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

Petition of AT&T Services, Inc., for	**)**	
Forbearance Under 47 U.S.C. § 160(c)	**)**	
from Enforcement of Certain Rules for	**)**	**WC Docket No. 16-363**
Switched Access Services and Toll Free	**)**	
Database Dip Charges	**)**	

COMMENTS OF

NTCA–THE RURAL BROADBAND ASSOCIATION

December 2, 2016

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SUMMARY

NTCA–The Rural Broadband Association (NTCA) recommends the Commission to deny the AT&T Petition for Forbearance for several reasons. Regarding the relief requested for tandem switching and tandem-switched transport, NTCA submits that the issues raised by AT&T are the subject of a pending rulemaking proceeding in which those issues are being considered as a part of a larger and interrelated regulatory revision. Accordingly, a limited and separate treatment of those issues in the instant proceeding would undermine the effort to address intercarrier compensation (ICC) reform on a full and structured basis. Moreover, several existing avenues to relief AT&T seeks are available, including the tariff dispute process as well as the Section 208 complaint process. A forbearance petition ought not be the vehicle to avoid either a pending rulemaking or currently available regulatory processes.

Regarding 8YY database dips for long-distance calls, the Petition fails to explain how the dips will be compensated. The impact of the Petition, if granted, would be a regime in which LECs would be obligated to incur costs but without a concomitant cost recovery mechanism. Given the cost-causing nature of the database dips, the Commission must not detariff these elements.

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To the Commission:

I. INTRODUCTION.

NTCA–The Rural Broadband Association (NTCA)[1] hereby submits this opposition to the Petition for Forbearance (Petition) filed by AT&T Services, Inc. (AT&T, or Petitioner) in the above captioned proceeding.[2] In its Petition, AT&T requests the Commission to grant forbearance from rules relating to (a) switched access services that are related to tandem and

[1] NTCA represents more than 800 independent, community-based telecommunications companies. All NTCA members are full service local exchange carriers and broadband providers, and many of its members provide wireless, cable, satellite, and long distance and other competitive services to their communities.

[2] *Petition for Forbearance of AT&T Services, Inc. for Forbearance Under 47 U.S.C. § 160(c) from Enforcement of Certain Rules for Switched Access Services and Toll Free Database Dip Charges* (filed Sep. 30, 2016); *see,* "Pleading Cycle Established for Comments on AT&T's Petition for Forbearance from Certain Tariffing Rules," Public Notice DA 16-1239, Docket 16-363 (Nov. 2, 2016).

transport services provided on calls to carriers engaged in access stimulation, and (b) database query charges to long-distance carriers for toll-free services.

As a threshold matter, NTCA opposes the Petition's attempt to utilize a forbearance petition to sidestep or leapfrog an existing rulemaking proceeding. This opposition is not based solely on principles of administrative efficiency, but rather also upon the relationship between the relief sought and the comprehensive regulatory design that is being examined in the ongoing proceeding. Moreover, *arguendo* the merits of the Petition were determined to be appropriate, other procedural options (beyond the pending rulemaking) that would be narrowly tailored and therefore better suited to obtain the requested relief are readily available to AT&T. Accordingly, the use of a broadly effective forbearance outcome should be rejected in favor of those measures that would address discrete issues of concern to AT&T in a more focused manner. For these reasons and as set forth further below, NTCA opposes the Petition, and urges the Commission to address the broader questions raised therein, to the extent appropriate and desired from a public policy perspective, within the context of comprehensive overall reform of high-cost support and intercarrier compensation (ICC).

II DISCUSSION.

A. THE COMMISSION SHOULD REJECT THE TANDEM SWTICHING AND TANDEM-SWITCHED ACCESS RELIEF REQUESTED.

AT&T alleges that certain LECs are continuing to engage in access stimulation by implementing "inflated" rates for tandem switching and tandem-switched transport charges.[3] Based on these assertions, AT&T requests the Commission to forbear from the tariffing of access

[3] Petition at 9.

charges for tandem switching and tandem-switched transport for *all* LECs, including intermediate LECs, where access stimulation is present.[4] As set forth below, NTCA opposes this request for several reasons, each of which is independently sufficient to justify rejection of the Petition. Collectively, they present an overwhelming basis for the Commission to deny the relief that is requested. In the first instance, a pending rulemaking proceeding is considering the very same issues raised by the AT&T request, and resolution of those issues is reserved properly to that forum. Additionally, lawfully-filed tariffs are already subject to regulatory oversight, and entities such as AT&T that have concerns regarding tariffed charges can seek relief via existing dispute processes. Finally, a standard complaint proceeding could be invoked to address instances in which AT&T or another party believes that Commission intervention is warranted. For all the foregoing reasons and as explained further below, AT&T's Petition must be denied.

