Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
A National Broadband Plan for Our Future	)	GN Docket No. 09-51
	)	
Establishing Just and Reasonable Rates for Local Exchange Carriers	)	WC Docket No. 07-135
	)	
High-Cost Universal Service Support	)	WC Docket No. 05-337
	)	
Developing an Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45
	)	
Lifeline and Link-Up	)	WC Docket No. 03-109
	)	
Universal Service Reform – Mobility Fund	)	WT Docket No. 10-208

REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: October 27, 2011 **Released: November 18, 2011**

Comment Date on Sections XVII.A-K: January 18, 2012
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By the Commission: Chairman Genachowski and Commissioners Copps and Clyburn issuing separate statements; Commissioner McDowell approving in part, concurring in part and issuing a statement.

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I. INTRODUCTION

1. Today the Commission comprehensively reforms and modernizes the universal service and intercarrier compensation systems to ensure that robust, affordable voice and broadband service, both fixed and mobile, are available to Americans throughout the nation. We adopt fiscally responsible, accountable, incentive-based policies to transition these outdated systems to the Connect America Fund, ensuring fairness for consumers and addressing the communications infrastructure challenges of today and tomorrow. We use measured but firm glide paths to provide industry with certainty and sufficient time to adapt to a changed regulatory landscape, and establish a framework to distribute universal service funding in the most efficient and technologically neutral manner possible, through market-based mechanisms such as competitive bidding.

2. One of the Commission's central missions is to make "available … to all the people of the United States … a rapid, efficient, Nation-wide, and world-wide wire and radio communication service with adequate facilities at reasonable charges."[1] For decades, the Commission and the states have administered a complex system of explicit and implicit subsidies to support voice connectivity to our most expensive to serve, most rural, and insular communities. Networks that provide only voice service, however, are no longer adequate for the country's communication needs.

3. Fixed and mobile broadband have become crucial to our nation's economic growth, global competitiveness, and civic life.[2] Businesses need broadband to attract customers and employees, job-seekers need broadband to find jobs and training, and children need broadband to get a world-class education. Broadband also helps lower the costs and improve the quality of health care, and enables people with disabilities and Americans of all income levels to participate more fully in society. Community anchor institutions, including schools and libraries, cannot achieve their critical purposes without access to robust broadband. Broadband-enabled jobs are critical to our nation's economic

[1] 47 U.S.C. § 151.

[2] *See generally* Federal Communications Commission, *Connecting America: The National Broadband Plan* (rel. Mar. 16, 2010), at xi (National Broadband Plan).

delete them without notice and comment.[1080] We also make conforming changes to existing rules to ensure they are consistent with changes made in this Order.[1081]

X. OVERVIEW OF INTERCARRIER COMPENSATION

648. In this section, we comprehensively reform the intercarrier compensation system to bring substantial benefits to consumers, including reduced rates for all wireless and long distance customers, more innovative communications offerings, and improved quality of service for wireless consumers and consumers of long distance services. The reforms also improve the fairness and efficiency of subsidies flowing to high-cost rural areas, and promote innovation by eliminating barriers to the transformation of today's telephone networks into the all-IP broadband networks of the future. The existing intercarrier compensation system—built on geographic and per-minute charges and implicit subsidies—is fundamentally in tension with and a deterrent to deployment of all IP networks. And the system is eroding rapidly as demand for traditional telephone service falls, with consumers increasingly opting for wireless, VoIP, texting, email, and other phone alternatives. Falling demand has led to rising access rates for smaller rural carriers, fueling wasteful arbitrage schemes and prompting costly compensation disputes.

649. To address these issues, we first take immediate action to curtail two of the most prevalent arbitrage activities today, access stimulation and phantom traffic. These schemes involve service providers exploiting loopholes in our rules and ultimately cost consumers hundreds of millions of dollars annually.

650. Next, we launch long-term intercarrier compensation reform by adopting bill-and-keep as the ultimate uniform, national methodology for all telecommunications traffic exchanged with a LEC. We make clear that states will continue to play a vital role within this framework, particularly in the context of negotiated interconnection agreements, arbitrating interconnection disputes under the section 251/252 framework, and defining the network "edge" for bill-and-keep.

651. We begin the transition to bill-and-keep with terminating switched access rates, which are the main source of arbitrage today. We provide for a measured, gradual transition to a bill-and-keep methodology for these rates, and adopt a recovery mechanism that provides carriers with certain and predictable revenue streams. We also begin the process of reforming originating access and other rate elements by capping all interstate rates and most intrastate rates as of the effective date of the rules adopted pursuant to this Order.

652. This Order also makes clear the prospective payment obligations for VoIP traffic and adopts a transitional intercarrier compensation framework for VoIP. In addition, we clarify certain aspects of CMRS-LEC compensation to reduce disputes and address existing ambiguity. We also make clear our expectation that carriers will negotiate in good faith in response to requests for IP-to-IP interconnection for the exchange of voice traffic.

653. Finally, in the Further Notice of Proposed Rulemaking (FNPRM), we seek comment on the transition and recovery mechanism for rate elements not reduced as part of this Order, including originating access and certain common and dedicated transport. We also seek comment on ways to implement our expectation of good faith negotiations for IP-to-IP interconnection for the exchange of voice traffic, ways to promote IP-to-IP interconnection, as well as other implementation issues for the bill-and-keep end state.

654. Our reforms will bring numerous and significant benefits to consumers. As with past intercarrier compensation reforms, we anticipate savings from intercarrier compensation payments will

[1080] 5 U.S.C. 553(b)(3)(B).

[1081] *See* Appendix A.

result in more robust wireless service, more innovative offerings, and cost savings to consumers. Our proposed gradual reduction of intercarrier charges and movement to a bill-and-keep methodology will significantly increase the efficiency of long distance and local calling, and of other services more generally. Indeed, we estimate, based on conservative assumptions, that once our ICC reform is complete, mobile and wireline phone consumers stand to gain benefits worth over $1.5 billion dollars per year.[1082]

655. In addition, our reforms will promote the nation's transition to IP networks, creating long-term benefits for consumers, businesses, and the nation. The convergence of data, voice, video, and text in networks based upon IP supports the Internet as an open platform for innovation, investment, job creation, economic growth, competition, and free expression.

XI. MEASURES TO ADDRESS ARBITRAGE

A. Rules To Reduce Access Stimulation

656. In this section, we adopt revisions to our interstate switched access charge rules to address access stimulation. Access stimulation occurs when a LEC with high switched access rates enters into an arrangement with a provider of high call volume operations such as chat lines, adult entertainment calls, and "free" conference calls. The arrangement inflates or stimulates the access minutes terminated to the LEC, and the LEC then shares a portion of the increased access revenues resulting from the increased demand with the "free" service provider, or offers some other benefit to the "free" service provider. The shared revenues received by the service provider cover its costs, and it therefore may not need to, and typically does not, assess a separate charge for the service it is offering. Meanwhile, the wireless and interexchange carriers (collectively IXCs) paying the increased access charges are forced to recover these costs from all their customers, even though many of those customers do not use the services stimulating the access demand.

657. Access stimulation schemes work because when LECs enter traffic-inflating revenue-sharing agreements, they are currently not required to reduce their access rates to reflect their increased volume of minutes. The combination of significant increases in switched access traffic with unchanged access rates results in a jump in revenues and thus inflated profits that almost uniformly make the LEC's interstate switched access rates unjust and unreasonable under section 201(b) of the Act.[1083] Consistent with the approach proposed in the *USF/ICC Transformation NPRM*, we adopt a definition of access stimulation that includes two conditions. If a LEC meets those conditions, the LEC generally must reduce its interstate switched access tariffed rates to the rates of the price cap LEC in the state with the lowest rates, which are presumptively consistent with the Act.[1084] This will reduce the extent to which IXC customers that do not use the stimulating services are forced to subsidize the customers that do use the services.

658. Based on the record received in response to the single-pronged trigger proposed in the *USF/ICC Transformation NPRM*, we modify our approach from defining an access stimulation trigger to defining access stimulation. The access stimulation definition we adopt now has two conditions: (1) a

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[1082] *See infra* Appendix I.

