

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
ESTABLISHING JUST AND ) WC Docket No. 07-135  
REASONABLE RATES FOR )  
LOCAL EXCHANGE CARRIERS )

COMMENTS OF THE  
INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE

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## SUMMARY

Existing regulations have contributed to admirable levels of telephone deployment across the Nation, while ensuring stability for carriers that deploy and maintain vital communications networks. The actions of a small minority should not portend sweeping changes that affect adversely the vast majority of carriers that adhere to the relevant regulations in a manner that is consistent with Congressional intent and Commission policy. Therefore, the Independent Telephone & Telecommunications Alliance (ITTA) recommends that narrowly-targeted refinements be implemented in order to ensure the integrity of the process and maintain the benefits that current regulations bring to carriers and their customers.

In brief, ITTA supports restrictions on carriers seeking to re-enter the NECA pool; supports the disallowance of payments to access stimulators in the revenue requirement of incumbent local exchange carriers; opposes measures that would have the effect of eliminating the “deemed lawful” provisions ordered by Congress in the Telecommunications Act of 1996; and, opposes automatic tariff re-filing requirements. Finally, although “access pumping” is an issue that merits attention, more significant matters that wreak greater financial impacts on carriers must be addressed by the Commission. Specifically, enactment of phantom traffic rules and compensation for VoIP traffic traversing and terminating on the public switched telephone network should be addressed immediately.

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**COMMENTS OF THE**

**INDEPENDENT TELEPHONE & TELECOMMUNICATIONS ALLIANCE**

To the Commission:

**I. INTRODUCTION**

The Independent Telephone & Telecommunications Alliance (ITTA) hereby submits comments in the above-captioned proceeding. ITTA represents mid-size local exchange companies that provide a broad range of high-quality wireline and wireless voice, data, Internet, and video telecommunications services to more than 26 million customers in 46 states. The Commission seeks comment on proposals to modify rules related to interstate access tariffs.<sup>1</sup> For the reasons set forth and described below, ITTA supports narrowly-tailored modifications to ensure that compliance with Commission regulations fulfills the goals intended by Congress to advance public policy.

Current regulations provide ample opportunity for investigation of tariffs when necessary; actions involving a small minority of carriers should not be met with sweeping changes that disrupt well-working mechanisms. In brief, ITTA supports restrictions on carriers seeking to re-enter the NECA pool; supports the disallowance of payments to access stimulators in the revenue requirement of incumbent local exchange

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<sup>1</sup> *Establishing Just and Reasonable Rates for Local Exchange Carriers: Notice of Proposed Rulemaking*, WC Dkt. 07-135, FCC 07-176 (2007) (NPRM).

carriers (ILECs); opposes measures that would have the effect of eliminating the “deemed lawful” provisions ordered by Congress in the Telecommunications Act of 1996;<sup>2</sup> and, opposes automatic tariff re-filing requirements. Finally, although “access pumping” is an issue that merits attention, more significant matters that wreak greater financial impacts on carriers must be addressed by the Commission. Specifically, enactment of phantom traffic rules and compensation for VoIP traffic traversing and terminating on the public switched telephone network (PSTN) should be addressed immediately.

## **II. RATE OF RETURN REGULATION ENABLES NETWORK DEPLOYMENT**

### **A. THE ACT REQUIRES JUST AND REASONABLE RATES**

Section 201 of the Act requires the Commission to ensure that rates are “just and reasonable.” The requirement not only ensures that users enjoy rates that are just and reasonable, but also ensures that providers are permitted to charge rates that enable sufficient recovery and a reasonable return on that investment. The Commission’s “rate-of-return” regulations direct rates toward a balance that achieves this mandate.

Incumbent local exchange carriers (ILECs) calculate access charges on the basis of costs and demands for access services. Carriers can either file individual tariffs, or participate in “pools” administered by the National Exchange Carrier Association (NECA). In the NECA process, rates are based on projected data, and carriers pool their access revenues. Participants in the pool then recover their costs, plus a return on their investment from the pool. While most carriers utilize projected costs (either through individually-filed tariffs

<sup>2</sup> Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (1996) (1996 Act). The 1996 Act amended the Communications Act of 1934. Hereinafter, the Communications Act of 1996, as amended by the 1996 Act, will be referred to as “the Act.”

or through NECA participation), certain smaller ILECs are permitted to base access charges on historic costs and demand.<sup>3</sup> Rate-of-return carriers are limited to recovering a prescribed return on their investment.<sup>4</sup>

