NTCA THE RURAL BROADBAND ASSOCIATION

September 17, 2019

VIA ECFS

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

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

Dear Ms. Dortch:

On Friday, September 13, 2019, Denny Law of Golden West Telecommunications, Ryan Boone of Premier Communications, Trey Judy of Hargray Communications, and Rebekah Goodheart of Jenner & Block LLP and the undersigned on behalf of NTCA–The Rural Broadband Association ("NTCA"), met with Nirali Patel, wireline advisor to Chairman Ajit Pai, and Victoria Randazzo, an intern in the Chairman's office, regarding matters in the above-referenced proceeding.[1] Messrs. Law, Boone, and Judy participated in that meeting by phone. On the same day, Ms. Goodheart and Mr. Romano met separately with Arielle Roth, wireline legal advisor to Commissioner Michael O'Rielly, and Travis Litman, chief of staff to Commissioner Jessica Rosenworcel, to discuss the same matters.

As a preliminary matter, NTCA continues to support targeted actions to address inefficient access stimulation practices to ensure that such arbitrage does not undermine the integrity of the intercarrier compensation system.[2] In the meeting, NTCA raised concerns that the Draft Order may inadvertently sweep in RLECs that are not engaging in access stimulation. In particular, by eliminating revenue sharing in the definition of access stimulation, the Draft Order could immediately have the inadvertent effect of treating innocent RLECs as access stimulators when

1 *See Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage, Report and Order and Modification of Section 214 Authorizations*, WC Docket No. 18-155, FCCCIRC 1909-02 (rel. Sept. 5, 2019) ("Draft Order").

2 NTCA has participated in industry efforts to curtail access stimulation in a manner that does not inadvertently sweep in innocent rural incumbent local exchange carriers ("RLECs"). *See* Letter from NTCA, AT&T, Verizon, Windstream, NCTA, Frontier, WTA, USTelecom to Marlene H. Dortch, Secretary, FCC, CC Docket No. 01-92, WC Docket No. 16-363 at 1 (filed Nov. 16, 2017).

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they do not engage in that practice at all. For example, based upon a preliminary analysis by the National Exchange Carrier Association ("NECA") of RLEC study areas' switched access projections as submitted for purposes of calculating CAF-ICC support for the 2018-2019 tariff period, the Draft Order's use of a 6:1 terminating-to-originating interstate traffic ratio could result in approximately four percent of RLECs participating in the NECA pool – without any prior engagement in access stimulation practices to NTCA's knowledge – suddenly being considered access stimulators and thereby forcing them to bear financial responsibility for transport and tandem switching costs; another one percent of NECA pool participants would be on the cusp of such a "definitional transformation" into access stimulators as well, based upon estimated ratios at or in excess of 5:1. (The figures for the 2019-2020 tariff period are relatively comparable, with the result that three percent of NECA pool participants – twenty-four carriers – would suddenly be deemed access stimulators, and another 9 carriers at least would sit on the precipice of such categorization. Of course, these estimates reflect only NECA pool participants, meaning that other innocent RLECs may be swept up as well through the strict liability of a 6:1 ratio.) Several NTCA members participating in the meeting shared that their own terminating-to-originating ratios for interstate traffic had been increasing over time, with some study areas reaching 4.5:1 ratios as a result of decreases in originating traffic for reasons discussed further herein. NTCA has received similar reports from other members upon initial inquiry, and indicated that it would seek additional information from members as well regarding current ratios and trends.

This concern is not new. Indeed, this is why the Federal Communications Commission (the "Commission") declined to adopt a trigger or volume threshold alone when it first adopted the access stimulation rules in 2011. There, the Commission concluded that revenue sharing was critical because "a terminating-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing [local exchange carriers ("LECs")] that had realized access traffic growth through general economic development, unaided by revenue sharing" – and specifically cited the example of "a customer support center in a new community."[3] The same holds true today. Indeed, NTCA members participating in the meeting shared examples within their service areas of seasonal upticks in terminating calls and, separately, a business that manufactures parts for a large industrial customer resulting in significant terminating call volumes as reasons why traffic ratios or volumes may be higher than the ratio and/or shift periodically.

