

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

In the Matter of)	
)	
Connect America Fund)	WC Docket No. 10-90
)	
Establishing Just and Reasonable Rates for Local Exchange Carriers)	WC Docket No. 07-135
)	
Developing a Unified Intercarrier Compensation Regime)	CC Docket No. 01-92
)	

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

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TABLE OF CONTENTS

I.	The Commission Should, Consistent with Precedent, Take Targeted Action to Address Any Unreasonable 8YY Arbitrage Practices While It Collects Data and Evaluates The Impact of the Previous Reforms.....	2
II.	The Commission Must Collect and Analyze Relevant Data Before Proposing or Adopting Originating Access Reforms	5
A.	The Commission Should Determine Whether Consumers Have Benefitted from Intercarrier Compensation Reform Prior to Undertaking Any Additional Sweeping Reforms.....	6
B.	The Commission Should, as It Did in 2011, Collect and Analyze Data Regarding Carriers’ Current Minutes, Revenues, and Rates before Initiating Any Originating Access Reforms.	8
III.	Any Reforms Must Recognize That Intercarrier Compensation for 8YY Traffic Operates Differently Than Originating Access for Traditional Interexchange Calls.	10
IV.	Conclusion	12

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Windstream Services, LLC (“Windstream”), Frontier Communications Corporation (“Frontier”) and NTCA – The Rural Broadband Association (“NTCA”), collectively the “rural LECs” submit these comments in response to the Wireline Competition Bureau’s (“Bureau”) June 29, 2017 Public Notice (“Notice”) requesting that parties “refresh the record” from the 2011 Further Notice of Proposed Rulemaking “regarding 8YY access charge reform.”¹ As described below, the Federal Communications Commission (“FCC” or “Commission”) lacks sufficient data to tackle originating access, including 8YY, reform at this time. Indeed, the Commission has not evaluated whether its predictions regarding projected pass-through of savings from interexchange carriers to long distance rates has occurred, nor has it analyzed changes in migration to IP networks and the costs and burdens associated with IP interconnection. Relatedly, unlike data on terminating access that the Commission possessed in 2011, the Commission currently lacks data

¹ *Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform*, Public Notice, Wireline Competition Bureau, WC Docket No. 10-90, 32 FCC Rcd 5117 (2017) (“Notice”).

on originating access minutes, revenues, and rates, which are necessary to create an appropriate transition and to size any access replacement mechanism.

To the extent the Commission is concerned about any arbitrage or inappropriate stimulation of 8YY traffic, the Commission should, as it did in 2011, adopt targeted rules to address such behavior. And, before the Commission evaluates any broader 8YY reforms, it must recognize that 8YY calls are different from other access charges in that they impose real costs on originating carriers that are not appropriately recovered in a bill-and-keep framework.

I. The Commission Should, Consistent with Precedent, Take Targeted Action to Address Any Unreasonable 8YY Arbitrage Practices While It Collects Data and Evaluates The Impact of the Previous Reforms.

In its *2011 USF/ICC Transformation Order and FNPRM*, the Commission not only adopted a framework to reform the intercarrier compensation system but also adopted targeted rules to address access stimulation and certain other arbitrage schemes.² The Commission also began the process of reforming originating access and other rate elements by capping all interstate rates and most intrastate rates.³ In addition, the Commission sought comment on how best to go about transitioning such originating access rates to bill-and-keep and, in particular, whether 8YY calls should be treated the same as all other originating access or differently.⁴

In response to the *2011 USF/ICC Transformation Order and FNPRM*, parties encouraged the Commission to wait and evaluate the impact of terminating access reforms before initiating any efforts to reform originating access charges, including 8YY.⁵ And, the Commission prudently

² *In re Connect America Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17,663 (2011) (“*2011 USF/ICC Transformation Order and FNPRM*”).

³ *Id.* at 17,923 para. 778.

⁴ *Id.* at 18,109-12 paras. 1298-1305.

