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Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, NW
Portals II, Room TW-A325
Washington, DC 20554

Ex Parte Submission

Re: *Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135; Connect America Fund, WC Docket No. 10-90; Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage, WC Docket No. 18-155.*

Dear Ms. Dortch,

I am writing to address certain questions raised by the Commission Staff in recent meetings regarding access stimulation, and to urge the Commission to act promptly to either complete its stated goal in the 2011 *Transformation Order* of finishing the transition of switched access traffic to bill and keep, or, in the context of access stimulation traffic, to adopt only “Prong 1” in the Commission’s pending NPRM on access stimulation.¹

In this rulemaking proceeding, the Commission proposes to update its rules in order to “Eliminate Access Arbitrage.” To achieve this long-awaited goal, the Commission needs to address the fundamental causes of access stimulation. Prong 1 addresses in part the underlying defects in the Commission’s rules that allow access stimulation schemes to continue, and if adopted, it would benefit consumers, ensure reasonable rates, and serve the public interest.

By contrast, the Commission should not adopt Prong 2, which would not address the underlying causes of access stimulation. In fact, enacting Prong 2 would allow these schemes to continue to flourish, because access stimulators would simply chose to operate in even more remote areas where direct connections would be either prohibitively expensive or infeasible. As a consequence, Prong 2 would be ineffective in curtailing the harms arising from access stimulation. Worse yet, Prong 2 would exacerbate the “whack-a-mole” problem that has allowed these schemes to fester for more than a decade: new direct connections would be established, but the access stimulation traffic would then be shifted to different locations, thereby stranding the new direct connection facilities established under Prong 2. Such a result would help only the access stimulators, lead to further disputes, and harm legitimate carriers and consumers.

¹ NPRM, *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, 33 FCC Rcd. 5466 (2018) (“NPRM”).

* * * *

In order to evaluate the likely effectiveness of the Commission’s proposed rule changes to “Eliminate Access Arbitrage,” it is important to understand the reasons why access stimulation continues to thrive, and to understand how past efforts to curtail access stimulation have proven ineffective.

I. ACCESS STIMULATORS EXPLOIT THE FLAWS IN THE ICC SYSTEM.

The underlying cause of access stimulation is the Commission’s intercarrier compensation regime, which remains flawed and can be exploited: an access stimulator generates hundreds of millions of minutes of traffic that cost very little to terminate, but under the Commission’s rules, the access stimulator can tariff and potentially collect substantial amounts of access revenues based on rates that are not adjusted to reflect the very low costs of transporting the traffic.² Making matters worse, wireless and interexchange carriers (“IXCs”) must purchase the access stimulators’ tariffed services, and IXCs are precluded from passing on the higher access costs associated with that traffic to the subset of their customers that cause them.³ Consequently, IXCs and wireless carriers—and the Commission—cannot rely on free market principles to avoid these schemes or ensure that the rates are reasonable.⁴

² See *Transformation Order*, 26 FCC Rcd. 17663, ¶¶ 9, 33, 648-49, 656-57 (2011) (“the combination of significant increases in switched access traffic with unchanged access rates . . . results in inflated profits”); see also Notice of Proposed Rulemaking, *Connect America Fund*, 26 FCC Rcd. 4554, ¶¶ 494-508 (2011) (explaining that ICC system “is broken and needs to be fixed”). Under the current rules, access stimulators benchmark against the lowest-priced, price cap ILEC in the state, but these rates are too high as applied to access stimulation traffic, and do not adjust to reflect the economic costs of the routing access stimulation traffic, which are minimal.

³ See, e.g., *Transformation Order*, ¶ 745 n.1306 (the existing ICC system is flawed because it allows carriers to shift costs and thereby prevents accurate price signals, which occurs “by virtue of the interrelationship of the tariffed access charge regime, mandatory interconnection and policies against blocking or refusing to deliver traffic and statutory requirements for nationwide averaging of long distance rates”).

⁴ See *id.*; *2007 Call Blocking Declaratory Ruling*, 22 FCC Rcd 11629 (2007) (no blocking permitted); *Seventh Report and Order*, 16 FCC Rcd. 9923, ¶ 31 (2001) (geographic de-averaging rules prevent IXCs from passing on excessive access costs to the callers that cause them); *Transformation Order*, ¶ 663 (same). As the Commission has recognized, where “the buyer must buy, . . . market forces are rendered ineffective as a means of achieving an efficient price.” *Implementation of the Pay Telephone Reclassification and Compensation Provisions*, 14 FCC Rcd. 2545, ¶ 65 (1999).

II. ACCESS STIMULATION INDISPUTABLY HARMS CONSUMERS AND THE PUBLIC INTEREST.

Regulators—including this Commission—and courts have been unanimous in condemning access stimulation as an unlawful and unreasonable “scheme” that has many “adverse effects.”⁵ Access stimulation “ultimately costs consumers hundreds of millions of dollars.” *Transformation Order*, ¶¶ 649, 664. That is because the inflated access revenues paid by IXC’s and wireless carriers are ultimately borne by ordinary consumers of long distance service—these consumers pay implicit subsidies so that the subset of users of the access stimulators’ calling services can receive those services for free or at reduced costs. *Transformation Order*, ¶ 663 (“all customers of these long-distance providers bear these costs, even though many of them do not use the access stimulator’s services, and, in essence, ultimately support businesses designed to take advantage of today’s above-cost intercarrier compensation rates.”).⁶

Further, access stimulation harms legitimate providers of conference calling services, because they cannot fairly compete against the nominally “free” calling services offered by access stimulators and subsidized by ordinary consumers. *Transformation Order*, ¶ 665. Access stimulation is also harmful because it has led to substantial litigation disputes, in courts, at state commissions, and at the Commission—almost all of which have been resolved unfavorably to the access stimulators.⁷

⁵ *E.g.*, *Transformation Order*, ¶¶ 9, 33, 648-49, 656-57, 662-66.

⁶ Some users of the free conferencing service have urged the Commission to retain the current system, claiming that the free calling services benefit public interest groups. These claims are misdirected. The Commission has long fought to remove implicit subsidies from its ICC system. *E.g.*, *Transformation Order*, ¶ 747 (noting the “direction from Congress in the 1996 Act that the Commission should make support explicit rather than implicit”). If the Commission were to conclude that some users were entitled to free conferencing services, those services should be funded by explicit subsidies, not implicit subsidies generated via access stimulation schemes. *Cf.* *Transformation Order*, ¶ 666. Indeed, access stimulation is a highly inefficient way to fund free conferencing services (even assuming, *arguendo*, that such funding is a proper policy goal). Access stimulators do not exclusively support free conferencing service for public interest groups—in fact, there is little indication in the record that such groups are the primary target of free calling providers. Many access stimulators continue to partner with providers of free radio services and explicit adult chat lines—and the public interest strongly counsels against either explicit or implicit subsidies for such services. Consequently, there is no reason why the Commission should continue to endorse rules that force ordinary long distance customers to implicitly subsidize users of such services.

⁷ *See also Transformation Order*, ¶ 663 (access stimulation “inefficiently divert[s] capital away from more productive uses”).

III. ACCESS STIMULATION CONTINUES TO THRIVE BECAUSE THE COMMISSION HAS NOT ADDRESSED THE REMAINING FLAWS IN THE ICC SYSTEM, AND ACCESS STIMULATORS HAVE ADAPTED THEIR SCHEMES TO EXPLOIT THOSE FLAWS.

Despite all of the harms of access stimulation, all of the litigation, and all the regulators' efforts to combat the problem, access stimulation continues to thrive today. *NPRM*, ¶ 1 (“arbitrage schemes continue to evolve and flourish”). This is in part due to the unscrupulous nature of the most active access stimulation LECs, as well as their conference, chat, and radio provider partners. However, it is also because, all too often, many of the orders and rules that condemned access stimulation were issued only after long delays that emboldened traffic pumpers.⁸ Moreover, when regulators have acted in the past, the rules and orders in many cases failed to address the root causes that facilitate access stimulation schemes. In response to litigation and regulatory efforts to curtail or stamp out these practices, access stimulators have continually adapted their operations to take advantage of the flaws in the intercarrier compensation system—and they will be able to do so in the future, so long as those flaws continue to exist.

A. The Commission’s Initial Efforts To Fight Access Stimulation By Small ILECs Led To Skyrocketing Levels of Access Stimulation Abuse by CLECs.

Access stimulators have revised their schemes after virtually every adverse decision by courts or regulators. For example, when access stimulation began significantly ramping up in 2006 and 2007, it was primarily small, rate-of-return LECs that were engaged in access stimulation, and they typically charged exorbitant end office switching rates.⁹ The end office rates these LECs billed were developed for use by rural carriers that typically handled very small volumes of traffic, and their access stimulation schemes resulted in these LECs stimulating tremendous volumes of traffic, which resulted in significantly higher access revenues.¹⁰

⁸ Indeed, some of the earliest court cases relating to access stimulation remain pending today. At the Commission, the first substantial traffic pumping complaint case took about five years to resolve—primarily due to significant misconduct on the part of the access stimulation LECs and their counsel, which submitted fraudulent evidence to the Commission, requiring substantial additional proceedings. *See, e.g., Qwest Commc’ns v. Farmers*, 23 FCC Rcd. 1615 (2008), *further recon.*, 24 FCC Rcd. 14801 (2009) (“*Farmers III*”).

