Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	**)**	
	)	
8YY Access Charge Reform	**)**	**WC Docket No. 18-156**
	)	

COMMENTS OF ITTA – THE VOICE OF AMERICA'S BROADBAND PROVIDERS

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ITTA – The Voice of America's Broadband Providers (ITTA) hereby submits its comments in response to the *FNPRM* seeking comment on measures to address arbitrage and abuses related to the intercarrier compensation system for telephone calls made to toll free (8YY) numbers.[1]

I. INTRODUCTION AND SUMMARY

In comments slightly over a year ago in response to a Public Notice seeking to refresh the record regarding potential 8YY access charge reform,[2] ITTA urged the Commission to maintain the status quo with respect to 8YY access charges. ITTA asserted that the Commission should not punish incumbent local exchange carriers (LECs) who, in good faith, enable their subscribers to access 8YY service. ITTA added that, if the Commission nevertheless was to adopt reforms diminishing or eliminating such access charges, it should implement an access revenue recovery mechanism.[3] In the face of the *FNPRM* now proposing to transition interstate

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[1] *8YY Access Charge Reform*, Further Notice of Proposed Rulemaking, FCC 18-76 (June 8, 2018) (*FNPRM*).

[2] *Parties Asked to Refresh the Record Regarding 8YY Access Charge Reform*, Public Notice, 32 FCC Rcd 5117 (WCB 2017).

[3] *See* Comments of ITTA, WC Docket Nos. 10-90 and 07-135, CC Docket No. 01-92, at 1 (July 31, 2017) (ITTA 8YY Record Refresh Comments).

and intrastate originating end office and tandem switching and transport charges for 8YY calls to bill-and-keep, ITTA reiterates the positions it took in last year's comments.

To the extent that some carriers continue to amass exaggerated origination minutes and costs for 8YY calls, these are in some cases, as the *FNPRM* concedes, attributable to parties engaged in arbitrage with respect to the 8YY intercarrier compensation regime. Therefore, any actions that the Commission takes to combat 8YY access charge abuses should be targeted towards such entities. Subjecting incumbent LECs (ILECs) who, in good faith, facilitate their subscribers accessing 8YY service to sweeping regulatory reforms and the loss of critical revenues would present a classic case of throwing the baby out with the bathwater.

If the Commission does, nevertheless, adopt reforms that extend beyond 8YY stimulators, it can make substantial headway towards achieving its aims of curtailing abuses of 8YY access charges by addressing database query charges for 8YY calls. The Commission should cap such charges on a nationwide basis, and should allow only one database query charge per 8YY call.

As ITTA urged a year ago, the Commission should not transition interstate and intrastate originating end office and tandem switching and transport charges for 8YY calls to bill-and-keep. To do so, thereby shifting the costs of 8YY calls from businesses to ratepayers, not only would be antithetical to the notion of toll free service and harmful to the public interest, it would also be cognitively dissonant insofar as the *FNPRM* itself portrays 8YY numbers as more useful to businesses than consumers.

In the unfortunate event the Commission does move forward with transitioning 8YY originating charges to bill-and-keep, there are three measures it should adopt to mitigate the harms that LECs and consumers will incur. First, the transition to bill-and-keep should apply only to interstate and intrastate originating end office charges for 8YY calls. Second, the Commission should implement a transition period akin to the one it adopted for transitioning

terminating access charges to bill-and-keep. Third, it should facilitate appropriate access revenue recovery mechanisms to remedy the losses of originating access revenues.

II. THE COMMISSION SHOULD NARROWLY TAILOR REFORMS TO ADDRESS STIMULATION OF 8YY ACCESS MINUTES AND COSTS

The *FNPRM* chronicles various categories of schemes exploiting the current intercarrier compensation regime for originating 8YY traffic.[4] ITTA supports the Commission's efforts to eradicate pestilent robocalls and to eliminate abuses of the intercarrier compensation regime.[5] However, as ITTA, together with several other entities, has contended, "it is premature for the Commission to determine whether a bill-and-keep methodology is appropriate for 8YY traffic in order to address any discrete concerns the Commission may have about abusive 8YY arbitrage schemes."[6] Instead, the Commission should take "targeted measures to address abusive 8YY arbitrage schemes," akin to those the Commission has taken previously to address unreasonable access stimulation schemes by terminating carriers.[7]

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[4] *See FNPRM* at 10-11, paras. 25-27 (describing "benchmarking abuse," mileage pumping," and "traffic pumping" purportedly associated with originating 8YY traffic).

