Before the
Federal Communications Commission
Washington, D.C. 20554

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

REPLY COMMENTS OF FREECONFERENCING CORP.

April 18, 2011

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APRIL 18 REPLY COMMENTS

Free Conferencing Corporation ("FreeConferenceCall.com") submits these reply comments on the Federal Communication Commission's ("FCC's") Notice of Proposed Rulemaking ("NPRM"),[1] Section XV.

I. EXECUTIVE SUMMARY

The better reasoned Comments agree that the principal concern with access stimulation is a mismatch between high rural access rates that were predicated on low volumes and low costs that result from high volumes. They agree that the preferred solution, if one is needed, is to

[1] *In the Matter of Connect America Fund, A National Broadband Plan for Our Future, Establishing Just and Reasonable Rates for Local Exchange Carriers, High-Cost Universal Service Support, Developing a Unified Intercarrier Compensation System, et al.*, WC Docket Nos. 10-90, 07-135, 05-337, 03-109, GN Docket No. 09-51, CC Dockets No. 01-92, 96-45, FCC 11-13, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking (rel. Feb. 8, 2011) ("NPRM").

require that rates to decrease gradually with increasing volume, eventually reaching and staying at RBOC rates. In addition, they recognize the importance of stimulating rural economies, and allowing construction of broadband, rather than forcing all high volume services into urban areas.

Well-reasoned Comments also recognize flaws in using the proposed net payor test as a trigger by itself. The test, used by itself, would unfairly penalize LECs that engage in revenue sharing that does not result in high traffic volumes, would discriminate in favor of vertically integrated companies that can share the benefits of revenues without making transfer payments, and would be extremely administratively burdensome. Therefore, FreeConference Call.com advocates use of a High Volume Access Tariff in rural areas that will taper rates down as volume increases. Such a tariff will allow for financing of new technologies in rural areas, and should be permitted to be filed on 15 days or less notice, so as to be "deemed lawful,"

Finally, well-reasoned Comments have identified strong reasons for rejecting punitive proposals to use a ratio of terminating to originating access traffic or minutes of use per line as a trigger, to restrict access rates, where a trigger is reached, to zero or below BOC levels, or to require detariffing or to prohibit revenue sharing as a violation of § 254(k),

II. THE COMMISSION'S CONCERNS ABOUT ACCESS STIMULATION ARE BEST ADDRESSED THROUGH A MECHANISM THAT REDUCES HIGH ACCESS RATES AS VOLUME INCREASES, AND CREATES A BALANCE BETWEEN URBAN AND RURAL CARRIERS

As a toll conferencing company operating in both urban and rural areas, FreeConferenceCall.com agrees that there are inefficiencies in the current intercarrier compensation system that should be corrected for the good of the overall telephony marketplace. Focusing on the nexus between revenue sharing and higher rural rates for large call volumes eliminates bad actors, yet maintains the consumer benefits associated with free conference calling.

As the Commission reviews the responses to the Notice of Proposed Rulemaking and develops a methodology to address high volume/high rate LECs by reducing rural tariffs, it must ensure a balance between urban and rural telephony (including tribal lands). We believe rural carriers should never be at a disadvantage to metro carriers and IXCs as a result of burdensome reporting or regulatory requirements or rates that are unjustly and unreasonably low.

Some of the more problematic proposals relate to a one-part revenue sharing test to reduce rural tariffs; a minutes of use cap or trigger as a volume test to reduce rural tariffs; a 3:1 reciprocal compensation framework; rural rates below RBOC or the predominant ILEC rate (such as .0007); a Section 254(k) prohibition on revenue sharing; mandatory detariffing; loss of deemed lawful status on rural tariffs; and disparate treatment of specific consumer services such as toll conference calling. All of the aforementioned proposals would create new collateral damage to consumers and/or to rural telephony, causing unintended hardship while not comprehensively remedying the issues identified in the NPRM.

On the other hand, the High Volume Access Tariff (HVAT) has been approved by the Commission on multiple occasions through 15-day tariffs and has already reduced rural rates down to the RBOC rate in some of those LECs. The HVAT is an appropriate pricing solution to address the terminating access pricing issue. The HVAT differs from many of the alternative proposals because LECs with low call volumes would not be required to reduce rates simply because they are revenue sharing, while rates would be reduced as call volumes increase—addressing revenue sharing and access stimulation simultaneously.

Based on the overall marketplace of differing rural regions and different initial tariffs, the Commission can set a downward arc on rural rates. The Commission should establish a national standard for overall LEC call volumes by setting intermediate benchmarks of trigger volumes and pegging specific reductions in rates at each benchmark (either in cents or as a percentage of the baseline rate) until those rates reach the RBOC or ILEC level in that marketplace. This structure allows for certainty in reducing rural access rates, certainty that can be quantified by the Commission when it lays out the trigger volumes and price step-downs.

Enforcement of this model is simplified by the involvement of the IXCs that are terminating calls at a given LEC. The IXC could compare its invoiced rates with the LEC's tariffed rates and easily determine if the LEC was adhering to the required tariff.

The certainty of a specified downward arc brings more parity to metro and rural tariffs for higher call volumes, reduces costs, and, with a just and reasonable tariff for complying LECs that is deemed lawful, ends the spate of self-help and confusion in the marketplace. This solution would provide an avenue for rural carriers to maintain their business and place rural and tribal telecommunications infrastructure on a more level playing field with urban areas in the United States.

A. Commenters recognize that the concern associated with access stimulation is the mismatch between high rural rates premised on low volumes and the reduction in average costs that results from increased volumes

Commenters agree with FreeConferenceCall.com that the concern associated with access stimulation is not whether there is revenue sharing, but the mismatch between high rural rates premised on low volumes and the reduction in average costs that results from increased volumes. For example, USTelecom states that the concern results from the fact that access stimulation enables "high-volume, low-cost carriers" to charge at "rates designed to fairly compensate low-volume, high-cost carriers for their costs of terminating traffic" and commends the Commission for "proposing to adopt reforms that clearly recognize the mismatch between rates and costs for companies engaging in access stimulation."[2] CenturyLink states that a rural LEC's access rates, "which are reasonable based on the low volumes of traffic assumed in setting the rates" become "unreasonable" as the result of increased volumes generated by access stimulation.[3]

Cablevision and Charter state that the "problem" is not revenue sharing, but the fact that some "carriers' access charges are set higher than their traffic volumes warrant."[4] EarthLink states that "[t]he source of the problem is the large volume of access minutes terminating to a LEC that is permitted under current rules to set higher access rates that are based, at least in part, on the assumption of low volumes."[5] Other commenters express similar views.[6]

Once the concern is viewed this way, the solution becomes fairly obvious: even if there are revenue sharing or access stimulation efforts, rates must taper down only as

[2] USTelecom Comments at 7, 9.