⁹ *See, e.g., Qwest Commc’ns Corp. v. Farmers & Merchants Mut. Tel. Co.*, File No. EB-07-MD-001 (filed May 2, 2007); *AT&T Corp. v. Superior Tel. Coop., et. al.*, Case No. 04-07-cv-00043-JEG-RAW (S.D. Ia., filed Feb. 20, 2007); *Sprint Commc’ns Co. v. Superior Telephone Cooperative, et. al.*, Case No. 04-07-cv-00194 (S.D. Ia., filed May 7, 2007). The end office switching rates billed by these LECs were often as high as 3 to 4 cents per minute.

¹⁰ *See NPRM, Establishing Just and Reasonable Rates for Local Exchange Carriers*, 22 FCC Rcd. 17989, ¶¶ 11 n.37 (2007) (“*2007 NPRM*”) (noting that billed minutes of use and/or revenue increased by 1000 times in just a few months).

The Commission partially responded to these schemes by suspending the tariffs of numerous rate-of-return LECs who appeared poised to begin engaging in access stimulation.¹¹ Further, because the rates charged by rate-of-return LECs ultimately needed to be adjusted in part to account for the increased volumes, some rate-of-return LECs abandoned their access stimulation practices, or engaged in elaborate sham arrangements so that those schemes could be continued.¹²

Ultimately, however, neither the Commission's rate-of-return rules nor its tariff investigation orders halted or even slowed the overall growth of access stimulation. Instead, the access stimulators adapted their practices, and they formed CLECs to supplant rate-of-return LECs as the primary type of carrier engaged in access stimulation schemes.¹³ In most cases, these "CLECs" had little or no actual end user customers, and did business almost exclusively with providers of free calling services. The bottom line is that these "CLECs" have not been operated to compete in providing local services, but have been operated almost entirely to exploit the Commission's rules by engaging in access stimulation schemes.¹⁴

Once CLECs became the primary providers of access stimulation services, access stimulation skyrocketed. Unlike rate-of-return LECs, CLECs could tariff and bill excessive end office charges indefinitely—and they often abused the Commission's rural exemption for CLEC access charges, or exploited the CLEC access rules by benchmarking their tariffed rates against very small, rural ILECs. The access stimulation CLECs did so even though they did not actually compete against such small rural LECs, and their business models bore no resemblance at all to the business models of legitimate small rural LECs. By exploiting the Commission's ICC system, these CLECs in short order dominated access stimulation, accounting for about 9 billion minutes

¹¹ *July 1, 2007 Annual Access Charge Tariff Filings*, 22 FCC Rcd. 11619 (2007). In its order, the Commission allowed these LECs to avoid investigation of their rates via various options, including re-joining the NECA pool or placing limitations in their tariffs to preclude increases in traffic volumes. None of these LECs chose to defend their rates. *Investigation of Certain 2007 Annual Access Tariffs*, 22 FCC Rcd. 21261 (2007).

¹² *See, e.g.*, 47 C.F.R. § 61.38; *see also AT&T Corp. v. All American*, 28 FCC Rcd. 3477 (2013) (sham arrangement in which CLECs billed for charges previously billed by an ILEC, allowing perpetuation of an access stimulation scheme that would have ended) (subsequent history omitted).

¹³ *See, e.g., Connect America NPRM*, ¶ 657; Comments of AT&T Inc., WC Docket No. 07-135, at 3 (Dec. 17, 2007) (reporting that more than three-fourths of traffic pumping minutes were stimulated by CLECs rather than ILECs); Letter from Brian Benison, AT&T, to Marlene Dortch, FCC, WC Docket No. 07-135 (Dec. 3, 2009) ("AT&T Dec. 3 2009 *Ex Parte*").

¹⁴ *See, e.g., All American*, ¶ 25 (three access stimulators "had no intention at any point in time to operate as *bona fide* CLECs or provide local exchange service to the public at large"); *In re Great Lakes Commc'ns Corp.*, No. SPU-2011-004, **12-13 (Ia. Utils. Bd. Mar. 30, 2012) (until recently, the access stimulation CLEC had "no outside plant or facilities. [It] has never provided access to [a] local exchange network and no person is able to make an outbound call or place a local exchange call").

of use annually, with an estimated cost to IXCs and consumers of several hundred million dollars per year.¹⁵

Contrary to these CLECs' claims, the money they collected via indirect payments from ordinary long distance consumers was not used to bolster rural broadband services.¹⁶ In fact, usually between 50% to 75% of the fees collected were immediately turned over, under secret revenue sharing arrangements, to providers of conferencing, adult chat, radio, and other free calling services. In short, the access stimulation LECs for years have abused the Commission's broken ICC system, and ordinary customers of long distance annually have paid hundreds of millions of dollars more, so that access stimulation LECs and their calling provider partners could profit.

B. The Commission Delayed Taking Action To Reform Its Rules, And Its Enforcement Actions, Though Appropriately Decided In Large Part, Have Done Little To Deter Access Stimulation.

Although the Commission had commenced an NPRM in 2007 in which it concluded that rule changes were necessary to fight access stimulation—and which acknowledged that traffic pumping by CLECs “raise[d] unique concerns,” 2007 NPRM, ¶¶ 1, 11-12, 34—the Commission did not act on the rulemaking for several years. Instead, the Commission decided several complaint cases—which often arose because courts referred many cases against access stimulation LECs to the Commission under the primary jurisdiction doctrine.¹⁷ Virtually all of those decisions were unfavorable to access stimulation LECs.

Notwithstanding these Commission adjudications, access stimulation LECs did not curtail their traffic pumping schemes.¹⁸ Instead, they again revised them in order to circumvent the

¹⁵ *Transformation Order*, ¶ 664; AT&T Dec. 3 2009 *Ex Parte* at 3-6.

¹⁶ Nor is it accurate, as some access stimulators have claimed, that long distance carriers have actually profited from access stimulation schemes. To the contrary, the IXCs and their customers are the primary targets of such schemes, and the access payments they make are used improperly to fund such schemes. Further, the “analyses” offered by the access stimulators that purport to show IXC profits on calls routed to access stimulation CLECs are riddled with errors. Indeed, if access stimulation benefitted IXCs, it is difficult to believe that the IXCs would have engaged in a decade-long campaign to end the practice. And, in any event, the Commission in 2011 stated that IXCs' revenues are “not at issue”—and that the problem is that access stimulation LECs are charging unreasonable rates. *Transformation Order*, ¶ 663 n.1090.

¹⁷ *Northern Valley Commc'ns v. Sprint Commc'ns Co.*, 2012 WL 997000, *3 (D.S.D. Mar. 23, 2012); *Qwest Commc'ns v. Tekstar Commc'ns*, 2010 WL 2772442, *3 (D. Minn. 2010) (both collecting some of the numerous cases referred to the Commission).

¹⁸ Even in instances where a particular access stimulation LEC has decided to exit the business, there has always been a substitute ready to take over the business. In fact, access stimulation LECs have a sort of competition among themselves: the LECs that are able to charge and collect the highest access revenues, and in turn offer the highest payments to free calling providers, are able to attract the most traffic. In other words, until the Commission acts to prohibit this abuse of its

Commission’s new orders. When the Commission held, for example, that access stimulation LECs violated their access tariffs by failing to route calls to “end users,” *Farmers III*, 24 FCC Rcd. 14801, ¶¶ 10-24, the access stimulation CLECs sought to revise their tariffs to eliminate any “end user” requirement.¹⁹ Then, when the Commission held that the tariffs of access stimulation LECs must have language requiring payment for telecommunications service by an end user,²⁰ many access stimulation LECs circumvented this requirement by “charging” fees but then automatically refunding them, or by requiring payment for services that were not for telecommunications services.²¹

C. *The Commission’s 2011 Rules Eventually Reduced Abuse Of End Office Charges By Moving To Bill-And-Keep For Those Charges, But Did Not Curtail Access Stimulation Because Access Stimulators Merely Adjusted Their Schemes To Exploit Originating Access And Tandem And Transport Charges.*

In 2011, the Commission issued a new NPRM on intercarrier compensation reform, including new rules designed to address access stimulation. *Connect America NPRM*, ¶¶ 635-77. The Commission acknowledged that the “ability to engage in this arbitrage arises from the current

ICC system, taking action against a single access stimulation LEC (or some subset of them, or the intermediate providers they use) will be ineffective in curtailing the practice. Absent reform of the rules that allow an access stimulator to force above-cost access payments, there will always be companies willing to exploit those rules to the detriment of ratepayers.

¹⁹ In a single footnote in one order, the Commission suggested in dicta that an access stimulation LEC “may not be precluded from receiving any compensation at all for the services it has provided,” notwithstanding its violations of law. *Farmers III*, n.96. While the Commission subsequently scaled back this comment, *see, e.g., AT&T v. All American*, 30 FCC Rcd. 8958, n.50 (2015), this single footnote has emboldened access stimulation LECs, and (i) has led to substantial litigation in courts and at the Commission as to whether the Commission’s rules precluded access stimulation LECs from pursuing state law quasi-contract claims and (ii) encouraged access stimulators to present patently absurd damages claims based on this footnote—sometimes exceeding their already-excessive tariffed charges by twenty times. A court of appeals has now definitively ruled that such claims by access stimulation LECs are pre-empted by the Commission’s rules. *CallerID4U v. MCI Commc’ns*, 880 F.3d 1048 (9th Cir. 2018). These disputes further underscore that access stimulators will seek to exploit any loophole, regardless of how small.