[5] *Accord* Comments of ITTA, WC Docket No. 18-155 (July 20, 2018) (advocating for initiatives to eliminate arbitrage by access-stimulating LECs). The entirety of the substance of Chairman Pai's Statement on the *FNPRM* focuses on traffic pumping, linking that problem with the pernicious problem of unwanted robocalls that the Commission is attacking on many fronts. *See FNPRM* at 47, Statement of Chairman Ajit Pai.

[6] Letter from NTCA, Windstream, Frontier, NCTA, ACA, ITTA and WTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No 16-363 and CC Docket No. 01-92, at 2 (filed Nov. 1, 2017) (Nov. 1, 2017 *Ex Parte*).

[7] *Id. See* Letter from Gerard J. Waldron, Counsel to Inteliquent, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 and 07-135, and CC Docket No. 01-92, at 1 (filed Dec. 21, 2017) (Inteliquent Dec. 21, 2017 *Ex Parte*) (supporting Commission efforts to address 8YY-related abuses "by a relatively small group of bad actors"); Letter from Michael R. Romano, Senior Vice President – Industry Affairs & Business Development, NTCA, to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 18-155, 18-156, 17-206, and 10-90, at 1 (filed May 29, 2018) (urging the Commission to be "surgical in its focus upon inefficient arbitrage, defining precisely what it considers to constitute such a practice and crafting remedies specifically to solve for any such concern").

Not only has the Commission previously taken such measures, it also has a pending Notice of Proposed Rulemaking, adopted two days prior to the *FNPRM*, in which it sought comment on additional proposals targeting access-stimulating LECs with the goal of eliminating arbitrage by such LECs.[8] There the Commission also identifies traffic pumping and mileage pumping as forms of intercarrier compensation abuse and arbitrage, yet its remedial proposals are targeted towards access-stimulating LECs and other narrowly focused entities or situations.[9] It is therefore inexplicable why the Commission proposes a narrowly-tailored approach in that proceeding but a boil-the-ocean approach in overhauling 8YY originating access in this one, essentially to address the same abuses. In light of the myriad consumer and carrier harms that would result from the Commission's transitioning 8YY originating access to bill-and-keep, doing so, instead of adopting more narrowly-focused measures, would present a classic case of throwing the baby out with the bathwater.

In order to pursue a more appropriately pinpointed course, the Commission should issue a second further notice of proposed rulemaking seeking comment on more refined proposals for combating the depicted abuses associated with 8YY originating access. For instance, the Commission could propose caps on the transport mileage between the end office and tandem, and benchmarking 8YY end office and tandem charges to the rates and charges of the ILEC in the market where the 8YY traffic originates.[10] This would prevent mileage pumping schemes and excessive end office and tandem charges.[11] The Commission should pay heed to the path

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[8] *Updating the Intercarrier Compensation Regime to Eliminate Access Arbitrage*, WC Docket No. 18-155, Notice of Proposed Rulemaking, FCC 18-68 (June 5, 2018).

[9] *See id.* at 2, 11-12, paras. 2, 31.

[10] *See* Inteliquent Dec. 21, 2017 *Ex Parte* at 1.

[11] *See* Letter from Gerard J. Waldron, Counsel to Inteliquent, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 16-363, 10-90 and 07-135, and CC Docket No. 01-92, at 1 (filed Dec. 6, 2017) (Inteliquent Dec. 6, 2017 *Ex Parte*).

forward espoused by Commissioner Rosenworcel, who recognizes that gaming, abuse and arbitrage in the intercarrier compensation system warrant fixing, "[b]ut simply put, there needs to be a way to do so that doesn't saddle consumers with the bill,"[12] as would be the result of transitioning 8YY originating access to bill-and-keep.