[3] CenturyLink Comments at 37.

[4] Cablevision and Charter Comments at 14.

[5] EarthLink Comments at 13.

[6] *E.g*, Communications Workers of America Comments at 3 (recommending that the Commission "adopt a regime that requires carriers to pay a lower rate consistent with their volume of traffic or benchmarked to a large incumbent local exchange carrier"); AT&T Comments at 10 (describing small ILECs filing "tariffs with high access rates, based on historical data, even though the ILECs' planned traffic stimulation schemes made the data and rates meaningless and unreasonable"); Verizon Comments at

volume increases, because costs decrease only as volume increases. Such a solution is proposed by the Coalition for Rational Universal Service and Intercarrier Reform, echoing a proposal that group made in December 2008. The proposal is for what is described as a "unified-rate method":

> the termination charge for calls would be priced on a single graduated scale, applied to the *total* volume of calls of all types from *all* other carriers terminated by the billing carrier. . . . The incremental cost per minute of calls would go down with volume, so the lowest-volume carriers would have the highest call termination rates. Usage would be aggregated monthly on a market-area or state basis, such that a holding company with several small contiguous or nearby study areas would see them treated as one, but a company with subsidiaries in different parts of the country could treat them separately.[7]

The Coalition for Rational Universal Service and Intercarrier Reform explains the benefits of such an approach: "if traffic rose, prices would fall automatically . . . Hence *no trigger is required*, and there is no need to create perpetual conflict over what is and isn't an acceptable business practice."[8] This type of approach is conceptually very similar to the High Volume Access Tariff ("HVAT") that FreeConferenceCall.com proposed in its Comments.[9] In both cases, the rates automatically adjust to volume, providing a glide path from high rates to low rates, as volume increases, and both avoid the administrative difficulties of looking at factors other than traffic volumes, such as whether revenue is or isn't being shared, examining ratios of terminating and originating volumes, and having bright line tests of minutes per month that can result in incremental minutes generating negative incremental revenue.

The principal difference between the two proposals is that the unified-rate method bases rates solely on volumes, without regard to location, while the HVAT preserves an incentive for

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[7] Coalition for Rational Universal Service and Intercarrier Reform Comments at 2-3, 7.
[8] *Id.* at 7.
[9] FreeConferencing Comments at 36-43.

investment in new technologies in rural areas. In addition, the unified-rate method would require that all LECs refile their access tariffs, whereas the HVAT approach would only require rural LECs that desire to increase their access volume to file new tariffs. For these reasons, FreeConferenceCall.com strongly prefers the HVAT approach.

B. Commenters agree as to the existence of flaws in the Commission's proposed revenue sharing trigger

Commenters agree that there are a number of flaws in the proposed revenue sharing test. It would discriminate in favor of vertically integrated companies, result in "false positives" by encompassing rural carriers that revenue share but do not have high call volumes, and would generate administrative complications.

In its Comments, FreeConferenceCall.com demonstrated that vertically integrated companies could achieve all the benefits of revenue sharing without meeting the proposed trigger.[10] Many other commenters agree. For example, Sprint commented that:

> it will be difficult, perhaps impossible, to "address a revenue sharing arrangement within the same company where an explicit revenue sharing agreement may not exist." A LEC that offers a "free" service itself or through one of its affiliates need not have an explicit revenue sharing agreement - the financial benefits of traffic pumping flow to the corporate entity as a whole even if the LEC does not share any portion of any access revenues with its "free" service sibling.[11]

Similarly, EarthLink observed that "the proposed definition of revenue sharing effectively exempts vertically integrated businesses like AT&T, Verizon and Qwest, who have both LEC and IXC arms."[12] Other commenters filing similar comments included Global Conference Partners (revenue sharing prohibition would discriminate in favor of largest IXCs,

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[10] FreeConferencing Comments at 30-34.
[11] Sprint Comments at 14-15 (footnotes omitted).
[12] EarthLink Comments at 18.

which can and do revenue share with affiliates)[13]; Leap Wireless (integration avoids the revenue sharing trigger)[14]; and Level 3 (recognizing that integrated companies can avoid the revenue sharing trigger).[15]

Commenters also agreed with the Comments of FreeConferenceCall.com that the proposed revenue sharing trigger, "on its face . . . would capture LECs that do not stimulate a single minute of additional access traffic. Thus, a stand-alone revenue sharing trigger would overreach because it would damage companies that share revenue but do not stimulate access."[16] As PAETEC *et al.* pointed out, the Commission has already found that a LEC's sharing of revenue with a hotel, university or other aggregator does not actually stimulate traffic.[17] NECA *et al*. observed that "the existence of a revenue sharing agreement, in itself, has no necessary relationship to the cost of service or reasonableness of rates."[18] The Comments of the Small Company Committee of the Louisiana Telecommunications Association agreed, stating that "the use of a revenue sharing agreement as a 'trigger' requiring tariff re-filing is problematic because there may be many arrangements between carriers and customers that might fall within the proposed definition but do not involve the type of access stimulation arrangements at issue in this proceeding."[19] Cablevision and Charter pointed out that the proposed revenue sharing trigger would unjustly sweep in LECs that paid their affiliates for the use of facilities used to provide access.[20]

Finally, Commenters agreed that the proposed revenue sharing test would generate administrative problems. Sprint pointed to the "over the course of the agreement" language as

[13] Global Conferencing Partners Comments at 11.
[14] Leap Wireless Comments at 6
[15] Level 3 Comments at 5.
[16] FreeConferencing Comments at 33
[17] PAETEC *et al.* Comments at 21.
[18] NECA *et al.* Comments at 35.
[19] Small Company Committee of the Louisiana Telecommunications Ass'n Comments at 16.
[20] Cablevision and Charter Comments at 14.