²⁰ *E.g., Qwest Commc’ns v. No. Valley*, 26 FCC Rcd. 8332, ¶¶ 7-9 (2011), *aff’d*, *No. Valley v. FCC*, 717 F.3d 1017 (D.C. Cir. 2013).

²¹ *E.g., AT&T Corp. v. Great Lakes Comm. Corp.*, Legal Analysis, at 24-32, File No. EB-16-MD-001 (filed Aug. 16, 2016) (explaining that an access stimulation LEC circumvented the Commission’s requirement that an end user pay the LEC a fee for telecommunications services by billing fees for services that are not telecommunications); *see id.* Reply Legal Analysis at 20-32 (filed Oct. 16, 2016).

access charge regulatory structure,” and concluded that it “imposes undue costs on consumers.”²² As in past cases, the response was nearly universal (apart from some access stimulation LECs) in condemning access stimulation.²³ Further, many industry participants favored mandatory detariffing or other similar rules—because they recognized that access stimulation LECs had previously circumvented other regulatory rules and orders, and because detariffing would reduce litigation and the other costs associated with access stimulation.²⁴

The Commission acted promptly in response to this NPRM, and later in 2011, it issued new rules that addressed access stimulation by both rate-of-return LECs and CLECs. *Transformation Order*, ¶¶ 656-699. As discussed above, the Commission determined that access stimulation harmed consumers and competition, and it rejected the claims, made by some access stimulation LECs, that the practice “offered economic development benefits,” including expanded broadband services in rural or Tribal areas. *Id.* ¶¶ 662-66.

Unfortunately, despite the Commission’s findings that access stimulation was a “scheme” that harmed consumers, and had no offsetting benefits, the Commission acknowledged that its new rules would not “eliminate the potential for access stimulation.” *Id.* ¶ 690; *see id.* ¶ 692. Under the new rules, CLECs engaged in access stimulation could continue to tariff access services—albeit at rates that were often lower than they traditionally had tariffed.²⁵ The Commission

²² *Id.* ¶ 636 (“Although the conferencing or adult chat lines may appear as ‘free’ to a consumer of these services, the significant costs of these arbitrage arrangements are in fact borne by the entire system as long distance carriers that are required to pay these access charges must recover these funds from their customers”).

²³ Comments in favor of rules curtailing access stimulation were favored by long distance and wireline carriers, wireless carriers, cable operators, state regulatory commissions, industry associations, the largest telecommunications union, and legitimate providers of conference calling service. *See* AT&T Reply Comment at 4-5 (citing comments), WC Docket 10-90, *et al.* (filed Apr. 18, 2011).

²⁴ *See, e.g.*, AT&T Reply Comments at 6-7 & nn.15-18; Comments of Texaltel, at 5 WC Docket 10-90, *et al.* (filed Apr. 1, 2011) (“As long as the underlying incentives exist, crafty companies will find ways to profit from it”); Comments of US Telecom., at 11-12, WC Docket 10-90, *et al.* (filed Apr. 1, 2011) (“Mandatory detariffing would limit the drain on scarce Commission resources and comport with the access pumpers’ argument that the market can address the rates”); Comments of T-Mobile, at 8-9, WC Docket 10-90, *et al.* (filed Apr. 1, 2011); Comments of Sprint, at 20-21, WC Docket 10-90, *et al.* (filed Apr. 1, 2011).

²⁵ The Commission required access stimulation LECs to benchmark against the lowest-priced price cap LEC in the state in which they operated, rather than against a small rural LEC or by use of the rural exemption. *See* 47 C.F.R. § 61.26(g). This rule change did eliminate the abuses of the rural exemption and precluded the improper use of rural rates for end office charges on access stimulation traffic. But it did little to address the problems caused by excessive tandem and transport rates, as explained below. Further, in a separate part of the *Transformation Order*, the Commission adopted a glide path, in which terminating end office access services were ultimately transitioned to zero. *See id.* ¶¶ 800-01. The reduction in end office charges, as applied to CLECs

apparently believed that its new rules would “curtail” access stimulation, and that additional “intercarrier reforms we adopt should resolve remaining concerns.” *Id.*

As with prior regulatory efforts, however, access stimulation LECs responded to the new rules not by curtailing their access stimulation schemes, as the Commission had hoped. In fact, the record in this proceeding establishes that the level of access stimulation today remains at about that same level that existed before the *Transformation Order*.²⁶ Rather, as before, these LECs modified their operations to exploit the remaining arbitrage opportunities in the ICC system, including originating access and those terminating tandem and transport charges that were not entirely transitioned to a default bill-and-keep regime. *See, e.g., NPRM*, ¶ 2.²⁷

As AT&T explained in its recent *ex parte*, in light of the new rules, access stimulators are able to continue to engage in such schemes by exploiting tandem and transport charges: either directly, through excessive and unnecessary tariffed transport rates, or via contractual arrangements where the price of transport is still excessive but offered at a slight discount from the tariff rates of intermediate transport providers. *See AT&T Feb. 5 Ex Parte*, at 5-6.

Because the focus of most cases was on the very high end office rates charged by most access stimulators, the tandem and transport charges billed on access stimulation traffic received somewhat less attention in prior years.²⁸ However, it is now clear that tandem and transport

engaged in access stimulation traffic, unquestionably benefited consumers. That said, the glide path allowed access stimulation LECs to continue to collect excessive end office access charges for several years after 2011. Moreover, the rules continued to embolden access stimulation LECs, and they even sought to rely on the *Transformation Order* as endorsing and “expressly legitimiz[ing]” access stimulation. *E.g., AT&T v. All American*, 29 FCC Rcd. 6393, ¶ 17 (2014); *Sprint v. Crow Creek*, 121 F. Supp. 2d 905, 923-24 (access stimulation LEC “argues that, as a matter of law,” the Commission in its *Transformation Order* “declared the practice of access stimulation to be lawful”).

²⁶ Compare *supra* note 15 with, *e.g.*, Ltr. of M. Nodine, AT&T, to Marlene Dortch, FCC, WC Docket Nos. 01-92 *et al.*, (Feb. 5, 2019) (“AT&T Feb. 5 *Ex Parte*”). AT&T Feb. 5 *Ex Parte* (showing that access stimulators have consistently handled around 8-9 billion minutes of use annually).

²⁷ The Commission’s separate proceeding on 8YY traffic is designed to address some of the most prevalent abuses of originating access charges, and this letter does not address those issues.

²⁸ Notably, in 2012, the Commission found unreasonable a scheme by certain rural incumbent LECs to abuse mileage-based transport charges, pursuant to which IXCs were charged twice for the same service. *See AT&T Corp. v. Alpine Commc’ns*, 27 FCC Rcd. 11511 (2012), *recon denied*, 27 FCC Rcd. 16606 (2012). Despite this clear precedent, however, numerous CLECs engaged in access stimulation began double-billing AT&T, arguing that the *Alpine* decision was not applicable to them. *See, e.g., Great Lakes Commc’n Corp. v. AT&T Corp.*, 2015 WL 12551192, **20-21 (N.D. Iowa June 8, 2015). The access stimulation LECs’ abuse of transport charges—even in the face of adverse Commission precedent—again underscores their willingness to exploit any type of loophole in the Commission’s ICC system.

charges billed on access stimulation traffic are—and have been for a long period—unreasonable and excessive, and they result in massive implicit subsidies being paid by long distance customers to access stimulators, their partners, and intermediate providers.

For example, access stimulation LECs operating in geographically large states like South Dakota are able to place their facilities up to 200 or more miles away from the IXCs' points of presence and bill over 0.6 cents per minute in distance sensitive mileage charges.²⁹ Such high mileage charges are also routine in Iowa: with respect to access stimulation traffic in that state, IXCs either are billed the tariffed rate filed by Iowa Network Services (“INS”), or can negotiate an agreement with an access stimulation LEC (or a least cost router who has an arrangement with an access stimulator). INS's tariffed rate for years was above 0.8 cents per minute, and thus IXCs and wireless carriers—and ultimately consumers—paid enormous price premiums for transport of Iowa-bound traffic to INS and/or access stimulation LECs.³⁰

In total, AT&T estimates that the current annual cost of access stimulation to IXCs (and customers)—which today is mostly comprised of tandem and transport charges—is about \$80 million. AT&T Feb. 5 *Ex Parte*, at 4.

Moreover, ongoing access stimulation schemes continue to lead to costly intercarrier disputes that waste the resources of carriers, regulators and courts. The Commission, courts, and IXCs have invested tremendous resources in litigating the high transport charges billed on access stimulation traffic by carriers like INS, Northern Valley (NVC), Great Lakes, and others. Further, collateral disputes have also wasted scarce Commission resources: one access stimulation LEC had the audacity to obtain universal service funding for its access stimulation lines, and even

²⁹ See Feb. 5, AT&T *Ex Parte* at 5. As discussed below, prong 2 of the Commission's rules would only incentivize access stimulators to extend these long distances even further.