III. IN THE ABSENCE OF LIMITING ACTION TO MEASURES TARGETING 8YY STIMULATORS, THE COMMISSION SHOULD RESTRICT ITS EFFORTS TO REFORMING DATABASE QUERY CHARGES

The record on which the *FNPRM* is based reflects that database queries have been the subject of abuse, and that database query charges comprise a "significant" share of the charges IXCs currently pay to originating LECs for 8YY calls.[13] If the Commission adopts measures beyond reforms surgically addressing 8YY access abusers, it should limit such measures to steadying the database query charge ship.

First, the *FNPRM* proposes to cap database query charges nationwide at the lowest rate currently charged by any price cap LEC.[14] While ITTA supports applying a nationwide cap to impose discipline upon database query charges, it does not agree that the lowest rate currently charged by any price cap LEC is an appropriate metric. As stated by Inteliquent:

> [T]o establish national rates for any 8YY-related elements, it is important to keep in mind that [ILECs] have disparate rate structures – a fact that makes establishing national rates difficult if . . . considered in isolation. Rate structures between [ILECs] trade off non-recurring setup charges, monthly recurring interconnect charges, 8YY query charge, per minute of use switching charges, and per minute per mile transport charges. For example . . . the 8YY DIP query

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[12] *FNPRM* at 50, Dissenting Statement of Commissioner Jessica Rosenworcel.

[13] *See id.* at 11, 21, paras. 28, 68 (citing Letter from Matt Nodine, Assistant Vice President – Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket Nos. 10-90 and 07-135, and CC Docket No. 01-92, Attach. at 3 (filed Feb. 12, 2018)). AT&T also maintains that an increasing share of its originating access is 8YY database queries charged by CLECs, and that 2% of the carriers billing for query charges bill for 90% of such charges, suggesting a high probability of abuse. *See id.* at 3-4.

[14] *See FNPRM* at 21, para. 69.

> charge may be high because the switched per minute of use charge is low, and vice versa.[15]

One alternative cap the Commission should consider is the National Weighted Average 8YY database dip query charge of $0.004248 as calculated by Inteliquent.[16] ITTA further suggests a three-year phase-down for carriers to lower their charges to the cap, in one-third increments each year.[17] Because of the factors, as described above, that may contribute to a carrier's establishment of its database query charge, ITTA also urges that, for carriers required to lower their database query charge to the cap, the revenues they consequently forego should be factored into the access revenue recovery mechanism the Commission must implement in the unfortunate event it does adopt a transition of 8YY originating access to bill-and-keep.[18]

ITTA also supports the *FNPRM*'s proposal to allow only one database query charge per 8YY call.[19] The *FNPRM* seeks comment on whether there is any legitimate reason that an IXC should reasonably be expected to pay for multiple database queries in connection with a single 8YY call.[20] ITTA cannot conjure any. In light of the alleged abuses associated with database dips, this measure strikes ITTA as appropriate for remediation.

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[15] Inteliquent Dec. 21, 2017 *Ex Parte* at 2. *But see FNPRM* at 22, para. 73 ("is there any reason [the lowest rate currently charged by a price cap LEC] should not serve as a nationwide cap for all 8YY database query charges?").

[16] *See* Inteliquent Dec. 21, 2017 *Ex Parte* at 2; *see also FNPRM* at 23, para. 74 (seeking comment on whether a cap should be based on the average or median rates currently charged by LECs, and citing Inteliquent proposal).

[17] *See FNPRM* at 22, para. 71 (seeking comment on whether the Commission should adopt a transition period for carriers to lower their rates to the cap).

[18] *See infra* Sec. IV.B.3. If the Commission does not transition 8YY originating access to bill-and-keep, it should adopt an access revenue recovery mechanism to account for lost database query charge revenues.

[19] *See id.* at 21, para. 69.

[20] *See id.* at 23, para. 77.