At this juncture, NTCA notes that it does not take a specific position regarding the legitimacy of AT&T's concerns with respect to the facts alleged regarding any individual dispute or the practices of any individual carrier. NTCA has addressed access stimulation in other filings where access stimulation has been considered by the Commission within the context of overall

[4] *See*, Petition at fn.21 ("The forbearance sought applies to all LECs. Thus, even if a LEC is not itself engaged in access stimulation, a LEC may not lawfully tariff (or bill pursuant to a tariff) for transport or tandem access charges for any calls to or from a LEC engaged in access stimulation. In many cases, the excessive tandem and transport charges are being billed by an intermediate carrier that may not have direct contractual arrangements with a provider of free calling services. Nevertheless, once forbearance is granted, such LECs could not lawfully tariff tandem or transport charges for any traffic routed to or from a LEC engaged in access stimulation.")

reform.[5] However, the sweeping way in which AT&T goes about prosecuting those allegations against the individual firms via a forbearance petition is where the problem arises.

Generally, NTCA recognizes the need for comprehensive treatment of intercarrier compensation, and notes the changes already implemented pursuant to the Transformation Order. Those adjustments were and are predicated on a prudent multi-year transition that will enable providers to transform their operations and strategies in a measured manner, and NTCA looks forward to working with the Commission to ensure that any future measures that may be implemented recognize similarly the value of a comprehensive, thoughtfully designed approach that is subject to reasonable transitions. By contrast, short-cutting such consideration via forbearance would be inappropriate as a matter of law, process, and good public policy.

1. The Forbearance Relief Sought for Tandem Switching and Tandem-Switched Transport Should be Rejected as That Issue is Under Consideration in a Comprehensive and Pending Rulemaking Proceeding.

NTCA submits the Commission should reject the Petition because it seeks relief that is already the subject of a pending rulemaking proceeding. Moreover, the issue presented by AT&T is part of a larger regulatory structure, and resolution of this singular issue is linked inextricably to a broader range of measures that, as the Commission itself has previously determined, are best addressed in a comprehensive manner.

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[5] *See, e.g., Connect America Fund (Docket No. 10-90); A National Broadband Plan for Our Future (Docket No. 09-51); Establishing Just and Reasonable Rates for Local Exchange Carriers (07-135); High-Cost Universal Service Support (Docket No. 05-337); Developing a Unified Intercarrier Compensation Regime (Docket No. 01-92): Comments of National Telecommunications Cooperative Association, et al.,* at pp.30-36 (filed Apr. 1, 2011).

In the Transformation Order, the Commission took steps to discourage access stimulation by implementing rules that require carriers, when access stimulation is determined to have occurred, to refile tariffs that reflect those existing traffic conditions.[6] The Commission defined "access stimulation," and then ordered that "[i]f a LEC meets both conditions of the definition, it must file a revised tariff except under certain limited circumstances. . . ."[7]

In making these changes in 2011, the Commission signaled its interest in "reach[ing] the end state for all rate elements as soon as practicable," but in the same sentence emphasized that must come about "with a sensible transition path that ensures that the industry has sufficient time to adapt to changed circumstances."[8] And, as the Commission considered explicitly the timing of changes to tandem switching and transport charges, it indicated again that a thoughtful transition, rather than a sporadically-applied flash-cut as envisioned by the Petition, is appropriate.[9] Toward those ends, the Commission sought comment on *how* such a transition would be implemented, including whether the transition should differ based on the type of carrier,[10] or "possible recovery for tandem switching and transport as part of our recovery mechanism."[11] As an

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[6] Transformation Order at para. 679.

[7] Transformation Order at para. 679.

[8] Transformation Order at para. 1297.

[9] Transformation Order at para. 1308.

[10] Transformation Order at para. 1308.

[11] Transformation Order at para. 1309.

overarching question, the Commission also sought comment on the general payment and market structure for the elements.[12]

In the face of (and despite) this structured process, and ostensibly driven by the specific practices of a limited number of competitive LECs, AT&T now requests the Commission to jettison *all* tandem switch and tandem-switched transport charges where it alleges access stimulation might be involved. The Commission should reject this request.