³⁰ In 2005, before access stimulation became rampant, INS reported call volumes of about 954 million minutes of use, and annual access revenues of about \$9.8 million. Thereafter, its traffic volumes and revenues skyrocketed, reaching a peak of 3.8 billion minutes and \$31.8 million in annual revenue. See Formal Compl. of AT&T, *AT&T Corp. v. INS*, ¶ 40, Proceeding No. 17-56 (June 8, 2017) (citing INS public rate filings) Assuming, *arguendo*, that 2005 is the appropriate baseline and that INS's non-access stimulation traffic remained steady (although the evidence show it has been steadily declining), a conservative estimate of the minutes and revenues associated with INS transported access stimulation traffic from 2006 to 2015 is 17.9 billion minutes of use, resulting in billed revenues of \$128 million dollars.

The amounts that IXCs have paid directly to access stimulating CLECs (or least cost routers) pursuant to contracts designed to bypass intermediate transport providers like INS is unknown. However, evidence developed in AT&T's complaint case against one access stimulation CLEC (Great Lakes Communication Corp.) showed that GLCC obtains an enormous price premium for transporting traffic directly to its end office switch, and was able to pay annually tens of millions of dollars to its conference and chat partners pursuant to revenue sharing arrangements. See Supp. Br. of AT&T Corp., at 1-9, *AT&T Corp. v. Great Lakes*, No. 16-170, File No. EB-16-MD-001 (filed Jan. 10, 2017); *id.*, Formal Compl., ¶ 42 (filed Aug. 16, 2016) (detailing the revenue sharing agreements and payments made thereto).

challenged before the Commission the USAC’s decision requiring the return of those funds.³¹ In other instances, parties and the Commission Staff have been required to devote substantial resources to investigating call completion issues on calls to access stimulation LECs—even though AT&T has not restricted calls to such carriers, and the root cause of any such issues has been caused in virtually all instances by the access stimulation LEC, its free calling provider partner, or the LEC’s intermediate transport provider, not the IXC.

IV. THE COMMISSION’S PROPOSED RULE CHANGES NEED TO BE EVALUATED IN LIGHT OF PAST EFFORTS TO ADDRESS ACCESS STIMULATION AND THE INCENTIVES TO CIRCUMVENT THOSE RULES.

The Commission’s proposed updates to its rules must be evaluated based on this backdrop, and the most fundamental point is that access stimulators will continue to try and exploit any remaining flaws in the ICC system as long as those flaws continue to exist. Consequently, until the Commission completes ICC reform, updated rules designed to “[e]liminate [a]ccess [a]rbitrage” must be written to prevent exploitation of the existing flaws.

A. *The Commission Should End The Ability of Access Stimulators To Force IXCs To Pay Transport Costs That Are Above the Reasonable Costs For Efficient Transport of Large Traffic Volumes In Urban Areas.*

The best solution would be to eliminate the above-cost tariffed charges that access stimulating LECs use to fund the access stimulation schemes. As the Commission has consistently noted, these arbitrage schemes are fueled by the availability of tariffed access charges that are well above the reasonable costs of the call routing services performed.³² Notably, when the Commission moved terminating end office access charges to a default bill-and-keep regime in mid-2018, that action has been (so far) successful in limiting further abuses of terminating end office charges. All of the benefits of bill-and-keep that the Commission identified in 2011 (*Transformation Order*, ¶¶ 740-59) apply equally to tandem and transport access charges on access stimulation traffic—including that it would likely curtail these schemes that harm consumers and competition, *id.* ¶ 752 (“Bill-and Keep Eliminates Arbitrage”).

The Commission’s conclusions in 2011 that the cost of terminating a call “is very nearly zero” and that, as a consequence, detailed proceedings to set a positive rate would impose unnecessary and “significant regulatory costs,” *Transformation Order*, ¶¶ 743, 753, apply fully to access stimulation traffic. As AT&T explains in the attached responses to the Staff’s questions, a

³¹ *Request for Review by Aventure Comm. Tech., LLC, of a Decision of the Universal Service Administrator*, 29 FCC Rcd. 9536, ¶¶ 3–6 (2014) (upholding USAC decision to require return of USF funds). The CLEC has petitioned the full Commission for review of the Staff decision, but the Commission has not yet acted on that petition.

³² *See Transformation Order*, ¶ 752 (“Intercarrier compensation rates above incremental cost have enabled much of the arbitrage that occurs today Rates today are determined by looking at the average cost of the entire network, whereas a bill-and-keep approach better reflects the incremental cost of termination, reducing arbitrage incentives”).

reasonable rate for transporting large volumes of traffic (*i.e.*, 30 to 50 million minutes per month, which is not atypical for access stimulators, *see* AT&T Feb. 5 *Ex Parte* at 3) from an IXC POP to an end office in an urban area is extremely low—no more than around \$0.0001/minute. *See* App. A (AT&T Resp. to Question 1).

Even though the incremental cost of termination” for access stimulation traffic “is extremely small,” *id.* ¶ 752, the rates and total amounts currently billed under tariffs for switched tandem and transport services on access stimulation traffic are in almost all cases far, far higher. For years, INS had a tariffed rate of \$0.00896/minute—and although that rate has been found to be unreasonable, the most recent rate that INS has tried to justify (*i.e.*, \$0.00296/minute) is still far in excess of the \$0.0001/minute that would be the maximum reasonable charge for the large traffic volumes at issue. Likewise, under NVC’s tariff, pursuant to which it seeks to bill about 192 miles of transport, the effective tariff rate that for transport service is \$0.006036/minute.

These rates are so high because access stimulators have the perverse incentive to force IXCs to use the *most inefficient* and *most costly* transport routes, so as to generate the access revenues that fund the calling services and the schemes that support them.³³ But there is no legitimate reason for access stimulators to locate their end office switches and conference/chat equipment in remote, rural areas—that has occurred only because those locations most effectively enable the access stimulator to exploit the Commission’s ICC rules. The fact is that, if the access stimulators were operating in a competitive market, and faced normal economic pressures to reduce their costs, they would locate in urban areas, and the costs they would incur to transport traffic to their customers would be extremely low, as described above and shown in the attached responses to the Staff’s questions.

In these circumstances, there is no economic or policy justification for requiring IXCs to pay tariffed tandem and transport charges on access stimulation traffic. The true economic cost of transporting this traffic is *de minimus*, and the access stimulator can and should bear these minimal costs itself, or if necessary seek to recover them from its calling service provider partners (which could in turn recover them from the users of the calling services).³⁴ In no event should IXCs and

³³ *See Transformation Order*, ¶ 745 (“the subscription decisions of the called party play a significant role in determining the cost of terminating calls to that party. A consequent effect of the existing intercarrier compensation regime is that it allows carriers to shift recovery of the costs of their local networks to other providers because subscribers do not have accurate pricing signals to allow them to identify lower-cost or more efficient providers. By contrast, a bill-and-keep framework helps reveal the true cost of the network to potential subscribers by limiting carriers’ ability to recover their own costs from other carriers and their customers, even as we retain beneficial policies regarding interconnection, call blocking, and geographic rate averaging.”) (footnotes omitted).

³⁴ *See, e.g., Transformation Order*, ¶ 746 (“We reject claims that bill-and-keep does not allow for sufficient cost recovery. In the past, parties have argued that a bill-and-keep approach somehow results in ‘free’ termination. But bill-and-keep merely shifts the responsibility for recovery Such an approach provides better incentives for carriers to operate efficiently by better reflecting those efficiencies (or inefficiencies) in pricing signals to end-user customers”); *id.* n.1309 (“The

their customers be required to pay tariffed rates for tandem and transport on access stimulation traffic that far exceed the actual costs that would be incurred if the transport were provided in a cost-effective, efficient manner.

For these reasons, the most effective and most simple solution to access stimulation is to eliminate tariffing of tandem and transport access services on access stimulation traffic. As the *NPRM* recognizes (¶ 24), this result is consistent with the Commission’s determinations in the *Transformation Order*.³⁵ Such a rule would make it much more difficult for access stimulators to circumvent the rules, would benefit ordinary customers of long distance service, and would reduce or eliminate future disputes over the propriety and/or level of access charges on access stimulation traffic.³⁶

B. *Adopting Prong 1 Would Also Be Reasonable, Provided That The Commission Takes Steps To Prevent The Rule From Being Circumvented.*

Prong 1, as proposed in the *NPRM*, could also be a reasonable way to address access stimulation. Under Prong 1, the access stimulation LEC would bear the costs of tandem switching and transport, including from any intermediate access provider to the LEC. *See NPRM*, ¶ 13.

The advantage of Prong 1 is that it more closely aligns the tandem and transport costs with the entities that are selecting the transport route, and as such, they should have incentives to choose a cost-efficient route—unlike what occurs under the current system. *See Transformation Order*, ¶ 745. Prong 1 also has the potential to avoid most of the implicit subsidies that IXC’s, wireless carriers, and their customers currently pay to access stimulators.

A potential flaw in Prong 1 is that it does not address a core cause of access stimulation: the existence of tariffed tandem and transport rates that far exceed the actual economic cost of routing large volumes of access stimulation traffic. As a consequence, access stimulators will retain the incentive to adjust their schemes to try to exploit this arbitrage opportunity. And, as

Commission has cited evidence suggesting that the forward-looking incremental cost of terminating traffic was extremely low, and very near \$0—certainly much lower than current switched access charges”); *id.* ¶ 752 (same).

