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
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109

REPLY COMMENTS OF AT&T INC.

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Pursuant to the *Public Notice*,[1] AT&T Inc., on behalf of itself and its wholly owned subsidiaries ("AT&T"), hereby submits these reply comments on the regulatory arbitrage issues identified in Section XV of the *NPRM*.[2]

[1] *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*, Public Notice, CC Docket Nos. 96-45, 01-92, WC Docket Nos. 03-109, 05-337, 07-135, 10-90 & GN Docket No. 09-51, DA 11-411 (rel. Mar. 2, 2011) ("*Public Notice*").

[2] *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, FCC 11-13 (rel. Feb. 9, 2011) ("*NPRM*").

INTRODUCTION AND SUMMARY

More than 80 parties have filed comments in this proceeding, and they overwhelmingly confirm that the Commission should immediately address, on an interim basis, certain severe market-distorting practices that have been allowed to grow and fester under its existing intercarrier compensation regime. As the comments confirm, many service providers today are pursuing blatant arbitrage schemes that are greatly exacerbating the overall imbalances that already permeate the Commission's outdated rules and severely distort the industry's incentives for investment in next-generation networks. The comments document the substantial harm being caused by wide-spread traffic pumping and phantom traffic schemes, and the many problems caused by uncertainty surrounding the application of access charges to IP/PSTN VoIP traffic, all of which have resulted in endless litigation in courts, before state commissions, and at the Commission itself. There is a broad and deep consensus that these three problems in particular have grown to intolerable proportions and must be addressed immediately in interim rules.[3]

Traffic Pumping. There is a remarkably broad consensus, from a wide array of industry participants, that the Commission should act immediately to restrict traffic pumping arbitrage schemes. As reflected in AT&T's and other parties' comments, the simplest solutions are to declare those schemes to be unreasonable practices under Section 201(b) of the Act and/or to forbear from the tariffing requirements and mandatorily detariff the services. If the Commission does allow LECs to tariff services in connection with traffic stimulation, then the comments demonstrate that the Commission's proposed trigger and benchmark rate must be modified. In particular, the Commission should adopt, in addition to a revenue sharing based trigger,

[3] As detailed in AT&T's Comments (filed April 1, 2011), there are a number of other schemes that are also causing public interest harms that require immediate attention. AT&T does not repeat these here, but urges the Commission to adopt the changes proposed therein.

additional triggers based on minutes of use per line, growth in minutes, and the ratio of terminating to originating minutes, which would be more easily enforced and which would go further in preventing traffic pumping LECs' efforts to circumvent any new rules. Further, the record shows that the Commission's proposed benchmark rate is far too high, and that a more appropriate benchmark, if the Commission does not adopt mandatory detariffing or bill-and-keep, should be no higher than the $0.0007 used in the dial-up ISP context.

Phantom Traffic. The comments unanimously support adopting the proposed rules aimed at reducing phantom traffic, as long as the Commission also adopts certain clarifications and modifications to the new rules to avoid inadvertently prohibiting legitimate conduct that is consistent with established industry standards and technical limitations. As explained below, these necessary exceptions include those set forth in the *Missoula Plan*[4] and the *USTelecom Proposal*,[5] instances where compliance with the new rules would require costly upgrades or replacement of existing equipment, and circumstances where compliance is not possible because the calling party number ("CPN") or other information addressed by the rules does not exist. The Commission must also ensure that the new rules do not punish intermediate providers that receive incomplete signaling information from upstream providers, or prohibit voluntary arrangements among providers for billing traffic. The Commission should not, however, adopt the various self-serving modifications to the proposed phantom traffic rules – *e.g.*, mandatory signaling of Carrier Identification Code ("CIC") and the Jurisdiction Information Parameter ("JIP") and mandatory sole reliance on CPN and JIP to jurisdictionalize traffic – that are unnecessary and that would impose substantial unnecessary burdens on the industry.

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[4] Letter from NARUC Task Force on Intercarrier Compensation to Chairman Martin (FCC), attaching Missoula Plan, CC Docket No. 01-92 (July 24, 2006) ("*Missoula Plan*").

[5] Letter from Glenn Reynolds (USTelecom) to Marlene Dortch (FCC), CC Docket No. 01-92 (Feb. 12, 2008) ("*USTelecom Proposal*").

VoIP. Finally, the commenters broadly support immediate adoption of interim rules that would maintain the same intercarrier compensation rules for IP/PSTN VoIP traffic and regular PSTN traffic throughout any transition to a new, final intercarrier compensation regime. Many commenters agree that the Commission's refusal to resolve disputes over such traffic has led to rampant arbitrage that is causing enormous public interest harms and deterring broadband investment. The Commission has ample authority under either Section 251(g) or Section 251(b)(5) to establish such rules, and many commenters agree that the Commission need not resolve larger issues such as the regulatory classification of retail VoIP services to adopt such rules.

I. THE COMMISSION SHOULD PROMPTLY ADOPT RULES TO ADDRESS "TRAFFIC STIMULATION" PRACTICES.

There is widespread agreement among commenters, across a remarkably broad spectrum of interests, that the Commission must act – and act promptly – to curb arbitrage schemes perpetuated by traffic pumpers. Long distance and wireline carriers,[6] wireless carriers,[7] cable

[6] *See*, *e.g.*, AT&T, at 7-21; Verizon, at 34 ("Traffic pumping schemes have festered for more than five years, and the Commission must take action now to stop this recognized arbitrage."); CenturyLink, at 27 ("CenturyLink supports the approach to resolution of the traffic pumping problem set forth in the NPRM."); Cbeyond, Integra Telecom, and tw telecom, at 16 (supporting "adoption of these rules as a reasonable approach to addressing traffic pumping schemes that are designed to generate profits from high access charges"); FairPoint, at 8 ("FairPoint also supports the Commission adoption of rules protecting access charge customers from paying inflated charges exacerbated by access stimulation."); Hawaiian Tel., at 10 ("The Commission should bring a swift end to access stimulation"); Level 3, at 1 ("The Commission's proposals regarding access stimulation will help eliminate arbitrage"); XO, at 41 ("XO strongly supports the Commission's 'goal of providing a targeted response to address access stimulation while minimizing additional burdens on LECs not engaged in access stimulation.'").