⁵ *See, e.g.*, Comments of Windstream Communications, Inc. on Sections XVII.L-R, WC Docket No. 10-90 et al., at 3-4 (Feb. 24, 2012) (observing that, at the completion of its transition for

followed such course during the past six years. The Commission now seeks to “refresh the record on 8YY access charges,” noting AT&T’s recent claim that “arbitrage and access stimulation schemes are increasingly shifting to 8YY service” as well as an *ex parte* letter filed by the Ad Hoc Telecommunications Users Committee.⁶ Specifically, the Commission seeks comments on whether it “should adopt a distinct resolution for 8YY originating traffic and how such a resolution would be implemented.”⁷

The rural LECs agree that, to the extent 8YY traffic pumping and other arbitrage schemes exist, they distort the market and harm consumers. However, unlike in 2011 when there was a proliferation of evidence of terminating access stimulation, there is little to no detailed, concrete evidence in the record to support claims that arbitrage and access stimulation schemes are increasingly shifting to 8YY service. Certainly, there is currently insufficient evidence to support a wholesale, industry-wide overhaul of charges for originating 8YY traffic, especially considering that such charges reflect the actual costs that LECs incur for 8YY database dips and to maintain the local networks that 8YY providers like AT&T are accessing to serve their customers.

Rather, to the extent that the FCC determines, after thorough investigation, that 8YY access stimulation has become sufficiently prevalent to warrant Commission action, the FCC should, consistent with precedent, take targeted action to address any such unreasonable practices. Indeed,

terminating access charges, the FCC will be in a better position to “evaluate the resulting regulatory and business environment, assess what would be an appropriate timeline for originating access reform going forward, and make any necessary course corrections to address market changes or unintended consequences of previous reforms”); Comments of Frontier Communications Corporation, WC Docket No. 10-90 et al., at 2-7 (Feb. 24, 2012) (noting that evaluation of the impacts of the *2011 USF/ICC Transformation Order*’s reforms on carrier revenues, consumer benefits, and the transition to IP networks is “a necessary precursor to any future ICC reforms”).

⁶ Notice, 32 FCC Rcd at 5117.

⁷ *Id.*

in the *2011 USF/ICC Transformation Order and FNPRM*, the Commission adopted rules to address unreasonable access stimulation by terminating carriers. In that case, LECs were entering into revenue sharing agreements with providers of high call volume operations such as chat lines, adult entertainment calls, and “free” conferencing calls to inflate or stimulate the access minutes terminated to the LEC at the expense of wireless and interexchange carriers and their customers. To address such arbitrage, the Commission adopted rules requiring LECs that enter into traffic-inflating revenue sharing agreements to reduce their interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates and authorizing interexchange carriers to file complaints if they do not.⁸

As AT&T acknowledges, the access stimulation rules have proven effective at reducing unreasonable traffic pumping activities designed to take advantage of inflated switched access termination rates,⁹ and we are working as an industry to propose similar, targeted measures intended to address specific unreasonable originating 8YY access schemes. If after an appropriate investigation the Commission concludes such stimulation exists and is material, then it should consider such targeted efforts before engaging in a process to reform all originating traffic-related charges. Doing so will enable the Commission to appropriately analyze the impact of the terminating access reforms and predictions about consumer benefits and to collect data before initiating additional reforms that could have far-reaching and unintended consequences for consumers.

⁸ *2011 USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17,874-75 paras. 657-659.

⁹ Petition of AT&T Services, Inc. For Forbearance Under 47 U.S.C. § 160(c), WC Docket No. 16-363, at 11 (Sept. 30, 2016) (observing that “arbitrage schemes are increasingly shifting to 8YY (as well as tandem-switching and transport) *as the Commission’s reforms of other elements proceed*” (emphasis added)).

Finally, the LECs making this filing are working to build an industry consensus to submit to the Commission to address 8YY arbitrage. We hope to submit a proposal in the record in the near future.