IV. THE COMMISSION SHOULD NOT TRANSITION 8YY ORIGINATING ACCESS TO BILL-AND-KEEP

Seven years ago, the Nebraska Rural Independent Companies wrote that a reciprocal compensation system, "'in which originating compensation does not exist, is unworkable in an environment of originating 8YY traffic . . . .'"[21] This remains true today. 8YY traffic is not reciprocal. One carrier's originating traffic does not terminate on another carrier's network. The originating 8YY traffic belongs to the carrier that sold the 8YY number to the customer, but the carrier that sold the 8YY number does not own the network used to originate the 8YY calls.

Nevertheless, the Commission now proposes to move all originating interstate and intrastate originating access charges associated with 8YY calls to bill-and-keep, except for database query charges.[22] As a result, LECs handling originating 8YY traffic would either have to pass the costs of such traffic on to their subscribers or absorb the loss of originating access revenue from 8YY calls. Neither outcome is in the public interest.

As described in ITTA's comments a year ago and discussed below,[23] passing the costs of originating 8YY traffic on to consumers fundamentally undermines the notion of "toll free" calling. In addition, the prospect of LECs absorbing the loss of originating access revenue from 8YY calls is also not good policy. For years, LECs' originating access revenues have been waning as customers migrate to other ways to originate toll calls. To illustrate, as compared to 2011, the non-8YY (traditional) originating access minutes of three ITTA members declined in 2016 by amounts ranging from one-third to over 45 percent.

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[21] *Connect America Fund et al.*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, 18111-12, para. 1304 (2011) (*USF/ICC Transformation Order and FNPRM*), *aff'd sub nom., In re: FCC 11-161*, 753 F.3d 1015 (10th Cir. 2014)) (citing Comments of the Nebraska Rural Independent Companies in Response to August 3, 2011 Further Inquiry, WC Docket No. 10-90 et al., at 71 (Aug. 24, 2011)).

[22] *See FNPRM* at 12, para. 31.

[23] *See* ITTA 8YY Record Refresh Comments 3-4; *see also infra* Sec. IV.A.

LECs are ill-equipped to absorb the significant loss of revenue should originating access charges for 8YY traffic be eliminated.[24] Three ITTA members report that, based on their most recent annualized data, one-half to approximately 60 percent of their originating interstate access minutes are attributable to 8YY calls, and a move of 8YY originating traffic to bill-and-keep would deplete them of revenues ranging from over $900 thousand to approximately $1.6 million annually.[25] Losing the originating access revenue from 8YY calls would particularly compound the financial woes of rural LECs most of whom are small enough that they do not have the wherewithal to make it up elsewhere.

The *FNPRM*'s proposal is also based on flawed assumptions. It states that the 'basic logic underpinning [its] proposal is that each carrier should be responsible for the costs of the parts of the call path which it has discretion to choose."[26] Although this may make some sense in the context of 8YY abusers, in non-abuse situations, the choice to utilize the originating carrier's network to initiate a call is made exclusively by the caller by exercising his choice to place the 8YY call in the first instance.

Furthermore, three ITTA members have indicated that, as compared to 2011, their originating 8YY access minutes decreased in 2016 by amounts ranging from slightly over 20 percent to slightly over half. In light of this, any contention that, across the board, significant

[24] The *FNPRM* largely dismisses these concerns, maintaining that ILECs should be able to recover revenues lost as a result of its proposals directly from their end users. *See FNPRM* at 20, para. 63. Aside from the consumer harms and affront to the concept of toll free calling attendant to the "solution" of increasing end-user rates, as Frontier has explained, "ILECs are not able to freely price their voice services in all states like their voice competitors. Frontier's interstate end-user rates are still effectively capped, and, indeed, still go into Frontier's overall price cap filing. Additionally, many of Frontier's 29 states prevent or otherwise regulate price increases." Letter from AJ Burton, Vice President, Federal Regulatory, Frontier Communications Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 18-156, at 2 (filed May 24, 2018) (Frontier *Ex Parte*).

[25] *See FNPRM* at 21, para. 66 (seeking comment on the effects on and revenue losses of originating carriers in the event of a transition of 8YY originating access to bill-and-keep).

[26] *Id.* at 12, para. 34.