³⁵ *See id.* ¶¶ 741-54. *See also, e.g., id.* ¶ 737 (bill-and-keep “eliminat[es] the existing opaque implicit subsidy system under which consumers pay to support other carriers’ network costs”); *id.* ¶¶ 752-53 (bill and keep eliminates arbitrage and marketplace distortions in the existing ICC system).

³⁶ *See id.* ¶ 738 (“A bill-and-keep methodology also imposes fewer regulatory burdens and reduces arbitrage and competitive distortions inherent in the current system, eliminating carriers’ ability to shift network costs to competitors and their customers”); *id.* ¶ 743 (“Bill-and-keep is also less burdensome than approaches that would require the Commission and/or state regulators to set a uniform positive intercarrier compensation rate”); *id.* ¶¶ 748-51 (bill-and-keep leads to consumer benefits).

history suggests, access stimulators have been willing to go to great lengths to modify their schemes to exploit flaws in the ICC system.

For example, it appears that, under Prong 1 as proposed in the NPRM, the IXC or wireless carrier would remain responsible for the costs of transporting traffic from the points of presence of IXCs and wireless carriers to the intermediate carrier's facility, *i.e.* a tandem switch. *See NPRM*, ¶ 13. AT&T, and likely most other IXCs, are able to transport traffic—even large volumes of access stimulation traffic—to virtually all tandem switches that are in use today. However, to the extent an access stimulation LEC deployed a new end office switch in a very remote location, and then had an affiliate or partner deploy a new tandem switch in an equally remote area, it would appear that, under Prong 1 as written in the *NPRM*, IXCs would need to obtain substantial transport facilities to the new tandem switch. Access stimulators would thus have the incentive to modify their schemes in this fashion if IXCs were compelled to purchase above-cost transport services to the new, remote tandem. Consequently, if the Commission were to adopt Prong 1, it should clarify that IXCs' obligations are to deliver access stimulation traffic to tandem switches that are currently in existence as of January 1, 2019.

Given the access stimulators' willingness and demonstrated history of exploiting loopholes in the Commission's rules, the Commission should also make clear that it retains authority under Section 201(b) to address unreasonable practices, attempts to circumvent the rules, and other access arbitrage schemes. All too often, access stimulators have taken the position that, unless the conduct at issue is expressly barred by the rules, their schemes are legitimate and cannot result in liability. The Commission should make clear that it retains its enforcement authority—and that it will not hesitate to use that authority to strike down promptly any such arbitrage schemes.

C. Prong 2 Should Not Be Adopted as A Choice For Access Stimulators.

The Commission should not adopt Prong 2 as described in the *NPRM*. Under Prong 2, the access stimulation LEC would have the option of allowing the IXC to install (either itself or via a third party) a direct connection to the access stimulation LEC's end office. *NPRM*, ¶¶ 13-14. The access stimulation LEC would not have to provide the direct connection if its current network does not extend to the IXC. *NPRM*, ¶ 15.

Prong 2 is well-intentioned, and, compared to tariffed tandem transport service, direct trunked transport can provide lower rates in many circumstances.³⁷ Further, in resolving individual disputes between an IXC and an access stimulation LEC where direct trunking facilities are readily available, a direct connection can be a reasonable remedy for retroactive claims. However, as a proposed rule change to eliminate access arbitrage, Prong 2 has a number of significant drawbacks.

Prong 2 retains tariffed charges by access stimulation LECs (or third party intermediate carriers that would partner with access stimulators) that (if otherwise lawful) would be paid by IXCs and wireless carriers (and their customers). These direct connection charges, although usually lower than per-minute tandem transport charges, can still be significant and well above the

³⁷ AT&T's responses, shown in the attached appendix, show the costs of direct connections—when actually available—versus tandem switched transport.

reasonable rate for exchanging traffic in an urban area. Prong 2 thus presents the same problems of abuse that have plagued prior efforts to curb access stimulation, and access stimulators will retain the incentive to exploit these ICC payments to subsidize their schemes—just as they have over the last decade.

But an even more fundamental problem exists with Prong 2: once an IXC establishes a direct connection with a particular access stimulation LEC, that investment in the new facilities is likely to become quickly stranded. For a particular access stimulation LEC located in a remote area, an IXC would likely incur substantial expense and other non-recurring charges (paid to the LEC or its intermediate transport provider partner) to establish a direct connection. As explained below, there can be significant transaction costs in establishing a direct connection. Once established, the per minute tandem and transport charges would likely be reduced. But that would not put an end to access stimulation schemes overall. At that point, the free calling providers associated with that LEC would have a strong incentive to end their relationship with that access stimulation LEC, and to partner with another access stimulation LEC located in a different—but still remote—area. The direct connections that had been established would become the equivalent of the “bridge to nowhere,” and all of these facilities and the related investment would become stranded.

Prong 2 fails to take into account that access stimulation traffic—unlike traditional traffic—is far more mobile, and can easily be shifted from one carrier to another based on the highest amount of revenue that the access stimulation LEC offers to share with its free calling provider partners. As noted above, access stimulation LECs have strong incentives to offer free calling providers the most attractive revenue sharing arrangements, and free calling providers have strong incentives to move their traffic to the access stimulation LECs that can offer the most revenue. Once direct connections are established with a particular access stimulation LEC, its ability to share revenue with the free calling providers is significantly reduced and it is likely that the traffic will move to a new location.

Indeed, AT&T recently encountered a situation wherein an access stimulator located in California simply vanished overnight. This access stimulator located their tandem in San Diego California, but had end offices located in California, Illinois, West Virginia, and Arizona. As this situation is ongoing, AT&T has not yet discovered where the access traffic will eventually be re-located; but, this is yet another example of both the national and transient nature of access stimulation.

To take another real world example, Northern Valley (NVC) is an access stimulation LEC that operates switch facilities in three very remote towns in South Dakota: Aberdeen, Groton and Redfield. AT&T’s POP is well over one hundred miles away in Sioux Falls, South Dakota. If Prong 2 were promulgated, then AT&T would have the nominal right to “direct connect” to NVC’s end office facilities. However, there would be numerous issues that would need to be resolved before such direct connections could actually be established. For instance, it is not entirely clear what company or companies own and control the transport facilities to carry traffic between Sioux

Falls and the three distant towns.³⁸ Moreover, NVC has deployed a “host-remote” switching arrangement—in which a host switch is located in Groton, and two remote switches are located in Aberdeen and Redfield, with most of the conference/chat equipment located in Redfield (and some in Aberdeen). NVC has claimed that it is not possible to establish direct connection with its remote switches, and it has thus taken the position that, even if direct connections were established in Redfield and Aberdeen, it would still need to assess per minute mileage charges between Groton and Aberdeen, and Groton and Redfield to first backhaul the traffic to Groton and then transport it back to Redfield and Aberdeen.³⁹

Even assuming, *arguendo*, that these issues were resolved, and a direct connection could be established between AT&T’s POP’s in Sioux Falls and the facilities in Redfield—a distance of 127 air miles—this result (while it could resolve the particular dispute between those two carriers) would likely prove short-lived as an overall response to access stimulation.⁴⁰ At that point, NVC would have less access revenue to share, and NVC’s free calling service partners would have incentives to move their access stimulation traffic to other carriers, either in South Dakota or in other states. And, if AT&T and other IXCs then went to the expense of establishing direct connections with these new carriers, then the access stimulation traffic would be moved again. Indeed, it is in the access stimulator’s interest to rely on or establish relationships with CLECs where the sole existing route to the end office can be controlled.⁴¹

³⁸ NVC sued the centralized equal access provider over this issue, among others, and the case settled before it could be definitively resolved in court or at the Commission. *See* Pet. for Expedited Decl. Ruling, WC Docket No. 18-41 (Feb. 7, 2018). Moreover, before AT&T settled its access dispute with NVC, it explored what alternatives, either existed or could be built, to carry traffic from AT&T’s network to NVC’s facilities, and found there were significant feasibility issues—even though AT&T could have realized significant savings if such an alternative had been put in place.

³⁹ AT&T’s involvement in other direct connection disputes with access stimulation CLECs only underscores that Prong 2 would likely result in significant litigation, instead of a significant reduction in access stimulation. Long ago, in 2008, the Commission determined that “a competitive LEC will permit an IXC to install direct trunking from the IXC’s point of presence to the competitive LEC’s end office, thereby bypassing any tandem function.” Order, *Access Charge Reform*, 23 FCC Rcd. 2556, ¶ 27 (2008). Despite this unambiguous duty, most access stimulation CLECs have flatly refused to allow such installations. One such dispute is currently been pending at the Commission, with the access stimulation CLEC asserting that there are no facilities that exist to allow a direct connect. *See AT&T Corp. v. Great Lakes Comm. Corp.*, Docket No. 16-170.

⁴⁰ Further, as explained in the response to Question 9 in the attached appendix, the direct connection cost to Redfield is about 10 times higher than a direct connection within an urban area in South Dakota (Sioux Falls).

⁴¹ *See, e.g.*, Compl. ¶ 66 n.131, *AT&T Corp. v. All American*, File No. EB-09-MD-010 (May 7, 2010) (access stimulator located a switch in Burbank, Nevada, a remote place that its consultant said “basically doesn’t exist” and described as a “ghost town” where there is no “business or anything else with an address”).