**B. RATE-OF-RETURN REGULATION ENABLES RECOVERY OF INVESTMENT NECESSARY TO DEPLOY NETWORKS**

Rate-of-return regulation enables continuing investment in carrier networks that provide service not only to the communities they serve but also to other providers, such as mobile voice or broadband, which ultimately rely upon the public switched telephone network (PSTN) for call transport and termination. NECA has estimated that roughly one-third of rural interstate cost recovery flows from interstate access.<sup>5</sup> By assuring cost recovery, the rules also buttress carriers' ability to obtain necessary capital investment in financial markets and have contributed to National telephone penetration rates that exceed 94%.<sup>6</sup> Rate-of-return regulation has been an integral part of an evolving network that has transitioned from single party lines to the deployment of advanced services, including broadband DSL. The assurance of stable access is critical to rural carriers and the customers they serve.

Similarly, Section 61.39 has provided many small, rate-of-return ILECs the ability to execute simplified tariff filings that achieve reasonable earnings. The Commission has determined that historic cost and demand figures utilized by Section

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<sup>3</sup> See 47 CFR 61.39.

<sup>4</sup> 47 CFR 65.700.

<sup>5</sup> See, *Developing a Unified Intercarrier Compensation Regime: Ex Parte of NECA*, CC Dkt. No. 01-92, attachment at slide 7 (filed Nov. 29, 2006).

<sup>6</sup> See, *Telephone Subscribership in the United States*, Federal Communications Commission, Industry Analysis and Technology Division, Wireline Competition Bureau (rel. Jun. 2007).

61.39 tariffs are “likely to be a close and unbiased substitute for prospective data,”<sup>7</sup> and declined specifically to require carriers with 50,000 or fewer lines to generate projected traffic data. Although the thoughtful and well-crafted rules have operated to enable successful network deployment by carriers across the Nation, activities involving a small minority of carriers have spurred the Commission to question whether adjustments to the rules should be made. ITTA submits that the actions of a few should not undermine effective processes used lawfully by the vast majority. Therefore, only narrowly-targeted refinements should be implemented.

**C. ACTIVITY AMONG A MINORITY OF CARRIERS HAS PROMPTED A QUESTION OF WHETHER THE COMMISSION’S RULES SHOULD BE ADJUSTED TO FACILITATE FULFILLMENT OF COMMISSION GOALS**

Recently, the Commission has been alerted to instances in which a small number of rate-of-return carriers (approximately less than one-half of one percent) have experienced significant increases in interstate traffic, while at the same time using the tariff filing process to capture relatively high access rates. These increases have tended to result in larger-than-historically-normal access revenues for the carriers in question, which in turn calls into question how the Commission should address instances in which compliance with Commission regulations can result in outcomes that are inconsistent with the goals those regulations were intended to fulfill. A carrier that intentionally inflates costs or underestimates demand in order to increase revenues beyond a return of 11.25% would appear to violate clearly the Section 201 proscription on unreasonable

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<sup>7</sup> *Regulation of Small Telephone Companies: Report and Order*, CC Dkt. No. 86-467, 2 FCC Rcd 3811, FCC 87-186, at n.22 (1987) (“In describing the process as self-correcting, we mean that historical data is likely to be a close and unbiased substitute for prospective data. Most importantly, for small companies, the benefits of this simpler process would appear to outweigh the combined costs from a time lag in rate adjustments plus the administrative costs incurred by the small companies.”).

rates.<sup>8</sup> The general fact patterns described in various proceedings evince compliance with tariff regulations, yet result in earnings that have been characterized as “grossly in excess”<sup>9</sup> of maximum allowed rates; the Commission found in one proceeding that a carrier had earned an excessive rate of return, but found that the carrier had not acted unlawfully.<sup>10</sup>

Although ITTA recommends that only measured modifications be imposed, ITTA notes at this juncture there has been no indication that any carriers other than those that utilize Section 61.39 have been implicated in any “traffic pumping” matter. Therefore, while ITTA urges narrowly-tailored refinements to the Section 61.39 process, there is no apparent need to consider proposals to revise other traffic practices. ITTA submits that in light of the overwhelming proportion of carriers whose actions are both lawful and consistent with Commission intent, and coupled with the success realized by current Commission regulations, any changes to the rules should be no more extensive than necessary to preempt future activities of the type out of which this instant proceeding arises.

