May 16, 2019

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage, WC Docket No. 18-155*

Dear Ms. Dortch:

NTCA has long supported efforts by the Federal Communications Commission ("Commission") to eliminate well-defined and clearly identified arbitrage in the intercarrier compensation systems. NTCA also recognizes the significance of the network cost recovery these systems otherwise enable, particularly for smaller local exchange carriers ("LECs") that rely on such cost recovery to deliver comprehensive universal service.

It is important in the first instance to establish through evidence and define carefully the extent to which any given practice gives rise to arbitrage concerns. Where arbitrage is clearly established with respect to transport charges in the context specifically of access stimulation, the Commission should adopt its "two-prong" proposal to address any lingering arbitrage.[1] That approach provides a promising blueprint for addressing any outstanding terminating access arbitrage by both (1) embracing industry consensus that the financial burden for transport in the specific event of access stimulation should be shifted to LECs *and* (2) promoting effective interconnection arrangements in those specific circumstances. Under prong 1 of the Commission's proposal, access-stimulating LECs without direct connections to interexchange carriers ("IXCs") "would bear all financial responsibility for applicable intermediate access provider terminating charges normally assessed to an IXC," such that the costs of tandem switching and transport—including transport to the LEC from the intermediate access provider—would be borne by the LEC.[2] And under prong 2, access-stimulating LECs would be afforded "the option to offer to connect directly to the IXC or an intermediate access provider of the IXC's choice" in lieu of ceasing to bill for their own transport charges.[3]

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[1] *See In re Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, Notice of Proposed Rulemaking, 33 FCC Rcd 5466 (2018) ("*NPRM*").
[2] *Id.* at 5470 ¶ 10.
[3] *Id.* at 5470 ¶ 13.

Although the record reflects support for the two-prong proposal from among a variety of stakeholders including some IXCs, AT&T has raised concerns about the direct interconnection option in prong 2.[4] To the extent that AT&T's speculative concerns—which are not supported by the record—have any validity, such concerns could be ameliorated or outright prevented by the adoption of easily administrable safeguards.

At the same time as it may act to address concerns about arbitrage once confirmed, the Commission must be careful not to expand the scope of this proceeding to tackle complicated issues associated with broader intercarrier compensation reform. Any far-reaching changes to interconnection regimes could harm rural operators of last resort and thereby undermine universal service. Similarly, NTCA encourages the Commission to ensure that non-access stimulating LECs are not inadvertently harmed by any reforms adopted as a result of this proceeding.

I. The Commission Should Adopt Its Two-Prong Proposal.

Prong 2 of the Commission's proposal is designed to promote direct interconnection in a manner that protects IXCs while also curbing terminating access arbitrage. As the Commission has explained (and as AT&T has conceded[5]), "the monthly charges for direct connections can often be substantially lower than per-MOU rates for an equivalent amount of traffic" if "there is a sufficient volume of traffic."[6] Although IXCs admit "that the volume of traffic bound for access stimulating LECs justifies direct connections," they have nonetheless cast doubt in the utility of such connections in this instance by "alleg[ing] that access-stimulating LECs currently refuse to accept such connections."[7] In order to balance these competing factors, the Commission proposed in prong 2 a process that both overcomes any access-stimulating LEC's incentive to decline direct interconnection *and* allows interconnection directly or indirectly. The Commission should adopt this proposal.

Contrary to the claims of AT&T—which has urged the Commission to abandon prong 2—the direct interconnection prong is narrowly targeted to address arbitrage while furthering efficient and cost-effective interconnection arrangements among carriers.[8] So too does the two-prong approach promote financial responsibility on the part of the carrier that makes the ultimate routing decision should the access-stimulating LEC refuse direct interconnection as has been alleged in the past.[9]

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[4] *See* Letter from Matt Nodine, AT&T, to Marlene Dortch, Secretary, FCC, WC Docket No. 18-155 (Apr. 9, 2019) ("*AT&T Ex Parte*").

[5] *Id.* at 14-15.

[6] *NPRM*, FCC Rcd at 5470 ¶ 13.

[7] *Id.*

[8] Although NTCA supports prong 2, the Commission should retain its focus in this proceeding upon addressing terminating access arbitrage as explained in section III *infra*. *Cf.* Letter from Joseph Cavendar, CenturyLink, to Marlene Dortch, Secretary, FCC, WC Docket No. 18-155, at 1-2 (Apr. 30, 2019) ("*CenturyLink Ex Parte*").