[1083] 47 U.S.C. § 201(b), which provides that "[a]ll charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful . . . ." *See Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, 22 FCC Rcd 17989, 17995-96, para. 14 (*Access Stimulation NPRM*).

[1084] *See infra* Appendix A, Section 61.26(g).

revenue sharing condition, revised slightly from the proposal in the *USF/ICC Transformation NPRM*; and (2) an additional traffic volume condition, which is met where the LEC either: (a) has a three-to-one interstate terminating-to-originating traffic ratio in a calendar month; or (b) has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. If both conditions are satisfied, the LEC generally must file revised tariffs to account for its increased traffic.

659. Adoption of the definition of access stimulation with two conditions will facilitate enforcement of the new access stimulation rules in instances where a LEC meets the conditions for access stimulation but does not file revised tariffs. In particular, IXCs will be permitted to file complaints based on evidence from their traffic records that a LEC has exceeded either of the traffic measurements of the second condition, i.e., that the second condition has been met. If the IXC filing the complaint makes this showing, the burden will shift to the LEC to establish that it has not met the access stimulation definition and therefore that it is not in violation of our rules. This burden-shifting approach will enable IXCs to bring complaints based on their own traffic data, and will help the Commission to identify circumstances where a LEC may be in violation of our rules.

660. We conclude that these revised interstate access rules are narrowly tailored to minimize the costs of the rule revisions on the industry, while reducing the adverse effects of access stimulation and ensuring that interstate access rates are at levels presumptively consistent with section 201(b) of the Act.

1. Background

661. In the *USF/ICC Transformation NPRM*, we proposed that carriers that have entered a revenue sharing arrangement be required to refile their interstate switched access tariffs to reflect a rate more consistent with their volume of traffic. For rate-of-return LECs, the rate would be adjusted to account for new demand and any increase in costs. For competitive LECs, that rate would be benchmarked to that of the BOC in the state, or, if there was no BOC in the state, to the largest incumbent LEC in the state. We also sought comment on alternative approaches.[1085]

2. Discussion

a. Need for Reform to Address Access Stimulation

662. The record confirms the need for prompt Commission action to address the adverse effects of access stimulation and to help ensure that interstate switched access rates remain just and reasonable, as required by section 201(b) of the Act. Commenters agree that the interstate switched access rates being charged by access stimulating LECs do not reflect the volume of traffic associated with access stimulation.[1086] As a result, access stimulating LECs realize significant revenue increases and thus inflated profits that almost uniformly make their interstate switched access rates unjust and unreasonable.

663. Access stimulation imposes undue costs on consumers, inefficiently diverting capital away from more productive uses such as broadband deployment.[1087] When access stimulation occurs in locations that have higher than average access charges, which is the predominant case today, the average per-minute cost of access and thus the average cost of long-distance calling is increased.[1088] Because of the rate integration requirements of section 254(g) of the Act, long-distance carriers are prohibited from

[1085] *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4757-70, paras. 635-670.

[1086] *See, e.g.*, Free Conferencing Corporation Section XV Comments at 26; ZipDX Section XV Comments at 5.

[1087] *See* 47 U.S.C. § 1302.

[1088] *See, e.g.*, AT&T Section XV Comments at 7-8, 11-12.

passing on the higher access costs directly to the customers making the calls to access stimulating entities.[1089] Therefore, 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.[1090]

664. The record indicates that a significant amount of access traffic is going to LECs engaging in access stimulation. TEOCO estimates that the total cost of access stimulation to IXCs has been more than $2.3 billion over the past five years.[1091] Verizon estimates the overall costs to IXCs to be between $330 and $440 million per year, and states that it expected to be billed between $66 and $88 million by access stimulators for approximately two billion wireline and wireless long-distance minutes in 2010.[1092] Other parties indicate that payment of access charges to access stimulating LECs is the subject of large numbers of disputes in a variety of forums.[1093] When carriers pay more access charges as a result of access stimulation schemes, the amount of capital available to invest in broadband deployment and other network investments that would benefit consumers is substantially reduced.[1094]

665. Access stimulation also harms competition by giving companies that offer a "free" calling service a competitive advantage over companies that charge their customers for the service. For example, conference calling provider ZipDX indicates that, by not engaging in access stimulation, it is at a disadvantage vis-à-vis competitors that engage in access stimulation.[1095] Providers of conferencing services, like ZipDX, are recovering the costs of the service, such as conference bridges, marketing, and billing, from the user of the service rather than, as explained above in the case of access stimulators, spreading those costs across the universe of long-distance subscribers.[1096] As a result, the services offered by "free" conferencing providers that leverage arbitrage opportunities put companies that recover the cost of services from their customers at a distinct competitive disadvantage.

666. Several parties claim that access stimulation offers economic development benefits, including the expansion of broadband services to rural communities and tribal lands.[1097] Although

[1089] 47 U.S.C. § 254(g). IXCs charge averaged rates for long-distance calls pursuant to the rate integration policy. To the extent that its average access costs are increased, the costs are spread among all customers of the IXC.

[1090] *See, e.g.*, AT&T Section XV Comments at 7. Some parties argue that IXCs are profitable overall or they would eliminate their "all you can eat" pricing plans. *See, e.g.*, Bluegrass Section XV Comments at 8-9; Free Conferencing Corporation Section XV Comments at 24-25. Whether the IXC's revenues for a call are more or less than its cost of terminating the call is not at issue. The question is whether just and reasonable rates are being charged for the provision of interstate switched access services. *See* 47 U.S.C. § 201(b).

[1091] *See* TEOCO, ACCESS STIMULATION BLEEDS CSPS OF BILLIONS, at 5 (TEOCO Study), *attached to* Letter from Glenn Reynolds, Vice President – Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135 (filed Oct. 18, 2010).

[1092] *See* Letter from Donna Epps, Vice President-Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1 (filed Oct. 12, 2010).

[1093] *See, e.g.*, Bluegrass Section XV Comments at 28-29.

[1094] *See, e.g.*, AT&T Section XV Comments at 3; USTelecom Section XV Comments at 6-8.

[1095] Letter from David Frankel, CEO, ZipDX, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 1, 3 (filed Nov. 26, 2010).

[1096] *See* Testimony of David Frankel, Founder, ZipDX, at the April 6, 2011, WCB Workshop at 25 ("[Zip DX] pay[s] interstate compensation charges as part of [our] wholesale arrangements with our underlying service providers"), *available at* http://webapp01.fcc.gov/ecfs/document/view?id=7021340998.

[1097] *See, e.g.*, Free Conferencing Corporation Section XV Comments at 6-7 (the revenues that LECs generate from traffic on their networks allow those carriers to invest in building out their networks with no federal financial (continued…)

expanding broadband services in rural and Tribal lands is important, we agree with other commenters that how access revenues are used is not relevant in determining whether switched access rates are just and reasonable in accordance with section 201(b).[1098] In addition, excess revenues that are shared in access stimulation schemes provide additional proof that the LEC's rates are above cost. Moreover, Congress created an explicit universal service fund to spur investment and deployment in rural, high cost, and insular areas, and the Commission is taking action here and in other proceedings to facilitate such deployment.[1099]

(i) Access Stimulation Definition

667. We adopt a definition to identify when an access stimulating LEC must refile its interstate access tariffs at rates that are presumptively consistent with the Act. After reviewing the record, we make a few changes to the *USF/ICC Transformation NPRM* proposal, including defining access stimulation as occurring when two conditions are met. The first condition is that the LEC has entered into an access revenue sharing agreement, and we clarify what types of agreements qualify as "revenue sharing." The second condition is met where the LEC either has had a three-to-one interstate terminating-to-originating traffic ratio in a calendar month, or has had a greater than 100 percent increase in interstate originating and/or terminating switched access MOU in a month compared to the same month in the preceding year. We adopt these changes to ensure that the access stimulation definition is not over-inclusive and to improve its enforceability.

