

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

In the Matter of)
)
8YY Access Charge Reform) WC Docket No. 18-156
)

**COMMENTS OF WINDSTREAM SERVICES, LLC, FRONTIER COMMUNICATIONS
CORPORATION, AND NTCA–THE RURAL BROADBAND ASSOCIATION**

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Windstream, Frontier, and NTCA submit these comments in response to the Federal Communications Commission’s (“Commission”) Further Notice of Proposed Rulemaking (“FNPRM”) in the above-captioned proceeding.¹

I. Introduction.

Windstream, Frontier, and NTCA support the Commission’s ongoing efforts to address fraud and abuse in the intercarrier compensation (“ICC”) system. As the Commission has long recognized, intercarrier compensation has played an important role in advancing universal service.² Efforts to take advantage of the ICC regime undermine the entire system and should be addressed.³ Bringing all 8YY traffic to bill-and-keep, however, is an overbroad and inappropriate solution to concerns relating to 8YY arbitrage.

¹ *In re 8YY Access Charge Reform*, WC Docket. No. 18-156, Further Notice of Proposed Rulemaking, FCC 18-76 (rel. June 8, 2018) (“FNPRM”).

² *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 17,965 ¶ 862 (2011) (“*USF/ICC Transformation Order*”) (recognizing that “incumbent LECs have limited control over the areas or customers that they serve, having been required to deploy their network in areas where there was no business case to do so absent subsidies, including the implicit subsidies from intercarrier compensation”); *id.* at 17,968 ¶ 870 (observing that intercarrier compensation rates include an implicit subsidy to offset the cost of providing local access service in expensive-to-serve, rural areas).

³ See Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, CenturyLink, WTA, USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92 (filed Apr. 11, 2018); Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, WTA, USTelecom to Marlene

At the outset, it is important to recognize that the Commission is not bound to transition 8YY access charges to bill-and-keep as a consequence of its previous ICC reforms. Although the Commission “adopted a national, default bill-and-keep framework as the ultimate end state of all telecommunications traffic”⁴ in the 2011 *USF/ICC Transformation Order*, the Commission deferred action on originating access generally. In the accompanying Further Notice of Proposed Rulemaking, the Commission also recognized differences between 8YY traffic and other intercarrier compensation traffic that could require “a distinct 8YY resolution”⁵ and sought comment on this issue.⁶

Chief among those differences is that, unlike in the case of traditional calling, the 8YY caller does not pay for the cost of originating and routing 8YY calls—the 8YY subscriber does.⁷ Indeed, this is in the Commission’s definition of a toll free number—“[a] telephone number for which the toll charges for completed calls are paid by the toll free subscriber.”⁸ By subscribing to 8YY service, businesses receive commercial benefits and distinguish themselves and their services. 8YY subscribers pay for the service because consumers expect 8YY calls to be connected “toll free.”

By moving 8YY originating access charges to bill-and-keep, the Commission’s proposal would upend the toll free calling paradigm and would have the perverse result of saddling 8YY

H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 16-363 (filed Nov. 16, 2017); Letter from NTCA, Windstream, NCTA, American Cable Association, Frontier, ITTA, and WTA to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 16-363 (filed Nov. 1, 2017).

⁴ FNPRM ¶ 13.

⁵ *USF/ICC Transformation Order* at 18,111 ¶ 1304.

⁶ *Id.*

⁷ *Id.* at 18,111 ¶ 1303.

⁸ 47 C.F.R. § 52.101.

callers with the costs of originating and routing supposedly “toll free” calls. If these costs are passed on to consumers—whether by increasing rates or imposing a per-call 8YY charge—they may make fewer 8YY calls, which would reduce the value of 8YY numbers. Furthermore, 8YY subscribers, such as banks and retailers, may risk exposing themselves to liability under state and federal consumer protection laws if they continue to market their 8YY numbers as “toll free” when, in fact, they no longer are because the customer placing the call now bears the costs of doing so in some form after all.