[9] *See In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663, 17,910 ¶ 749 (2011) ("*Transformation Order*"); *In re Developing A Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, 16 FCC Rcd 9610, 9616-18 ¶¶ 11-18 (2001); *NPRM*, 33 FCC Rcd at 5470-72 ¶¶ 13, 16.

The balanced nature of the Commission's two-prong approach has been supported by IXCs such as Verizon.[10] Verizon emphasized that, when "the [IXC] makes the routing decision," then the IXC would bear the cost; for example, an IXC that "chooses to connect directly at the LEC's end office" would "bear the costs of getting the telecommunications traffic to the end office," while an IXC that "chooses to use an intermediate provider" would "bear the costs of getting the traffic to the intermediate provider, including applicable tandem or transit charges."[11]

While noting that prong 2 is "well-intentioned" and may "provide lower rates in many circumstances,"[12] AT&T has raised concerns that direct interconnection could be inefficient and costly due to sunk investments.[13] Yet these concerns lack any evidentiary basis and appear overstated—and in any event could be effectively controlled (or entirely prevented) by the adoption of reasonable safeguards. As a threshold matter, AT&T's complaints assume incorrectly that the IXC *must* directly interconnect with the access stimulator. The Commission's proposal, however, makes clear that indirect interconnection as offered by the access-stimulating LEC then presents IXCs with "the *choice* to connect with an access-stimulating LEC directly or indirectly."[14] If AT&T does not want to directly interconnect, it does not have to do so and can continue to choose the indirect route (subject to the requirement to then pay for that having elected to forego direct interconnection as offered).

AT&T then raises a follow-on concern that access-stimulating LECs may opt to move their location after a direct interconnection is established.[15] But despite making sweeping claims about the "mobile" nature of all "access stimulation traffic,"[16] AT&T provides nothing more than anecdotal evidence and theoretical suppositions that this type of whack-a-mole will actually occur. AT&T's purported parade-of-horribles concerning the potential for relocation thus appears driven much more by hypothetical fears than any on-the-ground facts reflected in the record, and there is no evidentiary basis to justify accepting AT&T's claims and concerns.

Nonetheless, even assuming that AT&T's speculative concerns about prong 2 had merit and facts existed beneath its cursory claims, such concerns could be ameliorated or outright prevented through reasonable safeguards governing the implementation of prong 2. As just one example, the Commission could prevent an access stimulator with any common ownership or affiliates that attempts to relocate or otherwise abandon a direct interconnection arrangement within one year from collecting any transport revenues in a new location. That rule would be easy to administer and enforce, and it would entirely remove any incentive for an access stimulator to relocate. It would also embrace and preserve prong 1 of the Commission's approach as an available remedy.

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[10] *See* Comments of Verizon, WC Docket No. 18-155, at 5 (July 20, 2018).

[11] *Id.* Of course, the IXC would be responsible ultimately as well for any transport and termination charges payable to the terminating end office in choosing such an indirect route.

[12] *AT&T Ex Parte* at 14.

[13] *Id.* at 14-17.

[14] *NRPM*, 33 FCC Rcd at 5471 ¶ 13 (emphasis added).

[15] *AT&T Ex Parte* at 15-16.

[16] *Id.* at 15.

Finally, the Commission should reject AT&T's apparent suggestion that the cost of direct interconnection in rural areas is the same as in urban areas such as Chicago.[17] Due to lower population density and geographic sprawl, it is inappropriate and unrealistic to expect the costs in rural areas to be the same as Chicago—the nation's third largest city. If the Commission adopts prong 2, it should not mandate urban pricing in rural areas.[18] Existing tariffs are deemed just and reasonable and there is no principled (or evidentiary) basis for abandoning their terms.

II. Prong 1 Will Meaningfully Curb Terminating Access Arbitrage, But It Must Be Implemented Along with Appropriate Safeguards to Protect Innocent LECs.

There is general support in the record for adopting the industry proposal to shift the financial responsibility reflected in prong 1 of the Commission's proposal. That said, the Commission must ensure that prong 1 is limited to access stimulators. For example, LECs that do not qualify as access stimulators under the Commission's rules but which subtend the same CEA as those who do must not be affected by these reforms. In order to achieve that goal, a new subsection (3) should be added to the proposed text of § 51.914(a) to confirm that prong 1 will apply only to access stimulators. This clarification will help ensure that non-access stimulating LECs that subtend the same tandem or CEA will not be inadvertently affected by the Commission's reforms.