The absence of a revenue sharing component could lead to what the Commission tried to avoid in 2011: imposing strict liability on any carrier that meets the trigger without any intent or effort to stimulate access traffic specifically and thereby potentially penalizing rural operators for economic development in rural areas. Such an outcome would conflict with the Commission's stated goal in the Draft Order, which is focused specifically on eliminating *abuses* of the intercarrier compensation system.[4] Maintaining the revenue sharing definition, as NTCA has explained, is

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[3] *In re Connect America Fund*, *et al*., Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 17881-82, ¶ 677 (2011) ("*Transformation Order*").

[4] Draft Order ¶ 4 (explaining that the purpose of the item is "to eliminate the incentive to inefficiently route high-volume, purposely inflated, call traffic" and "eliminate the use of the ICC system to subsidize services, including the many 'free' services offered through access stimulation schemes.").

therefore critical to capture the scenarios in the record because entities would not engage in access stimulation absent some economic benefit.

The NTCA members also shared how their terminating-to-originating traffic ratios are increasing because of customer preferences and technology changes. For example, wireless substitution for voice services, particularly for originating long distance calls, contributes to a higher terminating-to-originating ratio. As another example, as providers offer more VoIP services or other customized long distance calling services, outbound calls may be originated through direct handoffs to cloud-based or other third-party providers without appearing as originating access traffic. At the same time, terminating calls in that circumstance would continue to be routed per the routing guides to the homed tandem and subtending end office (and thus appear as terminating access traffic). Finally, as yet a third example, there are instances where a LEC may cease billing a given interexchange carrier ("IXC") for originating access in connection with wholesale long distance services, leading the carrier's originating access charges and revenues as reflected in bills to decline even as the traffic continues to traverse its switch. All of these scenarios can lead or contribute to an increase of terminating-to-originating ratios.

NTCA therefore urged the Commission to keep revenue sharing as a component of the definition. Indeed, the very broad definition of revenue sharing from the *Transformation Order* already encompasses the kinds of practices alleged to be problematic today.[5] The best approach to targeting access stimulation is therefore not to reduce (or all but eliminate) the significance of revenue sharing through new complicated rules and definitions that may create all kinds of new problems (and loopholes[6]), but instead for the Commission to make the broad type of conduct and activities that would be considered revenue sharing. And, then for the Commission to enforce its rules as written.

If the Commission nonetheless departs from its finding in the *Transformation Order* that a revenue sharing component is essential to avoid picking up innocent RLECs, it must explain why the same concerns no longer exist and then ensure any new rules do not sweep in non-access stimulating carriers. To address these concerns, NTCA suggested the following modifications to the Draft Order:

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[5] NTCA previously explained that the current definition of revenue sharing is more than broad enough to include the examples cited by the Commission and others in the record. *See* Letter from Rebekah P. Goodheart, counsel for NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-155, at 2 (June 4, 2019).

[6] It is not at all clear that moving to a 6:1 ratio alone and eliminating revenue sharing as a mandatory component of the definition of access stimulation will do any better in deterring access arbitrage, as presumably carriers intent upon stimulation can "manage" their traffic in a way to stay beneath the 6:1 ratio. Indeed, the carriers perhaps most likely to be sideswiped by the Commission's current proposal for ratio-based strict liability would appear to be innocent LECs not so focused on "managing" their traffic and focused instead on providing service to customers in their serving areas.

1. *The Commission Should Adopt a Rebuttable Presumption that Will Enable Carriers to Show They Are Not Access Stimulators Under a Revised Definition.*

In adopting the current access stimulation rules, the Commission allowed RLECs that were alleged to have triggered the access stimulation "an opportunity to show that they are in compliance with the Commission's rules before being required to file a revised tariff."[7] Considering the consequences of filing an access stimulating tariff, this opportunity was key to allow carriers to show that they did not have a revenue sharing agreement or had terminated such agreement and were in compliance with the rules.