[7] *See*, *e.g.*, Sprint, at 7 ("Sprint is in full agreement with the Commission about the deleterious consequences of traffic pumping schemes, and applauds its expressed intent to address traffic pumping by both competitive and incumbent LECs on an expedited basis"); Leap Wireless and Cricket Communications ("Leap-Cricket"), at 4 ("In Leap's experience, access stimulation or "traffic pumping" has become a serious problem."); MetroPCS, at 6 ("Traffic pumping creates serious problems in the interexchange access and local terminating markets. The Commission

operators,[8] state regulatory commissions,[9] industry associations,[10] the largest telecommunications union,[11] and legitimate providers of conferencing services,[12] all support the Commission's initiative to promulgate rules that will prevent further harms to consumers and

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must adopt rules to eliminate this arbitrage in both markets."); T-Mobile, at 5 ("The Commission . . . 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] *See*, *e.g.*, Cablevision-Charter, at 13 ("Cablevision and Charter support the Commission's proposal to rein in the worst of the access stimulation or "traffic-pumping" schemes. Such schemes impose hundreds of millions in costs on other carriers each year . . . have proved exceedingly difficult for carriers to combat, whether through litigation or other means, and ultimately force all customers to pay higher costs."); Comcast, at 11 ("it is imperative that the Commission act swiftly to curtail access stimulation"); Cox, at 12 ("Cox supports the Commission's proposal to adopt changes in its tariffing rules that would apply to incumbent LECs and competitive LECs once they meet a specified trigger."); Time Warner Cable, at 14-15 ("Commission action is therefore appropriate to eliminate or at least reduce the incentives present in existing intercarrier compensation rules that drive [access-stimulation] behavior.").

[9] *See*, *e.g.*, Corporation Comm'n of the State of Kansas ("KCC"), at 18 ("The KCC supports the FCC's proposals to modify its rules in order to minimize access stimulation."); Iowa Utilities Board ("IUB"), at 17 ("The IUB believes the Commission's proposal to curb access stimulation is a viable solution to the problem that is consistent with the Commission's established benchmarking process."); Michigan Public Service Comm'n ("Michigan PSC"), at 6 ("[Michigan PSC] is supportive of other states' and FCC action to discourage and/or prevent the [access stimulation] practice"); Public Utilities Comm'n of Ohio ("Ohio PUC"), at 13 ("The Ohio Commission appreciates and supports the FCC's efforts to minimize these [access stimulation] arbitrage opportunities.").

[10] *See*, *e.g.*, CTIA, at 4 ("CTIA and its members applaud the Commission's recognition of the need to address this issue, and support immediate action to curtail this traffic pumping by all carriers and for all types of traffic."); Independent Telephone & Telecommunications Alliance (ITTA), at 23 ("ITTA maintains that access stimulation should be expeditiously addressed by the Commission."); National Association of State Utility Consumer Advocates ("NASUCA") and The New Jersey Division of Rate Counsel ("Rate Counsel"), at 11 ("NASUCA and Rate Counsel certainly support the Commission's efforts to prohibit competitive local exchange carriers . . . from engaging in access stimulation."); USTelecom, at 6 ("The Commission should immediately adopt rules to end access stimulation.").

[11] *See* Communications Workers of America ("CWA"), at 3 ("CWA concurs with Commission proposals to move forward expeditiously to amend its rules to reduce opportunities for carriers to game the system through such practices as 'phantom traffic' and 'access stimulation.'").

[12] *See*, *e.g.*, ZipDX, at 4 ("We are supportive of the proposed rules to reduce access stimulation.").

prevent further money from being funneled away from beneficial broadband and other investments into unproductive activities deployed solely for the purpose of pursuing arbitrage opportunities. Indeed, some of the nation's most notorious traffic pumpers either make no effort to defend their practices or, in some cases, even support rules that would restrict the practice.[13] While a few other traffic pumpers offer a tepid defense of their activities, even they seem resigned to fact that their long ride on the gravy train is about to end.[14] Accordingly, because the record here is unusually and overwhelmingly one-sided, the Commission should act very shortly after the close of the comment cycle to promulgate new rules to restrict traffic stimulation schemes.

As to the specific contents of the Commission's new rules, a significant number of commenters joined with AT&T to support either an outright prohibition on traffic pumping[15] or mandatory detariffing of services associated with traffic pumping.[16] As USTelecom explains, "[m]andatory detariffing would limit the drain on scarce Commission resources and comport with the [traffic] pumpers' argument that the market can address the rates."[17] Further, CTIA

[13] For example, the comments of Aventure, an Iowa LEC that has engaged in especially gross traffic pumping misconduct, *see* AT&T, at 8 n.10; *IUB Traffic Pumping Order*, at *29, make no attempt to defend its conduct or oppose the Commission's proposed rules. Omnitel and Tekstar, two of the very largest traffic pumpers, support the FCC's proposed rules (Omnitel-Tekstar, at 12-14, 17) – which, as explained below, is strong evidence that the Commission's proposed benchmark is too high.

[14] *See*, *e.g.*, Bluegrass and Northern Valley, at 17-23 (commenting on how the Commission should modify its proposed rules that would limit traffic pumping); FreeConferenceCall, at 34-38 (commenting on rules that would limit traffic pumping).

[15] *See, e.g.*, AT&T, at 12-13; CenturyLink, at 33-37; Sprint, at 7-8.

[16] *See, e.g.*, AT&T, at 13-15; USTelecom, at 11-12; CTIA, at 7; MetroPCS, at 9-10; Sprint, at 21; T-Mobile, at 8-9.

[17] USTelecom, at 11-12. By contrast, there is absolutely no merit to the claims put forward by some traffic pumpers that the Commission need not take any action because the existence of settlement agreements means that there are "market-based" rates for these services that are "just and reasonable." *E.g.*, Omnitel-Tekstar, at 7-10. Any existing agreements between traffic

explains that such an approach "would be consistent with the ultimate goal of the National Broadband Plan's intercarrier compensation recommendations, as well as the Commission's proposal ultimately to eliminate all mandatory per-minute intercarrier charges." CTIA, at 7. Because mandatory detariffing of traffic pumping traffic is also more consistent with the Commission's existing rules for CLEC access services, *see* AT&T, at 14, the Commission should adopt the simplest and most de-regulatory approach by forbearing from the tariff requirements, and requiring mandatory de-tariffing, for traffic pumping traffic.

If the Commission nevertheless decides to permit traffic-pumping LECs to file tariffs that would apply to such traffic, then the broad consensus of the comments is that the Commission's proposed approach – in which LECs meeting a specified trigger must file revised tariffs with reduced rates – is generally reasonable as an interim solution but does not go nearly far enough, especially in light of the fact that traffic pumpers will retain, at least until the Commission completes more broad intercarrier compensation reform, substantial incentives to evade any new rules.[18] In particular, the comments strongly support more aggressive approaches to limit traffic pumping, most importantly (1) the use of additional triggers beyond the existence of revenue sharing agreements, and (2) a reduced benchmark rate, one that is below the Commission's proposed BOC rate and that reflects the extraordinarily low costs of terminating very large

pumpers and IXCs plainly do not reflect truly competitive market conditions, because traffic pumping LECs have regulation-created terminating access monopolies, and IXCs are essentially forced to take their services. AT&T, at 11-12.