Similarly, the Commission should clarify and reaffirm that IXCs may not engage in "self-help" and must pay the relevant charges to non-access stimulating LECs that subtend to the same tandem as any LEC confirmed to participate in the defined access-stimulating activity. Indeed, NTCA is aware that large IXCs have used the excuse of access stimulation traffic associated with a single LEC that is being routed through a tandem to dispute payments for multiple LECs homed behind that tandem—despite the fact that these other LECs have no association or affiliation whatsoever with the access stimulation practice. This itself is "arbitrage" that the Commission must finally bring to a stop, allowing a carrier to "self-help" to refuse payments clearly due to one operator simply by reference to another operator's alleged practices. To deter such "self-help" arbitrage by IXCs, the Commission should add language to the text of the new proposed rule clarifying that there will be penalties for IXCs who fail to pay charges to non-access stimulating LECs. If a tariff is already on file and has been deemed lawful, IXCs should not be permitted to avoid their financial obligations. To the extent that the IXCs object to those tariffs, they should have been challenged before going into effect. To allow non-payment of valid tariffs would amount to arbitrage itself, and precisely the type of "self-help" against which the Commission has consistently warned.

[17] *AT&T Ex Parte* at 20.

[18] Although the Commission's 2011 access stimulation rules did use an urban rate for end office switching, the rate was used in that specific context to approximate volume of a larger carrier. Here, the National Exchange Carrier Association has rates to determine direct interconnection costs in rural areas and there is no basis for assuming that urban rates are appropriate. *See generally Transformation Order*, 26 FCC Rcd at 17,847-90 ¶¶ 656-701.

III. The Commission Should Reject CenturyLink's Suggestion to Mandate Direct Interconnection More Broadly.

Encouraging efficient interconnection is a laudable goal. The Commission must be careful, however, not to unnecessarily expand the scope of this limited proceeding—which, by definition, is focused upon a certain kind of alleged "access arbitrage"—to include broader intercarrier compensation reform or to adopt sweeping changes to interconnection rules for all providers.

CenturyLink has urged the Commission to substantially expand the scope of its proposal by (1) requiring "all providers, not just access stimulators" to comply with prong 2; and (2) adopting a rule "requiring access-stimulating LECs to always offer to connect" under prong 1.[19] Regardless of the merit of CenturyLink's sweeping proposal for mandatory interconnection, it travels beyond the proper scope of this proceeding. As NTCA explained in its comments, CenturyLink's proposals risk prejudging debates over appropriate "network edges" where financial responsibility for transport will begin and end, and they would involve sweeping, complex reforms that "could have substantial negative unintended consequences for LECs of all kinds in serving small customer bases in rural areas."[20] Given the extraordinarily broad nature of CenturyLink's proposals—which would have significant revenue impacts on numerous aspects of intercarrier compensation *and also* cost impacts in terms of the transport that rural incumbent LECs must now bear responsibility for in order to exchange traffic with other providers—no action on the CenturyLink proposal should be taken until both the Commission and interested parties have a dedicated, focused opportunity to flesh out fully and explore how these recommendations would affect all participants in the existing interconnection and intercarrier compensation systems.

In any event, CenturyLink's proposals have no merit. Although CenturyLink goes to great lengths to establish that its proposals would result in savings for IXCs and for its own business,[21] CenturyLink presents no evidence that the broader public interest would benefit from its proposed changes. Nor could it. CenturyLink's proposal would punish innocent LECs that are not engaged in access stimulation, which in turn would result in higher costs for those LECs' customers in deeply rural areas far from any centralized interconnection point whose location would inevitably be dictated by a larger national provider like CenturyLink. This would be particularly harmful for rural LECs and detrimental to the objectives of universal service, and the Commission must therefore evaluate these consequences far more thoroughly than the current record permits before considering such an approach.

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[19] *CenturyLink Ex Parte* at 1.

[20] Comments of NTCA, WC Docket No. 18-155, at 81-10 (July 20, 2018).

[21] *Id.* at 2-3.

IV. Conclusion.

To the extent that the record evidence confirms concerns raised with respect to terminating access arbitrage in the context of transport charges, NTCA supports the Commission's two-prong plan for targeting confirmed cases of such. The Commission should not abandon its sensible plan to promote incentives for efficient call routing and address arbitrage on a surgical basis through the two-prong approach, nor should it expand the scope of this proceeding to address broader questions related to interconnection duties and cost recovery through intercarrier compensation. Moreover, the Commission should implement this solution in a manner that avoids conflating innocent LECs with confirmed access stimulators and ensures that non-access-stimulating LECs are fairly compensated without self-help arbitrage by an IXC.

Respectfully submitted,

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