *See* Charles Waltner, *A New Era for Communications Begins with CRS-1* (May 25, 2004), *available at* http://newsroom.cisco.com/dlls/2004/hd_052504c.html.

[24] National Broadband Plan at 142.

[25] NPRM ¶¶ 616-19.

jurisdictionally-based ICC regime in any event.[26] The Commission should therefore avoid these highly regulatory and inefficient alternatives and adopt its proposal to subject interconnected VoIP traffic immediately to bill-and-keep.[27]

B. Requiring LECs to Accept And Terminate VoIP Traffic On A Bill-and-Keep Basis, With No Conversion Fees, Will Facilitate The Transition To An All-IP Network

To the extent that a bill-and-keep regime for VoIP generates incentives to convert TDM traffic to VoIP, it promotes the goals of the National Broadband Plan and hastens the transition to an all-IP network. Those policy goals, however, can be achieved only if the Commission ensures that terminating LECs are required to accept VoIP calls without passing along LEC TDM conversion costs resulting from the LECs' failure to upgrade their networks to IP technology. Otherwise, terminating LECs will be able to hinder the transition to an IP network by imposing unnecessary costs on VoIP traffic, even under a bill-and-keep regime.

IV. THE PHANTOM TRAFFIC PROPOSAL IS WORKABLE BUT SHOULD NOT BE USED AS A MANDATORY DETERMINANT OF WIRELESS CALL JURISDICTION

T-Mobile does not object to the Commission's proposal to help ensure that service providers can identify the originating provider for each call that is terminated on their

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[26] As the Commission explained in preempting state regulation of Vonage's "nomadic" interconnected VoIP service, "[Vonage's service] harnesses the power of the Internet to enable its users to establish a virtual presence in multiple locations simultaneously, to be reachable anywhere they may find a broadband connection, and to manage their communications needs from any broadband connection. . . . [Vonage's service] shares many of the same characteristics as . . . other services involving the Internet, thus making jurisdictional determinations about particular . . . communications based on an end-point approach difficult, if not impossible." *Vonage Holdings Corp.*, Memorandum Opinion and Order, 19 FCC Rcd 22404, 22419 ¶ 24 (2004), *aff'd, Minn. Pub. Utils. Comm'n. v. FCC*, 483 F.3d 570 (8th Cir. 2007).

[27] NPRM ¶ 615.

networks.[28] T-Mobile would strongly object, however, to burdensome or redundant signaling or traffic identification requirements, or any use of the calling party number ("CPN") or other signaling fields to establish call jurisdiction. The Commission must ensure that an interim solution does not require extensive investment or the expenditure of substantial resources that would be unnecessary after the long run reforms to intercarrier compensation.

As the Commission recognizes in the NPRM, call signaling information was not originally designed for billing but, rather, for call routing.[29] Moreover, because of the mobility of most wireless services, CPN is not an accurate indicator of the calling party's location. Accordingly, T-Mobile and other wireless providers rely primarily on negotiated traffic allocation factors in interconnection agreements to determine the jurisdiction of calls for ICC purposes.[30] T-Mobile agrees that the phantom traffic proposal should not affect such agreements.[31] Similarly, T-Mobile also supports the tentative decision to retain existing industry standards governing population of the SS7 signaling stream, particularly insofar as the proposal would leave such fields as the jurisdiction information parameter ("JIP") optional.[32] The JIP often does not provide accurate jurisdictional information in the case of mobile calls.

Finally, and notwithstanding the Commission's commendable efforts to promulgate a simple, flexible, and even-handed set of rules that are consistent with industry standards, the optimal long-term solution to the phantom traffic issue is the implementation of bill-and-keep. If

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[28] NPRM ¶¶ 625-34.

[29] *Id.* ¶ 621.

[30] *See Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling and Report and order, 20 FCC Rcd 4855, 4863 ¶ 14 (2005) (emphasizing Commission's "preference for contractual arrangements for non-access CMRS traffic").

[31] NPRM ¶ 632.

[32] *Id.* ¶ 628.

all traffic, irrespective of its jurisdiction, distance or originating or transiting carrier, were terminated on a bill-and-keep basis, this issue would disappear. Thus, any interim phantom traffic solution must be implemented only as part of an overall reform of the ICC regime, with commercial interconnection negotiations between carriers acting as a backstop for the resolution of any remaining phantom traffic issues.

CONCLUSION

For the foregoing reasons, T-Mobile urges the Commission to adopt interim rules governing traffic pumping, the ICC treatment of VoIP and phantom traffic consistent with these comments.

Respectfully submitted,

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April 1, 2011