To be sure, forbearance is an important tool and is a "critical complement to the other means by which the Commission may remove existing requirements that have been rendered unnecessary by market developments."[13] In the instant matter, however, the requested relief is less an attempt to reduce regulatory burdens in response to changed market circumstances than it is a bid to fast-forward rulemaking in piecemeal fashion. As articulated in a very similar proceeding more than a decade ago, the Petitioner here seeks "to jump out ahead of the Commission on intercarrier compensation reform by obtaining a quick, self-serving fix on one intercarrier compensation issue without the slightest regard for how such piecemeal relief would complicate resolution of all the other issues to which this one issue is inextricably tied."[14] Similar to the concerns expressed by the Commission in that proceeding, AT&T's instant Petition

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[12] Transformation Order at para. 1310.

[13] *Petition of SBC Communications, Inc., for Forbearance from the Application of Title II Common Carrier Regulation to IP Platform Services: Memorandum Opinion and Order*, Docket No. 04-29, FCC 05-95, at para. 9 (2005) (SBC).

[14] SBC at para. 9, quoting Letter from James C. Smith, Senior Vice President, SBC, to Michael K. Powell, Chairman, FCC, Docket No. 02-366 (filed Feb. 3, 2005).

requests relief that would disregard comprehensive, structured transition for which the Commission has expressed favor.[15]

The Transformation Order initiated comprehensive intercarrier compensation reforms that included measures aimed at discouraging access stimulation. However, whereas the rulemaking process permits consideration of the interplay of *all* ICC elements within the framework of broader reform, the Petition would "unduly cabin the Commission's discretion in considering both whether and when to modify discrete aspects of the regulatory regime, and could well stymie comprehensive reform." And, as the Commission stated in a similar proceeding, "[w]e do not believe that Congress, in framing [forbearance provisions of] section 10, could have intended this result, given the absence of specific deadlines for rulemaking proceedings in the statute."[16]

The question of a proper transition for tandem switch and tandem-switched transport is squarely presented in an open rulemaking. Numerous parties, including the Commission, devoted

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[15] "We agree with SBC that forbearance petitions seeking this kind of relief are likely to disrupt the course of the Commission's decision-making process by placing certain aspects of complex and comprehensive regulatory problems, but not others, on especially demanding, statutorily prescribed 'one year . . . [plus] 9- day[] schedules.'" SBC at para. 9 (internal citation omitted).

[16] *See,* SBC at para. 9. The Commission's articulation of its concerns in the SBC proceeding is strikingly relevant to the instant forbearance request ("We believe that the instant petition falls into the same category. While the Commission might sometimes choose to grant the relief sought by parties in the form of interim rules, permanent rules, or declarations regarding existing law, a framework permitting parties to compel a forbearance decision within the period set out in section 10(c) would unduly cabin the Commission's discretion in considering both whether and when to modify discrete aspects of the regulatory regime, and could well stymie comprehensive reform. We do not believe that Congress, in framing section 10, could have intended this result, given the absence of specific deadlines for rulemaking proceedings in the statute.").

extensive resources to commenting on this issue and addressing its role within the context of broader ICC and high-cost support reform. In other proceedings, the Commission has articulated its interest in not bypassing pending proceedings, or attaching a “shot-clock” to rulemaking, or dissecting a singular element from a complex regulatory organism. Similarly, the goals of the Petition can be more fulfilled more appropriately through the existing mechanisms of individual tariff reviews or common carrier dispute processes while broader overall reform is accomplished. For these reasons, the Petition should be denied. If AT&T wants *comprehensive action* on this issue (in lieu of seeking more targeted relief with respect to the practices of specific firms), then it should, quite simply, press for *comprehensive reform*.

The Commission established a structured definition for access stimulation[17] and in all events, meeting those criteria does not suspend access payments but rather triggers a rate adjustment. The Commission further adopted, as discussed above, a carefully designed transition for the ICC regime that contemplates the elimination of some charges and the reduction of others (paired with an equitable recovery mechanism) and the maintenance of still other charges, and it asked detailed, thoughtful questions about what further steps it should take with respect to any comprehensive ICC transition. In contrast, the relief sought by AT&T would override the existing transition and fast-forward the consideration of any further transition by simply suspending any obligation of the IXC to pay *any* charges. For these reasons, as well, the Petition should be denied. If AT&T wants relief, it can dispute tariffs or lobby for greater progress on a

[17] Transformation Order at paras. 667-678.

structured, comprehensive transition in the rulemaking. Forbearance, however, is an ill-fitting and simply inappropriate vehicle to address the concerns that AT&T raises.