[18] *See*, *e.g.*, AT&T, at 9-11; Texaltel, at 5 ("As long as the underlying incentives exist, crafty companies will find ways to profit from it"); Bright House, at 5-6.

volumes of calls to conference and chat line equipment collocated in traffic-pumping LECs' central offices.[19]

Additional Triggers. While most comments support the use of the Commission's proposed trigger based on the existence of access revenue sharing arrangements, *see NPRM* ¶ 659, there is also a broad recognition that reliance solely on this trigger alone is under inclusive and would undoubtedly encourage unscrupulous traffic pumping entities to invent ways to try to avoid the trigger.[20] Indeed, even traffic pumpers agree that the Commission's proposed trigger is "imperfect" and may be "difficult to administer and enforce."[21]

While AT&T does not propose to eliminate the Commission's proposed trigger,[22] it agrees with commenters such as Leap (at 6) that "there is no reason to rely on only one trigger" and also joins with the many commenters that advocate additional triggers, including those based on minutes of use per line per month, growth in terminating traffic, and on the ratio of

[19] *See, e.g.*, CenturyLink, at 39-41; Comcast, at 11; Cox, at 12; CTIA, at 8; Leap-Cricket, at 6; MetroPCS, at 9-10 ; NASUCA, at 10; NECA, at 32-33; Ohio PUC, at 14-15; SCC, at 16-17; Sprint, at 8-9; Time Warner Cable, at 15-16; T-Mobile, at 8-9; Warinner, at 7; USTelecom, at 10.

[20] *See, e.g.*, AT&T, at 9-12; Texaltel, at 5; USTelecom, at 10 ("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.").

[21] FreeConferenceCall, at 26; *see also* PaeTec, at 21-22.

[22] Contrary to the concerns stated by some commenters, the use of a trigger based on the existence of access revenue sharing agreements, as defined in the *NPRM*, does not constitute a condemnation of all revenue sharing agreements, regardless of the competitive and market conditions in which those agreements may be entered. What is certain is that the access revenue sharing agreements at issue here – namely, where LECs with terminating monopolies can force IXCs to route traffic to their free calling partners, charge IXCs rates that are clearly well above the costs of terminating the calls, and then share such a large portion of the access revenues that these partners are net recipients of revenues – are so plainly unreasonable that they can unquestionably serve as a legitimate basis to trigger (at a minimum) revised tariff filing requirements with drastically reduced rates.

originating and terminating minutes.[23] Although no single trigger is perfect, use of multiple triggers – including some based on more objective data – would be more difficult for traffic pumpers to circumvent, easier to enforce, and thus more effective in ending traffic pumping abuses.[24]

While the Commission and some commenters express concern that multiple (or more broad) triggers may be over inclusive and apply to legitimate LECs with high subscriber growth or with acquisitions, the record does not in fact show that this is at all likely to occur, so long as the additional triggers are set at appropriate levels.[25] In identifying traffic pumping LECs over the last several years, IXCs have often examined data such as the number of minutes per line or

[23] CenturyLink, at 39-41 (advocating a trigger based on 406 minutes of use per month per line); Comcast, at 11 (MOU trigger); Cox, at 12 (MOU triggers); CTIA, at 8 (traffic asymmetries); Leap-Cricket, at 6 (advocating a trigger based on ratio of originating-terminating traffic); MetroPCS, at 9-10 (originating-terminating ratios) ; NASUCA, at 10 (traffic increases); NECA, at 32-33 (MOU trigger); Ohio PUC, at 14-15 (increases in terminating traffic and on the ratio of originating to terminating traffic); SCC, at 16-17 (supporting MOU triggers); Sprint, at 8-9 (originating-terminating ratios); Time Warner Cable, at 15-16 (MOUs or originating-terminating ratios); T-Mobile, at 8-9 (originating-terminating ratios); Warinner, at 7 (MOU trigger); USTelecom, at 9 (MOU trigger).

[24] AT&T also endorses Verizon's proposal that "the Commission should also establish a presumption that a revenue sharing arrangement exists, and the new triggering mechanism is engaged, if a predominant share of a LEC's billed intercarrier compensation minutes are routed to or from conferences bridges, information services such as chat lines, or other known traffic stimulation mechanisms regardless of whether the LEC and the other providers are affiliated." Verizon, at 44.

[25] The trigger proposed by a coalition of participants in the Commission's prior docket was 406 minutes of use per line per month, which is based on the 99th percentile of NECA band 8 carriers. Thus, it would simply be extraordinary for a legitimate LEC, not engaged in traffic pumping, to have traffic patterns that exceed that level. Such extraordinary cases are precisely why the Commission has a process for good cause waivers of its rules. Further, AT&T agrees with those commenters who point out that even LECs that are not engaged in traditional traffic pumping but that reach the triggers due to normal economic activity, such as the existence of high volume call centers, should not be immune from reduced rates. *See, e.g.*, CenturyLink, at 38-39. Regardless of the cause, LECs should not be able to maintain very high access rates when the costs of terminating or originating calls is low, which is surely the case with rural, high volume call centers.

the ratio of originating and terminating traffic, and there is absolutely no evidence in the comments that any entity has ever been *falsely* accused of traffic pumping. To the contrary, the comments submitted in this docket, as well as the history of these arbitrage schemes, shows that the far more significant problem is that traffic pumping LECs have persisted in finding ways to circumvent the piecemeal approach previously adopted by the Commission to deal with these problems.[26] Accordingly, the Commission should adopt rules using its revenue sharing trigger, but also adopt triggers based on MOUs per line per month, originating-terminating ratios, and growth in traffic.

Revised Benchmark Rates. For LECs that meet one of the proposed triggers, AT&T joins with the commenters that advocate changing the Commission's proposed benchmark from the BOC rate to the $0.0007 rate used by the Commission in the dial-up ISP-bound traffic context.[27] As these comments recognize, the use of the BOC rate certainly overstates the extremely minimal costs that traffic pumping LECs incur when they route calls to their free calling provider partners.[28] Notably, no traffic pumping LEC introduced evidence showing that the relevant costs

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[26] Further, the rules proposed in the *NPRM* are intended to be an interim solution, and if the Commission's experience is that, for the first time, its rules are capturing not merely most traffic pumping schemes but also legitimate activity, it can relax the rules in later proceedings, and grant waivers in the interim period.

[27] *See, e.g.*, CTIA, at 7; Leap-Cricket, at 8; MetroPCS, at 9-10; Sprint, at 8, 16; T-Mobile, at 8-9.