8YY arbitrage and access stimulation opportunities exist that the Commission can reduce, if not eliminate, by transitioning originating 8YY traffic to bill-and-keep misses the mark. In fact, there is the paradoxical possibility that moving 8YY originating access to bill-and-keep actually could result in new arbitrage schemes being initiated.[27]

A. Transitioning 8YY Originating Access to Bill-and-Keep Would Contravene the Notion of Toll Free Calling and Harm Consumers

As discussed above, one of the two poor possible policy outcomes of transitioning 8YY originating access to bill-and-keep would be that the costs of originating traffic would be passed on to ratepayers. However, when a consumer places an 8YY call, she expects that call to be toll-free. Embedding charges attributable to "toll free" calling within the rates consumers pay LECs for telephone service would fundamentally contravene that expectation.[28] 8YY subscribers purchase 8YY services in order to entice customers to call them,[29] and, as such, their costs for

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[27] *See* Inteliquent Dec. 6, 2017 *Ex Parte* at 1. In the *USF/ICC Transformation Order and FNPRM*, the Commission capped originating access rates to combat potential arbitrage. 26 FCC Rcd at 17933-34, paras. 800-01 & n.1494. Nonetheless, the whole premise underlying the *FNPRM* is that other forms of arbitrage have proliferated with respect to 8YY originating access since then. If, as is often the case, past is prologue, there is a good chance new forms of arbitrage will arise in the event the Commission transitions 8YY originating access to bill-and-keep.

[28] FCC, Consumer and Governmental Affairs Bureau, What is a Toll-Free Number and How Does it Work? (Sept. 8, 2017), https://www.fcc.gov/consumers/guides/what-toll-free-number-and-how-does-it-work ("Toll-free numbers . . . can be dialed from landlines with no charge to the person placing the call. . . . Toll-free service has traditionally provided potential customers and others with a free and convenient way to contact businesses."); FCC, Toll Free, https://www.fcc.gov/general/toll-free (last visited Aug. 30, 2018) ("Toll-free numbers allow callers to reach businesses and/or individuals without being charged for the call. The charge for using a toll-free number is paid by the called party (the toll-free subscriber) instead of the calling party."). *See* Nov. 1, 2017 *Ex Parte* at 1 ("Transitioning 8YY to bill-and-keep is in tension with the concept of toll-free calling; although the 8YY subscriber is receiving a benefit from the "toll free" call, the cost of originating such calls would be shifted to the calling party."); Frontier *Ex Parte* at 1 (the Commission's proposal "turns the concept of toll-free calling on its head"); Inteliquent Dec. 6, 2017 *Ex Parte* at 1 "moving to bill-and-keep . . . is at odds with the toll-free nature of 8YY calls").

[29] Newton's Telecom Dictionary 65 (22nd ed. 2006) (defining 800 and other 8YY service as a "toll free call paid for by the called party, rather than the calling party. . . . Such 8[YY] service is typically used by merchants offering to sell something . . . . The idea of the free service is to

(continued…)

8YY services are a cost of attracting and conducting business. Thus, compounding the injury of effectively eviscerating the toll free service is that a bill-and-keep regime in the case of 8YY calls "would result in shifting costs from businesses to end-user customers. Ultimately, consumers will suffer as rates increase to subsidize a business service."[30] Moreover, if charges for ostensibly toll-free calls are embedded in LECs' rates, consumers who do not even place 8YY calls will end up subsidizing them nonetheless, rather than the businesses and their customers that primarily benefit from the 8YY calls.

Furthermore, the *FNPRM* attempts to obfuscate its disembowelment of consumer welfare. On the one hand, it invokes the prevalence of unlimited minutes plans for largely dismissing the financial benefit to the calling party of 8YY calls,[31] but on the other hand, it proclaims that, under bill-and-keep, "8YY calls will remain 'toll free' because originating callers will not be charged for the long-distance portion of the call."[32]

The *FNPRM* also blows a smoke screen to suggest that the outcome of *all* ratepayers covering businesses' costs of utilizing 8YY services to promote their businesses would actually result in a consumer benefit: "[I]nefficiencies and abuses of the intercarrier compensation system result in higher prices to 8YY subscribers, who must recover their costs from their customers – a group that likely includes originating 8YY callers. Thus, in the end, consumers indirectly subsidize inefficiencies and abuses of the 8YY intercarrier compensation system."[33] This reasoning turns consumer welfare on its head. Currently, if 8YY subscribers do recover their costs from their customers, it is from those particular consumers ultimately purchasing products

(Continued from previous page)
entice customers to call the number, with the theory being that if the call . . . cost the customer something, he or she might be less inclined to call.").