668. *Definition of a Revenue Sharing Agreement.* Many parties agree that the use of the revenue sharing arrangement trigger alone as proposed in the *USF/ICC Transformation NPRM* would be reasonable to reduce access stimulation,[1100] and other parties argue the existence of a revenue sharing arrangement should be used in conjunction with another condition.[1101] However, the use of a revenue sharing approach alone was criticized by some as being ambiguous, circular, or a poor indicator of access stimulation.[1102] Other parties found the definition of revenue sharing to be over-inclusive and/or under-

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support); Global Section XV Comments at 8 (revenues from competitive conferencing services help further investment in rural infrastructure, thereby promoting development).

1098 *See, e.g.*, NASUCA and NJ Rate Counsel Section XV Comments at 11-12; Sprint Section XV Reply at 1-2; Statement of Iowa Utilities Board Member Krista Tanner at the April 6, 2011 Workshop, at 61 ("[I]t doesn't matter what the traffic is for. It doesn't matter what you do with your reasonable profits."). The Commission is considering a wide range of issues related to improving communications services for Native Nations. *See generally Improving Communications Services for Native Nations,* CG Docket No. 11-41, Notice of Inquiry, 26 FCC Rcd 2672 (2011).

1099 *See supra* Sections VI and VII; *see also, e.g., Implementation of Section 224 of the Act; A National Broadband Plan For Our Future*, WC Docket No. 07-245, GN Docket No. 09-51, Report and Order and Order on Reconsideration, 26 FCC Rcd 5240 at 5319, para. 178 (2011) (*2011 Pole Attachment Order*).

1100 *See, e.g.*, CenturyLink Section XV Comments at 39-40; Global Section XV Comments at 12 ("appropriately tailored step that strikes a proper balance between the Commission's policy concerns and the legitimate business practices of carriers"); Omnitel and Tekstar Section XV Comments at 12-13. *But see* Beehive Section XV Comments at 5-7; EarthLink Section XV Comments at 13-16; HyperCube Section XV Comments at 4; Free Conferencing Corporation Section XV Comments at 2-3, 12-13.

1101 *See, e.g.*, AT&T Section XV Comments at 18-20; Leap Wireless and Cricket Section XV Comments at 6-7.

1102 *See, e.g.*, ZipDX Section XV Comments at 5; EarthLink Section XV Comments at 13-14; RNK Section XV Comments at 10-11 (will generate more disputes); Letter from Edward A. Yorkgitis, Jr., Counsel to Omnitel Communications, Inc and Tekstar Communications, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 2 (filed May 9, 2011) (Omnitel and Tekstar May 9, 2011 *Ex Parte* Letter).

inclusive.[1103] Several commenters offered suggestions on how to revise the definitional language.[1104]

669. After reviewing the record, we clarify the scope of the access revenue sharing agreement condition of the new access stimulation definition. The access revenue sharing condition of the access stimulation definition we adopt herein is met when a rate-of-return LEC or a competitive LEC: "has an access revenue sharing agreement, whether express, implied, written or oral, that, over the course of the agreement, would directly or indirectly result in a net payment to the other party (including affiliates) to the agreement, in which payment by the rate-of-return LEC or competitive LEC is based on the billing or collection of access charges from interexchange carriers or wireless carriers. When determining whether there is a net payment under this rule, all payments, discounts, credits, services, features, functions, and other items of value, regardless of form, provided by the rate-of-return LEC or competitive LEC to the other party to the agreement shall be taken into account."[1105]

670. This rule focuses on revenue sharing that would result in a net payment to the other entity over the course of the agreement[1106] arising from the sharing of access revenues.[1107] We intend the net payment language to limit the revenue sharing definition in a manner that, along with the traffic measurements discussed below, best identifies the revenue sharing agreements likely to be associated with access stimulation and thus those cases in which a LEC must refile its switched access rates. Revenue sharing may include payments characterized as marketing fees or other similar payments that result in a net payment to the access stimulator. However, this rule does not encompass typical, widely available, retail discounts offered by LECs through, for example, bundled service offerings.

671. Some commenters assert that the proposed definition of access revenue sharing arrangements was over-inclusive and/or under-inclusive.[1108] We believe that the net payment language,

[1103] *See, e.g.*, Rural Associations Section XV Comments at 32-36; PAETEC et al. Section XV Comments at 21.

[1104] *See, e.g.*, ZipDX Section XV Comments at 5 (proposing a revised definition to read: "Access revenue sharing occurs when a rate-of-return ILEC or CLEC enters in an agreement with another party (including an affiliate) that results in the aggregate fees owed to the ILEC or CLEC by the other party decreasing as the volume of access-fee-generating traffic attributable to that other party increases (including to the point that the other party is receiving a net payment from the ILEC or CLEC."); HyperCube Section XV Comments at 10 (proposing to distinguish wholesale sharing agreements from retail agreements and exclude wholesale agreements from the definition of revenue sharing); Omnitel and Tekstar May 9, 2011 *Ex Parte* Letter, Attach. at 1 (proposing a revised definition to read: "Access revenue sharing occurs when a rate-of-return ILEC or a CLEC enters into an agreement that will result in a net payment over the course of the agreement to the other party (including affiliates) to the agreement, in which payment by the rate-of-return ILEC or CLEC is tied to the billing or collection of access charges from interexchange carriers. When determining whether there is a net payment under this rule, all payment, discounts, credits, services, features and functions, and other items of value, regardless of form, given by the rate-of-return ILEC or CLEC to the other party in connection with the shall be taken into account.").

[1105] *See infra* Appendix A.

[1106] The use of "over the course of the agreement" does not preclude an IXC from filing a complaint if the traffic measurement condition is met. The agreement is to be interpreted in terms of what the anticipated net payments would be over the course of the agreement.

[1107] We clarify that patronage dividends paid by cooperatives generally do not constitute revenue sharing as contemplated by this definition. *See* Rural Associations Section XV Comments at 33-34. However, a cooperative, like other LECs, could structure payments in a manner to engage in revenue sharing that would cause it to meet the definition as discussed herein.

[1108] *See, e.g.*, PAETEC et al. Section XV Comments at 21 (claiming that the net payor test is both over- and under-inclusive because it targets the wrong factor—unreasonable traffic spikes in high-access-cost areas is more a function of the portability of the traffic than the direction or amount of net payments); Rural Associations Section XV Comments at 32-36 (claiming that the Commission must distinguish between situations where traffic levels are (continued…)

combined with either the terminating-to-originating traffic ratio or the traffic growth requirement, sufficiently limits the scope of the revenue sharing definition by narrowing the number of carriers that could be subject to the trigger. HyperCube argues that the Commission should exclude wholesale services from the definition of revenue sharing agreements.[1109] We find HyperCube's proposal unpersuasive because the sharing of access revenues is involved and thus should be covered if the second condition of the definition is met.[1110] If a LEC's circumstances change because it terminates the access revenue sharing agreement(s), it may file a tariff to revise its rates under the rules applicable when access stimulation is not occurring.[1111] As part of that tariff filing, an officer of the LEC must certify that it has terminated the revenue sharing agreement(s).

672. Several parties have urged us to declare revenue sharing to be a violation of section 201(b) of the Act.[1112] Other parties argue that the Commission should prohibit the collection of switched access charges for traffic sent to access stimulators.[1113] Many commenters, on the other hand, assert that revenue sharing is a common business practice that has been endorsed in some situations by the Commission.[1114] As proposed in the *USF/ICC Transformation NPRM*, we do not declare revenue sharing to be a *per se* violation of section 201(b) of the Act.[1115] A ban on all revenue sharing arrangements could be overly broad,[1116] and no party has suggested a way to overcome this shortcoming. Nor do we find that parties have demonstrated that traffic directed to access stimulators should not be subject to tariffed access charges in all cases. We note that the access stimulation rules we adopt today are part of our comprehensive intercarrier compensation reform. That reform will, as the transition unfolds, address remaining incentives to engage in access stimulation.

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artificially inflated and situations where traffic increases as a result of legitimate economic activity); HyperCube Section XV Comments at 4 (claiming that the revenue sharing definition is over-inclusive because it would encompass wholesale revenue sharing arrangements that HyperCube believes are in the public interest by promoting a competitive environment, rather than focusing on end-user stimulation).