[28] CTIA, at 6-7 ("The BOC rate may well be high enough to permit the LEC to share funds with conferencing or other service providers and to still earn substantial profits"); Leap-Cricket, at 7 ("Any higher access rate [than $0.0007] for a one-way traffic flow in this context would make no sense, and would result in a rate that might well be too high to deter many traffic-pumping schemes"); MetroPCS, at 10 ("The adoption of [$0.0007] would incent carriers to take part in meaningful bilateral negotiations, while discouraging carriers from engaging in the traffic pumping that currently is causing distortions in the local access market. The Commission recognized the importance of such a cap in its *ISP Remand Proceeding*, and the same arbitrage opportunities that the Commission sought to stop in that proceeding are pervading the local termination market: one way traffic pumping business plans that were created to exploit holes in the system and allow for arbitrage opportunities"); T-Mobile, at 9 & n.16 (adopting "a $0.0007 rate simply recognizes current market conditions").

are at all comparable on a per-line basis to those of the BOCs. While BOCs handle very large volumes of calls, they have very significant facilities and other costs, whereas traffic pumpers handle very large volumes of calls without any of those significant costs.

In this regard, among the most persuasive evidence that the Commission's proposed benchmark rate is too high is that two of the nation's very largest traffic pumpers have called it "not unreasonable" and support it.[29] These carriers have apparently calculated that, with very large volume operations – and traffic pumping LECs are the largest-volume single LECs in Minnesota, South Dakota, and Iowa – they can easily continue to reap monopoly profits by continuing to engage in arbitrage schemes, even at the BOC rate proposed by the Commission. Thus, the Commission's benchmark approach, if adopted, may not end or even curb traffic pumping, but perversely result in larger traffic pumping LECs that route larger and larger volumes of traffic, thereby continuing to harm ratepayers.

Effect of Rules. Further, even if the Commission adopts more broad triggers and a lower benchmark, it still must take steps not to promulgate rules that inadvertently facilitate traffic pumping and related access arbitrage schemes. *See NPRM* ¶ 639. Accordingly, AT&T agrees with the comments of Verizon and others that the Commission should establish a presumption that access arbitrage that occurs outside the confines of the Commission's rules is not legitimate, and still will be subject to challenge through existing remedies, such as Section 208 complaints. Verizon, at 42-44. Likewise, if the Commission adopts rules that allow LECs to file tariffs that may encompass services associated with traffic pumping, the Commission should unambiguously state that those rules (1) do not affect existing decisions finding that LECs

[29] Omnitel-Tekstar, at 17.

engaged in traffic pumping have violated their access tariffs,[30] and (2) do not preclude the Commission from finding that LEC tariffs that were filed to avoid these decisions contain provisions that are unjust and unreasonable, in violation of Section 201(b) of the Act.[31]

The Commission Should Reject As Unnecessary Proposed Prohibitions on "Self-Help". Finally, the Commission should refuse the requests, made primarily by the traffic pumpers whose arbitrage schemes the Commission's proposed rules are designed to curb, to impose new and unnecessary rules that would purport to bar interexchange carriers from withholding payment from local exchange carriers involved in traffic pumping, a practice the traffic pumpers characterize as "self-help."[32]

The notion that IXCs have acted improperly by withholding payment to traffic pumping LECs is flatly incorrect, and thus the "self-help" rules proposed by traffic pumpers seek to address a problem that does not actually exist. These commenters ignore that traffic pumping LECs are not in fact providing the services described in their access tariffs and thus are not entitled to payments.[33] Further, in the circumstances here, IXCs are not engaged in impermissible "self help," but merely are defending themselves against unlawful arbitrage

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30 *See, e.g., Qwest Commc'ns* v. *Farmers & Merchs. Mut. Tel.*, Second Order on Reconsideration, 24 FCC Rcd. 14801 (2009) ("*Farmer III*"), *recon. denied*, 25 FCC Rcd. 3422 (2010), *pet. for review pending* (D.C. Cir., No. 10-1093).

31 *E.g., Qwest Commc'ns Co*. v. *No. Valley Commc'ns, LLC*, Complaint, File No. EB-11-MD-001 (filed Jan 7, 2011); *Sprint Commc'ns Co*. v. *No. Valley Commc'ns, LLC*, Complaint, File No. EB-11-MD-003 (filed Feb. 22, 2011).

32 *See, e.g.*, Aventure, at 6-7; FreeConferenceCall, at 49; Global Conference, at 13-15; *see also* PaeTec, at 16-20; Pac-West, at 17-19.

33 *See, e.g., Farmers III* ¶¶ 12-26. Under the Act and longstanding precedent, a carrier may lawfully assess tariffed charges only for those services specifically described in its applicable tariff. 47 U.S.C. § 203; *AT&T Corp.* v. *YMAX Communications Corp.*, File No. EB-10-MD-005, FCC 11-59, ¶ 12 & n.50 (April 8, 2011) ("*YMAX*").

schemes perpetuated by traffic pumpers.[34] Because IXCs are captive to these traffic pumping LECs' terminating access monopolies, they have no other legitimate response except to dispute and withhold payment of the charges, which is usually expressly permitted pursuant to the terms of the LECs' own tariffs.[35] Notably, many LECs' tariffs contain provisions that allow the LECs to assess substantial late payment fees if the LEC prevails on the billing dispute, and thus IXCs will generally withhold payments only when there are legitimate, good faith billing disputes on which they are likely to prevail.[36]

In addition to these remedies, the LECs retain the right to seek to collect, via a collection action in federal or state courts, charges that they contend they have properly tariffed and provided pursuant to that tariff.[37] By contrast, as the Commission recently re-affirmed, the Act "governs a carrier's obligations to its customers, and not vice versa," and thus LECs cannot maintain Communications Act claims against their customers for nonpayment of tariffed

[34] The cases in which the Commission has taken issue with customers' "self-help" are not remotely like the present circumstances and generally occur when the customer i) conceded that it ordered and wanted the tariffed services and that the carrier provided the services described in the tariff, but ii) contended that the rate or some other term in the tariff was unreasonable. Such "self-help" cases are simply inapposite.

[35] *See, e.g.*, *AT&T Corp.* v. *Beehive Tel. Co., Inc.*, 17 FCC Rcd. 11641, ¶ 26 (2002); *YMAX* ¶ 48 n.134 (discussing LEC tariff that "expressly contemplates that a customer may withhold payment of disputed charges while [the carrier] pursues resolution").

[36] Even though they already have multiple reasonable remedies, some traffic pumping LECs have attempted to file tariffs with patently unreasonable remedies, such as those that bar withholding in all circumstances, that purport to limit customers' rights to seek refunds, and that improperly presume that all billed charges are accurate. The Commission should not endorse such remedies either in this proceeding or elsewhere.