Prong 2 thus would be ineffective curtailing access stimulation. Instead—as in past efforts to regulate these schemes—access stimulators would adapt their schemes to circumvent the rules, and there would likely be significant disputes in the courts and at the Commission over the terms for any direct connections. Further, because access stimulation traffic can be moved from LEC to LEC, Prong 2 would result in stranded direct connection facilities and would perpetuate “whack-a-mole” contests in which access stimulation schemes would pop up in ever more remote locations.

D. *The Responses to the Commission Staff’s Questions Underscore that Prong 2 Would Not Be An Effective Remedy to Further Curtail Access Stimulation.*

Attached as Appendix A is AT&T’s response to a series of questions asked by the FCC Staff at recent *ex parte* meetings. These questions were not provided to AT&T in writing by staff; however, AT&T noted during discussions with staff that salient questions remained and AT&T memorialized, at a minimum, the overall thrust of the questions posed, if not the exact nature of the questions posed to AT&T during discussions. These responses confirm that Prong 2 would not be effective in addressing access stimulation schemes.

First, in response to Question 1, AT&T explains that, if there were incentives to route access stimulation traffic efficiently, *i.e.*, in urban areas near IXC facilities, then the transport costs would be *de minimus*: no more than \$0.0001 per minute, or a few thousand dollars per month. These low costs—which are consistent with the Commission’s conclusions in the *Transformation Order*—underscore that the past and current transport charges collected by access stimulators (including intermediate providers) are priced far above the actual costs of providing transport for access stimulation traffic on a cost efficient basis. It is this mismatch that has allowed access stimulation schemes to continue to thrive.

Second, in response to Questions 2 through 9 and 12, AT&T explains that, while a direct connection typically provides cost savings compared to the tandem switched transport charges that are currently billed (and thus can be an effective solution to particular disputes), the direct connections that would be required in remote areas would be more expensive (if available at all) than those in urban areas. Further, there are several reasons why direct connections are not an effective response to access stimulation. In practice, access stimulators locate (and would have an increased incentive to locate) their operations in remote areas where direct connections may not be available, or may only be available at unreasonable prices using facilities controlled by the access stimulator or a partner. In addition, as also explained above, once direct connections are established, these facilities can easily become stranded.

Third, in response to Questions 10, 11, and 13, AT&T explains that the harms associated with access stimulation cannot be addressed by use of HD Tandem’s services, by reducing rates of centralized equal access (CEA) providers, or by hoping that competitive transport providers will reduce costs.

- HD Tandem proposes to be the monopoly provider of service, and (unless the Commission were to revise its policies on matters like tariffing, interconnection, call blocking, and geographic averaging) use of HD Tandem’s services poses

virtually all the same problems that have long been associated with access stimulation.

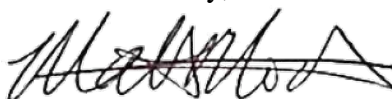
- Reducing the rates of CEA providers is beneficial, but even if properly priced, their rates would be far above the efficient cost of transporting large volumes of access stimulation traffic. And, in all events, reducing those rates does not address access stimulation in other areas—and would likely provide incentives for access stimulators to relocate to new, remote areas.
- Competitive providers of transport have not entered, and are not likely to enter, this market—given the high probability that such capacity would become stranded if (as is likely) the access stimulator moves the traffic to a different location.

* * *

In conclusion, as AT&T has stated previously and in constancy with AT&T's prior advocacy, the access stimulating LEC should remain the sole party responsible for the costs associated with delivering access stimulation traffic to the LEC's end offices (and remotes) whether via direct connections or via an intermediate provider.

By adopting the NPRM's first prong, the Commission can effectively restore marketplace balance by requiring LECs that are engaged in the practice to bear the costs of transporting calls from the IXC's network to the LEC's end office switch, thus reducing the current incentive to locate the equipment used to provide conference and chat services at remote locations. Prong 1 ensures that legitimate intermediate providers will continue to be paid for the services they provide but be paid by the cost causer – the access stimulating LEC.

Sincerely,



Matt Nodine

AT&T Services Inc.

Enclosure

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Q1. What is a ‘reasonable rate’ for access stimulation traffic?

A1: A reasonable rate for access stimulation traffic should not exceed the rate charged for terminating traffic by an ILEC in an urban area. If either the provider or the consumer of access stimulation services were required to pay for the cost of transporting the calls to the equipment used to facilitate the conference or chat service, they would attempt to minimize those costs by placing that equipment in an urban area as close to the long distance carriers network as possible. If, for example, the calls were terminated in Chicago within one mile of the long distance carriers’ networks, the rate would be about \$0.0001/min. assuming 50 million minutes of use per month and about \$0.000095 assuming 30 million minutes of use per month.

The following table sets forth more details regarding this calculation.

Chicago Ameritech DS3 at 1 Mile		
	DS3	DS3
	60 Month	60 Month
Entrance Facility - Zone 1	\$585.00	\$585.00
Direct Trunk Transport - Zone 1		
Termination	\$110.70	\$110.70
Facility mile	\$18.00	\$18.00
Total DS3 Zone 1 Transport	\$128.70	\$128.70
Total DS3 EF and Transport	\$713.70	\$713.70
DS3 MOU per month	8,000,000	8,000,000
Effective per mou	\$0.000089	\$0.000089
MOU/Month	30,000,000	50,000,000
mou/ds3	8,000,000	8,000,000
ds3 needed	3.8	6.3
DS3 (round up)	4.0	7.0
Total Cost	\$2,855	\$4,996
	30,000,000	50,000,000
Effective per mou	\$0.000095	\$0.000100

As the Commission has concluded, a significant cause of arbitrage schemes like access stimulation is that the perpetrators of such schemes are able to bill intercarrier revenues that are significantly in excess of the costs of routing the access stimulation traffic, which is minimal. Tariff charges—the current rates and those that prevailed in the recent past—for tandem and transport on access stimulation greatly exceed this cost, which is why access stimulation schemes have continued to flourish even as terminating end office charges have been reduced.

Q2. What is the expense ‘delta / difference’ between what AT&T pays now for access stimulation traffic and what AT&T would pay with a direct connect to its POP?

A2. Because access stimulators locate their services in different jurisdictions at various distances from the relevant AT&T POPs, it is not possible to state with precision the exact delta/difference that AT&T would experience with a direct connect to each access stimulator. Further, what AT&T pays each access stimulator varies as a result of several factors, such as distance, the tariffed rates, and whether AT&T purchases from the tariff or via a negotiated agreement. In addition, there can be significant transaction costs in obtaining direct connections, and these types of costs would likely continue to be incurred even if the Commission were to adopt Prong 2. In many cases, access stimulation LECs have refused to provide direct connections or have claimed that it is not possible to establish direct connections with their facilities. To the extent that there is insufficient capacity on a particular route, or new facilities need to be constructed, then the costs of establishing a direct connection could involve substantial additional costs. Additionally, it is likely that, once established, these direct connections could become stranded.

As noted in response to Question1, the amounts that AT&T currently pays for transport far exceed the amounts that AT&T would pay for a direct connect (about \$0.0001/min.) if the conference and chat services were provided on a cost efficient basis in an urban area such as Chicago. This is because access stimulators generally locate their operations in remote areas, resulting in much higher transport rates. By way of example, the following table shows the current costs of termination incurred by AT&T with respect to an access stimulator located in Iowa with traffic volumes of about 30 million minutes of use per month. This table excludes the transaction costs and non-recurring costs, which as noted above, are often substantial

Current Costs of Termination								
	Rate	# of DS3	# of Miles	MOU	Current	% of Total		Effective Rate/MOU
Direct Connect from AT&T POP to INS Tandem								
DS3 Entrance Facility	\$1,083.53	5			\$5,418			
DS3 Fixed	\$186.43	5			\$932			
DS3 Per mile	\$38.70	5	1		\$194			
Total					\$6,543	4%		\$0.00022
CEA Usage								
INS per mou	\$0.002960			30,000,000	\$88,800	51%		\$0.00296
Traffic stimulator								
per minute termination	\$0.000240			30,000,000	\$7,200			
per minute /per mile	\$0.000030		80	30,000,000	\$72,000			
Total					\$79,200	45%		\$0.00264
Grand Total					\$174,543			\$0.00582
Current Path	AT&T POP	---	CEA Tandem	---	Traffic Stim LEC	---	Traffic Stim Platform	

As can be seen, in this example, the average rate is about \$0.00582/min., which is about 58 times higher than the rate that would be charged if the service were provided in an urban area like Chicago.

The next table shows the costs of a hypothetical direct connect between AT&T's POP in Iowa (that is located in Des Moines) and the platform of the access stimulator depicted in the prior table. This table accounts for none of the potential difficulties, some of which are described above, that AT&T has experienced, and would likely experience in the future, in actually establishing direct connections with access stimulation LECs.

Hypothetical Direct Connect								
	Rate	# of DS3	# of Miles	MOU	Current	Diff to Current		Effective Rate/MOU
DS3 Entrance Facility	\$1,083.53	5			\$5,418			
Termination	\$264.88	5			\$1,324			
Permile	\$32.12	5	70		\$11,242			
Total					\$17,984	(\$156,559)	-90%	\$0.00060
Hypotetical Path	AT&T POP	--->	--->	--->	Traffic Stim LEC	--->	Traffic Stim Platform	

In this scenario, the tandem transport charges are eliminated and the overall transport costs are reduced from \$0.00582/min to about \$0.0006/min., a reduction of almost 90%.