[30] Nov. 1, 2017 *Ex Parte* at 1.

[31] *See FNPRM* at 3, para. 5.

[32] *Id.* at 27, para. 92.

[33] *Id.* at 14, para. 39.

or services from the 8YY subscribers. But under the proposal to transition 8YY originating access to bill-and-keep, *all* local service consumers subsidize 8YY services. And because the *FNPRM* proposes not permitting carriers to reflect consequential increases in end-user rates through new line items,[34] there would be no more transparency regarding consumer subsidization of 8YY services via rate increases than there is currently.[35]

That the costs of 8YY calls should remain 8YY subscribers' cost of doing business (whether or not they recover those costs from their customers) is further underscored by the increasing demand for 8YY numbers despite purported abuses, as well as the several business-enhancing explanations for the continued demand for 8YY services.[36] The possibility that, if the *FNPRM*'s proposal is adopted, callers will be responsible for a larger share of the total costs of an 8YY call than 8YY subscribers will be[37] demonstrates how skewed it is that the 8YY subscribers' cost of doing business could primarily be transferred to all wireline ratepayers as a result of this proposal.

B. In the Unfortunate Event the Commission Transitions 8YY Originating Access to Bill-and-Keep, it Should Adopt Measures to Mitigate the Effects on Consumers and LECs

If, notwithstanding the infirmities of its policy underpinnings, the Commission does adopt its proposal to transition 8YY originating access to bill-and-keep, various measures to

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[34] *See id.* at 21, para. 66.

[35] The *FNPRM* cites the *USF/ICC Transformation Order and FNPRM* for the propositions that transitioning to bill-and-keep "will reduce consumers' effective price of calling" and "lead to substantial savings on calls made." *Id.* at 14, para. 40 (citing *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17909, para. 748). Not only are the putative consumer effective savings on 8YY calls from a transition to bill-and-keep entirely speculative, as the Commission does not know whether – let alone how much – 8YY subscribers recover these costs from their customers, but for those consumers who do not initiate 8YY calls, it is impossible for them to save any more from their current effective price of zero, and, in fact, after such a transition they would be forced to incur costs to subsidize 8YY calls that they did not incur previously.

[36] *See id.* at 3, 28, paras. 6, 96.

[37] *See id.* at 28, para. 95.

mitigate the effects on consumers and LECs are warranted. These include only transitioning originating end office 8YY charges to bill-and-keep or, at most, moving 8YY tandem switching and transport to bill-and-keep only where the originating carrier owns the tandem; adopting a transition period mirroring the period for transitioning terminating access to bill-and-keep; and adopting access revenue recovery mechanisms for price cap and rate-of-return carriers.

1. The Commission Should Only Transition Originating End Office 8YY Access Charges to Bill-and-Keep

The *FNPRM* invites comment on an alternative proposal to transition all originating interstate and intrastate end office 8YY charges to bill-and-keep, but to move 8YY tandem switching and transport to bill-and-keep only where the originating carrier also owns the tandem.[38]

As an initial matter, ITTA reiterates its prior advocacy that the Commission should reverse the bill-and-keep transition for tandem switching and transport, and bring parity to tandem providers.[39] As ITTA has urged, in light of developments that have occurred since the *USF/ICC Transformation Order* was adopted, the Commission should revisit the transition to bill-and-keep of tandem switching and transport charges when the terminating price cap carrier also owns the tandem in the serving area.

As ITTA member CenturyLink has explained, the transition to bill-and-keep of tandem switching and transport charges when the terminating price cap carrier also owns the tandem in the serving area is rife with ambiguities and inequities.[40] For instance, the rules codified to implement the bill-and-keep transition of tandem switching and transport charges reference

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[38] *See id.* at 16, para. 49.