[37] The traffic pumping LECs' complaints that such litigation can be lengthy and time-consuming lack merit. The litigation is equally costly and drawn out for the IXCs, and the reality is that if the LECs were not engaged in arbitrage schemes but instead were providing legitimate services properly under their tariffs, there would likely be no litigation at all, or at least litigation that could be resolved quickly.

services.[38] If the Commission were to adopt the new rules on "self-help" suggested by traffic-pumping LECs, it would, contrary to the decision in *All American* and years of additional precedent, engulf the Commission in collection action claims by carriers against their purported customers. In short, new rules on self-help are entirely unnecessary, and instead the Commission should focus on ways to limit traffic pumping, which will enable those carriers that are engaged in legitimate practices that benefit competition and consumers, and that are properly providing services according to tariffs with reasonable rates and terms, to be paid promptly.

II. THE COMMENTS CONFIRM THAT THE COMMISSION SHOULD ADOPT THE PROPOSED "PHANTOM TRAFFIC" RULES, WITH MODIFICATIONS.

The comments unanimously support adopting the proposed rules aimed at reducing phantom traffic, so long as the Commission also adopts certain clarifications and modifications to avoid inadvertently prohibiting legitimate conduct that is consistent with established industry standards and technical limitations. AT&T agrees, and as discussed below, the Commission should promptly adopt the proposed phantom traffic rules with such clarifications and modifications. A few commenters, however, propose other, unnecessary and self-serving modifications to the proposed rules that would serve no legitimate purpose and that would impose substantial additional burdens on the industry. For the reasons set forth below, these proposals should be rejected.

A. The Comments Confirm That New "Phantom Traffic" Rules Should Not Inadvertently Prohibit Legitimate Conduct.

The record confirms that the Commission should adopt certain modifications and clarifications to the proposed phantom traffic rules to ensure that they do not impose unnecessary and undue burdens on the industry by inadvertently prohibiting legitimate conduct.

[38] *All American Tel. Co.* v. *AT&T Corp.*, 26 FCC Rcd. 723, ¶¶ 9-11 (2011).

1. The comments confirm that the phantom traffic rules should expressly incorporate the exceptions set forth in the *Missoula Plan* and the *USTelecom Proposal*, both of which reflect broad industry consensus as to legitimate conduct that is consistent with industry standards and technology limitations, but that may nonetheless result in phantom traffic.[39]

2. The comments establish that the Commission should clarify that, under the "technical feasibility" and "industry standards" exceptions, providers have no obligation to make costly upgrades or to replace legacy equipment simply to transmit calling party information.[40] Thus, even where it may be technically possible to comply with the rules, providers should not be required to do so where that would require substantial investments to retrofit or replace existing systems.[41] A contrary rule would be unduly burdensome, and would undermine the core goals of

[39] *Missoula Plan*; Letter from Glenn Reynolds (USTelecom) to Marlene Dortch (FCC), CC Docket No. 01-92 (Feb. 12, 2008) ("*USTelecom Proposal*"); *see also* AT&T, at 23-24; CenturyLink, at 21-25; ITTA, at 20-21; Verizon, at 46 & n.70. For these same reasons, the Commission also should reject Aventure's proposal (at 8) to require officers of transiting carriers to confirm in sworn statements that their companies are not knowingly deleting or changing routing data: in some instances, industry standards or technical limitations require such deletions or changes.

[40] *See, e.g.*, AT&T, at 24; CTIA, at 9; Leap-Cricket, at 8; Sprint, at 26; T-Mobile, at 12; Verizon, at 49. In addition, AT&T agrees with Verizon (at 49) that the Commission should address the inconsistency in the proposed new rule by clarifying that all traffic is governed by the "technical feasibility" and "industry standards" exceptions. As currently written, the rule might be interpreted to mean that the technical feasibility exception applies only to originating providers and the industry standards exception applies only to intermediate providers. *NPRM*, Appx. B.

[41] *See, e.g.*, CTIA, at 9 ("the new rule should not be understood to require . . . that carriers deploy or replace costly equipment solely to comply with its mandate regarding the transmission of calling party information"); Verizon, at 49 & n.70 ("Any order should make clear that . . . the proposed rule imposes no obligation on providers to deploy new equipment or upgrade equipment in order to transmit or pass telephone number information"); Leap-Cricket, at 9 ("Carriers thus should not have to replace existing facilities or deploy costly new equipment to comply with these interim rules."); *see also, e.g.*, AT&T, at 23-25; T-Mobile, at 12-13.

the National Broadband Plan by diverting resources away from investment in next generation broadband services.[42]

3. The comments confirm that the rules (or orders adopting them) should explicitly acknowledge that CPN may not exist for certain types of traffic and that such traffic is exempted from the anti-phantom traffic rules, just as similar PBX traffic is already exempted under 47 C.F.R. § 64.1601(d)(3).[43] Such traffic may include, for example, certain IP-originated VoIP traffic and international originated traffic.[44]

4. The comments demonstrate that the Commission should clarify that the new rules are not intended to ensnare intermediate providers that receive incomplete signaling information. For example, as Verizon correctly observes (at 54), the rules should not impose any "duty on the part of an intermediate provider to investigate and make a legal determination about whether intercarrier compensation is due – and from whom – to a terminating LEC" because

[42] *See, e.g.*, Verizon, at 48 ("It is important that the exceptions to the Commission's proposed new signaling rules are sufficient to avoid disrupting the migration to new IP-based services and do not necessitate expensive systems modifications merely to comply with the rules themselves for some interim period."); *see also, e.g.*, AT&T, at 24.

[43] *See, e.g.*, AT&T, at 23-25; Level 3, at 10-11; T-Mobile, at 12-13; Verizon, at 50.

[44] *See, e.g.*, Verizon, at 50 ("where the originating provider has not assigned a telephone number to the calling party, and the originating provider does not receive a telephone number from the calling party, the originating provider should be unambiguously excepted from any requirement to signal such information"); Level 3, at 11 ("the Commission should . . . make clear that this rule applies only where the caller has a telephone number"); PaeTec, at 8-10 ("not all calls contain originating CPN"). Some commenters propose that the Commission "clarify that providers may not substitute a number of a calling 'platform' or 'gateway' for the CPN or CN associated with the originating caller [number]." Blooston, at 10; *see also* NECA, at 23-24. AT&T opposes this blanket prohibition, because there are circumstances where existing technical requirements and industry standards support the use of gateway or platform numbers. AT&T agrees, however, that the Commission should clarify that where a legitimate CPN exists and industry and technical standards permit it to be signaled, providers should not be permitted to substitute a different number (of course, this prohibition should not, however, preclude standard industry practices where CPNs are substituted for legitimate reasons, *e.g.*, where a telemarketer populates the CPN with a toll free callback number).