2. The Requested Relief Attempts to Short-Circuit Existing Tariff Review Processes.

The petition should also be rejected because the relief it seeks through forbearance is already available through established tariff review processes. Within that framework, a party ostensibly affected by a tariff has standing to initiate a proceeding to dispute a rate or other element of the tariff. That process provides a full opportunity for both the filing and disputing entities to respectively justify and dispute the tariff. In contrast, AT&T requests the Commission to substitute allegations of access stimulation for the fully-developed tariff dispute process.

AT&T proposes a sweeping claim that tariffed charges for tandem switching and tandem-switched transport "have little rational relationship to their underlying cost" and are priced above cost, "providing implicit subsidies to the charging carrier, to the detriment of ratepayers of the purchasing carriers."[18] But, rather than avail itself of the existing regulatory protocol, AT&T instead requests the Commission to enact what would be tantamount to far-reaching reforms affecting the industry as a whole – including intermediate providers that have no connection to or even awareness of the alleged activity at issue – based upon allegations of access stimulation involving individual competitive carriers. Without taking a position on the merits of AT&T's claims as to the access stimulation practices of individual carriers, NTCA submits that a standard and ordinary tariff review process would lead to appropriate relief if such relief were warranted.

[18] Petition at 5.

The Petition's approach is particularly troubling because there is no evidentiary basis to support the proposition that access stimulation generally is inherently reflective of unlawful tandem switched and tandem-switched transport rates. Rather, the tariff dispute process provides ample opportunity for the petitioner or any other firm to invoke the tariff dispute process if it were to aver that access stimulation is at the heart of a tariffed rate.

Even where the Commission has determined that access stimulation may exist, the Commission did not impose a consequence of non-payment. Rather, the Commission provides an opportunity for carriers to refile tariffs with rates that reflect the changed traffic circumstances. Similarly, even if the Commission were to rule that access stimulation equates to unlawful tandem switched and tandem-switched transport rates, then the appropriate relief would be a trigger to refile that tariff, rather than a wholesale suspension of an obligation to pay the existing lawful rate. For this reason alone, the Commission should reject the AT&T petition for its attempt to circumvent the existing tariff dispute process.

3. Targeted Relief is Available Through Existing Commission Complaint Processes.

In addition to the tariff dispute process described above, AT&T may also avail itself of the Section 208 complaint process. Section 208 of the Act provides an opportunity for parties to make complaints against common carriers.[19] These complaints are addressed by the Commission's Market Disputes Resolution Division (MDRD) and may be brought by market participants, entities, or organizations. They may be filed using a formal or informal complaint

[19] 47 U.S.C. § 208; *see*, 47 C.F.R. § 1.720 *et. seq.*

process and, in certain instances, can be set to rapid resolution under the Accelerated Docket program (the "rocket docket").[20] Notably, the Section 208 Formal Complaint Intake Form asks specifically whether the "Compliant seeks prospective relief identical to the relief proposed or at issue in a notice-and-comment proceeding that is concurrently before the Commission."[21] This recognizes implicitly the Commission's interest in administrative efficiency and ensuring that scarce agency and industry resources are not squandered by engaging duplicative avenues to simultaneously litigate a singular issue in multiple administrative fora. Any allegations with respect to potentially unjust and unreasonable practices of parties engaged in access stimulation can and should be directed squarely against those parties rather than implicating the industry as a whole. The merits of those claims can be litigated in a proper evidentiary forum, and if AT&T's claims with respect to the access stimulation practices of those parties are valid, then the relief it deserves can be obtained.

4. The Petition Does Not Establish Sufficient Evidence to Support Forbearance and the Requested Relief.

NTCA submits that the Petition does not establish sufficient evidence to support the relief requested. As noted above, NTCA does not take a specific position regarding the legitimacy of AT&T's concerns with respect to the facts alleged regarding any individual dispute or the practices of any individual carrier. NTCA, however, submits that the information surrounding

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[20] *See* 47 C.F.R. § 1.730. *See, also, Implementation of the Telecommunications Act of 1996, Amendment of Rules Governing Procedures to be Followed when Formal Complaints Are Filed Against Common Carriers: Second Report and Order*, Docket No. 96-238, FCC 98-154 (1998).