Given the Draft Order's proposed changes to the definition of access stimulation, it is even more critical for RLECs to have the opportunity to show that the traffic ratio was triggered by economic development, seasonal variations, and/or changes in technology, rather than an access stimulating scheme. Absent a rebuttable presumption, the Commission could penalize real economic development in rural areas that has nothing to do with efforts to generate access traffic even if terminating traffic growth is one outcome of that development. This outcome would undermine the Commission's universal service efforts and, as noted, is in tension with the goals of the Draft Order.[8]

NTCA therefore urged the Commission to include such a rebuttable presumption in the order. In particular, the Commission should make clear that any LEC accused by an IXC or any other provider of being an access stimulator will have the opportunity to present evidence in the first instance that actual (not billed minutes) across all providers do not trigger the ratio. But, even if it does trigger the ratio, the LEC should be given the opportunity to show that the ratio is *not* attributable to access stimulation schemes to pump access revenues but can instead be explained due to factors such as seasonal activity, the physical presence of large businesses such as call centers or manufacturing plants that take orders, etc.[9] During the pendency of any dispute, which should follow tariff dispute resolution procedures, the RLEC should continue to be compensated and should not assume shifted financial responsibility for transport or tandem switching. If an IXC and RLEC are unable to resolve the dispute, the IXC could then file a complaint with the Commission to determine whether the RLEC should have refiled its tariff as an access stimulator.

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7 *Transformation Order* at 17883, ¶ 683.

8 Draft Order ¶ 4.

9 This presumption is critical because, even as the Commission would move to a simple ratio-based test for access stimulation, no IXC has full visibility into a LEC's entire call volume or traffic ratios. Thus, even if any single IXC believes a LEC has a traffic ratio of a certain level based upon that IXC's own data, such a belief on the part of that IXC is hardly dispositive because any ratios are measured based upon the LEC's total interstate access traffic and not its exchange of traffic with any one IXC.

2. The Commission Should Make Clear that a LEC Deemed to Be an Access Stimulator Is Only Financially Responsible for the Tandem Switching and Transport that It Chooses for Purposes of a Subtending End Office.

The Draft Order requires access stimulating LECs to assume financial responsibility for the transport and tandem switching associated with its traffic. NTCA urged the Commission to make clear that this responsibility *only* applies to the transport routes and switching charges associated with the tandem that the LEC itself has chosen to subtend and the transport from that tandem. Put another way, a LEC should not be responsible to assume financial responsibility should an IXC then elect a different path for routing traffic for termination to the LEC than the one defined by the LEC.

3. RLECs Should Be Subject to a Different Access Stimulation Definition Given the Structural Disincentives for Such Practices.

NTCA is not aware of any member company that, through its RLEC operations, has been alleged to remain engaged in access stimulation practices today.[10] This is not surprising given the disincentives the Commission has adopted. In adopting the access stimulation rules, the Commission discouraged RLECs from engaging in access stimulation. Among other things, NECA pool members have no incentive to engage in access stimulation because any short-term revenue gains would be shared with the entire pool and the RLEC must then exit the pool within 45 days after becoming an access stimulator.[11] Moreover, any RLEC that engages in access stimulation would reduce its Eligible Recovery and eligibility to receive CAF-ICC support. In particular, any amounts that an RLEC generates associated with access stimulation must be removed from that carrier's "Base Period Revenue" that is foundational in calculating CAF-ICC support – *not only moving forward but dating back to July 2012*.[12] The Commission thus already has rules that deter RLECs from participating in access stimulation and, in so doing, has treated RLECs and competitive LECs differently.

In addition, to the extent concerns have been raised in the record that access stimulators may migrate traffic or move operations to manage ratios or avoid tripping certain traffic volumes, such concerns do not apply to RLECs. RLECs have been providing service to their rural communities for decades, and, if anything, the industry trend has been toward consolidating switches and end

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10 Although CenturyLink has submitted a filing in the past identifying certain firms it alleges to be engaged in access stimulation, NTCA believes this filing may refer to operating names that do not necessarily target or capture RLEC-specific operations as compared to operations in competitive areas. *See* Letter from Joseph Cavender, CenturyLink, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-155, Attach., Description of Methodology at 1 (Apr. 30, 2019). To be clear, a handful of competitive LEC affiliates of NTCA members may continue to engage in access stimulation, but NTCA is not aware of any specific allegations that RLEC members themselves continue to engage in access stimulation.