"[d]epending on its position in the call path, an intermediate provider may or may not be in a position to know who the 'financially responsible party' for a call is, let alone have the capability to make such determinations instantaneously as call signaling information is transmitted and calls are set up and taken down."[45] Accordingly, as Comcast explains (at 9-10), "[a] provider should not . . . be held financially responsible for traffic it receives from another provider that does not include the information needed to ensure proper billing"; rather, "[t]he responsibility – and liability – should lie with the party that failed to provide the necessary information, or that stripped the call-identifying information from the traffic before handing it off."[46]

5. The comments confirm that the Commission should clarify that its rules do not prohibit voluntary arrangements among providers for billing traffic, such as arrangements where industry participants have determined that the most efficient method of exchanging traffic does not include transmitting CPN and CN, and have developed other methods for determining proper billing of calls, such as factoring.[47]

B. The Commission Should Reject Proposed Phantom Traffic Rules That Would Serve No Legitimate Purpose And Significantly Increase Providers' Costs.

The Commission should reject proposed modifications to the phantom traffic rules that would serve no legitimate purpose, and that would require massive overhauls of existing systems

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[45] *See also* Comcast, at 9-10 ("[T]he Commission should make clear that a provider involved in transmitting a call that does not receive the calling party's number or other pertinent information from the preceding provider in the transmission path is not responsible for tracing down the missing information or paying transport and termination charges.").

[46] *See also* KCC ¶ 19 ("A transiting provider can only pass along call information it has received from the originating provider or other providers in the call path."). For these reasons, the Commission should reject proposals to "[m]ak[e] the intermediate provider responsible for providing upstream carrier information where call detail is missing and/or switched records have been altered." PaeTec, at 9-12; EarthLink, at 25-26.

[47] *See*, *e.g.*, Verizon, at 47-48 ("Carriers can and should continue to rely on factoring, in addition to any new call signaling rules"); *see also*, *e.g.*, AT&T, at 24-25; Hypercube, at 15-16, 22.

or that would otherwise impose costly obligations on innocent providers *not* engaged in schemes to create phantom traffic for the purpose of avoiding access charges.

1. The Commission should reject proposals to require carriers using SS7 to signal the Carrier Identification Code ("CIC") and the Jurisdiction Information Parameter ("JIP"), in addition to transmitting CPN and CN.[48] Proponents of these requirements incorrectly assert that the CIC is needed to identify which provider to bill, and that the JIP is needed properly to jurisdictionalize traffic created by nomadic services (*e.g.*, wireless and VoIP services). In fact, the CIC is not needed to identify the provider that should be billed, because terminating LECs already have access to that information,[49] and, as explained below, although the JIP may be useful and appropriate for jurisdictionalizing traffic in many circumstances, there are other circumstances where it is not.[50] Such mandates, however, would impose enormous burdens on the industry, because they would require substantial upgrades and modifications to IXC and

[48] *See, e.g.*, Consolidated Communications, at 38; GVNW, at 5-6; Frontier, at 13; Hypercube, at 15-6; NECA, at 21-23; PaeTec, at 6-8; Rural LEC Commenters, at 11; TCA, at 6; TDS, at 9; Toledo, at 6; Warinner, at 6.

[49] When a terminating LEC connects directly with an IXC, the LEC can determine the CIC from the trunk group through which it receives the traffic. *See* Verizon, at 46-47; *NPRM* n.950; Verizon, *Verizon's Proposed Regulatory Action to Address Phantom Traffic*, at 4-7 ("Verizon Phantom Traffic White Paper"), attached to Letter from Donna Epps (Verizon) to Marlene H. Dortch, (FCC), CC Docket No. 01-92 (filed Dec. 20, 2005). Likewise, when a terminating LEC receives traffic indirectly from a tandem operator, the tandem operator identifies the CIC from the trunk groups through which it received the traffic and provides that information to the terminating LEC as part of the EMI records. *See NPRM* ¶ 622 & n.950; Verizon, at 46-47; Verizon Phantom Traffic White Paper, at 4-7. Thus, no legitimate purpose would be served by forcing carriers to include CIC in the SS7 stream. There is likewise no merit to PaeTec's assertion (at 7) that the CIC should be signaled to facilitate the determination of the *jurisdiction* of the call. The CIC could only identify the IXC that carried the call, not whether it was an interstate or intrastate call. The CPN and CN that are already required by the rule will therefore be far more useful for determining call jurisdiction.

[50] The JIP identifies the switch from which a call originated. Switches, however, may serve multiple LATAs and even multiple states. In these circumstances, the JIP, like the CPN, may be insufficient to enable terminating LECs to identify the LATA or state where the caller is located. *See, e.g.*, Nebraska Rural Companies, at 24; T-Mobile, at 13.

wireless providers' systems that are often incapable today of capturing and signaling CIC and JIP.[51]

2. The Commission should also reject proposals to mandate the use of CPN and JIP to jurisdictionalize calls.[52] First, these proposals have nothing to do with phantom traffic, or schemes to avoid paying access charges, and are not appropriately addressed here. Second, although the CPN and the JIP can certainly be useful for jurisdictionalizing calls and may be the appropriate approach for doing so in many circumstances, a blanket mandate requiring their use to jurisdictionalize traffic is clearly not appropriate, because it would eliminate providers' flexibility to determine how best to address the circumstances where the CPN and the JIP do not accurately identify call jurisdiction (*e.g.*, a wireless phone customer with a New York City telephone number may place a call from Los Angeles or a wireless call may originate from a mobile switch that serves multiple states but only has one JIP).[53] Third, such a rule would create additional opportunities for arbitrage. Indeed, providers that alter CPN information often do so for the express purpose of asserting a false jurisdiction for the call based on calling and called

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[51] *See*, *e.g.*, Coalition for Rational Universal Service, at 5-6. The Commission should also reject the proposal of PaeTec (at 7-8) and others that providers should be required to transmit an Operating Company Number ("OCN") and a Location Routing Number ("LRN") in the SS7 stream. The OCN is not even an SS7 Parameter. And the LRN is used primarily for the limited purpose of routing calls to numbers that have been ported to providers other than the carrier to which the number was assigned. LRNs would therefore be of very limited use for billing or jurisdictionalizing traffic. The Commission also should reject Aventure's proposal (at 7) that the Commission "prohibit carriers from routing traffic in a manner that is inconsistent with the LERG Routing Guide." The LERG merely indicates the ultimate (end office) and penultimate (tandem) termination points. The LERG does not address intervening routes. Moreover, there are legitimate instances where traffic can be routed more efficiently than as set forth in the LERG. For example, consider two carriers that are directly interconnected and where the NPA-NXX code of the terminating party homes behind a third party's access tandem. The most efficient routing in that situation is to route the call using the direct connection rather than through the third party tandem (as the LERG would indicate).

[52] *See*, *e.g.*, Bright House, at 5; CTIA, at 9-10; NECA, at 28.

[53] *See*, *e.g.*, CTIA, at 9-10; T-Mobile, at 12-13; Sprint, at 25-26.

party numbers.[54] As discussed above, providers and terminating LECs have entered into various arrangements to address these "wireless roamer" and "nomadic VoIP" issues, including the use of factors and other information. The record contains no valid basis for interfering with those arrangements by mandating the method for determining call jurisdiction.