opening the possibility that the agreement would have to be completed before it could be determined whether there was or was not a net payment.[21] EarthLink noted that it:

> would have to establish a system to monitor any revenue sharing arrangements, whether or not it mirrors rural ILEC access rates. EarthLink does not maintain a centralized database that tracks which contracts are subject to revenue sharing or the net payments made under such contracts. While EarthLink could conceivably develop a database to track such information across its operating subsidiaries, it would be manual, cumbersome, and prone to error. Presumably the contracts with revenue sharing could be entered into a tracking spreadsheet, and the payments made to and received from the customer could be tracked in the same spreadsheet. But it is not uncommon for carriers to share revenues only if/when they are received and to book revenue based on accounting rules that may or may not match up with the "course of the agreement." Based on this fairly complicated set of reconciliations, it may be difficult to predict accurately whether the payment over the course of the agreement will be a net payment to the customer. If the customer has multiple locations, some where EarthLink mirrors BOC rates and some in non-BOC price cap territory, it is not clear whether the Commission expects the entire contract payments to be measured or only those subject to the higher non-BOC rates. Moreover, it is not clear how the Commission, or complaining IXCs, would be able to determine if, how, and when a net payor trigger is met. As such, the trigger fails to meet the Commission's goal of enforceability. In short, the proposed trigger is administratively burdensome for LECs and lacks a bright line test that is easy to enforce.[22]

PAETEC *et al.* similarly pointed out that LECs would:

> have to create elaborate tracking tools that may have to cross multiple billing or invoice systems for products and services, many of which extend well beyond telecommunications services (*e.g.*, software, resold electricity, CPE), none of which exists today, to monitor arrangements the LEC and potentially various affiliates might have with each of their customers (and potentially various affiliates of each customer), so that each time that a particular customer wanted to order a new service from the LEC, the LEC could then reasonably ascertain whether the new incremental business opportunity with that customer would cross the "net payor" threshold.[23]

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[21] Sprint Comments at 14.
[22] EarthLink Comments at 15-16.
[23] PAETEC *et al.* Comments at 21-22.

These identified flaws in the net payor test, combined with the fact that the record shows that the real problem is not revenue sharing but the application of high access rates predicated on low volumes to high volumes of access traffic, point the Commission in the direction of a different solution. A preferred solution is one that results in access rates tapering downwards as volume increases, such as the High Volume Access Tariff proposed by FreeConferenceCall.com.

III. THE COMMISSION SHOULD REJECT SEVERAL ALTERNATIVE PROPOSALS SUGGESTED BY VARIOUS COMMENTERS

A. The Commission should reject proposals for a minutes of use trigger

A number of parties propose a trigger based on a carrier's MOUs per line per month, often pointing to a USTelecom trigger of 406 MOUs per line per month offered in an October 8, 2010 *ex parte* in WC Docket 07-135.[24] These proposals should be rejected because the trigger is arbitrary, likely to result in both false positives and false negatives, invites IXCs to game the system by placing additional calls to reduce their access bills, imposes an undue administrative burden, and is easily avoided.

The arbitrariness of the trigger is highlighted in Tekstar's October 28, 2010 *ex parte*. As Tekstar points out, antecedents of the 406 MOUs per line per month proposal included proposals by AT&T for a trigger of 2000 MOUs per line per month and by the Rural Independent Competitive Alliance for 3000 MOUs per line per month.[25] And the Comments of NECA *et al.* propose 1500 MOUs per line per month.[26]

[24] USTelecom *ex parte* letter in WC Docket 07-135 and CC Docket 01-92, October 8, 2010; *see* AT&T Comments at 19-20; Cox Comments at 13; ITTA Comments at 25; NECA *et al.* Comments at 34-35; Small Company Committee of the Louisiana Telecommunications Ass'n Comments at 16; USTelecom Comments at 9.

[25] *Ex parte* letter of Thomas Cohen in WC Docket 07-135 and CC Docket 01-92, October 28, 2010, at 5 n.15.

[26] NECA *et al.* Comments at 34-35.

Any cut-off number is arbitrary and may result in false positives. As Tekstar points out, a CLEC that is a few minutes over the arbitrary limit is permitted to collect significantly less access revenue than one that provides slightly less access service.[27] Any rule that results in less payment for more service is lacking in logic, and invites IXCs to game the system by placing additional calls simply to drive the CLEC's access minutes over the arbitrary limit and thereby reduce their own access bills. By contrast, FreeConferenceCall.com's proposal of a high volume access tariff,[28] with rates tapering down in multiple steps as additional MOUs are used, ensures that the provision of an additional minute of service always results in some positive incremental revenue, although the incremental revenue per MOU decreases with additional MOUs.

Tekstar's *ex parte* also highlights the arbitrariness of a per-line measurement. If a LEC is indeed engaging in some sort of undesirable "traffic pumping," it is allowed much more "traffic pumping" if it has a larger number of lines.[29] This leads to an obvious flaw in the trigger: a CLEC can simply add more lines in order to stay under the trigger amount. ICORE likewise points out that under a growth trigger, such as imposed by the Iowa Utilities Board, a very small LEC might be subject to the trigger simply because a large business customer moved into its territory.[30] To address this type of problem, Cox suggests that the Commission "ensure that the triggers are set to account for organic growth or acquisitions."[31] Cox is right in principle, but does not suggest how this could be accomplished in practice. This is a case of "the devil is in the

[27] *Id.* at 7.

[28] *See* FreeConferencing Comments at 36-43.

[29] *Ex parte* letter of Thomas Cohen in WC Docket 07-135 and CC Docket 01-92, October 28, 2010, at 5.

[30] ICORE Comments at 8-9; *see* Small Company Committee of the Louisiana Telecommunications Ass'n Comments at 15 ("if a call center locates in a rural area - a key economic development (and incentive for broadband deployment) in areas often lacking in substantial job growth - the carrier serving the call center should not be penalized").

[31] Cox Comments at 13.

details." Triggers should allow for legitimate growth, but no one has offered a workable solution that will do so.