In sum, in this hypothetical example, in which there are no transaction costs and no costs that become stranded, the delta/difference between what AT&T would pay now and what it would pay with a direct connect is large. For this reason, where an IXC and an access stimulation LEC have a specific dispute, and where the direct connection can be established easily using existing capacity and facilities, then requiring a direct connection can be an effective way to resolve the dispute between that IXC and that access stimulation LEC. However, for the reasons explained in AT&T's letter, direct connections do not effectively address the incentives to engage in access stimulation, and Prong 2, which relies on direct connections, would not be an effective way to address access stimulation schemes overall. Indeed, because the potential revenue that could be shared would be reduced once a direct connection is established, that creates incentives for calling providers to shift their traffic to new, more remote locations.

Q3. What would the expense be to direct connect to an access stimulator?

A3. As noted in response to Question 2, the costs associated with a direct connect vary significantly depending on the location of the access stimulator and the traffic volumes involved. If the access stimulator were located in a large urban area, the rate would be close to \$0.0001/min and the non-recurring costs of arranging for a direct connect should be relatively modest. In a large urban area, the facilities needed for a direct connect would also likely be available. Nevertheless, there is still a risk that these facilities could become stranded, because an access stimulation LEC located in an urban area would have a difficult time retaining the access stimulation business, and its free calling provider partners would have strong incentives to move the traffic to a different, more remote area, particularly if the Commission fails to address the ability of access stimulators to force IXCs to make ICC payments.

The costs associated with a direct connect with an access stimulator located in a rural area are quite higher than the rates in an urban area. As pointed out in the response to Question 2, the rates for a direct connect in a rural area, while lower than the rates for a tandem connection, are still about six times higher than in an urban area. Moreover, there are a number of other concerns. *First*, the availability of the facilities needed to direct connect in a rural area would be a major concern. A number of the access stimulators have deliberately chosen to locate in remote areas where the availability of such facilities is limited—and/or is controlled by the access stimulator or another entity that is not willing to make those facilities available at a reasonable rate. *Second*, if spare capacity is not available or new facilities have to be constructed, that increases the costs of the project and extends the time to completion, meaning that the higher tandem rates are incurred for a longer period of time. *Third*, there is a significant risk that, once the project is completed, the access stimulation traffic could be shifted, as described above, or the access stimulation LEC could even decide to relocate to a new location (the actual capital costs of setting up an access stimulation operation are quite small). Consequently, it is relatively easy for the access stimulator to move to a new location, thereby stranding the facilities installed to provide the direct connection, as well as the investment associated with those facilities.

Q 4. Are there any 'step arounds' whereby AT&T could bypass an access stimulator?

A4. No. Under the Commission's rules, calls to access stimulators must be completed, regardless of disputes about compensation. As a consequence, there is no way for an IXC to avoid completing calls to an access stimulator. *See also Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 30-32 (2001).

In the access stimulation context, bypass typically refers to the use of an alternate route to deliver a call around an intermediate carrier, not the terminating switch of the access stimulation LEC. While such intermediate bypass exists, it is typically priced at a rate that is just a bit below the applicable tariff rates. Further, use of least cost providers presents risks, because an IXC is responsible for monitoring and correcting any performance issues with these providers.

Q 5. What are the sunk costs for a direct connect to the access stimulator?

A5. The sunk costs associated with a direct connect vary depending on the specific arrangement used to accomplish the direct connection. If the facilities needed for the direct connect are available (i.e., they do not need to be constructed) and they are leased from a third party provider, the sunk costs would include all of the recurring and non-recurring costs associated with the lease. Because lease costs vary depending on the length of the lease, a longer lease with a lower rate generally results in a higher level of sunk costs. If facilities have to be constructed, the sunk costs are likely to be even higher.

Q6. What are the sunk costs for a direct connect to an access stimulator, with the access stimulator connecting at AT&T's POP?

A6. As explained in response to Question 5, substantially all of the costs associated with a direct connect are sunk costs. Once AT&T agrees to lease the facilities associated with a direct connect, then all of the costs that it has committed to pay over the course of the lease would be considered sunk. Similarly, if AT&T had to pay any special construction fees (or it decided to construct the facilities itself), those costs would be sunk.

Q7. What are the general costs (manpower, attorney fees, vendors, etc...) with negotiating a direct connect?

A7. AT&T does not separately track such costs in the ordinary course. Further, they can vary significantly depending on the particular negotiation. The factors that can impact such negotiations include: the location and availability of the facilities, the need for new construction, the willingness of the access stimulator/transport provider to agree to a direct connect, the reasonableness of the proffered price, etc. Moreover, these costs can increase significantly if litigation ensues. As described in AT&T's letter, in AT&T's experience, these costs have been substantial, and AT&T has had mixed success in establishing direct connections, and the courts and the Commission have not decided such disputes quickly.

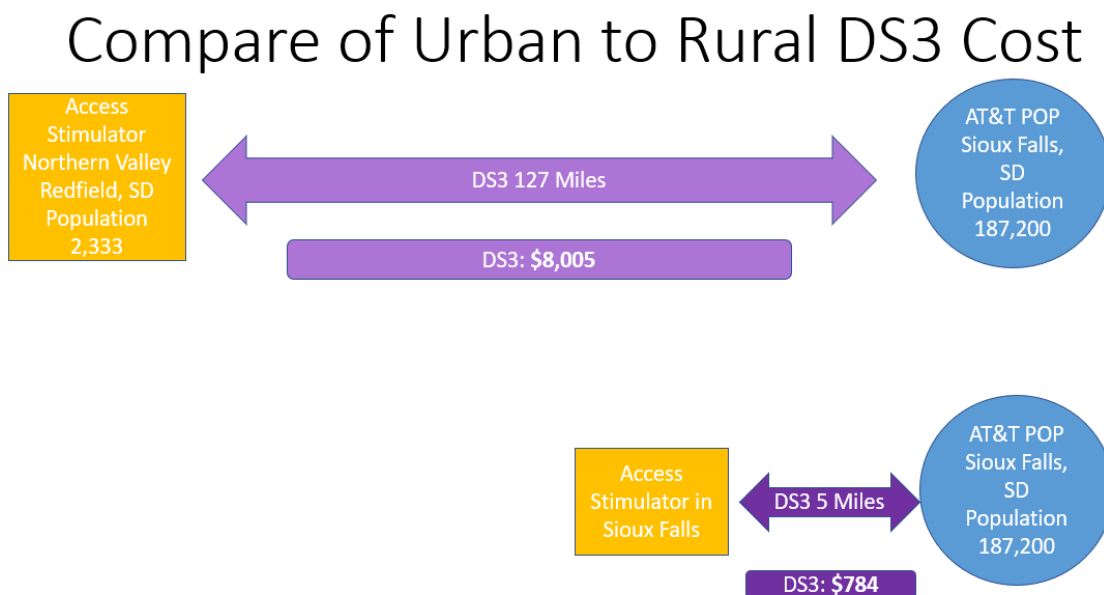
Q8. Assuming an intermediate provider between the IXC and the LEC, what is the cost of access stimulation traffic to AT&T?

A8. Each intermediate provider has different rates and mileages, so there is no one answer to this question. The costs are unique to each specific arrangement and depend on the company that would provide the direct connect facilities to AT&T. As explained in response to Question 2, the costs of a direct connect in a large urban area are significantly lower than the costs of a direct connect in a rural area.

Q9. What is the cost difference between a comparable level of traffic between a remote area, such as Redfield, South Dakota, and that same volume of traffic in an urban area, for example Chicago?

A9. As explained in response to Question 2, the cost differential between an urban and rural direct connection can be substantial. In that response, the comparison was between (A) a direct connect in Chicago assuming 30 million minutes of use per month, a transport distance of 1 mile and 4 DS-3s; and (B) a rural connection in Iowa assuming 30 million minutes of use per month, a transport distance of 70 miles and 5 DS-3s. The cost of the urban direct connect was about \$3,000 per month and the estimated rate was about \$0.0001/min. The rural direct connection was more costly (almost \$18,000 per month) and the rate was higher: \$0.0006/min.