### **III. THE COMMISSION SHOULD NOT FORESAKE REGULATIONS THAT HAVE OPERATED EFFECTIVELY FOR REQUIREMENTS THAT CONFLICT WITH CONGRESSIONAL INTENT**

The situation the Commission seeks to address occurs when abnormal increases in access traffic cause earnings in excess of the authorized rate-of-return. This can occur

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<sup>8</sup> The fact that actual costs or demand differs from projections is not by itself sufficient evidence that rates are unlawful or that a carrier violated the rules. By their very nature, projects are *predictions*, and actual results can and do vary. Although a variation may implicate the accuracy of *future* projections, variations do not imply *per se* that the original projection was either inaccurate or unlawful when made.

<sup>9</sup> *NPRM* at para. 11.

<sup>10</sup> *Qwest Communications Corporation, Complainant, v. Farmers and Merchants Mutual Telephone Company, Defendant: Memorandum Opinion and Order*, File No. EB-07-MD-001, FCC 07-175 (2007).

with a 61.38 carrier, *i.e.*, a carrier that files access tariffs on the basis of projected costs, or a 61.39 carrier, *i.e.*, a carrier with 50,000 or fewer access lines that files access tariffs with initial rates based on historical costs or average schedule settlements. (The Commission also asks whether participants in the NECA pool have incentives to stimulate access traffic. ITTA submits that the effects of NECA participants are spread throughout the pool to an extent that removes incentive for individual actors.)

The Commission has periodically modified and refined its Part 61 rules to create a balance between ensuring reasonable rates, terms, and conditions, and efficient tariff administration.<sup>11</sup> As the cumulative result of all of these revisions, the Commission currently has in place all of the pre- and post-effective tools necessary for it to ensure that rates remain reasonable and that consumers are protected.

**A. RE-ENTRY TO THE NECA POOL SHOULD BE BANNED WHERE INTENDED TO EVADE EFFECTS OF INCREASED ACCESS TRAFFIC**

Dramatic increases in access demand may arise legitimately out of exogenous events or factors arising out of the normal and ordinary course of business. Intentional manipulation of demand in order to earn in excess of the authorized rate-of-return, however, is inconsistent with the statute and Commission rules. Accordingly, routes to such activity should be closed. The Section 61.39 process (which permits carriers to base tariffs on historic data, rather than projections) already contains an automatic correction mechanism by requiring carriers to file new tariffs on the basis of historic traffic patterns. Therefore, carriers with high access rates based on historically low demand are able to

<sup>11</sup> See *i.e.*, *Tariff Filing Requirements for Nondominant Common Carriers: Memorandum Opinion and Order*, CC Docket No. 93-36, 8 FCC Rcd 6752, FCC 93-401 (1993) (streamlining of tariffing requirements for non-dominant carriers); *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation: Report and Order*, CC Docket No. 93-253, 8 FCC Rcd 4545, FCC 93-252 (1993) (implementing rate regulation changes for small and mid-size carriers).

command high rates for high demand for only one tariff cycle before their rates are adjusted downward to reflect actual demand. An unscrupulous carrier, however, could avoid this impact by simply (re)entering the NECA pool during the next tariff cycle, thereby preserving its heavy traffic while shielded by its participation in the NECA pool. A remedy to this would be to bar Section 61.39 carriers that experience dramatic increases in access traffic from reentering the NECA pool during the next three tariff cycles (six years), absent waiver.<sup>12</sup>

This NECA pool re-entry ban forces the carrier to reduce its access rates for the next tariff cycle in the absence of a Commission enforcement action in the interim. ITTA submits that a ban on “NECA hopping” is the least intrusive, most cost effective, and administratively efficient way to address the issue of “access stimulation” and “traffic pumping.” Finally, the ban on “NECA hopping” removes implicit incentives to engage in traffic pumping since the benefits would be short-lived and would ultimately result in a requirement to file reduced access rates. The ban is a self-policing corrective measure that imposes strong disincentives for activities intended to misuse regulatory allowances intended to preserve adequate networks.