Similarly, the USTelecom proposal would prevent a CLEC that has met the 406 MOU trigger from refiling at RLEC rates for a year, even if it no longer meets the trigger. Assume, however, that after (or perhaps because) the CLEC meets the trigger, it loses its revenue sharing arrangement, reducing its access minutes below the trigger. The proposal would require the CLEC to offer access service at low rates that are predicated on high volume, but without the high volume. USTelecom asserts that "this proposal is not meant to be punitive,"[32] but requiring a carrier with low volume to offer access service at low rates that are predicated on high volume for a year appears to be highly punitive.

Tekstar's *ex parte* also highlights the undue administrative burden in terms of filing, record-keeping, and responding to audits that the MOU trigger would impose on small rural CLECs, along with a corresponding burden on the Commission to process the reports and conduct audits—a burden that is not imposed on metro carriers or IXCs.[33] In sum, the MOUs per line proposal is arbitrary, burdensome, and likely to be ineffective.

B. The Commission should reject proposals for a trigger based on a 3:1 ratio of outbound and inbound access traffic

Several parties propose that the Commission impose a trigger with respect to *access* traffic exchanged between carriers in which the LEC receives 3 times as much traffic from the IXC as it sends to the IXC; some of these commenters also suggest that such traffic be subject to

[32] USTelecom *ex parte* letter in WC Docket 07-135 and CC Docket 01-92, October 8, 2010, at 4.
[33] *Ex parte* letter of Thomas Cohen in WC Docket 07-135 and CC Docket 01-92, October 28, 2010, at 7.

a rate of \$.0007/MOU, pointing to the Commission's 3:1 rules for *local* traffic.[34] Leaving aside the impropriety of the \$.0007 rate, which is discussed in Section III.C, below, the proposals for a 3:1 trigger on *access* traffic are not well thought out, and must be rejected.

Unlike local traffic, which, as reflected by the term "*reciprocal* compensation," is inherently two-way, access traffic is inherently one-way and therefore inherently out of balance.[35] Take for example, the balance of traffic between an ILEC, AT&T California, and an IXC, Sprint. Since AT&T California also provides most of its local customers with long distance service, either bundled with local service or separately, it unquestionably sends the vast majority of its outbound access traffic over the AT&T long distance network. Leaving aside 8YY traffic, AT&T California will only send outbound long distance traffic to Sprint if the AT&T local customer has turned down the AT&T bundle and affirmatively elected Sprint as its long distance carrier. We are sure that in that state of California, there must be some such customers, but they are surely few and far between. As a result, AT&T California probably sends Sprint a very limited number of outbound access minutes.

In contrast, Sprint's tens of millions of wireline and wireless customers from all over the country are surely placing a significant percentage of their calls to AT&T California customers, resulting in a large number of inbound access minutes sent by Sprint to AT&T California. For Sprint and AT&T California, the ratio of terminating to originating traffic is quite certainly much

[34] Sprint Comments at 8-9, 18; T-Mobile Comments at 2, 7-8; Ohio PUC Comments at 15; Leap Wireless/Cricket Comments at 6-7; CTIA Comments at 8-9.

[35] The rationale for reciprocal compensation for local traffic is that the originating carrier imposes costs upon the terminating carrier, while the end user revenue goes to the originating carrier. For access traffic, the rationale for intercarrier compensation is different. The IXC is compensated by its end user customer that placed the call for all long distance traffic, whether originating from the LEC or terminating to the LEC. Thus, there is no need for the IXC to be compensated by the LEC for traffic going in either direction. In contrast, the LEC does not receive end user revenues for the interexchange traffic, but incurs costs. It is therefore perfectly appropriate for the IXC to compensate the LEC for such costs, regardless of the directionality of the call.

greater than 3:1, regardless of any access stimulation efforts on the part of AT&T California. Yet Sprint and the other advocates of the 3:1 ratio would subject AT&T California to a revenue sharing trigger (and in some cases limit AT&T California to a $.0007/MOU or even a zero access rate).

As this example shows, the 3:1 ratio test, as applied to *access* traffic, will result in many false positives. In fact, an IXC such as Sprint is likely to have a ratio in excess of 3:1 with *every* LEC that has a long-distance affiliate or that is reselling the long distance service of any IXC other than Sprint. Thus, while the 3:1 ratio test was adopted by the Commission for local traffic because of the difficulty of ascertaining which local traffic was ISP-bound,[36] when the test is applied to interexchange traffic in an effort to determine whether particular traffic is the result of access stimulation, it does an exceptionally poor job of making such a determination.

C. The Commission should reject proposals to impose a rate below the BOC rate on traffic subject to revenue sharing

Several commenters suggest that once the revenue sharing trigger is met, a rate of $.0007 per MOU or bill and keep (a rate of zero) should apply.[37] These proposals should be rejected as non-compensatory takings, with no basis in cost. Moreover, establishing an additional class of traffic that is subjected to a non-standard intercarrier compensation rate would be a step away from the direction of a unified rate in which the FCC is attempting to move.

None of the advocates of a $.0007 rate or a zero rate provide a persuasive argument why such a rate is believed to cover the costs of providing access service for LECs that have met the trigger, or why the Commission's proposal of the BOC rate is excessive. Indeed, two of the

[36] *Order on Remand and Report and Order*, CC Dockets 96-98 and 99-68, FCC 01-131 (April 27, 2001) at ¶ 79 and n. 150.

[37] AT&T Comments at 16-17; CTIA Comments at 6-7; Sprint Comments at 8-9, 18-20;T-Mobile Comments at 8-9.

three RBOCs, both of which own large IXC networks and therefore are large payers of access charges, as well as USTelecom, agree that the proposed BOC rate is reasonable.[38] FreeConferenceCall.com agrees with CenturyLink that:

> Because the regulatory structure for a BOC's switched access rates essentially presumes that the rates in the tariff remain just and reasonable at any level of traffic per line (that is, that there are no excess monopoly profits available for sharing with a "business partner"), *the BOC rate provides a reasonable benchmark for a CLEC's tariffed switched access rate in a traffic pumping context*.[39]

As PAETEC *et al.* point out, if a CLEC serving a free conference calling service charges BOC access rates, as required under the Commission's proposal once the trigger is met, the IXCs serving the callers actually pay *less* in terminating access charges than they would if the callers completed an equal number of garden variety long distance calls, because BOC access rates are lower than the national average of access rates.[40] There is no need for the Commission to issue a rule that reduces access rates even further, providing IXCs even more of a surplus than they receive from BOC rates.