1109 HyperCube Section XV Comments at i, 4.

1110 In all events, HyperCube states that it is already benchmarking to the rates of the BOC in its service areas and thus would likely be unaffected by the rules adopted here, even though we are departing from the BOC rates as the benchmark and using the lowest price cap rate in the state. *Id.* at 3.

1111 *See* Bluegrass Section XV Comments at 19.

1112 *See, e.g.*, CenturyLink Section XV Comments at 33-34, 53 (sharing of revenues is unreasonable practice under section 201(b)); XO Section XV Comments at 44; USTelecom Section XV Comments at 10; AT&T Section XV Comments at 12-13.

1113 *See, e.g.*, AT&T Section XV Comments at 12-15; Sprint Section XV Comments at 20; CenturyLink Section XV Comments at 34-35 (Billing IXC for tariffed access charges for traffic delivered to business partner instead of end user violates most LECs' access tariffs and FCC rules.).

1114 *See, e.g.*, HyperCube Section XV Comments at 7-8 (Commission should not ban revenue sharing agreements that are invisible to the calling party, such as HyperCube, and therefore do not stimulate the calling party to place additional calls.).

1115 *See, e.g.*, Cablevision and Charter Section XV Comments at 13-14; Free Conferencing Corporation Section XV Comments at 30; Neutral Tandem Section XV Comments at 5.

1116 *See, e.g.*, *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, 9142-43, para. 70 (2004) (*CLEC Access Charge Reform Reconsideration Order*); *AT&T's Private Payphone Commission Plan*, ENF-87-19, Memorandum Opinion and Order, 7 FCC Rcd 7135 (1992).

673. A few parties argue that the Commission explicitly approved revenue sharing in the *CLEC Access Charge Reconsideration Order* when it found that commission payments from competitive LECs to generators of toll-free traffic, such as hotels and universities, did not create any incentives for the individuals who use those facilities to place excessive or fraudulent calls.[1117] That case is inapposite. The Commission there was responding to IXC assertions in connection with 8YY calling and the Commission noted that it did not appear that the payments would affect calling patterns because the commissions did not create any incentive for those actually placing the calls to artificially inflate their 8YY traffic.[1118] By contrast, when access traffic is being stimulated, the party receiving the shared revenues has an economic incentive to increase call volumes by advertising the stimulating services widely.

674. Several parties ask that we address the potential for LECs to attempt to evade the prohibition on access stimulation by integrating high call volume operations within the same corporate entity as the LEC, rather than providing those services through contracts with third parties or affiliates, so that it is able to characterize this arrangement as something other than a revenue sharing agreement.[1119] In particular, CenturyLink argues that revenue sharing in the access stimulation context, however structured, violates section 254(k) of the Act because terminating switched access is a monopoly service and the conferencing services are competitive.[1120] The rules adopted here pursuant to sections 201 and 202 of the Act address conferencing services being provided by a third party, whether affiliated with the LEC or not.[1121] Section 254(k) would apply to a LEC's operation of an access stimulation plan within its own corporate organization. In that context, as we have found in other proceedings, terminating access is a monopoly service.[1122] The conferencing activity, as portrayed by the parties engaged in access stimulation, would be a competitive service.[1123] Thus, the use of non-competitive terminating access revenues to support competitive conferencing service within the LEC operating entity would violate section 254(k) and appropriate sanctions could be imposed.

675. *Addition of a Traffic Measurement Condition.* After reviewing the record, we agree that it is appropriate to include a traffic measurement condition in the definition of access stimulation.[1124] Accordingly, in addition to requiring the existence of a revenue sharing agreement, we add a second condition to the definition requiring that a LEC: "has either an interstate terminating-to-originating traffic ratio of at least 3:1 in a calendar month, or has had more than a 100 percent growth in interstate originating and/or terminating switched access MOU in a month compared to the same month in the

[1117] PAETEC et al. Section XV Comments at 27; EarthLink Section XV Comments at 19-20.

[1118] *See CLEC Access Charge Reform Reconsideration Order,* 19 FCC Rcd at 9142-43, para. 70.

[1119] *See, e.g.,* Level 3 Section XV Comments at 5; Verizon Section XV Comments at 43-44.

[1120] CenturyLink Section XV Comments at 43-50. In relevant part, section 254(k) provides that "[a] telecommunications carrier may not use services that are not competitive to subsidize services that are subject to competition." 47 U.S.C. § 254(k).

[1121] Free Conferencing Corporation, on the other hand, argues that using revenue sharing as a trigger discriminates in favor of vertically integrated companies, such as AT&T and Verizon, where the conference calling provider and the LEC collecting access charges are part of the same overall enterprise. Free Conferencing Corporation Section XV Comments at 26-27; *see also* Global Section XV Comments at 11-12. This argument is unpersuasive for the reasons stated in paragraph 666 *supra.*

[1122] *See CLEC Access Charge Order,* 16 FCC Rcd 9923, 9935, para. 30.

[1123] *See, e.g.,* Free Conferencing Corporation Section XV Comments at 1, 17; Global Section XV Comments at 9.

[1124] *See, e.g.,* AT&T Section XV Comments at 18-20; ITTA Section XV Comments at 25; Verizon Section XV Comments at 44.

preceding year."[1125] The addition of a traffic measurement component to the access stimulation definition creates a bright-line rule that responds to record concerns about using access revenue sharing alone. We conclude that these measurements of switched access traffic of all carriers exchanging traffic with the LEC reflect the significant growth in traffic volumes that would generally be observed in cases where access stimulation is occurring and thus should make detection and enforcement easier. Carriers paying switched access charges can observe their own traffic patterns for each of these traffic measurements and file complaints based on their own traffic patterns. Thus, this will not place a burden on LECs to file traffic reports, as some proposals would.[1126]

676. The record offers support for both a terminating-to-originating traffic ratio[1127] and a traffic growth factor.[1128] The Commission adopted a 3:1 ratio in its 2001 *ISP-Remand Order* to address a similar arbitrage scheme based on artificially increasing reciprocal compensation minutes.[1129] Further, the Wireline Competition Bureau employed a 100 percent traffic growth factor as a benchmark in a tariff investigation to address the potential that some rate-of-return LECs might engage in access stimulation after having filed tariffs with high switched access rates.[1130] In each case, the approach was largely successful in identifying and reducing the practice.

677. We conclude that the use of a terminating-to-originating traffic ratio in conjunction with a traffic growth factor as alternative traffic measures addresses the shortcomings of using either component separately. A few parties argue that carriers can game the terminating-to-originating traffic ratio component by simply increasing the number of originating MOU.[1131] The traffic growth component protects against this possibility because increasing the originating access traffic to avoid tripping the 3:1 component would likely mean total access traffic would increase enough to trip the growth component.

[1125] *See infra* Appendix A.

[1126] *See* Letter from Henry Goldberg, Counsel for Free Conferencing Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, GN Docket No. 09-51, CC Docket No. 01-92, Attach. at 7 (filed July 8, 2011) (Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter).

[1127] *See, e.g.*, CTIA Section XV Comments at 7-9; Sprint Section XV Comments at 8-9, 18-20; Ohio Commission Section XV Comments at 15; Time Warner Cable Section XV Comments at 15-16; Leap Wireless and Cricket Section XV Comments at 6-7.

[1128] *See, e.g.*, XO Section XV Comments at 41-43; RNK Section XV Comments at 11-12; Cox Section XV Comments at 13; NASUCA and NJ Rate Counsel Section XV Comments at 10.

[1129] *See Intercarrier Compensation for ISP-Bound Traffic,* CC Docket Nos. 96-98, 99-68, Order on Remand and Report and Order, 16 FCC Rcd 9151, 9183, para. 70 (2001) (subsequent history omitted) (*ISP Remand Order*). There, as here, reciprocal compensation rates were sufficiently high that many competitive LECs found it profitable to target and serve ISP customers who were large recipients of local traffic, since dial-up Internet customers would place calls to their ISP with lengthy hold times. This practice led to significant traffic imbalances, with competitive LECs seeking substantial amounts in reciprocal compensation payments from other LECs.