[21] *See,* "Section 208 Formal Complaint Intake Form," FCC Form 485, OMB Control Number 3060-0411 (Nov. 2014).

the basis for relief as alleged by the Petitioner is not facially sufficient to justify grant of the requested relief.

In the Transformation Order, for example, the Commission cited a study by TEOCO that estimated the cost of access stimulation to IXCs.[22] In contrast, the instant Petition does not provide evidence sufficient to support a section 10 finding. Nor does the Petition offer any guidance as to how the limited data presented therein can be verified. This begs the question as to whether the market trends generally described by AT&T as relating to tandem switch and tandem-switched transport[23] are so pervasive as to justify forbearance, an especially drastic step in the face of a pending rulemaking.

By way of example, AT&T writes, "Because the partial reforms to the intercarrier compensation regime continue to perpetuate inefficient rates, and to allow access arbitrage schemes to flourish, the Commission should promptly act to set the transition for the remaining intercarrier compensation charges, and to revise its existing rules to allow competition to discipline intercarrier compensation."[24] While NTCA does not go so far as to submit that the problem is non-existent, it notes that AT&T does not quantify the relative alleged pervasiveness of the problem in a manner that would tend to justify sidestepping a pending rulemaking proceeding, a targeted tariff dispute processes, or a standard complaint procedures in favor of forbearance.

[22] Transformation Order at para. 664 (internal citations omitted).

[23] *See, i.e.,* Petition at 9.

[24] Petition at 11.

Evidence is an indispensable part of the Commission's analysis and decision-making process.[25] AT&T submits that " . . . while **some** carriers (but not all) complied with the new requirements by lowering their end office switching rates, **these carriers** attempted to recoup the resulting lost revenues by assessing high per-minute, per mile transport charges."[26] And, yet, the Petition does not identify or enumerate the number of carriers that underlies either "some" or "these carriers;" the Petition does not indicate which category is larger, or offer an indication as to the proportional difference between the respective sizes of the two sets. Absent that information, there is no way for the Commission or other parties to assess the necessity of or justification for forbearance as opposed to targeted tariff challenge or complaint processes with respect to the individual competitive firms that give rise to this concern. Agencies are required to "examine the relevant data and articulate a satisfactory explanation for the its actions including a 'rational connection between the facts found and the choice made.'"[27] The Commission has

[25] *See, Fox Television Stations, Inc. v. FCC,* 489 F.3d 444, 460, notes 10, 11 (2d. Cir. 2007) (the Commission's reasoned explanation of action must be supported by record evidence).

[26] Petition at 15 (emphasis added).

[27] *Motor Vehicles Manufacturers' Association of U.S., Inc., v. State Farm Mutual Auto Insurance Co.,* 463 U.S. 29, 43 (1983), quoting *Burlington Truck Lines v. U.S.,* 371 U.S. 156, 168 (1962).

previously rejected petitions for forbearance for lack of sufficient evidence,[28] and should do so here, as well.[29]

5. The Petition Threatens to Capture Carriers That Are Not Involved in Alleged Access Stimulation.

Of concern, the Petition threatens to capture carriers that are not involved directly in alleged access stimulation. The request for relief, therefore, is not as narrowly tailored as the Petition might imply, and therefore cannot be adjudged to adequately meet the narrow prongs of Section 160(c). Footnote 21 of the Petition supposes that *any* carrier in the stream of an access stimulating activity would be ineligible to collect tandem switch and tandem-switched transport charges, *even if that carrier has no knowledge of or intent to participate in such a practice*. This outcome would be inapposite to the Commission's approach in the Transformation Order, where the Commission articulated an express interest and took intentional action to "limit[] the scope of the revenue sharing definition by *narrowing the number of carriers that could be subject to the*

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[28] *See, e.g., ATT Corp. v. FCC*, 236 F.3d 729, 731 (D.C. Cir. 2001) (court affirmed Commission's rejection of petitioner data because underlying raw data was not made available, leaving Commission unable to verify the assertions of the petitioner); *see, also, Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area: Memorandum Opinion and Order*, Docket No. 04-223, FCC 05-170 (2005) (Commission denied request for forbearance because petitioner did not supply sufficient data regarding the geographic area for which relief was granted).