II. The Commission Must Collect and Analyze Relevant Data Before Proposing or Adopting Originating Access Reforms.

The Commission has consistently emphasized the need to develop policies based on sound evidence and data. Chairman Pai, for instance, has underscored the importance of the Commission making “well-informed, economically sound policy” that is “[g]uided by economists and data experts, using data collected by the FCC and from other sources.”¹⁰

The Commission’s recent actions to address persistent rural call completion issues exemplify this data-driven approach. There, the Commission directed the Bureau to analyze rural call completion data collected from covered providers and to prepare a report evaluating the impact of the Commission’s 2013 rules on rural call completion rates.¹¹ In June of this year, the Bureau issued its rural call completion report, concluding that there had been little improvement in providers’ reported call completion performance, but also noting concerns with the reliability of the underlying data.¹² Only after receiving and reviewing this data report did the Commission propose to take further measures to address ongoing call completion issues, and still the

¹⁰ Remarks of FCC Chairman Ajit Pai at the Hudson Institute, *The Importance of Economic Analysis at the FCC* at 4 (Apr. 5, 2017), https://transition.fcc.gov/Daily_Releases/Daily_Business/2017/db0405/DOC-344248A1.pdf; see also *In re Connect America Fund*, Notice of Proposed Rulemaking and Further Notice of Proposed Rulemaking, 26 FCC Rcd 4554, 4721 para. 536 (2011) (“*USF/ICC Transformation NPRM*”) (“[W]e emphasize that the Commission intends to use a data-driven process to analyze the proposed reforms.”).

¹¹ *In re Rural Call Completion*, Report and Order and Further Notice of Proposed Rulemaking, 28 FCC Rcd 16,154, 16,198 para. 105 (2013); *In re Rural Call Completion*, Report, 32 FCC Rcd 4980, 4981 para. 2 (WCB 2017) (“*Rural Call Completion Report*”).

¹² *Rural Call Completion Report*, 32 FCC Rcd at 4981 para. 2.

Commission seeks additional examples and data “on the prevalence and scope of rural call completion problems today.”¹³

Consistent with the data-driven approach taken in the rural call completion proceeding, the Commission should evaluate whether and to what degree consumers actually benefitted from prior access charge reductions in the form of lower long distance and wireless rates, and also collect and analyze relevant data regarding current minutes, revenues, and rates before proposing and adopting any further originating access reforms. Absent such data, the Commission is essentially making policy “in the dark,” without reference to information that would guide its way, and has no way to determine the appropriate transition, the size of such revenues or the impact of such reforms on consumers and providers. Such a result would be arbitrary and capricious.¹⁴

A. The Commission Should Determine Whether Consumers Have Benefitted from Intercarrier Compensation Reform Prior to Undertaking Any Additional Sweeping Reforms.

When the Commission adopted its terminating access reforms in 2011, it predicted that the transition to bill-and-keep would yield consumer benefits of \$1.5 billion in the form of lower prices, increased service levels at existing prices, and/or more innovative services for consumers. The Commission further estimated that the benefits of its reforms would outweigh any costs by at least 3 to 1.¹⁵ This estimate was based on a series of predictions regarding the expected revenues of price cap, rate of return, and competitive carriers; the likely pass-through rates for ICC savings

¹³ *In re Rural Call Completion*, Second Further Notice of Proposed Rulemaking, WC Docket No. 13-39, FCC 17-92, at para. 10 (rel. July 14, 2017) (public draft).

¹⁴ *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (holding that “the agency must examine the relevant data” and explain how its decision is rationally related to the facts found).

¹⁵ *2011 USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17,671 para. 14; *see also id.* at 18,295, App. I at para. 1.

between long distance carriers and local service providers, as well as between the different types of local exchange carriers and end users; and the likely percentage of actual access recovery charge (“ARC”) increases compared to allowed ARC increases.¹⁶

The Commission predicted that lower termination rates would lead to other consumer benefits as well. For example, the Commission surmised that as a result of the substantial elimination of termination charges, “a wide range of IP-calling services [were] likely to be developed and extended.”¹⁷ In addition, the Commission anticipated that the elimination of per-minute access charges would facilitate IP-to-IP interconnection and accelerate the transition to all IP networks.¹⁸

Prior to taking any other sweeping steps with respect to comprehensive reform, the Commission should analyze whether and to what extent ICC savings have actually been passed through to providers in the form of lower wholesale rates, and to consumers in the form of lower prices and better service. Similarly, the Commission should ensure that there have been no negative impacts on LECs but, in fact, such providers have been able to maintain and enhance their networks and that rural consumers have not been deprived the benefits of faster and more reliable broadband networks in contrast to the Commission’s universal service goals. Such data and resulting report, like the rural call completion report, will be a critical input when it comes to tackling originating access charges and allow the Commission to make any necessary course corrections rather than repeating any past mistakes.