[39] *See* Comments of ITTA, WC Docket No. 10-90, CC Docket No. 01-92, at 13-16, Sec. III (Oct. 26, 2018) (ITTA ICC Refresh Comments).

[40] *See* CenturyLink Petition for Limited Stay of Transformation Order Years 6 and 7 ICC Transition – As it Impacts a Subset of Tandem Switching and Transport Charges, WC Docket No. 10-90 et al. (filed Apr. 11, 2017) (CenturyLink ICC Transition Petition)

traffic traversing a tandem switch that the terminating carrier "or its affiliate[s]" own(s), though nowhere in the *USF/ICC Transformation Order and FNPRM* or the Commission's rules does the Commission define what "affiliates" are referred to in this context.[41] This led CenturyLink to urge the Commission to more carefully consider the best intercarrier compensation approach to deal appropriately with "the entire suite of tandem services."[42] ITTA supported the CenturyLink ICC Transition Petition, and called upon the Commission to consider whether the transition for tandem switching and transport services is functioning as intended.[43]

As CenturyLink argued, the ambiguities surrounding application of the transition rules to the price cap terminating carrier's affiliates "will lead to fundamental asymmetry in ICC treatment" and, thereby, competitive harm.[44] This asymmetry contravenes the *USF/ICC Transformation Order and FNPRM*'s goal of bringing terminating end office rates to parity.[45] In addition, as CenturyLink maintained, a key policy underpinning of the intercarrier compensation transition was the Commission's "desire to eliminate the confusing market signals and other competitive harm and the variety of arbitrage schemes that result when there is disparity in rates for identical services."[46] Terminating carriers already are encountering an overload of traffic dumped at their tandems, as carriers endeavor to foist upon terminating carriers the cost of

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[41] *See id.* at 5; *see also* 47 CFR § 51.907(g)(2), (h).

[42] CenturyLink ICC Transition Petition at 11.

[43] *See* ITTA Reply Comments, WC Docket No. 10-90 et al., at 8 (May 11, 2017).

[44] CenturyLink ICC Transition Petition at 8.

[45] *See, e.g., USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17677, 17937-38, paras. 35, 808.

[46] CenturyLink ICC Transition Petition at 8-9 (citing *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17929-30, paras. 790-92); *see also USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17677, para. 35 ("We focus initial reforms on reducing terminating switched access rates, which are the principal source of arbitrage problems today.").

transporting this traffic from the tandem to their end office.[47] This arbitrage will only continue so long as tandem services are subject to bill-and-keep. Instead, all tandem services should be compensable based on market forces.

Therefore, in order to effectuate the Commission's avowed intercarrier compensation reform goal of eliminating, or at least minimizing, arbitrage, the Commission should reverse the bill-and-keep transition for tandem switching and transport when the terminating price cap carrier also owns the tandem in the serving area. And, ultimately, all tandem services should be compensable based on market forces. These companion measures would place all tandem providers on equal footing, thus fulfilling the parity goal also underlying intercarrier compensation reform.

If the Commission does adopt any transition of 8YY originating access to bill-and-keep, but does not reverse the bill-and-keep transition for tandem switching and transport, ITTA supports the *FNPRM*'s alternative proposal to move 8YY tandem switching and transport to bill-and-keep only where the originating carrier also owns the tandem.[48] As the *FNPRM* recognizes, this is the bill-and-keep transition construct that the Commission adopted in reforming terminating access charges.[49] ITTA believes that this alternative proposal would more than adequately address abuses in the 8YY marketplace, including benchmarking abuse and mileage pumping.[50] This is especially so because, concomitant with this alternative proposal, the *FNPRM* proposes to cap the mileage that carriers can charge for tandem switching and transport,

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[47] *See* ITTA ICC Refresh Comments at 9-10, Sec. II.B.2.

[48] In order to address the asymmetries described above, the Commission should resolve the ambiguities surrounding the definition of "affiliate" in a manner that defines ownership of the tandem at the holding company level. *See FNPRM* at 16, para. 50 (seeking comment on whether to determine ownership at the holding company level).