[1130] *See Investigation of Certain 2007 Annual Access Tariffs*, WC Docket No. 07-184, WCB/Pricing No. 07-10, Order Designating Issues for Investigation, 22 FCC Rcd 11619 at 16120, para. 28 (WCB 2007) (*Designation Order*). The *Designation Order* identified two safe harbor provisions that would allow the affected carriers to avoid the investigation if the carrier either: (1) elected to return to the NECA pool; or (2) added language to its tariff that would commit to the filing of a revised tariff if the filing carrier experienced a 100 percent increase in monthly demand when compared to the same month in the prior year. *Id.*

[1131] *See, e.g.*, Letter from Henry Goldberg, Counsel for Free Conferencing Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90, 07-135, GN Docket No. 09-51, CC Docket No. 01-92, Attach. at 8 (filed May 26, 2011); Letter from Norina Moy, Director, Government Affairs, Sprint, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, at 4-7 (filed June 15, 2011).

The terminating-to-originating traffic ratio component will capture those current access stimulation situations that already have very high volumes that could otherwise continue to operate without tripping the growth component. For example, a LEC that has been engaged in access stimulation for a significant period of time would have a high terminating traffic volume that, under a traffic growth factor alone, could continue to expand its operations, possibly avoiding the condition entirely by controlling its terminating traffic. Because these alternative traffic measurements are combined with the requirement that an access revenue sharing agreement exist, we reduce the risk that the terminating-to-originating traffic ratio or traffic growth components of the definition could be met by legitimate changes in a LEC's calling patterns. The combination of these two traffic measurements as alternatives is preferable to either standing alone, as some parties have urged.[1132] A terminating-to-originating traffic ratio or traffic growth condition alone could prove to be overly inclusive by encompassing LECs that had realized access traffic growth through general economic development, unaided by revenue sharing. Such situations could include the location of a customer support center in a new community without any revenue sharing arrangement, or a new competitive LEC that is experiencing substantial growth from a small base.[1133]

678. We decline to adopt a condition based on absolute MOU per line, either on a stand-alone basis or in conjunction with a revenue sharing condition, as suggested by several parties.[1134] Under these proposals, if a LEC's MOUs per line exceeded a specified threshold, the LEC would be required to take some action to reduce its rates. Many LECs could evade a MOU per line condition simply by adding additional lines. Moreover, a MOU per line approach would require self-reporting, because neither an IXC nor the Commission could otherwise readily tell if the condition had been met.

(ii) Remedies

679. If a LEC meets both conditions of the definition, it must file a revised tariff except under certain limited circumstances. As explained in more detail below, a rate-of-return LEC must file its own cost-based tariff under section 61.38 of the Commission's rules and may not file based on historical costs under section 61.39 of the Commission's rules or participate in the NECA traffic-sensitive tariff. If a competitive LEC meets the definition, it must benchmark its tariffed access rates to the rates of the price cap LEC with the lowest interstate switched access rates in the state, rather than to the rates of the BOC or the largest incumbent LEC in the state (as proposed in the *USF/ICC Transformation NPRM*). We conclude, however, that if a LEC has terminated its revenue sharing agreement(s) before the deadline we establish for filing its revised tariff, or if the competitive LEC's rates are already below the benchmark rate, such a LEC does not have to file a revised interstate switched access tariff. However, once a rate-of-return LEC or a competitive LEC has met both conditions of the definition and has filed revised tariffs, when required, it may not file new tariffs at rates other than those required by the revised pricing rules until it terminates its revenue sharing agreement(s), even if the LEC no longer meets the 3:1 terminating-to-originating traffic ratio condition of the definition or traffic growth threshold. As price cap LECs

[1132] *See, e.g.*, XO Section XV Comments at 46; RNK Section XV Comments at 12 (50 percent increase over the previous six months would create a rebuttable presumption of being engaged in access stimulation).

[1133] State Joint Board Members propose a condition for access stimulation based on a terminating ratio one standard deviation above the national average terminating ratio annually. *See* State Members Comments at 156. Under their proposal, a carrier meeting this condition would set new rates so that the terminating revenue for any carrier equals the carrier's initial rate times its originating minutes times the terminating ratio at the one standard deviation point. *Id.* We decline to adopt this proposal because it is unclear that using originating traffic volumes would produce a rate that adequately reflects the increased terminating traffic volumes sufficient to ensure that rates are just and reasonable as required by Section 201(b) of the Act.

[1134] *See, e.g.*, USTelecom Section XV Comments at 9 n.20; Rural Associations Section XV Comments at 33-36; ITTA Section XV Comments at 25; Louisiana Small Company Committee Section XV Comments at 16-17; Toledo Telephone Section XV Comments at 7.

reduce their switched access rates under the ICC reforms we adopt herein, competitive LECs must benchmark to the reduced rates.

680. *Rate-of-Return Carriers Filing Tariffs Based on Historical Costs and Demand: Section 61.39.* We adopt our proposal in the *USF/ICC Transformation NPRM* that a LEC filing access tariffs pursuant to section 61.39 would lose its ability to base its rates on historical costs and demand if it is engaged in access stimulation.[1135] Incumbent LECs filing access tariffs pursuant to section 61.39 of the Commission's rules currently base their rates on historical costs and demand, which, because of their small size, generally results in high switched access rates based on the high costs and low demand of such carriers.[1136] The limited comment in the record was supportive of our proposal for the reasons set forth in the *USF/ICC Transformation NPRM.*[1137] We accordingly revise section 61.39 to bar a carrier otherwise eligible to file tariffs pursuant to section 61.39 from doing so if it meets the access stimulation definition. We also require such a carrier to file a revised interstate switched access tariff pursuant to section 61.38 within 45 days after meeting the definition, or within 45 days after the effective date of this rule in cases where the carrier meets the definition on that date.

681. *Participation in NECA Tariffs.* In the *USF/ICC Transformation NPRM,* the Commission proposed that a carrier engaging in revenue sharing would lose its eligibility to participate in the NECA tariffs 45 days after engaging in access stimulation, or 45 days after the effective date of this rule in cases where it currently engages in access stimulation.[1138] A carrier leaving the NECA tariff thus would have to file its own tariff for interstate switched access, pursuant to section 61.38 of the rules.[1139]

682. The record is generally supportive of this approach for the reasons stated in the *USF/ICC Transformation NPRM,*[1140] and we adopt it, subject to one modification. We clarify that, pursuant to section 69.3(e)(3) of the rules,[1141] a LEC required to leave the NECA interstate tariff (which includes both switched and special access services) because it has met the access stimulation definition must file its own tariff for both interstate switched and special access services.[1142]

683. We also adopt a revision to the proposed rule similar to a suggestion by the Louisiana Small Carrier Committee, which recommends that rate-of-return carriers be given an opportunity to show

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[1135] *USF/ICC Transformation NPRM,* 26 FCC Rcd at 4767, para. 664.

[1136] 47 C.F.R. § 61.39.

[1137] *See, e.g.,* AT&T Section XV Comments at 17-18; Level 3 Section XV Comments at 3; USTelecom Section XV Comments at 11.

[1138] *USF/ICC Transformation NPRM,* 26 FCC Rcd at 4766, para. 662.

[1139] *Id.*

[1140] *See, e.g.,* Rural Associations Section XV Comments at 35-36; AT&T Section XV Comments at 17-18; Level 3 Section XV Comments at 3; *but see* USTelecom Section XV Comments at 10-11 (arguing that such a rule is unnecessary).

[1141] 47 C.F.R. § 69.3(e)(3).

[1142] USTelecom suggests that given that shared revenues are not appropriately included in a carrier's revenue requirement, the Commission does not need to address eligibility for participation in NECA tariffs in its access stimulation rules—a carrier would either stop sharing, or file its own tariff without any mandate to do so. USTelecom Section XV Comments at 10-11. We disagree, because current rules only provide for a participating carrier to leave the NECA tariff at the time of the annual tariff filing. A rule prohibiting LECs from further participating in the NECA tariff when the definition is met, and providing for advance notice to NECA, spells out the procedure.

that they are in compliance with the Commission's rules before being required to file a revised tariff.[1143] Accordingly, we conclude that if a carrier sharing access revenues terminates its access revenue sharing agreement before the date on which its revised tariff must be filed, it does not have to file a revised tariff. We believe that when sharing agreements are terminated, in most instances traffic patterns should return to levels that existed prior to the LEC entering into the access revenue sharing agreement. This eliminates a burden on such carriers when there is no ongoing reason for requiring such a filing.