[29] The lack of sufficient evidentiary basis is even more troubling when considered within the context of footnote 21 of the Petition, in which AT&T insinuates that *any* carrier in the stream of access stimulation would be unable to collect tandem switch and tandem-switched transport charges. This potential broad net could create vast uncertainty among many providers, depressing incentives that could otherwise lead to necessary intercarrier services and, ultimately, consumer benefits. For these reasons, the Commission should deny the Petition.

trigger."[30] In the instant matter, forbearance would have the likely effect of *increasing* the number of carriers that would be implicated by the requested relief, especially in light of AT&T's apparent interest in exercising the forbearance relief against any entity that is allegedly in the stream of access stimulation.[31] The implication that *all* parties in a singular stream of commercial action should be implicated by the actions of a single player is a proposition better addressed in a full rulemaking proceeding, as it speaks to considerations broader than the narrow scope that would be implied by a forbearance petition. The Transformation Order specifically limited application of the access stimulation remedy. Expansion of that remedy to implicate intermediate carriers, to the extent it is explored, should be undertaken within the existing rulemaking proceeding. A forbearance proceeding is not the appropriate place to effectively expand application of a Commission rule. In fact, it is not clear *how* AT&T would "prove" that access stimulation was in play.

AT&T makes clear in footnote 21 that it is seeking forbearance from the tariffing of access charges for tandem switching and tandem-switched transport for all LECs, including intermediate LECs, on all calls to or from LECs engaged in access stimulation. In requesting such forbearance, AT&T presumes intermediate LECs can know if a terminating LEC is engaged in traffic stimulation activities. This assumption is questionable. An intermediate LEC typically cannot know the cause of an increase in traffic, and should not be required to investigate such increase unless special circumstances exist (for example, if the terminating LEC is an affiliate of

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[30] Transformation Order at para. 671 (emphasis added).

[31] *See,* Petition at fn.21.

the intermediate LEC). Absent actual knowledge of such activities, grant of AT&T's request would make it very difficult for companies attempting to bill legitimate transport charges. Not only would it be difficult to determine whether any call was "legitimate" or "stimulated," but it would open a door for every sending carrier to refuse the charges, regardless of the actual cause for the traffic. It would thus most certainly increase disputes by giving less-than-honest providers a way of avoiding or disputing legitimate bills, making the whole process more complicated and driving up costs, and therefore rates. The Commission should therefore make clear that if the requested relief is granted notwithstanding the dubious procedural posture of the Petition, such forbearance does not apply to intermediate LECs.

The Commission has expressed a general interest in tailoring relief narrowly, and not imposing "overly broad" mandates.[32] And, yet, the breadth of AT&T's intent is so broad that it could deny revenues to firms that are not engaging directly in any sort of access stimulation activity. For this reason, as well, the Petition should be denied.

6. The Petition Would have Negative Impacts on Network Edge and Universal Service Issues

AT&T alleges that certain LECs refuse to offer direct trunking to their end offices, which would have allowed IXCs to avoid most or all of the transport charges - even though the price cap LECs to which these carriers are benchmarked have long offered such flat-rated transport options. AT&T suggests that if the Commission were to (a) detariff all tandem switching and transport, and (b) issue reasonable rules to define the "network edge," then the resulting

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[32] *See, i.e.,* Transformation Order at para. 672 ("A ban on all revenue sharing agreements could be overly broad, and no party has suggested a way to overcome this shortcoming.").

competitive market would in most cases can ensure that IXCs would not be charged unreasonable transport charges to carry traffic to the "edge."[33] The outcome envisioned by A&T would implicate a proverbial 180-degree turn from an environment in which rural LECs (RLECs) are compensated to originate and terminate calls delivered to their customers to a regime in which RLECs would not only *not* be compensated for originating calls, but would now be required to cover the costs of bringing calls to distant "network edges" dozens or hundreds of miles away.

For this reason, NTCA notes that AT&T's position once again implicates much broader policy considerations than simple forbearance – and is fraught with danger for the very notion of universal service itself. In 2012, NTCA and other rural associations urged the Commission to ensure that state commissions retain their essential roles and responsibility for defining network edges for the purposes of interconnection.[34] The parties also emphasized the importance of the "rural transport rule" adopted as part of the 2011 reforms that limit the financial responsibility of RLECs for transport of telecommunications traffic in the interest of ensuring universal service is

[33] Petition at 8.