III. TREATMENT OF IP/PSTN VOIP TRAFFIC.

Finally, there is extremely broad agreement that the Commission should *immediately* adopt clear interim rules to govern intercarrier compensation for IP/PSTN VoIP traffic.[55] Numerous commenters emphasize that the Commission's longstanding refusal to address these issues has led to widespread arbitrage schemes, which has reached "crisis proportions."[56] In particular, commenters note the competitive imbalances and harmful incentives resulting from the fact that many CLECs that provide interconnection for VoIP providers impose access charges on PSTN-to-IP calls that they *terminate* for their VoIP provider customers while at the same time

[54] *See also* CenturyLink, at 23 ("the Commission should . . . make clear that the assignment of a telephone number that does not correspond to the actual physical location of the originating caller (such as with nomadic VoIP services) will not alter the actual jurisdiction of the call, including for rating purposes").

[55] Cablevision-Charter, at 3-13; Cbeyond, at 4-16; Verizon, at 2; GVNW, at 8; NECA, at 4-6, 8-13; Nebraska Rural Companies, at 2-3; SCC, at 5; Surewest, at 3-5; TDS, at 3-4; Toledo Tel. Co., at 3-4, Washington UTC, at 2-5; Windstream, at 3-4; Cox, at 4-6; EarthLink, at 2-3; Hawaiian Tel., at 3-4, 9-10; Indiana Regulatory Commission, at 6; NASUCA, at 3-4; Neutral Tandem, at 2; Pac-West at 6-7; Ohio PUC, at 7-8; TCA, at 2-5.

[56] ITTA, at 4-5 ("The VoIP issue is no longer a minor one, but has reached crisis proportions affecting mid-size and smaller carriers alike, putting millions of dollars in dispute, and requiring costly litigation," and this "arbitrage issue[] require[s] an immediate solution before comprehensive reform can take place"); Time Warner Cable, at 4 ("reform is urgently necessary"); Cablevision-Charter, at 13 ("There is a need for prompt FCC action on this point"); XO, at 7 ("It is past time for the Commission to adopt a compensation regime applicable to VoIP traffic"); Verizon, at 2 (reforms are needed "within the span of weeks not months or years").

insisting that they owe only reciprocal compensation for IP-to-PSTN calls that they *originate* for those same customers.[57]

The harms from these arbitrage regimes are so rampant that incumbents, CLECs, cable companies, and state commissions, all agree that the Commission should immediately adopt interim rules under which IP/PSTN traffic would be subject to the same intercarrier compensation rules and rates as PSTN traffic (and would remain the same throughout any transition to a new, final regime).[58] As commenters recognize, there is no reliable method today for determining whether a particular call originated as a VoIP or PSTN call, and therefore allowing different rates for the termination of VoIP and PSTN traffic would only invite more

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[57] XO, at 7 ("Many VoIP providers and others that transport VoIP traffic maintain that access charges do not apply because the traffic qualifies for the 'enhanced service provider' exemption. By contrast, terminating LECs often insist that they are entitled to assess switched access charges because interexchange VoIP traffic constitutes a 'telecommunications service'"); NECA, at 6 ("Regulatory uncertainty surrounding the intercarrier compensation obligations of providers terminating millions of VoIP calls on the PSTN has generated an ever-increasing number of disputes in which VoIP service providers refuse to pay legally-billed access charges, ignore multiple requests for payment, unilaterally decide to pay below-tariff rates on a 'take it or leave it' basis, or pay nothing at all"); Cablevision-Charter, at 13 ("Not only have there been numerous disputes among carriers regarding the treatment of VoIP traffic under the access charge regime, but some carriers have engaged in self-help, unilaterally withholding millions of dollars of payment due under tariffs and interconnection agreements"); Hawaiian Tel., at 2 ("one carrier refused to pay terminating access for approximately 80 percent of the traffic that it sent to HTI and currently owes HTI in excess of $700,000 . . . not only do HTI and these carriers disagree whether compensation is due on this traffic, but also HTI is unable even to verify if the carriers' alleged percentage of VoIP traffic is accurate").

[58] Cablevision-Charter, at 3 ("Cablevision and Charter strongly support the Commission's proposal immediately to make clear that VoIP is subject to the same intercarrier compensation rates as any other kind of voice traffic, to be reformed in harmony as part of a future glide path"); Cox, at 8 ("the only way to ensure that the transition to IP interconnection occurs when it is economically efficient is to maintain intercarrier compensation at the same level for TDM- and IP-based traffic"); NECA, at 6 ("The only sensible path forward . . . is to subject VoIP traffic to the same intercarrier compensation rules as all other traffic, pending a more comprehensive reform effort *that is under the Commission's – and not the arbitrageurs' – control*."); Hawaiian Tel., at 9 ("The FCC should make clear that in the interim period while comprehensive reform proposals are developed and implemented, interconnected VoIP traffic should be treated the same as all other voice traffic for all ICC, including access charges and reciprocal compensation.").

arbitrage and fraud.[59] Moreover, as both the Commission and the commenters agree, the current disparities are deterring investment in broadband networks.[60]

Although there is broad agreement on these general principles, some individual commenters argue that the Commission should reach this result by classifying *retail* IP/PSTN VoIP service as a telecommunications service.[61] As most commenters recognize, however, the Commission can adopt interim compensation rules without addressing the regulatory

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[59] Cablevision-Charter, at 5 ("creating distinct, lower rates for exchanging VoIP traffic would not only create opportunities for arbitrage and fraud, it would do so in an area where carriers are uniquely poorly-situated to police one another's treatment of traffic and resolve billing disagreements"); XO, at 10-11 ("The establishment of a specific intercarrier compensation rate would . . . eliminate the incentive for VoIP providers to select one termination method over another in an attempt to avoid or reduce the termination rates paid for the traffic"); Cox, at 6-7 ("Indeed, it is likely that left unchecked carriers would allege that all traffic they carry is IP-based if doing so would reduce their access and local termination charges"); PaeTec, at 31-32 ("Adopting a VoIP-specific rate would thus exacerbate current disputes and arbitrage as providers would have an even greater incentive to claim their traffic is entitled to the VoIP-specific rate"); EarthLink, at 3 ("A VoIP-specific rate would perpetuate arbitrage [because] there is no industry standard to identify and distinguish VoIP-originated or terminated traffic from other traffic [and] a VoIP-specific rate lower than the TDM rate would still give carriers an incentive to classify the traffic as VoIP to get the benefit of that rate"); NECA, at 5 ("if the Commission were to find now that VoIP traffic should be subject to a very low or 'zero' rate, ... the Commission would have effectively ceded the ICC reform field to the arbitrageurs").