684. *Rate of Return Carriers Filing Tariffs Based On Projected Costs and Demand: Section 61.38.* In the *USF/ICC Transformation NPRM*, we proposed that a carrier filing interstate switched access tariffs based on projected costs and demand pursuant to section 61.38 of the rules be required to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the effective date of the rule if the LEC on that date is engaged in access revenue sharing,[1144] unless the costs and demand arising from the new revenue sharing arrangement had been reflected in its most recent tariff filing.[1145] We further proposed that payments made by a LEC pursuant to an access revenue sharing arrangement should not be included as costs in the rate-of-return LEC's interstate switched access revenue requirement because such payments have nothing to do with the provision of interstate switched access service and are thus not used and useful in the provision of such service.[1146] Thus, we proposed to clarify prospectively that a rate-of-return carrier that shares access revenue, provides other compensation to an access stimulating entity, or directly provides the stimulating activity, and bundles those costs with access, is engaging in an unreasonable practice that violates section 201(b) and the prudent expenditure standard.[1147]

685. We adopt the approach proposed in the *USF/ICC Transformation NPRM.* Commenters that addressed this issue support the approach.[1148] In particular, we adopt a rule requiring carriers filing interstate switched access tariffs based on projected costs and demand pursuant to section 61.38 of the rules to file revised access tariffs within 45 days of commencing access revenue sharing, or within 45 days of the effective date of the rule if the LEC on that date was engaged in access revenue sharing,[1149] unless the costs and demand arising from the new access revenue sharing agreement were reflected in its most recent tariff filing. This tariff filing requirement provides the carrier with the opportunity to show, and the Commission to review, any projected increase in costs, as well as to consider the higher anticipated demand in setting revised rates. If the access revenue sharing agreement(s) that required the new tariff filing has been terminated by the time the revised tariff is required to be filed, we will not

[1143] Louisiana Small Company Committee Section XV Comments at 17 (for example, because unexpectedly high levels of traffic have been terminated).

[1144] *USF/ICC Transformation NPRM,* 26 FCC Rcd at 4767, para. 663.

[1145] *Id.*

[1146] *Id.* at 4766, para. 661.

[1147] *Id.* The prudent expenditure standard is associated with the "used and useful" doctrine, which together are employed in evaluating whether a carrier's rates are just and reasonable. *See Access Stimulation NPRM,* 22 FCC Rcd at 17997, para. 19, n.47.

[1148] *See, e.g.*, AT&T Section XV Comments at 17-18; USTelecom Section XV Comments at 11. Sprint is concerned that rates filed under section 61.38 will not be just and reasonable, even if LECs' projections are made in good faith because of the lack of a true-up mechanism. Sprint Section XV Comments at 15. Sprint's concern is unfounded. The revised tariffs filed by a section 61.38 carrier meeting the revenue sharing definition will be subject to the Commission's tariff review processes in which the projected cost and demand data can be reviewed and appropriate action taken if necessary.

[1149] *See USF/ICC Transformation NPRM,* 26 FCC Rcd at 4767, para. 663.

require the filing of a revised tariff, as the proposal would have. A refiling in that instance would be unnecessary because the original rates will now more likely reflect the cost/demand relationship of the carrier. If a LEC, however, subsequently reactivates the same telephone numbers in connection with a new access revenue sharing agreement, we will presumptively treat that action to be furtive concealment resulting in the loss of deemed lawful status for the LEC's tariff, as discussed below in conjunction with the discussion of section 204(a)(3) of the Act.[1150] This will prevent a LEC from entering into a series of access revenue sharing agreements to avoid the 45-day filing requirement, while benefiting from the advertising of those telephone numbers used under previous agreements.

686. We also adopt the proposal that payments made by a LEC pursuant to an access revenue sharing agreement are not properly included as costs in the rate-of-return LEC's interstate switched access revenue requirement. This proposal received broad support in the record.[1151]

687. We decline to adopt either of two suggested alternative pricing proposals for section 61.38 LECs. First, several parties suggested allowing a rate-of-return carrier filing a tariff based on projected costs and demand pursuant to section 61.38 to file a rate of $0.0007, rather than requiring it to make a new cost showing.[1152] Second, other parties proposed that a section 61.38 carrier be allowed to benchmark to the BOC rate in the state since that rate is just and reasonable.[1153] An established ratemaking procedure for section 61.38 LECs already exists. No party has demonstrated why either of the proposed rates would be preferable to the rates developed under existing ratemaking procedures. Thus, the rule we adopt will require section 61.38 carriers to set their rates based on projected costs and demand data.[1154]

688. *Competitive LECs.* In the *USF/ICC Transformation NPRM,* we proposed that when a competitive LEC is engaged in access stimulation, it would be required to benchmark its interstate switched access rates to the rate of the BOC in the state in which the competitive LEC operates, or the independent incumbent LEC with the largest number of access lines in the state if there is no BOC in the state, and if the competitive LEC is not already benchmarking to that carrier's rate.[1155] Under the proposal, a competitive LEC would have to file a revised tariff within 45 days of engaging in access stimulation, or within 45 days of the effective date of the rule if it currently engages in access stimulation.[1156]

689. After reviewing the record, we adopt our proposal with one modification to ensure that the LEC refiles at a rate no higher than the lowest rate of a price cap LEC in the state. In so doing, we conclude that neither the switched access rate of the rate-of-return LEC in whose territory the competitive

[1150] *See infra* para. 695. As described therein, a carrier may be required to make refunds if its tariff does not have deemed lawful status.

[1151] *See, e.g.,* AT&T Section XV Comments at 12-15; CenturyLink Section XV Comments at 53; Level 3 Section XV Comments at 3; XO Section XV Comments at 44; RNK Section XV Comments at 11.

[1152] *See, e.g.,* AT&T Section XV Comments at 15-17; CTIA Section XV Comments at 7; MetroPCS Section XV Comments at 5; Sprint Section XV Comments at 8-9, 18-20; T-Mobile Section XV Comments at 8-9.

[1153] CenturyLink Section XV Comments at 42; North County Section XV Comments at 2-3 (LECs reduce rates as volumes increase until the BOC rate is reached).

[1154] Beginning July 1, 2012, rate-of-return LECs must comply with the transition procedures described in Section XII.C, *infra.*

[1155] *USF/ICC Transformation NPRM,* 26 FCC Rcd at 4767, para. 665.

[1156] *Id.*

LEC is operating nor the rate used in the rural exemption[1157] is an appropriate benchmark when the competitive LEC meets the access stimulation definition. In those instances, the access stimulator's traffic vastly exceeds the volume of traffic of the incumbent LEC to whom the access stimulator is currently benchmarking.[1158] Thus, the competitive LEC's traffic volumes no longer operationally resemble the carrier's traffic volumes whose rates it had been benchmarking because of the significant increase in interstate switched access traffic associated with access stimulation.[1159] Instead, the access stimulating LEC's traffic volumes are more like those of the price cap LEC in the state,[1160] and it is therefore appropriate and reasonable for the access stimulating LEC to benchmark to the price cap LEC.[1161]

690. Although many parties support using the switched access rates of the BOC in the state, or the rates of the largest independent LEC in the state if there is no BOC,[1162] as we proposed, we conclude that the lowest interstate switched access rate of a price cap LEC in the state is the rate to which a competitive LEC must benchmark if it meets the definition.[1163] Generally, the BOC will have the lowest interstate switched access rates. However, the record reveals that in California, Pacific Bell's interstate switched access rates are higher than those of other price cap LECs in the state, as well as being higher than the interstate switched access rates of price cap LECs in other states. Benchmarking to the lowest price cap LEC interstate switched access rate in the state will reduce rate variance among states and will significantly reduce the rates charged by competitive LECs engaging in access stimulation, even if it does not entirely eliminate the potential for access stimulation.[1164] However, should the traffic

[1157] *See* 47 C.F.R. § 61.26(e).