Moreover, these differentials hold up if the comparison is done on a comparable volume basis within the same state. The following example compares the rates for direct connect in Sioux Falls, South Dakota (the largest urban area in South Dakota) to Redfield, South Dakota (the location of a large access stimulator in South Dakota)

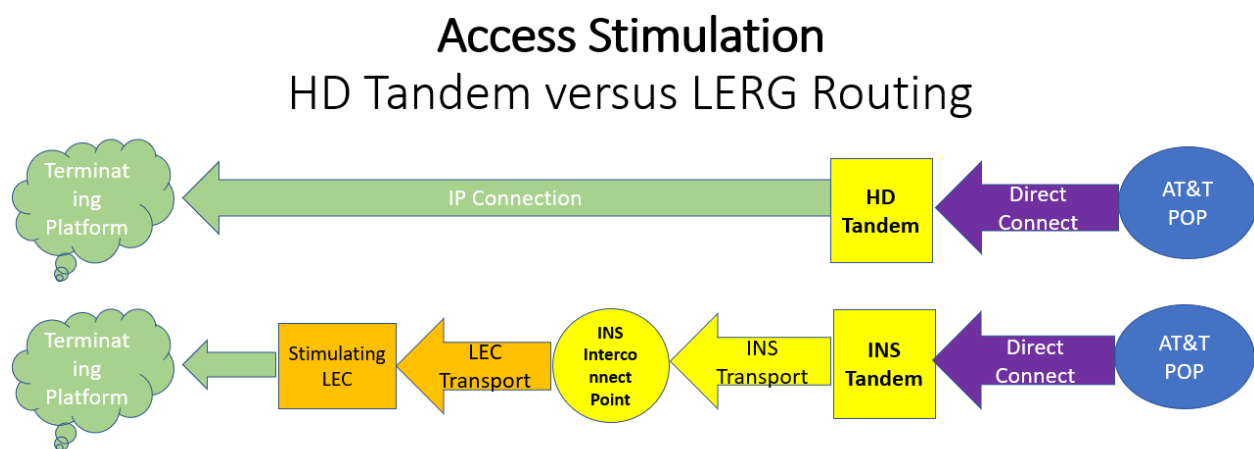


As can be seen, the cost differential is significant. The direct connect between AT&T's POP in Sioux Falls and Redfield would cost about \$8,005 per month based on the Qwest/CTL DS3 non-plan rates for over 50 miles (i.e., a \$520.36 fixed rate plus \$58.94 per mile rate times 127 miles). By contrast, the direct connect between AT&T's POP and an access stimulator located in Sioux Falls would cost \$784.89 per month based on the Qwest/CTL DS3 monthly non plan rates for 0 to 8 miles (i.e., a \$429.89 fixed rate plus \$71.01 per mile rate times 5 miles). In other words, the rural direct connect would cost about 10 times more than a direct connect in an urban area.

Q10. Why doesn't moving access stimulation traffic to HD Tandem solve the access stimulation issue?

A10. HD Tandem is not a certificated carrier (as it readily admits); instead it offers an alternative termination service. HD Tandem's proposal is for the FCC to 'authorize' it as a 'monopoly' provider of termination to calls to free services (chat, conference, radio) and thereby replace the access rates charged by individual carriers with its allegedly 'commercial' rates for the delivery of the traffic.

The following diagram depicts the difference between HD Tandem's proposal and the tandem connection arrangement that currently exists in Iowa using INS's services.



There are a number of problems with HD Tandem's proposal. First, HD Tandem is not a certificated carrier and its rates are not regulated in any manner. Consequently, the only constraint on HD Tandem's rates are the excessive rates that are currently charged by the existing carriers. Second, this problem is compounded by HD Tandem's suggestion that it would be the 'monopoly provider.' As the only provider, what would stop HD Tandem from charging unreasonable rates? Would the Commission require that IXCs to complete calls to HD Tandem regardless of cost, and would the Commission prevent IXCs from passing on the higher costs to the callers placing calls to HD Tandem? Third, this situation is made even worse by the fact that HD Tandem is affiliated with arguably the largest free conferencing service provider (i.e., Free Conferencing). As the principal provider of transport services, HD Tandem could easily use that position not only to charge excessive rates but to favor its affiliate.

In sum, substituting HD Tandem for the current transport problem would not eliminate the problems that currently exist—and it would arguably only exacerbate them. Long distance and wireless carriers (and their customers) would still be subsidizing "free" conferencing services. In addition, a host of new issues would be introduced, and the industry would once again find itself engaged in litigation against new arbitrage methods.

Q11. Why don't the FCC's recent INS / SDN rate orders solve the access stimulation issue?

A11. The FCC's recent INS/SDN rate orders, while providing some relief as to level of the rates charged to long distance carriers with respect to access stimulation traffic in those states, do not solve the problem of access stimulation—which can occur anywhere because, as explained by the Commission in 2011 and in AT&T's letter, the rates that access stimulators can bill and collect are not adjusted to reflect the very minimal costs of routing the traffic.

First, the tariffed rates charged by INS and SDN are still too high—as indicated above and in AT&T's letter, INS's rates are still many times higher than the economic costs for transporting large volumes of traffic in urban areas. Even if INS's rates are reduced further (as they should be), the issue is that, under the Commission's existing ICC system, access stimulators have the incentive to choose an *inefficient* and *costly* transport route—such as by routing traffic via INS through Iowa. Why are access stimulators electing to route billions of minutes through rural Iowa, when there is no legitimate reason to do so? It is because they can engage in arbitrage due to INS's rate. Even if INS's rate were ultimately reduced to reasonable levels, it would still be more expensive (and beneficial to access stimulators) to route billions of minutes of traffic through Iowa as compared to a route within a dense urban area. What would “solve the access stimulation issue” is to bring economic forces to bear on the call routing of access stimulation traffic. See, e.g. *Transformation Order*, ¶¶ 742-53.

Second, AT&T still has to pay the additional transport charges (which are sizeable) to move the traffic from the networks of INS and SDN to the access stimulators' platforms. Indeed, the Commission's recent orders have created an even greater incentive to locate those platforms as far from those networks as possible.

In the case of INS, the FCC's orders seek to have INS base its rates on the lower of (1) the comparable ILEC rate or (2) INS's correctly calculated cost of service. These rate orders do not address which entity should be responsible to pay for that inefficient routing service. As can be shown from the first table in response to Question 2, the INS rate could be eliminated altogether and there would still be a problem. The cost of termination (i.e., \$85,743/mo.) would still be about five times higher than a rural direct connection (i.e., \$17,684/mo.) and seventeen times higher than an urban direct connection (i.e., \$5,000/mo.).

The situation with respect to SDN is similar. While the Commission lowered the tariffed rate charged by SDN for tandem switching from \$0.004871/min (SDN's previously tariffed rate) to \$0.002252/min (new benchmark rate), the access stimulator can still bill the complete mileage from SDN's tandem in Sioux Falls to the access stimulators' platforms. For example, in South Dakota, Northern Valley charges 192 miles from the SDN tandem to its platform and, at the Northern Valley tariffed rate, the cost to carrier would be \$.006036, per MOU. At an average volume of traffic of fifty million MOUs, the carrier would be billed approximately \$300,000 per month.

Further, if Northern Valley were able to circumvent the Commission's definition of access stimulation, and thereby able to bill access stimulation traffic at the NECA rates under the “rural exemption” (i.e., to approximately \$0.09 per MOU versus the current rate of \$.006036), annual costs would increase by more than \$50M/year.

In sum, while the INS and SDN orders have reduced the tariffed rates charged by INS and SDN for access stimulation traffic, those orders have not solved the access stimulation issue either in Iowa, South Dakota, or other states.

Q12. What is the cost for building a circuit between “X” and “Y” (meaning, does AT&T have a general expense model it uses ‘per mile’ to build a trunk?)

A12. There is no general cost model that reflects the cost of building a circuit between two locations. As shown in response to Question 2 and explained in the responses to Questions 2,5 and 7, there are significant differences in the costs of building telecommunications circuits between rural and urban areas, and this can be true even within the same company. Further, the costs of such construction between companies also vary widely. Some facility providers have ICB rates which must be negotiated. Further many ILECs and RBOCs do not have the facilities and/or the facility capacity (i.e. 10 DS3s of capacity) to rural areas.

In addition, the choice of a facility provider is often controlled by the access stimulating CLEC, which may only allow one company to construct and provide DS3s of transport to their end offices. For example, AT&T reached an agreement with Tekstar to permit direct trunking to their end office at Perham, Minnesota. However, Tekstar told AT&T there was one company, 702 Communications, which could provide the number of DS3s needed between AT&T Fargo, North Dakota POP and the Perham end office. AT&T therefore had to negotiate with that single supplier for a quote for that capacity.

Q13. What are the barriers to entry for a competitor to enter the market who could drive costs down (presumably tandem switching and transport)?

A13. The barriers to entry facing a new entrant seeking to provide transport capacity are very similar to the problems that AT&T and other long distance providers face in acquiring capacity for a direct connection. The obstacles to building facilities to locations that are purposefully located in remote rural areas are significant. Not only is such construction costly, there is no guarantee that once constructed the traffic to that location will remain in place. It is very easy for an access stimulator to relocate to another rural location, thereby stranding the investment. Further, there is no guarantee that the access stimulator will agree to accept traffic transported by the chosen facility provider, which would likewise result in stranded investment.

Indeed, if it made long-term economic sense for competitors to build facilities in these locations, then they would already be doing so. Competitors have not done so, presumably because they recognize that, once the access stimulation traffic is moved (and the only reason it is in this location in the first place is that the Commission's ICC rules currently are flawed and have perverse incentives for inefficient routing), there is little economic use for transport facilities of very large capacity. They will have built the proverbial "Bridge to Nowhere."

In sum, the access stimulation problem confronting the Commission cannot be solved by the potential entry of alternative providers of transport. As the Commission has previously acknowledged, the problem with access arbitrage that must be addressed is the continued flaws in the current intercarrier compensation framework. *Transformation Order*, ¶ 752 ("Intercarrier compensation rates above incremental cost have enabled much of the arbitrage that occurs today"). This framework permits access stimulators to direct traffic to high cost locations, thereby imposing costs on the IXCs that subsidize their free calling services.

The only effective solution is to require the providers and or the users of the access stimulating services to bear the costs of providing those services, including the transport costs associated with such calls. To the extent that responsibility for those costs are properly assigned, the incentives to manipulate the routing of the traffic will be eliminated, and calls will be provided in an efficient and cost effective way.