The Commission proposes to take the dramatic step of moving to bill-and-keep to address arbitrage concerns based on little evidence, beyond the self-serving statements of the major toll free service providers, regarding the scope or extent of such arbitrage or its effect on 8YY prices.⁹ And, what evidence there is suggests that 8YY arbitrage is not an industry-wide problem, but rather that such activity is confined to a small handful of carriers.¹⁰

But the fact that some parties may have found opportunities to abuse the ICC system and generate charges that would not result from efficient routing of 8YY calls does not justify transitioning all 8YY traffic to bill-and-keep. Moreover, if the Commission wants to reform database query charges, picking the lowest rate out of the hat is the definition of arbitrary and capricious and not a valid basis for reform. Windstream, Frontier, and NTCA do not oppose evaluating reforms to database query charges, but the Commission should be careful to avoid an arbitrary number—particularly the rate of the largest ILECs, which likely have the largest call volume.

⁹ The Commission itself observes that the comments on transitioning 8YY access charges to bill-and-keep are “mixed.” FNPRM ¶ 14.

¹⁰ See, e.g., AT&T Forbearance Petition *Ex Parte* at 10 (representing that 17 carriers accounted for 20% of AT&T’s originating access spend in September 2016, while the remaining 80% was attributable for 1,300 remaining carriers).

There also is no foundation for the Commission's prediction that these reforms will encourage investment and upgrades for legacy networks to migrate to IP networks. To the contrary, taking away revenues will make it more difficult for carriers to invest in the network upgrades necessary to transition to all-IP services and to expand broadband, particularly in high cost areas.

For all these reasons, the Commission should refrain from adopting its proposal to transition all 8YY traffic to bill-and-keep. Rather, the Commission can and should consider adopting targeted measures to address 8YY arbitrage schemes, consistent with the terminating access stimulation rules.¹¹

II. The Commission's Proposal Will Harm Consumers.

The Commission predicts that its proposal to transition most 8YY originating access charges to bill-and-keep will benefit both consumers and 8YY subscribers by eliminating inefficiencies in the intercarrier compensation system that lead to higher prices for 8YY service.¹² The more likely outcome, however, is that the Commission's proposal will simply shift the burden of paying for the cost of originating 8YY calls from the 8YY subscriber—the party unmistakably looking to entice more calling from potential or current customers through the use of a toll free number—to callers, with consequent harms for both.

Under the current intercarrier compensation system, 8YY subscribers (*e.g.*, retail stores and banks), not 8YY callers (*e.g.*, retail and banking customers), pay for the cost of originating and routing 8YY calls from the customers' premises to their destination—often, a call center. They do so to encourage consumers to call their businesses and to set themselves apart from other

¹¹ See 47 C.F.R. §§ 61.3(bbb), 61.38, and 69.3(e)(12).

¹² FNPRM ¶ 39.

businesses that do not offer “toll free” calling. Customers meanwhile are able to obtain customer service support and information free of charge.

To be sure, “the prevalence of unlimited minutes plans for both wireless and wireline service and the advent of the Internet and other advances in communications have reduced the financial benefit to the calling party of being able to make a telephone call and not pay for the toll portion of the call.”¹³ Nonetheless, as the Commission recognizes, “many businesses and consumers continue to find 8YY numbers useful.”¹⁴

If the Commission adopts its proposal, however, 8YY calls will no longer be “toll free” for consumers. Rather, under a bill-and-keep framework, LECs will be forced to bear the costs of originating 8YY calls and then to bill their subscribers—which include both 8YY and non-8YY callers—to recover such costs.¹⁵ The result is that consumers—including those living in high cost rural areas—will pay more for local exchange service, even if they do not use this service to place 8YY calls.

Additionally, depending on how LECs decide to pass 8YY originating access costs through to 8YY callers—*i.e.*, by increasing rates for all subscribers or assessing a volume-based or per-call

¹³ *Id.* ¶ 5.