**B. THE COMMISSION’S PROPOSAL TO FORBEAR FROM “DEEMED LAWFUL” IS INCONSISTENT WITH CONGRESSIONAL DIRECTIVE, HISTORIC POLICY, AND EFFICIENT CARRIER OPERATIONS**

The Commission’s proposal to “forbear” from the deemed lawful provisions of Section 204(a)(3) is inconsistent with Congressional directives and departs from historic Commission policies that have assured operational certainty for carriers. Section 10(a) of

<sup>12</sup> A legitimate increase might arise out an exogenous event beyond the carrier’s control, such as the construction of a new housing development or office park, the entry of a new business, or the exit of another communications provider from market.

the 1996 Act enables the Commission to forbear from enforcing a regulation when the Commission finds that the regulation is “not necessary to ensure that charges, practices, classifications, or regulations . . . are just and reasonable and are not unjust or unreasonably discriminatory,” “is not necessary for the protection of consumers,” and that forbearance “is consistent with the public interest.” The proposal to forbear from enforcing the “deemed lawful” provision fails to meet any of these standards.

Forbearance from “deemed lawful” would fly in the face of not only Section 204(a)(3), but also the overall intent of the 1996 Act by seeking to impose regulations where Congress removed them. Congress undertook to *reduce* regulatory burdens on carriers when it enacted Section 204(a)(3) of the 1996 Act. The directive to employ streamlined tariff approvals is consistent with the general goals of the 1996 Act, which are to “promote competition and *reduce regulation* . . .” Section 204(a)(3) permits carriers to file tariffs on a streamlined basis that are “deemed lawful” when effective unless specific review is invoked.

Historically, the Commission refrained from ordering tariff refunds. The practice of “retroactive ratemaking” is eschewed generally for several reasons, including forcing carriers into a state of “constant jeopardy of being forced to refund enormous sums of money, *even though they complied scrupulously with their filed rates.*”<sup>13</sup> Although the Commission ordered certain refunds in 1985,<sup>14</sup> Congressional directive in Section

<sup>13</sup> See, *i.e.*, *AT&T v. FCC*, 836 F.2d 1386, at 1394 (DC Cir. 1988) (Starr, J., concurring) (finding FCC rule requiring refunds in excess of expected rate-of-return contradictory to rate-of-return regulation) (emphasis added).

<sup>14</sup> See, *Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers: Memorandum Report and Order*, CC Dkt. No. 84-800, Phase I, 2 FCC Rcd 190, FCC 86-544 (1987) (denying deferral of automatic refund rules), *citing Phase I Order*, CC Dkt. No. 84-800,

204(a)(3) restored certainty by legislating that tariffs filed under the “streamlined” provisions of Section 204(a)(3) of the Act are “deemed” lawful if they are not suspended by the Commission for investigation prior to their effective date. This does not mean that the Commission loses oversight over tariff filings. Rather, the Commission can order prospective relief. In implementing Section 204(a)(3), the Commission declared,

a tariff filing that takes effect without prior suspension or investigation is conclusively presumed to be reasonable and, thus, a lawful tariff during the period that the tariff remains in effect. . . tariff filings that take effect, without suspension, under section 204(a)(3) that are subsequently determined to be unlawful in a section 205 investigation or a section 208 complaint proceeding would not subject the filing carrier to liability for damages for services provided prior to the determination of unlawfulness.<sup>15</sup>

Where a tariff is subsequently found unlawful, only prospective changes may be made.

The deregulatory intent of Congress is clear in Section 204(a)(3), and the Commission found that implementation of the plain language of the statute would reduce significantly the regulatory burden associated with tariff filings:

By the 1996 Act, Congress sought to establish “a pro-competitive, de-regulatory national policy framework” for the telecommunications industry. Consistent with that goal, Section 402 is intended streamline the LEC tariff filing process by truncating the period for pre-effective review of certain LEC tariffs.<sup>16</sup>

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FCC 85-257, 50 Fed. Reg. 41350 (1985), and *Reconsideration Order*, CC Dkt. No. 84-800, FCC 86-114, 51 Fed. Reg. 1103 (1986).

<sup>15</sup> *Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996: Report and Order*, CC Dkt. No. 96-187, 12 FCC Rcd 2170, FCC 97-23, at paras. 19, 20 (1997) (*Streamlined Tariff Order*).

<sup>16</sup> *Implementation of Section 402(b)(1) of the Telecommunications Act of 1996: Notice of Proposed Rulemaking*, CC Dkt. No. 96-187, 11 FCC Rcd 11233, FCC 96-367, at para. 5 (1996). Section 402(b)(1)(A)(iii) of the 1996 Act added section 204(a)(3) to the Communications Act. *Streamlined Tariff Order* at para. 1.