[1158] For example, AT&T submitted data showing that the terminating MOU of 12 competitive LECs in Iowa, Minnesota, and South Dakota averaged 750,000,000 compared to 2,028,398 for NECA Band 8 LECs in those states. *See* Letter from Brian J. Benison, Director, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 6 (filed Dec. 3, 2009) (AT&T Dec. 3, 2009 *Ex Parte* Letter). The relationship of those traffic volumes has not changed significantly since 2009. *See* Letter from Brian J. Benison, Director, Federal Regulatory, AT&T Services Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 07-135, Attach. at 4 (filed May 13, 2011).

[1159] *See, e.g.*, AT&T Section XV Comments at 14-17; CenturyLink Section XV Comments at 37-40; T-Mobile Section XV Comments at 7-8.

[1160] *See USF/ICC Transformation NPRM*, 26 FCC Rcd at 4767, para. 665. AT&T shows that "rural" access stimulating competitive LECs in Iowa, Minnesota and South Dakota collectively are terminating three to five times as many minutes as the largest incumbent LEC operating in the same state. AT&T Dec. 3, 2009 *Ex Parte* Letter, Attach. at 4.

[1161] We reject NASUCA's suggestion that we use the lowest NECA rate as the benchmark. NASUCA and NJ Rate Counsel Section XV Comments at 11. The traffic patterns of those NECA carriers are likely to be even less comparable to the traffic patterns of a competitive LEC engaged in access stimulation.

[1162] *See, e.g.*, CenturyLink Section XV Comments at 38-39; ITTA Section XV Comments at 24-25; Level 3 Section XV Comments at 3; Omnitel and Tekstar Section XV Reply at 4, 17; IUB Section XV Comments at 17-18; Ohio Commission Section XV Comments at 14-15. Several parties argue that a lower rate would be reasonable and should be adopted. *See, e.g.*, AT&T Section XV Comments at 17; CTIA Section XV Comments at 6-7; Sprint Section XV Comments at 2.

[1163] We decline to adopt the Level 3 proposal that we adopt a requirement that a competitive LEC must file a declaration with the Commission attesting to the fact that it entered into an access revenue sharing agreement within 45 days of the effective date of the agreement. *See* Level 3 Section XV Comments at 4. Under the revised rules, competitive LECs are required to file revised tariffs if they engage in access stimulation. The proposed declaration would be duplicative.

[1164] *See, e.g.*, AT&T Section XV Comments at 17; Sprint Section XV Comments at 13.

volumes of a competitive LEC that meets the access stimulation definition substantially exceed the traffic volumes of the price cap LEC to which it benchmarks, we may reevaluate the appropriateness of the competitive LEC's rates and may evaluate whether any further reductions in rates is warranted. In addition, we believe the reforms we adopt elsewhere in this Order will, over time, further reduce intercarrier payments and the incentives for this type of arbitrage.

691. We require a competitive LEC to file a revised interstate switched access tariff within 45 days of meeting the definition, or within 45 days of the effective date of the rule if on that date it meets the definition. A competitive LEC whose rates are already at or below the rate to which they would have to benchmark in the refiled tariff will not be required to make a tariff filing.

692. We will not adopt a benchmarking rate of $0.0007 in instances when the definition is met, as is suggested by a few parties.[1165] The $0.0007 rate originated as a negotiated rate in reciprocal compensation arrangements for ISP-bound traffic, and there is insufficient evidence to justify abandoning competitive LEC benchmarking entirely. Nor will we immediately apply bill-and-keep, as some parties have urged.[1166] We adopt a bill-and-keep methodology for intercarrier compensation below, but decline to mandate a flash cut to bill-and-keep here. Additionally, we reject the suggestion that we detariff competitive LEC access charges if they meet the access stimulation definition.[1167] Our benchmarking approach addresses access stimulation within the parameters of the existing access charge regulatory structure. We expect that the approach we adopt will reduce the effects of access stimulation significantly, and the intercarrier compensation reforms we adopt should resolve remaining concerns.

693. A few parties encourage the Commission to require high volume access tariffs (HVATs) for competitive LECs.[1168] These tariffs reduce rates as volumes increase and, as suggested by some parties, would provide a transition from today's interstate switched access rates to the benchmarked rate over two years.[1169] Under our benchmarking approach, if a competitive LEC meets the definition, its rates must be revised so that such rates are at or below the benchmark rate, unless they are already at those levels. A transitional HVAT that had one or more rates that exceeded the benchmark rate would not be in compliance with the benchmarking requirement adopted herein. Proponents of a transitional HVAT have not established why a transition is required or even appropriate, particularly considering the high traffic volumes associated with access stimulation. A competitive LEC that met the definition could, of course, file an HVAT if all of the rates in the tariff are below the benchmark rate.

694. We also decline to require or allow competitive LECs to use the "settlements specified in the extended average schedules published by NECA"[1170] or the NECA rate band 1 local switching rate,[1171] or to permit a competitive LEC to use section 61.38 procedures to establish its interstate switched access

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[1165] *See, e.g.*, AT&T Section XV Comments at 21; Sprint Section XV Comments at 2, 8-9.

[1166] *See, e.g.*, CTIA Section XV Comments at 7; Leap Wireless and Cricket Section XV Comments at 7; MetroPCS Section XV Comments at 4; T-Mobile Section XV Comments at 2, 8-9.

[1167] *See, e.g.*, AT&T Section XV Comments at 13-17 (the BOC rate would continue to encourage traffic pumping); Sprint Section XV Comments at 20-21.

[1168] *See, e.g.*, Free Conferencing Corporation Section XV Comments at 37-38; *see also* Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter, Attach. at 6 (urging the use of HVAT as a transition to BOC rates in two years).

[1169] *See* Free Conferencing Corporation July 8, 2011 *Ex Parte* Letter, Attach. at 6-8.

[1170] NASUCA Section XV Comments at 11.

[1171] Bluegrass Section XV Comments at 15-16.

rates if the price cap LEC rates would not adequately compensate the competitive LEC.[1172] We maintain the benchmarking approach to the regulation of the rates of competitive LECs. The average schedules published by NECA are inadequate for this purpose. The schedules are constrained by the characteristics of the carriers included in their samples, which likely do not include any rate-of-return LECs engaging in access stimulation. Thus, NASUCA has not shown that the average schedules would be a reasonable approach for establishing a rate to which competitive LECs could benchmark. There is insufficient evidence in the record that abandoning the benchmarking approach for competitive LEC tariffs and compelling competitive LECs to comply with 61.38 rules is necessary to address concerns regarding access stimulation, particularly considering the burden that would be imposed on competitive LECs to start maintaining regulatory accounting records. Instead, we believe it is more appropriate to retain the benchmarking rule but revise it to ensure that the competitive LEC benchmarks to the price cap LEC with the lowest rate in the state, a rate which is likely most consistent with the volume of traffic of an access stimulating LEC.

695. *Section 204(a)(3) ("Deemed Lawful") Considerations.* In the *USF/ICC Transformation NPRM*, we proposed that LECs that meet the revenue sharing definition be required to file revised tariffs on not less than 16 days' notice.[1173] We further proposed that if a LEC failed to comply with the tariffing requirements, we would find such a practice to be an effort to conceal its noncompliance with the substantive rules that would disqualify the tariff from deemed lawful treatment.[1174] Finally, we proposed that rate-of-return LECs would be subject to refund liability for earnings over the maximum allowable rate-of-return,[1175] and competitive LECs would be subject to refund liability for the difference between the rates charged and the rate that would have been charged if the carrier had used the prevailing BOC rate, or the rate of the independent LEC with the largest number of access lines in the state if there is no BOC.[1176]

696. After reviewing the record,[1177] we decline to adopt our proposal. We conclude that the policy objectives of this proceeding can be achieved without creating an exception to the statutory tariffing timelines. LECs that meet the access stimulation trigger are required to refile their interstate switched access tariffs as outlined above. Any issues that arise in these refiled tariffs can be addressed through the suspension and rejection authority of the Commission contained in section 204 of the Act, or through appropriate enforcement action.