¹⁴ *Id.*

¹⁵ The Commission concludes that “[u]nder [its] proposal, 8YY calls will remain ‘toll free’ because originating callers will not be charged for the long-distance portion of the call.” FNPRM ¶ 92. The Commission’s conclusion appears to be based on the Ad Hoc Telecommunications Users Committee’s observation that “from the beginning,” the term “toll free” has meant that “the caller doesn’t pay the *toll*—*i.e.*, long distance—charges.” *Id.* But this observation, even if accurate, is irrelevant. What matters is not what was originally meant by the term, but what consumers have come to understand and expect. And there can be no serious question that consumers now expect that they will not be charged any additional fees—long distance or otherwise—for making a “toll free” call. Bill-and-keep produces a zero rate precisely because “a bill-and-keep methodology requires carriers to recover the cost of their network through end-user charges.” *USF/ICC Transformation Order* at 17,906 ¶ 742. Thus, moving to bill-and-keep for 8YY calls necessarily means that the calling customer will now bear these costs.

fee to those subscribers who place 8YY calls—the Commission’s proposal may lead to consumers making fewer 8YY calls. This may, in turn, reduce the value of 8YY telephone numbers to businesses and lead LECs to abandon 8YY service altogether.

The Commission’s proposal may also have implications for how businesses market their 8YY numbers. Because consumers will be forced to bear at least part if not all of the cost of originating 8YY calls, businesses will no longer be able to advertise their 8YY numbers as being “toll free” without at the same time disclosing that consumers may be required to pay for the costs of originating and routing the call to the applicable long-distance carriers. Businesses that fail to provide such disclosures risk exposure to liability under state and federal consumer protection laws prohibiting deceptive advertising practices.¹⁶

If the Commission adopts a bill-and-keep framework but retains a “toll free” calling framework, additional questions need to be addressed. If 8YY calls are no longer toll free, what is the service provided by the carrier selling the toll free service? The Commission would need to revise its toll free numbering rules¹⁷ and charge for toll free numbers¹⁸ if the Commission eliminates a toll free service.

The Commission downplays these concerns, while predicting that its proposal to transition most 8YY originating access charges to bill-and-keep will benefit both consumers and 8YY subscribers by eliminating the inefficiencies and abuses in the ICC system that lead to higher prices for 8YY service.¹⁹ As support for this prediction, the Commission points to the “significant growth

¹⁶ See, e.g., 15 U.S.C. § 45 (empowering and directing the Federal Trade Commission to prevent businesses from using “deceptive acts or practices in or affecting commerce”).

¹⁷ See 47 C.F.R. § 52.101 *et seq.*

¹⁸ See 47 C.F.R. § 1.154 (setting a “Toll Free Number Fee” of \$0.12 per Toll Free Number).

¹⁹ FNPRM ¶ 39.

that has occurred in wireless subscribership since the Commission moved all CMRS traffic to bill-and-keep.” The Commission claims that such growth is proof that its previous intercarrier compensation reforms succeeded as predicted in reducing the price of wireless calling and/or improving service quality.²⁰

But correlation does not establish causation. As the Commission acknowledges, “there are several factors that may explain increased calling.”²¹ The Commission makes absolutely no effort to determine how much of this increase is attributable to the bill-and-keep transition as opposed to these other factors. Nor does the Commission make any effort to study the impact of its 2011 terminating access reforms to see if its predictions regarding likely pass-through rates and consumer benefits have proven true.²² Absent such economic data and analysis, the consumer benefits predicted by the Commission are speculative at best.

Moreover, even if the Commission’s 2011 reforms have succeeded in lowering prices and increasing call volumes—despite the lack of any Commission analysis or evidence on this point—this does not mean that transitioning 8YY originating access charges to bill-and-keep will produce the same results. To the contrary, there are good reasons to think that it will not. For one, unlike traditional voice calls, 8YY callers are not the consumers of 8YY services, 8YY subscribers are. For consumers to benefit from the Commission’s proposed 8YY reforms, two things must happen.