Had Congress determined that additional regulatory oversight of tariffs was necessary, then it would have imposed appropriate requirements in the 1996 Act. The deregulatory intent of Section 204(a)(3) is clear, and the Commission should not obstruct it through a forbearance action.

There is also no evidence that forbearance from “deemed lawful” is necessary to protect consumers. Even after tariff changes are effective, an interested party may file a complaint asking the Commission to find an effective tariff unlawful pursuant to Sections 207 (in Federal district court) or 208 (at the Commission) of the Act. The Commission may begin an investigation of existing tariff terms and conditions on its own motion and prescribe lawful terms and conditions pursuant to Section 205 of the Act. The Commission has concluded in the past that such procedures are sufficient to protect customers.<sup>17</sup> Although rare, the Commission has also used its Section 205 prescription power to reform carrier rates.<sup>18</sup>

The rights of consumers are protected in the “deemed lawful” environment. “Deemed lawful” enables the Commission and carriers to avoid tariff review processes for each filing. Forbearance from “deemed lawful” could place LECs into “almost endlessly suspended animation”<sup>19</sup> by removing certainty from filed tariff rates.

Meanwhile, the rights of users of tariffed services are protected: the filing of tariffs

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<sup>17</sup> *Streamlined Tariff Order* at paras. 20-23 (1997), *recon. denied, Order on Reconsideration*, 17 FCC Rcd 17040, at para. 8,(2002).

<sup>18</sup> *See, i.e., New England Telephone Co., et al., v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) (carrier ordered to reduce rates in order to compensate customers for over-earnings; rate reductions were referred to as “refunds,” though reductions would accrue to a different customer base than that which had contributed to the over-earnings), *cert. denied*, 109 S. Ct. 1942 (1989).

<sup>19</sup> *See ACS of Anchorage, Inc., v. FCC*, 290 F.3d 403, 413 (DC Cir. 2002).

electronically enables interested parties to review tariff transmittals as they are filed.<sup>20</sup> And, the current structure enables the Commission to suspend tariffs where resolution cannot be found during the seven and 15 day review periods (for rate decreases and increases, respectively).

Finally, forbearance from “deemed lawful” is not in the public interest. The streamlined process enables carriers to react quickly to competitive forces, reinforcing the goals of the 1996 Act. The statute is unambiguous and evinces clear Congressional intent to eliminate regulatory hurdles that would decelerate market-fueled tariff adjustments. Forbearance from “deemed lawful” would rip meaning from the statute; it would not simply *suspend* regulation, but would have the opposite effect of *imposing* regulation where Congress has relieved it. Moreover, there are other safeguards at the Commission’s disposal other than forbearance.

ILECs are already heavily regulated. They must file voluminous amounts of data every time they make annual tariff filings that detail their historical and projected costs, and historical and projected demand. This information is required to be filed in a Tariff Review Plan (“TRP”), some of which must be filed approximately 60 days prior to the actual tariff effective date. In addition, the Commission often asks for additional information to clarify or supplement the TRP information after the tariff is filed. Neither customers nor the Commission need additional information, over and above that already provided, to evaluate carrier rates. Such additional requirements would be burdensome and therefore should not be adopted.

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<sup>20</sup> See, *i.e.*, *Streamlined Tariff Order* at para. 47 (ordering electronic filing).

In sum, forbearance from the “deemed lawful” provision is inherently inconsistent with the intent of the 1996 Act, the purpose of Section 204(a)(3), and would impose regulation beyond the careful balance that Congress sought to achieve through enacting changes to the tariff process.<sup>21</sup>

**C. CARRIERS SHOULD NOT BE REQUIRED TO INCLUDE AUTOMATIC RE-FILE TRIGGERS IN THEIR TARIFFS**

The Commission has proposed that carriers be required to re-file tariffs if demand spikes are dramatic enough to cause excessive earning. The Commission has requested comment on the growth rate that should trigger that requirement, the term during which such growth would be measured, and whether carriers should be required to re-file when entering arrangements that would tend to cause dramatic access increases (*i.e.*, providing service to a conference call service or call center). The supposed benefit of such a requirement would be to add a measure of certainty to the role that access revenues play in assuring a carrier’s authorized rate-of-return, and foreclosing the opportunity to earn excessive returns on rates whose traffic-sensitive basis is no longer valid. The Commission proposes that tariff language be inserted by ILECs which obligates a carrier to reduce rates if demand grows by a specified percentage, such as 100 percent, during the tariff period. Such a requirement would be inconsistent with the statute and violate the long-standing principals that rate changes should be carrier-initiated, reviewed only in the context of the two-year monitoring period, and afford a carrier due process rights.