¹⁶ *Id.* at 18,295-301, App. I at paras. 1-17.

¹⁷ *Id.* at 17,910 para. 750.

¹⁸ *Id.* at 17,926 para. 783.

B. The Commission Should, as It Did in 2011, Collect and Analyze Data Regarding Carriers' Current Minutes, Revenues, and Rates before Initiating Any Originating Access Reforms.

The Commission has long recognized that ICC revenues provide implicit support for incumbent LECs,¹⁹ which have allowed them to make the infrastructure investments necessary to continue providing and enhancing service to consumers in rural areas. Particularly at a time when providers are under increasing financial pressures due to changing market circumstances and regulatory funding levels, a flash cut to such support could only further jeopardize incumbent LECs' ability to make these investments in the future and undermine the agency's commitment to universal service.²⁰ To mitigate harm to consumers as a result of its terminating access reforms, the Commission in 2011 collected extensive data from incumbent LECs, including data on minutes, revenues, and local retail rates.²¹ The Commission used such data to model the impact of its terminating access reforms on each price cap carrier that submitted data and for rate-of-return carriers, to devise a sufficiently gradual transition to bill-and-keep,²² and to craft a recovery mechanism "designed to provide predictability to incumbent carriers that had been receiving

¹⁹ See, e.g., *In re High-Cost Universal Service Support*, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, 24 FCC Rcd 6475, 6569-70, 6574-75, App. A at paras. 165-166, 173-175 (2008); *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4706, 4722 paras. 501, 540; *2011 USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17,904-05 para. 738.

²⁰ *2011 USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17,938 para. 810 (recognizing the need to craft a gradual transition to "reconcile the 'implicit tension between' the Act's goals of 'moving toward cost-based rates and protecting universal service'" (quoting *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 538 (8th Cir. 1998))).

²¹ *Id.* at 17,958-59 paras. 851 n.1641, 852 n.1646.

²² *Id.* at 17,934 para. 801 (concluding that "a six-year transition for price cap carriers and competitive LECs that benchmark to price cap carrier rates and a nine-year transition for rate-of-return carriers and competitive LECs that benchmark to rate-of-return carrier rates to transition rates to bill-and-keep strikes an appropriate balance that will moderate potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes").

implicit ICC subsidies, to mitigate marketplace disruption during the reform transition, and to ensure [its] intercarrier compensation reforms do not unintentionally undermine [its] objectives for universal service reform.”²³

As the Commission acknowledged in its *2011 USF/ICC Transformation Order and FNPRM*, originating access reform presents many of the same challenges and potential pitfalls as terminating access reform. Questions the Commission seeks to answer include: What is the appropriate time-period for price cap carriers and rate of return carriers to transition to bill-and-keep? Should rate of return carriers be given additional time to transition such rates? If so, how much? How should reductions of originating access rates be structured? Should rates be reduced in equal increments over a period of years? Should the timing of rate reductions vary by type of carrier?²⁴ To answer these questions, and to ensure a sufficient glide path, transition, and recovery, the Commission must obtain up-to-date data regarding the minutes, revenues, and rates of each price cap carrier and for rate of return carriers in the aggregate.