697. We conclude that a LEC's failure to comply with the requirement that it file a revised tariff if the trigger is met constitutes a violation of the Commission's rules, which is sanctionable under section 503 of the Act.[1178] We also conclude that such a failure would constitute "furtive concealment" as

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[1172] Bluegrass Section XV Comments at 14-15; *but see* Free Conferencing Corporation Section XV Comments at 35 (opposing requiring a competitive LEC to use section 61.38).

[1173] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4768, para. 666.

[1174] The carrier would also be subject to sanctions for violating the Commission's tariffing rules.

[1175] 47 C.F.R. § 65.700. An exchange carrier's interstate earnings are measured in accordance with the requirements set forth in 47 C.F.R. § 65.702.

[1176] *USF/ICC Transformation NPRM*, 26 FCC Rcd at 4768, para. 666.

[1177] *See, e.g.*, Level 3 Section XV Comments at 4.

[1178] Section 503(b)(2)(B) of the Act authorizes the Commission to assess a forfeiture of up to $150,000 for each violation, or each day of a continuing violation, up to a statutory maximum of $1,500,000 for a single act or failure to act by common carriers; *see also* 47 C.F.R. § 1.80(b)(2). In 2008, the Commission amended its rules to increase the maximum forfeiture amounts in accordance with the inflation adjustment requirements contained in the Debt Collection Improvement Act of 1996, 28 U.S.C. § 2461. *See Amendment of Section 1.80(b) of the Commission's*
(continued...)

described by the D.C. Circuit in *ACS v. FCC.*[1179] We therefore put parties on notice that if we find in a complaint proceeding under sections 206-209 of the Act, that such "furtive concealment" has occurred, that finding will be applicable to the tariff as of the date on which the revised tariff was required to be filed and any refund liability will be applied as of such date. We conclude that this approach will eliminate any incentives that LECs may have to delay or avoid complying with the requirement that they file revised tariffs. Several parties support this approach.[1180]

698. All American Telephone Co. filed a petition for declaratory ruling requesting that the Commission find that commercial agreements involving the sharing of access revenues between LECs and "free" service providers do not violate the Communications Act.[1181] In this Order, we adopt a definition of access revenue sharing agreement and prescribe that a LEC meeting the conditions of that definition must file revised tariffs. Given our findings and the rules adopted today, we decline to address the All American petition and it is dismissed.

(iii) Enforcement

699. The revised interstate access rules adopted in this Order will facilitate enforcement through the Commission's complaint procedures, if necessary.[1182] A complaining carrier may rely on the 3:1 terminating-to-originating traffic ratio and/or the traffic growth factor for the traffic it exchanges with the LEC as the basis for filing a complaint. This will create a rebuttable presumption that revenue sharing is occurring and the LEC has violated the Commission's rules. The LEC then would have the burden of showing that it does not meet both conditions of the definition. We decline to require a particular showing, but, at a minimum, an officer of the LEC must certify that it has not been, or is no longer engaged in access revenue sharing, and the LEC must also provide a certification from an officer of the company with whom the LEC is alleged to have a revenue sharing agreement(s) associated with access stimulation that that entity has not, or is not currently, engaged in access stimulation and related revenue sharing with the LEC.[1183] If the LEC challenges that it has met either of the traffic measurements, it must

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Rules, Adjustment of Forfeiture Maximum to Reflect Inflation, EB File No. EB-06-SE-132, Order, 23 FCC Rcd 9845 at 9847 (2008).

[1179] In 2002, the United States Court of Appeals for the D.C. Circuit, in reversing a Commission decision that had found a tariff filing did not qualify for deemed lawful treatment and was thus subject to possible refund liability, noted that it was not addressing "the case of a carrier that furtively employs improper accounting techniques in a tariff filing, thereby concealing potential rate of return violations." *ACS of Anchorage, Inc. v. FCC,* 290 F.3d 403, 413 (D.C. Cir. 2002) (*ACS v. FCC*).

[1180] *See, e.g.,* PAETEC et al. Section XV Comments at 31; XO Section XV Comments at 46 (adopt a rebuttable presumption that increases in access volumes of more than 100 percent in a six month time period would automatically revoke, for the period contemporaneous with and following the increase, the "deemed lawful" status of a LEC whose interstate tariffed rates are above those of the BOC or largest incumbent LEC in the state until reviewed by the Commission).

[1181] *See* Petition for Declaratory Ruling of All American Telephone Co., Inc., e.Pinnacle Communications, Inc., and ChaseCom to Reconfirm that Local Exchange Carrier Commercial Agreements with Providers of Conferencing, "Chat Line" and Other Services Do Not Violate the Communications Act, WC Docket No. 07-135 (filed May 20, 2009).

[1182] Given the two-year statute of limitations in section 405 of the Act, 47 U.S.C. § 405, a complaining IXC would have two years from the date the cause of action accrued (the date after the tariff should have been filed) to file its complaint. Because the rules we adopt are prospective, they will have no binding effect on pending complaints.

[1183] The Ohio Commission argues that the Commission should not prohibit rebates, credits, discounts, etc. Ohio Commission Section XV Comments at 13-14. Section 203(c)(1) provides that no carrier shall "charge, demand, collect, or receive a greater or less or different compensation for such communication...than the charges specified in (continued...)

provide the necessary traffic data to establish its contention. With the guidance in this Order, we believe parties should in good faith be able to determine whether the definition is met without further Commission intervention.

700. *Non-payment Disputes.* Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate switched access services.[1184] As the Commission has previously stated, "[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions."[1185] We otherwise decline to address this issue in this Order, but caution parties of their payment obligations under tariffs and contracts to which they are a party. The new rules we adopt in today's Order will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.

(iv) Conclusion

701. The rules we adopt in this section will require rates associated with access stimulation to be just and reasonable because those rates will more closely reflect the access stimulators' actual traffic volume. Taking this basic step will immediately reduce some of the inefficient incentives enabled by the current intercarrier compensation system, and permit the industry to devote resources to innovation and investment rather than access stimulation and disputes. We have balanced the need for our new rules to address traffic stimulation with the costs that may be imposed on LECs and have concluded that the benefits justify any burdens. Our new rules will work in tandem with the comprehensive intercarrier compensation reforms we adopt below, which will, when fully implemented, eliminate the incentives in the present system that give rise to access stimulation.

B. Phantom Traffic

702. In this portion of the Order, we amend the Commission's rules to address "phantom traffic" by ensuring that terminating service providers receive sufficient information to bill for telecommunications traffic sent to their networks, including interconnected VoIP traffic. The amendments we adopt close loopholes that are being used to manipulate the intercarrier compensation system.

703. "Phantom traffic" refers to traffic that terminating networks receive that lacks certain identifying information. In some cases, service providers in the call path intentionally remove or alter identifying information to avoid paying the terminating rates that would apply if the call were accurately signaled and billed. For example, some parties have sought to avoid payment of relatively high intrastate access charges by making intrastate traffic appear interstate or international in nature.[1186] Parties have also disguised or routed non-local traffic subject to access charges to avoid those charges in favor of lower reciprocal compensation rates.[1187] Collectively, problems involving unidentifiable or misidentified

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the schedule then in effect." 47 U.S.C. § 203(c)(1). A corollary to subparagraph (1), section 203(c)(2) provides that no carrier shall "refund or remit by any means or device any portion of the charges so specified." 47 U.S.C. § 203(c)(2). This prohibition on rebates is intended to preclude discrimination in charges, and the practice may be subject to sanctions under section 503. 47 U.S.C. § 503.

1184 *See, e.g.*, Pac-West Section XV Comments at 17-19 (carriers must dispute and pay for there to be a level playing field for all carriers).

1185 *All American Telephone Co., et al. v. AT&T Corp.*, File EB-10-MD-003, Memorandum Opinion and Order, 26 FCC Rcd 723, 728 (2011).

1186 *See, e.g.*, CenturyLink Section XV Comments at 19.

1187 *See id.; see also* Windstream Section XV Comments at 15-16.