FreeConferenceCall.com also agrees with the Comments of PAETEC *et al.* regarding the $.0007 rate. As PAETEC *et al.* point out, "[t]he $0.0007 rate is an arbitrary figure that was never based on any cost analysis; in reality, it does not permit carriers to recover their costs unless, like Verizon and AT&T, they are extremely large with long distance, wireless and other affiliates that will receive a windfall from the reduced rates."[41] FreeConferenceCall.com also agrees that such a rate would "have an especially harsh effect on CLECs" because they "are not guaranteed to recover any reductions in terminating revenues from universal service and

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[38] CenturyLink Comments at 39; *see* Verizon Comments at 41 ("Requiring CLECs to benchmark to the state-specific RBOC access rate when they engage in revenue sharing is also reasonable."); USTelecom Comments at 11 (endorsing FCC proposal to require CLECs that meet the trigger to benchmark to BOC rates).

[39] CenturyLink Comments at 39 (emphasis added).

[40] PAETEC *et al.* Comments at 29-30.

[41] PAETEC *et al.* Comments at 38.

increased SLC charges to consumers."[42] Further, PAETEC *et al.* showed that numerous parties have correctly argued, and shown through cost studies, that a rate of $.0007 does not cover costs and would constitute a confiscatory taking.[43] The Comments of Core Communications make the same points.[44]

Advocates of a rate of $.0007 or zero offer a number of reasons, none of which have merit, for such an approach. T-Mobile points to agreements between CMRS providers and CLECs for intraMTA (local) traffic.[45] These agreements were reached in the context of a regime that provided for reciprocal compensation rates that were much lower than the access rates that currently apply to interstate switched access traffic, and that did not allow for tariffing of any intercarrier charges, let alone access charges.[46] They therefore provide no indication of what a reasonable rate would be for tariffed access charges.

T-Mobile and CTIA contend that there are no incremental costs associated with switching.[47] The fallacy of this argument is that in a declining cost industry such as telecommunications, costs must be recovered on the basis of total or average costs, not incremental costs, as the Commission recognized in adopting a TELRIC, rather than a LRIC, methodology when implementing its pricing rules under the Telecommunications Act of 1996. Moreover, even an analysis of incremental costs depends on the specific increment involved. For example, if a switch is already at capacity, an incremental minute will require the LEC to purchase a new switch or to upgrade the existing switch, thus resulting in a substantial incremental cost.

[42] *Id.*
[43] *Id.* at 38-42.
[44] Core Communications Comments at 13-14.
[45] T-Mobile Comments at 9 n.16.
[46] Sprint also cites unspecified "compensation agreements negotiated between private parties." Sprint Comments at 8. In the absence of further specificity, the commission should assume that Sprint is referring to the same CMRS-CLEC agreements as T-Mobile.
[47] *Id*. at 10; CTIA Comments at 6.

CTIA argues that BOC interstate switched access rates are above cost, even for BOCs.[48] To the extent that argument is correct, it would certainly be appropriate for the Commission to consider it as part of its overall reform of intercarrier compensation. To the extent, however, that the Commission's orders concerning arbitrage do not adjust BOC switched access rates, the fact that BOC rates assertedly exceed a BOC's cost is not a basis to impose lower rates on a selected group of other LECs, without lowering BOC rates and all rates generally.

Sprint argues that if a LEC desires to challenge its proposed $.0007 rate, the LEC can always seek a waiver.[49] This of course presupposes that the $.0007 rate is "just and reasonable" in the first place. It makes no sense for the Commission to adopt a confiscatory rate in the first instance, simply because carriers then have the option of undertaking a time-consuming and costly waiver proceeding in which they can seek an exemption from such a confiscatory rate.

AT&T contends that "based on recent AT&T internal data, each of the largest traffic pumping CLECs in Iowa, Minnesota, and South Dakota handles volumes of traffic that exceed the traffic handled by the largest ILEC in those states by seven or nine times" and therefore has lower costs than the BOC.[50] The Commission should not base its policy judgments on such unsupported claims. First, AT&T has not presented any data for the Commission or the parties to examine. Therefore, its contention should not serve as a basis for the Commission to make policy. Second, AT&T does not explain how it knows the total traffic of the LECs involved in these three states, since it is only one of many carriers sending them traffic, and only sends one type of traffic, access traffic. Third, AT&T does not specify whether the traffic to which it refers is access traffic, local traffic, or both. If as seems likely, AT&T is referring only to access

[48] CTIA Comments at 6-7.
[49] Sprint Comments at 9.
[50] AT&T Comments at 17.

traffic, the alleged imbalance in access traffic may be offset by the BOC's greater volume of local traffic.

Fourth, AT&T uses the term "traffic handled by" but does not specify if it is referring to originating traffic, terminating traffic, or both. Since the same switch handles both originating and terminating traffic, and since the largest BOC in these states, Qwest, likely sends virtually all of its outbound access traffic over Qwest's own network (and sends virtually none to AT&T), AT&T may have failed to include the huge volumes of outbound access traffic that Qwest carries. By contrast, the so-called "traffic pumping" LECs are likely to carry very little outbound traffic. Fifth, AT&T's argument is based on the traffic volume of the "largest traffic pumping CLEC" in the three states it examined, but its proposed rules would apply to all CLECs meeting the trigger in all 50 states, many of which are likely to have only a small fraction of the traffic of the three CLECs to which AT&T refers. Once again, the IXCs promote a regulatory framework that would weigh heavily on rural carriers with no corresponding rules for metro carriers or IXCs themselves.

Finally, and most importantly, as Qwest's parent, CenturyLink, commented, "the regulatory structure for a BOC's switched access rates essentially presumes that the rates in the tariff remain just and reasonable *at any level of traffic per line* (that is, that there are no excess monopoly profits available for sharing with a "business partner").[51] AT&T assumes, without proof, that economies of scale are endless. As CenturyLink recognizes, the regulatory structure does not assume an endlessly decreasing cost curve. Rather, it assumes that once BOC volumes have been reached, costs cease to decrease with increasing volume. Therefore, even if some CLECs in the three states named by AT&T carry more traffic than Qwest does in that state (a proposition that has not been demonstrated), their costs are not necessarily lower than Qwest's.