[34] *Connect America Fund (Docket 10-90); National Broadband Plan for Our Future (Docket No. 09-51); Establishing Just and Reasonable Rates for Local Exchange Carriers (Docket 07-135); High-Cost Universal Service Support (Docket 05-337); Developing a Unified Intercarrier Compensation Regime (Docket No. 01-92); Federal-State Joint Board on Universal Service (Docket 96-45); Lifeline and Link-Up (Docket No. 03-109); Universal Service Reform – Mobility Fund (Docket No. 10-208): Initial Comments of the National Exchange Carrier Association, Inc.; National Telecommunications Cooperative Association; Organization for the Promotions and Advancement of Small Telecommunications Companies; and the Western Telecommunications Alliance on Sections XVII.L-R (Intercarrier Compensation Issues),* at 25 (filed Feb. 24, 2012).

not undermined through the shifting incurrence of substantial new transport costs. Setting aside whether RLECs receive payment for transport, compelling RLECs to bear the costs of interconnecting at "network edges" dozens or hundreds of miles away would lead to higher prices for small rural customer bases from whom such costs need to be recovered – to the detriment of universal service policy. Such considerations underscore why, for years, universal service and ICC reform were treated as different sides of the same coin, and why now it would be unwise and imprudent to proceed via forbearance rather than considering the broader public policy implications of changes such as those sought here by AT&T. From a procedural standpoint, as well, the Commission must ensure that the discussion of this issue in the instant proceeding does not supplant the record in the pending rulemaking proceeding. Any final disposition of that broader rulemaking must evolve upon the basis of the record assembled there pursuant to notice and comment requirements of the Administrative Procedure Act. The instant forbearance proceeding should not be misinterpreted as an opportunity to embark upon a "rulemaking lite." For these reasons, as well, the Petition should be rejected.

B. FORBEARANCE FROM CHARGES FOR 8YY DATABASE DIPS WILL LEAVE CARRIERS WITHOUT A MECHANISM TO RECOVER THE COSTS OF THOSE CHARGES AND SHOULD THEREFORE BE REJECTED

NTCA opposes AT&T's request that the Commission forbear from its rules allowing LECs to assess per query database dip charges on toll-free calls. AT&T seeks to place the responsibility for paying for the costs of routing toll-free calls on the originating LECs and their end users,[35] an outcome that would upend the definition of a "toll free" call. Most critically, the petition does not articulate how the dip would be compensated.

It is notable that while AT&T alleges that these tariffed database query charges vary substantially among LECs, AT&T does not argue that there are no costs involved. Rate variability does not justify a flash-cut to a zero-rate. The impact of the Petition, if granted, would be a regime in which LECs would be obligated to incur costs but without a concomitant cost recovery mechanism. Such an outcome would implicate concerns relating to a Constitutional violation of "takings," as prohibited by the 5th Amendment of the U.S. Constitution.[36] To the extent the 8YY rate issue warrants examination, the Commission has other tools at its disposable to "refine its rules;" the Petition proposes options in footnote 33 that the Commission could explore in a regular rulemaking proceeding. To the extent such exploration is warranted, a rulemaking, rather than a forbearance, proceeding would be a far more suitable forum in which the full scope of implications could be examined.

The construct proposed in the Petition would allow AT&T to charge RLECs for dips that are necessary to route calls to their customers, but for AT&T to not pay the RLECs. The Petition

[35] Petition at 22.

[36] *See, Smith v. Illinois,* 282 U.S. 133, 51 S. Ct. 65 (1930) (protecting utility firms from unlawful takings). *See, also, Duquense Light Co. v. Barasch,* 488 U.S. 299, 307-308 (1989) ("[t]he Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory."). NTCA submits that a rate of zero would effectively, if not "practically deprive the owner of property without due process of law." *See, Covington & L Turnpike Road Co. v. Sandford,* 164 U.S. 578, 597 (1896).

raises the question of whether AT&T would avoid query charges, yet still collect them when it is the SS7 provider.

Tellingly, it appears from AT&T's Petition that its primary issue is with the database query charges imposed by competitive LECs, not RLECs. And, yet, the Petition does not explain how bill-and-keep would work for toll free calls, as RLECs have no relationship with the paying customer and thus cannot bill them. The queries allow LECS to identify the IXC to whom the calls should be routed, and it is generally that IXC (or the terminating carrier) who has the relationship with the billed customer. Thus, moving to bill-and-keep for these charges does not give LECs "appropriate incentives to serve their [own end-user] customers efficiently."[37] In all events, rate-of-return carriers whose 8YY charges are cost-based should be excluded from any forbearance outcome the Commission may consider.