²⁰ *Id.* ¶ 40.

²¹ *Id.*

²² *USF/ICC Transformation Order*, Appendix I, at 18,298-299 ¶¶ 9-10 (predicting that incumbent LECs would pass through 50% of their ICC savings to consumers and that competitive LECs and CMRS providers would pass through 75% of their savings, resulting in net consumer benefits of \$2.6 billion). As NTCA has previously explained, the Commission should evaluate the degree to which consumers have actually benefited from the Commission’s reforms to date before proposing (or certainly adopting) further specific ICC reforms. *See, e.g.*, Joint Comments of NTCA–The Rural Broadband Association and WTA – Advocates for Rural Broadband, at 12-13, CC Docket No. 01-92 (Oct. 26, 2017).

First, the 8YY providers must pass through their cost savings to 8YY subscribers in the form of lower prices and/or improved service. Second, 8YY subscribers must, in turn, pass through their cost savings to consumers in the form of lower prices on goods and service. Again, the Commission offers no economic data or analysis to support either of these predictions.

Furthermore, consumers understand and expect that they will not be charged when they make an 8YY call. If that changes, as it will if the Commission proceeds with its proposal to transition 8YY originating access charges to bill-and-keep, then consumers may choose to make fewer 8YY calls and/or to cease making such calls altogether. The FNPRM fails to grapple adequately with these key differences between 8YY calling and wireless calling when examining the likely outcome of its proposed reforms.

In short, the Commission's proposal, if adopted, will end "toll free" calling as it currently exists, while offering consumers and 8YY subscribers only speculative benefits in return.

III. The Record Does Not Support the Need for Broad 8YY Originating Access Reform.

The Commission proposes to transition most elements of 8YY originating access charges to bill-and-keep over a three-year period, seeks comment on capping or otherwise reforming cap database query charges, and to limit database query charges to one per 8YY call.²³ The Commission states that such actions are necessary "to combat the abuses that *appear* to plague the existing 8YY regime."²⁴ But the record before the Commission contains remarkably little in the way of concrete evidence of 8YY arbitrage, and what little evidence it does contain does not justify the sweeping reforms the Commission proposes.

²³ FNPRM ¶ 3.

²⁴ *Id.* ¶ 33 (emphasis added); *see also id.* ¶ 1 (observing that the current intercarrier compensation system for 8YY calls is "rife with opportunities for arbitrage and fraud").

To be sure, the major 8YY service providers, including AT&T, Verizon, Sprint, and Somos, all claim that 8YY originating access arbitrage has increased in recent years as a result of the Commission's 2011 ICC reforms, which mostly removed the incentives for carriers to engage in *terminating* access arbitrage. The 8YY service providers also provide generic descriptions of several different types of 8YY access arbitrage in which they allege carriers are engaged.²⁵ However, such claims lack specificity and should be dismissed for what they are: self-serving statements from the parties that stand to benefit most from the Commission's proposed reforms.

The only actual evidence that the 8YY service providers offer to support their claims of rampant 8YY abuse is data showing that 8YY originating access minutes have increased in recent years at a time when originating access minutes as a whole are declining.²⁶ But such anecdotal evidence is not proof that arbitrage is occurring. A migration to 8YY conference calls and away from "free" conference calls as a result of the Commission's targeted terminating access stimulation rules could equally explain the increase in 8YY minutes. Moreover, as the market for standalone long distance service dwindles and bundled local and long distance expand and consumers increasingly cut the cord, it is logical that 8YY would increase as a percentage of the total originating access minutes share, since 8YY service providers are less likely to be affiliated with the originating LEC.

But even if some of the increase in 8YY originating access minutes is due to traffic pumping and other forms of 8YY arbitrage, the data at most show that these increases are being driven by a small handful of competitive LECs, and therefore that access stimulation is not an

²⁵ See, e.g., Somos Reply Comments at 1 (describing in broad terms how a traffic pumping scheme works, but failing to provide any specific examples).