[51] CenturyLink Comments at 39 (emphasis added).

AT&T has provided no basis for the Commission to conclude (a) that CLECs subject to its revenue sharing rules carry more traffic volume that do BOCs, (b) if they did, their costs would be lower than BOC costs, or (c), if CLEC costs are lower than BOC costs, they are enough lower to warrant imposition of a $.0007 per MOU rate. Such determinations should not be made without a careful review of the evidence. Such a review is not consistent with the timeline proposed by the Commission for its order on Section XV issues.

D. The Commission should reject suggestions that Section 254(k) prohibits the revenue sharing arrangements under consideration

The Commission should reject CenturyLink's contention that CLEC sharing of access revenue violated § 254(k).[52] Omnitel and Tekstar's comments provide good reasons why § 254(k) does not apply to the type of revenue sharing that is at issue in this proceeding. First, as Omnitel and Tekstar point out, "OmniTel and Tekstar have been unable to find any cases where the Commission or the courts considered applying Section 254(k) to a situation involving two unaffiliated entities."[53] Likewise, FreeConferenceCall.com has not been able to find any such cases. Most importantly, even the proponents of the proposition that § 254(k) applies here have failed to cite any such cases. Second, as Omnitel and Tekstar point out, such proscriptions have been in the context of cross-subsidies within a corporate family.[54]

Third, the legislative history of the provision clearly suggests that Congress was concerned about cross subsidies within a corporate family via cost allocation and cost assignment. The Senate Committee Report states that this subsection

> prohibits telecommunications carriers from subsidizing competitive services with revenues from non-competitive services. The FCC and the

[52] *See* CenturyLink Comments at 43-51; *see also* Sprint Nextel Comments at 18 n. 31.
[53] Omnitel and Tekstar Comments at 32.
[54] *Id.*

> States are required to establish any necessary cost allocation rules, accounting safeguards, and other guidelines to ensure that universal service bears no more than a reasonable share (and may bear less than a reasonable share) of the joint and common costs of facilities used to provide both competitive and noncompetitive services. For instance, this provision, at a minimum, prevents any assignment of direct costs associated with the provision of competitive telecommunications services, information services, or video programming services to telephone exchange service or exchange access service, as long as such exchange or exchange access service remains noncompetitive.[55]

The Report's focus on allocation "of the joint and common cost of facilities used to provide both competitive and noncompetitive services" and preventing "assignment of direct costs associated with competitive telecommunications services" to noncompetitive services establishes that Congress intended this section of the Act to apply to cost allocation and assignment within a corporate family, and not to payments made to third parties outside the corporate family. Such payments would clearly not be the subject of the "cost allocation" and "assignment" with which Congress was concerned.

Fourth, as Omnitel and Tekstar point out, CLECs "do not have the kind of market power that Section 254(k) is meant to rein in."[56] CenturyLink argues that in a 2001 ruling, the Commission found that a CLEC held a "bottleneck monopoly" over terminating access.[57] In that regard, it is instructive to consider a complaint filed by CenturyLink subsidiary Qwest in 2007 with regard to AT&T's practice of refusing to pay CLECs' tariffed access rates. Citing AT&T's assertion that it had entered into "hundreds of agreements with CLECs" governing the below-tariff rates for switched access charges that AT&T would pay, Qwest alleged that:

> AT&T obtained enormous financial leverage over the CLECs through its unilateral decision to withold [*sic*] payment of the tariffed access charges.

[55] Report of the Committee on Commerce, Science, and Transportation on S. 652, S. Rpt. No. 104-23, at 30 (1995) (discussing then section 253(i), which was enacted as section 254(k)).

[56] *Id.* at 33.

[57] CenturyLink Comments at 47.

> This created a financial squeeze on CLECs that effectively eliminated meaningful opportunities for negotiation, and put the CLECs at the mercy of AT&T's demands.
>
> . . .
>
> AT&T unilaterally decided to engage in self-help through confidential, coerced deals that afforded discriminatory pricing in its favor
>
> . . .
>
> AT&T used the financial leverage gained through its size, and the volume of its intrastate calls originated or terminated with CLECs, to refuse to pay CLECs for access services at lawful tariffed rates and to induce, coerce, or persuade the CLECs to enter into agreements for the purpose of avoiding lawful tariffed access charges.[58]

Qwest's 2007 allegations regarding AT&T's power to coerce CLECs to enter into agreements accepting less than their tariffed rates are certainly inconsistent with the possibility that CLECs provision of switched access service is "non-competitive," as required by Section 254(k).

There are other reasons why the service does not now meet the "non-competitive" standard. When the FCC issued its *Seventh Report and Order,* establishing benchmarks for CLEC access rates, it stated that we "stress" that the benchmark mechanism is "a transitional one; it is not designed as a permanent solution to the issues surrounding CLEC access charges."[59] At the same time, it stated that CLEC access services would be subject to competitive alternatives if IXCs entered into local exchange markets and alliances formed between IXCs and ILECs, events that had not then "come to pass."[60]

Over the past 10 years, those events have in fact "come to pass," in the form of mergers by the two largest IXCs with the two largest ILECs and receipt of § 271 approvals by all BOCs.

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[58] Exhibit A. Complaint, *Qwest Communications Corp. v. AT&T Inc.*, File No. 27-CV-07-2014 (Minn. 4th Judicial District), filed January 29, 2007, at ¶¶ 32, 35, 36, 38.

[59] *In the Matter of Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262; FCC 01-146, April 27, 2001, at ¶ 7.

[60] *Id.* at ¶ 32.

Through their local affiliates, IXCs now have alternatives to purchasing of CLEC switched access. As shown by the testimony of economist Dr. August H. Ankum in a recent proceeding before the Colorado PUC, CLECs use access facilities that are generally available to most carriers and indeed the FCC found in the *TRO and TRRO* the switching facilities that CLECs use to provided switched access are not a source of significant market power.[61]

Before it jumps to the conclusion that CLEC provision of switched access is "non-competitive," as required by § 254(k), the FCC should conduct a proceeding to examine whether CLECs in fact have market power over switched access. The type of fact-intensive proceeding that is required for such a finding is completely inconsistent with the speed called for to address intercarrier compensation Section XV issues on an expedited basis.