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<sup>21</sup> See, *AT&T Corp. Petition Pursuant to 47 U.S.C. Section 160(c) of the Communications Act For Forbearance from Enforcement of Section 204(a)(3) of the Communications Act, as Amended: Comments of the Verizon Telephone Companies*, WC Docket No. 03-256 (filed Jan. 30, 2004).

First, Section 204(a)(3) of the Communications Act conclusively designates tariff changes made pursuant to the terms of the statute as “deemed lawful.” Therefore, rates remain lawful until and unless the Commission finds that the rates are unlawful pursuant to its other statutory processes, such as through a decision based on proceedings conducted pursuant to Sections 205 or 208 of the Act.<sup>22</sup> Forcing a carrier to include language in a tariff that would automatically require it to make a change based on a single numerical trigger is inconsistent with this statutory “deemed lawful” status. Simply put, since the tariffs are “deemed lawful,” they cannot automatically become unlawful until government action is taken.

Second, tariffs are carrier-initiated: it is the carrier’s responsibility when providing service to file tariffs that recover its costs, and the tariff may remain in effect until an appropriate government action requires the carrier to change it. If the carrier is under-earning, then it is the carrier’s responsibility to file a rate change, and the prohibition on retroactive ratemaking prohibits a carrier from recovering past undercharges.<sup>23</sup> Thus, the automatic revision language conflicts inherently with the principle that telecommunications tariffs are to be carrier-initiated, absent a finding of unlawfulness on a going forward basis through use of appropriate due process procedures.

Third, an automatic revision requirement violates the Commission’s two-year rate-of-return monitoring period. Section 65.701 of the Commission’s rules provides that

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<sup>22</sup> *Streamlined Tariffing Order*, at 2184, para. 23.

<sup>23</sup> *Arkansas-Louisiana Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981)(followed by *Investigation Of Special Access Tariffs Of Local Exchange Carriers*, CC Docket No. 85-166, 12 FCC Rcd 7026, paras. 224-25 (1997)); *Armour Packing Co. v. United States*, 209 US 56, 81 (1907); *Public Service Commission of New Hampshire v. FERC*, 600 F.2d 944, 961 (D.C. Cir. 1979), *cert. denied*, 444 US 990 (1979).

the Commission will evaluate whether a carrier is earning in excess of its authorized rate-of-return prescription only upon a review of the carrier's actual costs and demand as reflected in a final two-year rate-of-return monitoring report. The Commission selected the two-year period in order to provide flexibility to carriers and to recognize that costs and demand fluctuate over time. Therefore, the Commission concluded that only the entire two-year period is a reasonable time period within which to review performance.<sup>24</sup> Requiring carriers to adjust rates based on the occurrence of one event, *i.e.*, a demand change, at a specific point in time during this period upsets the careful balance achieved by the two-year tariff period. It fails to account for any other changes, such as costs changes, or changes which may occur during a later time in the monitoring period.<sup>25</sup>

Finally, the automatic revision requirement violates the carrier's due process rights. A carrier is entitled to make its own decision on whether a tariff change should be proposed. If a government agency believes that a change is warranted, then it is entitled under the law to require it; however, the agency must afford a carrier due process rights. Due process requires that the company have an opportunity to provide its own facts and position prior to the government reaching a decision. Such due process rights are contemplated in both the Section 208 complaint process, as well as the Section 205 prescription process. The proposed procedures do not protect due process rights, because there is no opportunity to present one's case to the government. For all of these reasons,

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<sup>24</sup> *Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes*, CC Docket No. 92-133, 10 FCC Rcd 6788, para. 144 (1995).

<sup>25</sup> In fact, the Commission's attempt to circumvent the two-year period has been reversed in court in the past. *See, e.g., Virgin Islands Telephone Co. v. FCC*, 989 F.2d 1231 (D.C. Cir. 1993) (a finding of unlawfulness based on a six-month period found to violate the FCC's two-year rate-of-return monitoring period).

the *NPRM*'s suggestion that carriers be required to include an automatic rate adjustment clause in their tariffs should be rejected as unlawful.