²⁶ See Verizon Comments at 3 ("8YY traffic today makes up the bulk of originating access minutes"); GCI Comments at 2; AT&T Comments at 7-8; see also Teliax Comments at 8 (noting that even consumers with unlimited data plans continue to place 8YY calls).

industry-wide problem. AT&T, for example, has estimated that 20% of AT&T’s originating access spend in September 2016 was attributable to only 17 carriers and that 80% of spend was attributable to 1,300 other carriers.²⁷ AT&T has further observed that “[t]he explosion in CLEC minutes has occurred as overall *originating 8YY minutes are down significantly* (and, indeed, ILEC 8YY originating minutes are *barely a third of their 2007 totals*).”²⁸

Given the lack of concrete evidence of widespread 8YY arbitrage, the Commission should, at this time, refrain from implementing an industry-wide overhaul of 8YY originating access charges that could undermine universal service in some of the most rural parts of the United States. At most, the record supports the Commission adopting measures—along the lines of the Commission’s terminating access stimulation rules—designed to target only those LECs engaged in traffic pumping and other types of 8YY arbitrage schemes. Or, the Commission could open investigations into the handful of carriers regarding potential unjust and unreasonable practices, and take a hard look at any other carriers that exhibit anomalous increases in traffic.

IV. The Commission Should Ensure That Reforms to Database Query Charges Are Not Arbitrary and Capricious.

In the FNPRM, the Commission notes that “database queries also appear to have been the subject of abuse” and seeks comment on capping or reducing the database query charges.²⁹ While Windstream, Frontier, and NTCA would not oppose reforms to the database queries,³⁰ we do not

²⁷ AT&T Forbearance Petition *Ex Parte* at 10.

²⁸ Comments of AT&T at 8, WC Docket No. 10-90 (July 31, 2017) (emphasis added).

²⁹ FNPRM ¶ 28.

³⁰ *See, e.g.*, Letter from Gerard J. Waldron, Counsel to Inteliquent, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 et al., at 1, 3-4 (Dec. 21, 2017) (“*Inteliquent Dec. 21 Ex Parte*”) (proposing a nationwide average rate as one possible solution); Letter from Christianna Barnhart, Vice President, Regulatory Affairs, Charter Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 07-135 et al., at 2 (Dec. 14, 2017) (expressing

support arbitrarily pointing to a single tariffed rate as the basis for reform. Under the APA, “an agency must examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made.”³¹ Nor may the Commission rely on its predictive judgment, without supplying a reasonable, discernible basis for its action.³² While an agency is not required to consider “every alternative conceivable” it must evaluate alternatives that are “neither frivolous nor out of bounds.”³³

Simply adopting the lowest rate charged by a price cap carrier—a rate roughly one-third that of the average nationwide rate³⁴—fails to account for, or even adequately consider, relevant factors influencing the level of database query charges, such as differences in geography, relative subscription levels, and general line loss trends. For example, far from realizing efficiencies on legacy TDM equipment, decreasing subscription levels (and thus, utilization) could suggest that 8YY costs are rising rather than falling as those costs are increasingly spread across a smaller

willingness to explore options for addressing high database dip charges, including adopting a national cap or unified rate).

³¹ *Motor Vehicles Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Sorenson Commc’ns. Inc. v. FCC*, 755 F.3d 702, 707-08 (D.C. Cir. 2014) (declining to rely on Commission’s “predictive judgment” and invalidating rule requiring users of particular kind of TRS to pay \$75 for equipment, where “there [was nothing] in the record demonstrating how [that] price point” would achieve Commission’s objective or why the Commission had selected the “target price”); *cf. MCI Telecom. Corp. v. FCC*, 143 F.3d 606, 608 (D.C. Cir. 1998) (per curiam) (describing that reaching rate for coinless calls by starting from baseline of coin calls and subtracting resembled “subtracting apples from oranges” in an “unreasoned” manner).