Finally, even in cases such as the 2001 case cited by CenturyLink, in which the Commission has applied § 254(k) to CLEC access rates, it has *denied* claims of § 254(k) violations where the CLEC's rates are at the level approved by the Commission.[62] As of today, there is no evidence that CLECs are out of compliance with the Commission's currently applicable CLEC benchmarks; absent such evidence, they cannot be violating § 254(k). Should the Commission modify those benchmarks through this proceeding, CLECs that comply with the new benchmarks should under no circumstances be subjected to any proceedings under section 254(k).

[61] Exhibit B. Testimony of Dr. August H. Ankum, *Qwest Corp. v. MCImetro Access Transmission Services, et al.* Docket No. 08F-259T (Colo PUC, August 10, 2009), at 13-15, Dr. Ankum also demonstrates that the fact that the IXC may not have an alternative at the instant a call is placed is "meaningless," because "in any meaningful analysis of market structure, market power and control over bottleneck facilities needs to consider the long run," as shown by the U.S. Department of Justice's *Horizontal Merger Guidelines. Id.* at 22-23.

[62] *AT&T Corp. v. Business Telecom, Inc.,* 16 FCC Rcd. 12312 at ¶ 61 (2001).

E. The Commission should reject proposals for mandatory detariffing

The Commission should reject the suggestions of AT&T,[63] Sprint[64] and USTelecom[65] that the Commission mandatorily detariff access rates for CLECs with respect to traffic sent to end users with which they engage in revenue sharing. Reasoning that tariffing of CLEC access charges "is appropriate only when the CLEC provides services that are 'functionally equivalent' to those of the ILEC," AT&T proceeds from the principal premise that "traffic-pumping CLECs do not at all perform services functionally equivalent to ILECs when they complete calls to their free calling service partners."[66]

AT&T's premise is unfounded and erroneous in several respects. To begin, AT&T would apply the mandatory tariffing sanction to all LECs that engage in revenue sharing, without regard to whether they provide service that is "functionally equivalent to those of the ILEC." The record is replete with comments that revenue sharing is not the same as "traffic pumping," does not only entail services to "free calling service partners," and in many respects is highly beneficial.[67] There is also widespread agreement that sanctions against those engaging in

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[63] AT&T Comments at 13-15.

[64] Sprint Comments at 20.

[65] USTelecom Comments at 11-12. The partial quotation in USTelecom's footnote 27 of a FreeConferenceCall.com Powerpoint slide presentation in purported support of USTelecom's advocacy of mandatory detariffing is out of context. In context, the "pricing problem" FreeConferenceCall.com referred to in the language quoted by USTelecom is clearly the "problem" that rates in rural LEC tariffs are based on an assumption of low volume, but access stimulation has led to high volume, therefore warranting lower rates. When the presentation asserted that "we might find . . . that market driven solutions have solved the problem," it clearly referred to the problem of tariffed rates that were too high for the LEC's actual traffic volumes. FreeConferenceCall.com certainly did not suggest that "market driven solutions" would be able to solve the very different problem that would result from under mandatory detariffing, which is that IXCs would refuse to pay reasonable rates for LECs' access services. Given that, as shown in the text, there is a substantial imbalance in market power because a small number of IXCs have the ability to control the flow and volume of virtually all traffic and pressure CLECs by withholding payments, a pure market driven solution will remain elusive. Hence, where detariffing might otherwise be considered a possible solution, it is completely unworkable in the market today.

[66] AT&T Comments at 14.

[67] *See* CenturyLink Comments at 35 ("there are obviously situations where the sharing of revenues in a legitimate marketing arrangement can be appropriate"); Comments of the Coalition for Rational Universal Service and Intercarrier Reform at 6 ("sharing revenue with a service provider may well

revenue sharing would discriminate in favor of vertically integrated companies such as AT&T that can share revenues without making payments.[68]

AT&T thus assumes, without proof, that in completing all calls made to customers with which a CLEC is sharing revenues, the CLEC does "not at all perform services functionally equivalent to ILECs." The Commission should not rely on such a bold and unsupported claim. Moreover, while FreeConferenceCall.com does not concede that there are *any* calls in which the CLEC fails to perform services functionally equivalent to an ILEC, if in fact the service that the CLEC provides does not meet the definition of access service in the CLEC's tariff, then the CLEC will not be able to collect access charges even under its tariff, and detariffing is not needed.

AT&T also supports its proposal for mandatory detariffing with the assertion that "traffic pumping CLECs . . . do not actually offer any services to ordinary residents and businesses in the rural area."[69] AT&T offers no support for this assertion, and we believe it to be untrue as to the CLECs with which FreeConferenceCall.com has a relationship. Even assuming that AT&T could prove this assertion with respect to any particular CLEC, the existence of such a CLEC would not provide a foundation for detariffing for *all* CLEC revenue sharing traffic, urban and rural, and whether or not the CLEC actually served "ordinary residents and businesses."

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be the most economically efficient and consumer-friendly way of providing low-cost enhanced services, such as conference calling "; "access stimulation . . . provides some small carriers with incremental revenue that enables them to compete with larger ones"); EarthLink Comments at 19-21 (revenue sharing is common practice in the industry, which the FCC has explicitly approved); FreeConferencing Comments at 26-29 (same); Global Conference Partners Comments at 10-12 (same); NASUCA/New Jersey Division of Rate Counsel Comments at 9 (opposing prohibition of revenue sharing) Omnitel/Tekstar Comments at 14-17 (same); PAETEC *et al.* Comments at 26-28 (same); HyperCube Comments at 4 (revenue sharing is a longstanding marketing tool that is prevalent throughout many sectors of the U.S. economy); NECA *et al.* at 33 ("there may be many arrangements between carriers and customers that might vfall within the proposed definition and yet to not involve the type of traffic pumping arrangements at issue in this proceeding").

[68] *See* Section II.B, above.