**D. PAYMENTS TO ACCESS STIMULATORS SHOULD NOT BE INCLUDED IN REVENUE REQUIREMENTS**

The Commission should rule that payments to potential access stimulators are not permissible for revenue requirement calculation purposes. ITTA agrees with the Commission's tentative conclusion that "compensation paid by the exchange carrier to the entity stimulating the traffic is unrelated to the provision of exchange access."<sup>26</sup> Therefore, those amounts should not be included in the costs used to develop access rates, *i.e.*, as a marketing expense, or by including them in another regulated account.

**IV. OTHER INTERCARRIER COMPENSATION ISSUES MUST BE ADDRESSED**

**A. AFTER SEVERAL YEARS, PHANTOM TRAFFIC REMAINS AN OPEN ITEM WHILE CARRIERS ABSORB UNRECOVERABLE COSTS**

The swiftness with which the Commission has responded to allegations of "access stimulation" and "traffic pumping" evidences the Commission's avid interest in ensuring that its regulations fulfill the policies underlying their promulgation. ITTA submits that similar alacrity must attend the Commission's response to the on-going practice of "phantom traffic." A proposal for a comprehensive solution was filed more than two years ago,<sup>27</sup> and last year a solution linked to the Missoula Plan was offered on a stand-alone basis to the Commission.<sup>28</sup> While the industry awaits a meaningful and efficient

<sup>26</sup> *NPRM* at para. 19.

<sup>27</sup> See, *i.e.*, *Developing a Unified Intercarrier Compensation Regime: Ex Parte Filing of the Midsize Carrier Coalition*, CC Dkt. No. 01-92 (filed Dec. 5, 2005).

<sup>28</sup> See, *i.e.*, *Developing a Unified Intercarrier Compensation Regime, Proper Routing and Compensation for Termination of Telecommunications Traffic: Comments of the Independent Telephone & Telecommunications Alliance and Balhoff & Rowe, LLC*, CC Dkt. No. 01-92, (filed Dec. 7, 2006).

Commission enforcement regime, systemic non-payment for use of the network occurs, affecting the roughly 33% of rural carrier interstate cost recovery that stems from access charges. Network costs and market decisions are distorted; the use of new technologies is inhibited; and network investment in new technologies is placed at risk. Accordingly, ITTA urges the Commission to take action as soon as practicable.

**B. THE COMMISSION SHOULD AFFIRM OBLIGATIONS TO PAY FOR USE OF THE PSTN**

The Commission must be vigilant to ensure that PSTN providers are fairly and adequately compensated for use of the PSTN. The PSTN remains the underlying network for the vast majority of communications, including wireline, wireless mobile, and broadband. As the Commission considers enhancements to regulations that are intended to assure carriers a just and reasonable return for access to their networks, similar efforts must ensure that all providers availing themselves of the PSTN contribute toward those investments that are devoted to serving the public. As the instant proceeding strengthens regulations related to ensuring adequate recovery of investment, the Commission should reaffirm that rates charged for use of the PSTN, and which represent the costs of services provided to entities using the PSTN, shall apply to all providers that rely upon the PSTN.<sup>29</sup>

**V. CONCLUSION**

Existing regulations have contributed to admirable levels of telephone deployment across the Nation, while ensuring stability for carriers that deploy and

<sup>29</sup> See, i.e., *Petition for Declaratory Ruling that AT&T's Phone-to-Phone IP Telephony Services are Exempt from Access Charges: Order*, WC Dkt. No. 02-361, FCC 04-49 (2004); *Petition for Declaratory Ruling Regarding Enhanced Prepaid Calling Card Services, Regulation of Prepaid Calling Card Services: Order and Notice of Proposed Rulemaking*, WC Dkt. Nos. 03-133, 05-58, FCC 05-41 (2005). See, also, *Regulation of Prepaid Calling Services: Comments of the Independent Telephone & Telecommunications Alliance, et al*, WC Dkt. No. 05-68 (filed Apr. 15, 2005).

maintain vital communications networks. The actions of a small minority should not portend sweeping changes that affect adversely the vast majority of carriers that adhere to the relevant regulations in a manner that is consistent with Congressional intent and Commission policy. Therefore, ITTA recommends that narrowly-targeted refinements be implemented in order to ensure the integrity of the process and maintain the benefits current regulations bring to carriers and their customers.

Respectfully submitted,

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