11 *Transformation Order*, 26 FCC Rcd at 17882-845, ¶¶ 680-687.

12 *See* 47 C.F.R. § 51.917(c).

offices rather than the opening of new end offices. RLECs thus are not adding new end offices and concerns about migrating large volumes of traffic overnight are not applicable.

For these reasons, NTCA urged the Commission to recognize the incentives and ability of RLECs to engage in access stimulation are different from competitive LECs. Among other things, as part of any such changes, the Commission should, at a minimum: (1) given that some RLECs likely already exceed the 6:1 ratio based at least upon the NECA estimates, increase the terminating-to-originating interstate traffic ratio proposed in the Draft Order to 10:1 specifically for RLECs; and (2) adopt a second criterion that deems an RLEC to be engaged in access stimulation only if it *also* has at least 3 million minutes of interstate calls per month terminating to a given end office. Three million MOUs is well below reports in the record regarding 28 to 50 million MOUs for access stimulators.[13] This two-part test, which should be measured over three months rather than a single month to avoid triggers that reflect mere seasonal changes or fluctuations, would help to ensure that innocent RLECs are not inadvertently swept up as access stimulators due merely to a definitional change in the Draft Order as described above, while still providing more than sufficient capability to address access stimulators that tend to see much higher volumes of traffic terminating to their networks.[14]

Finally, the Draft Order should make clear that any access stimulation trigger be based upon *actual* minutes of use as measured by the LEC traversing the switch, rather than by reference to billing records. NTCA understands this is how the current rules have been applied in practice, but to avoid any potential ambiguity, the application of the test will take on increasing importance if the access stimulation definition is "relaxed." Specifically, as described above, as providers move to more efficient long distance arrangements that may involve negotiated transactions with originating IXCs for wholesale long distance or other calling arrangements, not all originated

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[13] *See* Letter from Matt Nodine, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-92, 07-135, 10-90, 18-155, at 3, 6 (Feb. 5, 2019) ("AT&T Feb. 5 Letter").

[14] For example, the Draft Order notes (at paragraph 15) that "twice as many minutes were being routed per month to Redfield, South Dakota . . . as is routed to all of Verizon's facilities in New York City." Providers seeking modifications to the definition of access stimulation have likewise cited traffic volumes far in excess of the 3 million minutes monthly threshold recommended here. *See, e.g.*, AT&T Feb. 5 Letter, at 3; Letter from Matt Nodine, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 01-92, 07-135, 10-90, 18-155, at 5 (June 12, 2019). While these providers have tended to assert that any volume threshold will be problematic because of how access stimulators can spread traffic across multiple end offices, this again should not be a concern in the case of RLECs due to the factors noted above, including most notably an RLEC's practical inability to suddenly open dozens of new end offices after decades of having very few. Indeed, even if NTCA's understanding were incorrect and if there were found to be a few RLECs still engaged in access stimulation practices (despite there being no clear record evidence of such), the relative inability of RLECs to add and open new end offices rapidly and without attention would result in any RLEC access stimulator that does exist almost certainly still exceeding the higher ratios and thresholds proposed here.

minutes may be billed and using actuals is important in evaluating whether a carrier actually triggers the ratio.

4. The Commission Should Periodically Review Any Changes to the Definition of Access Stimulation to Ensure It Keeps Pace with Marketplace Changes.

As noted above, there is some indication that terminating-to-originating ratios are increasing due to factors such as wireless substitution specifically for purposes of placing outbound long distance calls and how LECs procure and/or structure their own outbound long distance services through VoIP or other solutions. Thus, the Commission should direct the Wireline Competition Bureau to solicit comment and information from interested parties every two years on trends in the access marketplace. Such a process would allow the Commission to determine if any ratio that might be modified and adopted in this proceeding for access stimulation remains appropriate and relevant for future use, or whether it should be studied for further modification.

Please contact the undersigned if you have any questions regarding these matters.

Sincerely,

/s/ *Michael R. Romano*
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cc: Nirali Patel
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