[69] AT&T Comments at 15.

AT&T's rationale is based on an unproven factual assertion, coupled with a remedy that is far broader than warranted by the facts that AT&T assumes.

Most significantly, AT&T argues that under mandatory detariffing IXCs would be willing to compensate CLECs "at market-based rates."[70] This comes from the same AT&T IXC entity that, as shown above, "obtained enormous financial leverage over the CLECs through its unilateral decision to withold [*sic*] payment of the tariffed access charges," and thereby "put the CLECs at the mercy of AT&T's demands." With that background, and the well-documented background of other IXCs refusing to pay tariffed access rates or, in Verizon's case, unilaterally deciding to pay a rate of $.0007 per MOU, AT&T's reference to "market-based rates" can be seen for what it is: an invitation for large IXCs such as AT&T and Verizon to engage in self-help refusals to pay, so as to pay little or nothing for the services they receive from CLECs.[71] Simply stated, the Commission should not be granting leverage to already dominant market players.

Sprint offers a different rationale for mandatory detariffing, but one that provides no better a basis than AT&T's. Sprint alleges that the Commission "has previously found that eliminating the ability of competitive providers to invoke the filed rate doctrine would be in the public interest."[72] Sprint supports its discussion of this rationale by reference to several FCC decisions. One was a 1996 request by CLECs for *voluntary* detariffing,[73] a request that preceded

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[70] AT&T Comments at 14.

[71] As the California PUC noted: "disputes have also arisen in the context of CLEC-CLEC intercarrier compensation, where one CLEC has no way of compelling another CLEC to enter into an interconnection agreement." California PUC Comments at 8 n.28. If such disputes arise in the context of two CLECs, where neither has greater market power, they are likely to be much worse in the case of a small CLEC trying to induce a giant IXC to enter into an intercarrier compensation agreement..

[72] Sprint Comments at 20.

[73] *Hyperion Telecommunications Inc. Notice of Proposed Rulemaking*, (CC Docket Nos. 96-262 and 97-146), 12 FCC Rcd 8596 (1997).

AT&T's campaign of refusals to pay CLEC access charges. Needless to say, after AT&T's campaign of coercion, no CLEC has asked the Commission to detariff its access services.

Sprint's second reference is to an FCC Notice that resulted in the FCC's *Seventh Report & Order*, in which the FCC decided *not* to mandatorily detariff CLEC access charges, but rather to benchmark them to ILEC rates.[74] The third refers to the FCC's decision to impose mandatory detariffing of basic interexchange rates.[75] This was of course a completely different market, one in which customers numbered over one hundred million, and no customer held market power. By contrast, with respect to switched access, carriers sell to a handful of IXCs, fully capable of using their buying power and their willingness to withhold payment to coerce CLECs as to rates, terms and conditions. There is nothing in this decision to suggest that the FCC would find it in the public interest to detariff CLEC access rates, a market in which CLECs are selling to a handful of extraordinarily powerful buyers that have proven themselves more than willing to refuse to pay even tariffed access charges. The cases cited by Sprint simply do not provide support for the mandatory detariffing remedy proposed by Sprint and AT&T.

F. The Commission should reject Verizon's proposal for a trigger "if a predominant share of a LEC's billed intercarrier compensation minutes are routed to or from conferences [*sic*] bridges, information services such as chat lines, or other known traffic stimulation mechanisms"

The Commission should reject Verizon's vague and ambiguous proposal for an additional trigger "if a predominant share of a LEC's billed intercarrier compensation minutes are routed to or from conferences [*sic*] bridges, information services such as chat lines, or other known traffic

[74] Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001)

[75] *In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Sect/on 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 20730, 20760 (1996).

stimulation mechanisms."[76] Verizon offers no rationale for this proposal, and thus fails to explain how a rule could be crafted that would delineate with precision which customers meet its criteria of "conferences [*sic*] bridges, information services such as chat lines, or other known traffic stimulation mechanisms." Verizon also fails to explain what services constitute "information services such as chat lines." Nor does Verizon explain what it means by "other known traffic stimulation mechanisms." For example, would that term include voicemail? Call forwarding? A friends and family program? Weather reports? Questions about delineation of included services are practically endless.

Apart from being too vague, Verizon's proposal is cumbersome, and might involve repeated detariffing and retariffing. Verizon does not specify what would happen if 51% of a LEC's access revenue were from the services referred to by Verizon in period 1, the LEC were then mandatorily detariffed in period 2, negotiated contracts with IXCs in period 3, and its percentage of access revenue from those services dropped to 49% in period 4. Would it then be permitted to retariff? If so, what showing would it have to make and in what type of proceeding? What would be the effect on the contracts entered into in period 3?

If the Commission adopted a rule tracking Verizon's proposal, such a rule would not come close to meeting legal requirements that rules issued by a government agency must be clear, so that the affected members of the industry and public know how to comply. Before the Commission gives Verizon's proposal any consideration whatever, let alone adopts it, Verizon would have to offer a definition that is clear enough to be upheld on appeal. This definition would need to be considered after thorough public discussion to determine its validity as public policy, a process that is clearly not underway.

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[76] Verizon Comments at 44.

IV. CONCLUSION

For the reasons set forth above, as well as in FreeConferenceCall.com's Comments, FreeConferenceCall.com believes that if special rules to address access stimulation are needed, the high volume access tariff best balances public interest considerations. The HVAT meets the public policy goals of a pricing solution for a pricing issue while holding rural carriers with low call volumes harmless; a clear and quantifiable cost structure based on known benchmarks; and a straightforward enforcement regime that can be aided by the CLECs/ILECs/IXCs. Because it would be discriminatory to define revenue sharing in such a way that it includes independent conference call providers but excludes those that share revenue within a corporate enterprise, and impractical to define it to include revenue sharing within a corporate enterprise, revenue sharing should not be a trigger by itself. Rather, if a trigger is needed, it should also be based on volume that reduces costs and thereby justifies a lower rate. The HVAT proposed herein would do just that, and do so automatically, by providing a step-down of rural rates based on increased volume. In addition, it would ensure a balance between urban and rural telephony. Finally, because it would be "deemed lawful," it would minimize IXC incentives to engage in self-help refusals to pay that generate needless litigation.