³² *See U.S. Postal Serv. v. Postal Regulatory Comm’n*, 785 F.3d 740, 744 (D.C. Cir. 2015) (describing that no deference is owed to an agency’s purported expertise where the reason for the agency’s action cannot be discerned).

³³ *Chamber of Commerce of the U.S.A. v. SEC*, 412 F.3d 133, 144 (D.C. Cir. 2005).

³⁴ *See, e.g., Inteliquent Dec. 21 Ex Parte* at 2 (calculating a nationwide weighted average of \$0.004248).

subscriber base.³⁵ Adopting the lowest rate in the country, without sufficient explanation or examination of these and other factors, would be arbitrary and capricious.

V. Moving All 8YY Traffic to Bill-and-Keep Will Make It More Difficult, Not Easier, for LECs to Make Investments to Upgrade Their Networks.

The Commission conjectures that continuing ICC revenues might pose a disincentive for carriers to transition to IP-based services and therefore suggests that moving originating 8YY access charges might expedite the transition to IP services.³⁶ For Windstream, Frontier, and NTCA’s members, the prospect of maintaining 8YY compensation is not a relevant consideration for transitioning to IP. In fact, the opposite is likely to be true: if LECs’ 8YY revenues are eliminated, it may be more difficult to upgrade their networks from remaining legacy TDM facilities to all IP.

This is particularly likely to be the case in rural areas, where small and mid-size ILECs with rural footprints still depend upon such revenues to recover costs and enable further network investments. These revenues are meaningful to carriers serving rural areas—especially those that already face the prospect of unpredictable universal service support to serve the high-cost rural areas in which they operate.³⁷ Taking away such revenues now and requiring even greater recovery of costs from small rural customer bases undermines, rather than furthers, the goals of universal service.

³⁵ See, e.g., Patrick Brogan, *USTelecom Industry Metrics and Trends 2018* at 4 (Mar. 1, 2018), available at <https://bit.ly/2IjdamT> (showing that ILECs lost more than 80% of traditional wireline voice connections between 2000 and 2018).

³⁶ FNPRM ¶ 46.

³⁷ *In re Connect America Fund*, Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, WC Docket Nos. 10-90 et al., at ¶¶ 73-82 (released Mar. 23, 2018); see generally Comments of NTCA–The Rural Broadband Association at 2-26, WC Docket Nos. 10-90 et al. (May 25, 2018).

Moreover, cutting revenues—particularly for carriers serving low-density, sparsely populated corners of rural America—will not create incentives for increased investment. It will produce exactly the opposite and directly move funding from the capital budgets underlying rural broadband and next-generation network deployments. Cutting revenues creates incentives for LECs to utilize existing network facilities as long as possible to avoid unnecessary new expenditures. Indeed, extracting tens of millions of dollars from intercarrier compensation revenues by moving 8YY traffic to bill-and-keep at a time when many NTCA members are already facing hundreds of millions of dollars of universal service funding shortfalls will hardly advance the cause of or increase the wherewithal for investment in advanced networks. It stands to reason therefore that if the Commission were to proceed with its proposal to transition 8YY originating access charges to bill-and-keep, then LECs would not be able to pay for the network upgrades necessary to transition to all-IP services. Doing so in an environment when other revenues are decreasing, including universal service budget issues for both rate-of-return and price cap carriers, will make it even harder for LECs to make upgrades and investments.

With this background, the Commission’s consideration of reducing 8YY traffic to bill-and-keep represents picking the largest IXCs as regulatory winners and customers as losers. Fortunately, the Commission has an easy path to avoiding this wealth transfer from the least able to pay while still achieving its goal of reducing access arbitrage by simply focusing on the small number of actual bad actors.

VI. Conclusion.

For these reasons, the Commission should defer bringing all 8YY traffic to bill-and-keep and instead assess these issues as part of broader ICC reform. Ultimately, the Commission should adopt targeted measures to address 8YY arbitrage consistent with the Commission’s treatment of terminating access arbitrage.

Respectfully submitted,

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