[60] Cablevision-Charter, at 6 ("LECs using circuit-switched systems have a 'perverse incentive' to retain those systems in order to preserve their access revenue stream, rather than transitioning to more efficient IP networks," and "LECs would have little incentive to invest in network upgrades if doing so guaranteed lower revenues, as they would under any proposal to subject the exchange of VoIP traffic to rates lower than the exchange of circuit-switched traffic"); XO, at 12 ("the lack of a clear understanding of VoIP termination costs is a significant deterrence to the development on introduction of new IP-based services"); Cox, at 5 ("In the absence of clear Commission guidance, carriers will attempt to interpret the rules for themselves, based on their own incentives, which will destabilize the regime even further and will delay the capital investments necessary for the transition to IP interconnection"); Verizon, at 9 ("The regulatory uncertainty in this area is likely deterring investment in VoIP and the associated growth in broadband usage and deployment"); ITTA, at 8 ("unpredictable decline in access payments can impede investment incentives to build broadband-capable networks"); *see also* Hawaiian Tel., at 5; Time Warner Cable, at 6-7, 10.

[61] CPUC, at 4-5; Cbeyond, at 7-16; Comptel, at 2-7; KCC, at 9-10; Rural LEC Commenters, at 7-8; TSTCI, at 5-7.

classification of retail VoIP services.[62] The intercarrier compensation at issue here is a "carrier-to-carrier" wholesale service, and the Commission has ample authority to regulate those services regardless of whether the retail VoIP service is an information service.[63] Moreover, as a number of commenters note, interconnected VoIP services that utilize the local exchange are plainly "telecommunications" within the meaning of Section 251(b)(5) regardless of regulatory classification, and thus (as AT&T and others note), the Commission could either apply existing regimes grandfathered under Section 251(g) or displace those regimes with new compensation arrangements under Section 251(b)(5).[64]

Although a few commenters offer a mild defense of the current chaos as "good faith" interpretations of the rules,[65] most commenters recognize that the ESP exemption has no application here.[66] The ESP exemption was adopted to enable enhanced service providers to purchase local business lines out of state tariffs in lieu of interstate access services in order to

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[62] Cablevision-Charter, at 7-8 ("whether interconnected VoIP is an 'information service' or a 'telecommunications service' under the Communications Act is irrelevant to how carrier-to-carrier services for the traffic are to be compensated"); Time Warner Cable, at 8 ("the regulatory classification of the end-user service (in this case, VoIP) is *irrelevant* to a separate entity's obligation to pay access charges or reciprocal compensation based on the telecommunications service component of that service"); CenturyLink, at 5-6; Hawaiian Tel., at 7; ITTA, at 10-13; TDS, at 1-3.

[63] Cablevision-Charter, at 8 (citing *Time Warner Cable Request for Declaratory Ruling That Competitive Local Exchange Carriers May Obtain Interconnection Under Section 251 of the Communications Act of 1934, as Amended, to Provide Wholesale Telecommunications Services to VoIP Providers*, Memorandum Opinion and Order, 22 FCC Rcd. 3513, ¶¶ 9-12 (2007)); Time Warner Cable, at 8 ("the service at the heart of this debate is not interconnected VoIP service but a standard interstate or intrastate access service").

[64] *See, e.g.*, Cablevision-Charter, at 8-9; XO, at 12-13, 19-24; EarthLink, at 5-7; Time Warner Cable, at 6.

[65] *See, e.g.*, Comptel, at 6-7.

[66] Cablevision-Charter, at 10-11; CenturyLink, at 13-16; CCI, at 18-21 (connections are made by carriers, not by the ESP); Cox, at 10-11; Hawaiian Tel., at 8; ITTA, at 14-16; NECA, at 13; Time Warner Cable, at 5-8.

establish a link with *their own customers*.[67] Even if the VoIP service is an information service, the ESP exemption could not conceivably be extended to the wholesale *carrier* that is purchasing an access service to establish a connection with the *ILEC's* customer on the PSTN.[68] As Time Warner Cable puts it (at 8), "the ESP exemption applies to the *provider* of the service that is enhanced; it does not grant relief with respect to *traffic* delivered to that provider via a wholly distinct, non-enhanced service."

Finally, Verizon appears to believe that there is *no* rule under current law governing compensation for IP/PSTN traffic,[69] but that is incorrect.[70] Accordingly, Verizon's focus on whether the retail interconnected VoIP service is an information service is again misplaced; as Time Warner Cable explains (at 8), the service at issue "is not interconnected VoIP service but a standard interstate or intrastate access service," and "[u]sers of such access services thus are

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[67] *See, e.g.*, Cablevision-Charter, at 10 ("The ESP exemption was created by the Commission in order to prevent calls between information service providers . . . *and their customers* from being subject to access charge" (emphasis added)); *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16132-33 ¶ 343 (1997) ("*Access Charge Reform Order*") (explaining that the ESPs for whom the exemption was devised "use incumbent LEC networks to receive calls from their customers"), *pets. for rev. denied*, *Southwestern Bell Tel. Co.* v. *FCC*, 153 F.3d 523 (8th Cir. 1998).

[68] *See also* Cablevision-Charter, at 11 ("the exemption was written to ensure that local calls to ISPs did not somehow convert the ISPs into IXCs when the ISP sent information across exchange boundaries, not to exempt IXCs carrying interexchange calls to or from ISPs from paying access charges," citing *Northwestern Bell Telephone Company Petition for Declaratory Ruling*, Memorandum Opinion and Order, 2 FCC Rcd 5986, 5988, ¶ 21 (1987)); PaeTec, at 32 & n.58 ("the ESP exemption only permits an information service provider to purchase access to the PSTN as an end user, and has no effect on the rights or obligations of telecommunications carriers that provide services to an ESP"); Cox, at 10.

[69] *See* Verizon, at 8, 31 ("The Commission should confirm that VoIP and IP-enabled services are information services, to which switched access tariffs do not apply"); *see also* NECA, at 7 ("Even large carriers, including Verizon, have started refusing to pay legally-imposed tariffed access charges, claiming . . . that IP-originated or IP-terminated traffic is not subject to switched access tariffs or related charges").

[70] *See* 47 C.F.R. § 69.5(b).

obligated to pay – and providers of such services are entitled to collect – intercarrier compensation charges pursuant to the Commission's rules."[71]

CONCLUSION

For the foregoing reasons, and for the reasons set forth in AT&T's Comments, the Commission should adopt the regulatory reforms supported and proposed by AT&T.

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[71] Hawaiian Tel., at 7 ("Interconnected VoIP providers cannot unilaterally decide that they want to take advantage of ILEC access services without complying with the terms of the tariff "); NECA, at 5 ("it is long past time for the Commission to confirm that under existing law, interconnected VoIP traffic is currently subject to the same intercarrier compensation rules – including the same access charge obligations – as any other voice traffic originating on or terminating to the PSTN").