C. THE PETITION DOES NOT MEET THE STANDARDS NECESSARY TO SUPPORT THE RELIEF REQUESTED.

The Petition does not meet the standards necessary to support the relief requested. In order to grant the Petition, the Commission must find that (a) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory; (b) enforcement of such regulation or provision is not necessary for the protection of consumers; and (c) forbearance from applying such provision or regulation is consistent with the public interest.

[37] Petition at 21. As most RLECs purchase query service from a larger LEC that has a regional data base, there is a clear cost that must be recovered.

As set forth above, the practices disputed by AT&T relate to rates charged by firms that are alleged to be within a stream of access stimulation, regardless of an intermediate carrier's awareness or intent. Tariffs are intended to enable providers to recover the costs of services provided. The Commission recognized in the Transformation Order that even where access stimulation has been identified, costs must yet be recovered. Therefore, the remedy of the Transformation Order was to *reduce* rates to a level that when *combined with* increased traffic would result in revenues that cover the provider's costs. The relief requested by AT&T, in contrast, would eliminate the tariff rate and result in a "zero rate" that by definition is unreasonable. This would be a patently inappropriate result as the Commission has recognized the inextricable relationship between high cost support, ICC, and the deployment and maintenance of networks in high cost areas. Accordingly, grant of the petition and its requested relief to eliminate a form of cost recovery would visit an adverse impact on consumers. In contrast, enforcement of the provisions is necessary for consumers who by extension rely upon those revenues to support the network they use. Finally, grant of the Petition cannot be found to be consistent with the public interest. As noted above, a pending rulemaking proceeding is addressing certain of the issues discussed above in a manner that contemplates their disposition in concert with overall reform. That type of studied and measured consideration that addresses the issue contextually is preferable to a forbearance proceeding that seeks to carve off an issue for disposition that may be favorable to only a single limb of a more complicated organism. Moreover, the proposed elimination of 8YY charges would disrupt the public interest by unlawfully restricting a provider's ability to recover costs from parties that cause them. This upends traditional tariff ratemaking principles and will impose even greater constraints upon a system that is currently in transition. To the extent any action may be considered, it should be considered in full measure and concert with its interrelated parts.

III. CONCLUSION.

As set forth above, the Petition should be denied for several reasons. Regarding tandem switching and tandem-switched transport, lawfully-filed tariffs are already subject to regulatory oversight, and entities that dispute tariffed charges can seek relief via the tariff dispute process or seek resolution via a complaint process against individual firms, if warranted. Moreover, a pending rulemaking proceeding address this issue is under current consideration at the Commission, and a forbearance petition ought not be used to supplant that active docket. Even if the availability of existing tariff dispute and complaint processes and the existence of a pending rulemaking could be overcome, the Petition does not present evidence sufficient to support its request for relief. Finally, the relief sought would have an unduly broad impact by potentially capturing entities that are not involved in the practices from which AT&T seeks relief. Regarding 8YY database dips for long-distance calls, the Petition fails to explain how the dips will be compensated.

Overall, AT&T's positions relating to 8YY database queries invoke the general concerns related to the relief that it requests regarding tandem switching and tandem-switched transport. Thus, the likely outcome is that tandem switching, tandem-switched transport, and database queries for toll-free services would become "free." However, the Commission has not yet developed an effective ICC recovery mechanism for these services, as it did in the Transformation Order for other ICC charges that it has transitioned to bill-and-keep.

If rates for tandem switching, tandem-switched transport, and database queries for toll-free services were mandatorily de-tariffed, small RLECs would be required to negotiate the rates with much larger, better resourced carriers, or not charge at all. There is little need to explain the likely result of price negotiations between large national carriers and small rural companies. This has already been aptly demonstrated when large wireless carriers simply refused to negotiate terminating charges for their calls, declaring they were free ("bill-and-keep").

WHEREFORE these reasons, NTCA recommends the Commission to reject the Petition and to consider the issues raised therein within the context of the pending rulemaking proceeding.

Respectfully submitted,

NTCA THE RURAL BROADBAND ASSOCIATION

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