Moreover, to the extent the Commission considers further ICC reform, it cannot do so in a vacuum and must consider the impact of other universal service reforms on providers’ ability to “maintain [and] enhance their networks while still offering service to end-users at reasonable rates.”²⁵ For example, as the Commission begins phasing out Connect America Fund (“CAF”)-ICC replacement support for price cap carriers, such carriers are already being forced to make tough choices about which network investments they can justify at present prices and levels of

²³ *Id.* at 17,962 para. 858; *see also id.* at 17,974-75 paras. 885-886 (considering the decrease in ILEC switched access minutes in setting the eligible recovery for price cap carriers), 17,977-81 paras. 892-894 (analyzing NECA data on aggregate revenues and minutes in calculating eligible recovery rate for rate-of-return carriers).

²⁴ *Id.* at 18,110 para. 1299.

²⁵ *Id.* at 17,962-63 para. 858 (quotation marks omitted).

support. If the Commission decides at the same time to reduce originating access charges, important investments in enhanced network speeds and reliability will become that much more difficult to justify, potentially undermining the Commission's universal service goals. Accurate data are necessary to ensure that any reforms do not result in such unintended consumer harms.

III. Any Reforms Must Recognize That Intercarrier Compensation for 8YY Traffic Operates Differently Than Originating Access for Traditional Interexchange Calls.

As it considers any reforms to the originating access regime, the Commission must take into account that intercarrier compensation for 8YY calls operates differently than for traditional interexchange calls.²⁶ These operational differences are a feature, not a bug, of 8YY calling, as Ad Hoc suggests in its *ex parte* letter.²⁷ 8YY calls were originally designed as a way for a merchant seeking inbound calls to pay the end-user's share of the bill for originating the call. Thus, far from being captive victims of originating access rates, as Ad Hoc suggests, 8YY providers are active drivers of 8YY calls and are compensated by the 8YY customer in order to provide a service to their customers. Ad Hoc's sleight of hand would have the perverse result of shifting to the originating customer (or its LEC provider) the entire tab for the "toll-free" service the 8YY provider and its own customer (*e.g.*, a bank call center or retail store) are purportedly offering.

Like traditional originated calls, 8YY calls have costs associated with the use of the local network on the originating side of the call. In addition, the LEC must query a toll-free database each time a customer originates a toll-free call to an 8YY provider. Yet, unlike the 8YY provider, which is compensated by the customer subscribing to the 8YY service, the originating LEC has no

²⁶ As noted above, in the *2011 USF/ICC Transformation Order and FNPRM*, the Commission asked whether it "should distinguish between originating access reform for 8YY traffic and originating access reform more generally." *Id.* at 18,111 para. 1303.

²⁷ Letter from Colleen Boothby, Counsel, Ad Hoc Telecommunications Users Committee to Marlene H. Dortch, Secretary, FCC, WC Docket 10-90 et al. (filed May 19, 2017).

relationship with that bank or retail store and therefore has no way to be compensated by that customer for the use of the LEC's network and the costs it incurs to set up the call.²⁸ LECs originating calls should not be forced to provide these services to the 8YY provider without compensation, nor should the end-user customer be told he or she is making a toll-free call but then get stuck with the bill. Doing so would constitute an un-Constitutional taking, depriving LECs of just compensation for the service provided²⁹ and call into question the entire premise of toll-free calling as a "free" service to consumers.

²⁸ See Windstream Comments on AT&T Petition for Forbearance, WC Docket No. 16-363, at 2-3 (Dec. 2, 2016).

²⁹ See, e.g., *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 310 (1989); see also *In re Revision of the Commission's Rules to Ensure Compatibility with Enhanced 911 Emergency Calling Systems*, Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 18,676, 18,722 para. 89 (1996) ("No party disputes the fundamental notion that carriers must be able to recover their costs.").

IV. Conclusion

For the foregoing reasons, the Commission should, to the extent there is actual evidence of 8YY traffic pumping or other arbitrage schemes, adopt targeted rules to address such an unreasonable practice rather than attempt a wholesale reform of originating access charges at this time. However, to the extent the Commission decides to evaluate reforms to originating access compensation, it must take an evidence-based approach that examines models and evaluates the impact of reforms on carriers and consumers. Any reforms must also account for the costs that LECs incur for originating calls and 8YY database dips.

Respectfully submitted,

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