[49] *See id.* at para. 49.

[50] *See id.* at para. 50 (seeking comment on adequacy of alternative proposal to combat 8YY abuses).

as well as cap tandem switching and transport rates based on the rates charged by the ILEC serving the area where the call originates.[51] These corresponding proposals are akin to what ITTA advocates above that the Commission limit its actions to in order to target 8YY abuses without harming consumers and non-abusing LECs alike.[52]

2. The Commission Should Provide a Transition Period Matching That Established in the *USF/ICC Transformation Order and FNPRM*

The *FNPRM* proposes a three-year period for transitioning access charges for 8YY calls to bill-and-keep, asserting that "would be consistent with the Commission's decision, in the *USF/ICC Transformation Order*, to adopt a glide path to a bill-and-keep methodology for many terminating access charges."[53] ITTA staunchly supports a transition period in the unfortunate event the Commission adopts bill-and-keep for 8YY originating access, but urges such period to be at least twice as long as that proposed in the *FNPRM*, matching the transition schedule the Commission adopted in the *USF/ICC Transformation Order and FNPRM* for terminating access charges.

In the *USF/ICC Transformation Order and FNPRM*, the Commission concluded that a six-year transition for price cap carriers and CLECs that benchmark to price cap carrier rates, and a nine-year transition for rate-of-return carriers and CLECs that benchmark to rate-of-return carrier rates, to transition rates to bill-and-keep "strikes an appropriate balance that will moderate potential adverse effects on consumers and carriers of moving too quickly from the existing intercarrier compensation regimes."[54] Furthermore, as the *FNPRM* notes, the Commission also selected these transition periods to "provide industry with certainty and sufficient time to adapt

[51] *See id.* at para. 49.

[52] *See supra* at 4.

[53] *Id.* at para. 52.

[54] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17934, para. 801.

to a changed regulatory landscape," and "help avoid market disruption to service providers and consumers."[55] Notably, the Commission adopted this transition plan in order to address "the most acute intercarrier compensation problems, such as arbitrage," where they arose at that time.[56]

Against this backdrop, ITTA cannot conjure why the Commission would suggest that a transition period of one-third to one-half of the duration of that adopted in the *USF/ICC Transformation Order and FNPRM* would be sufficient. Aside from averring that a three-year transition period would be "consistent" with that adopted in the *USF/ICC Transformation Order and FNPRM*, and acknowledging many of the policy considerations noted above that the Commission factored in adopting the transition period for terminating access charges, the *FNPRM* provides no explanation for why a three-year transition period would be of sufficient duration. In the *USF/ICC Transformation Order and FNPRM*, the Commission found that six- and nine-year transition periods struck the appropriate balance, including appropriate dispatch in addressing the "most acute" arbitrage within the intercarrier compensation system at that time.

Also in contrast to the transition period for terminating access charges, here the Commission is proposing to move all tandem switching and transport to bill-and-keep.[57] This would make the *FNPRM*'s already severely-limited proposed three-year duration even more puzzling.[58]

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[55] *FNPRM* at 16, para. 52 (quoting *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17667, 18038, paras. 1, 996).

[56] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17933, para. 800.

[57] *See FNPRM* at 16, para. 49 (recognizing the departure from the Commission's approach in reforming terminating access charges).

[58] Of course, as ITTA maintains above, even if the Commission does transition 8YY originating access to bill-and-keep, it should not move tandem switching and transport to bill-and-keep or, at most, it should adopt bill-and-keep for tandem switching and transport only where the originating carrier also owns the tandem. *See supra* Sec. IV.B.1.

In light of all of the above considerations, ITTA urges the Commission to adopt a minimum six-year transition period if the Commission moves 8YY originating access to bill-and-keep. This would match the transition period that price cap carriers had to transition terminating access charges to bill-and-keep under the *USF/ICC Transformation Order and FNPRM*, and is expedited compared to the transition period that rate-of-return carriers have. Further, as the Commission did in the *USF/ICC Transformation Order and FNPRM*, it should accord one extra year for the completion of the transition of tandem switching and transport to bill-and-keep, regardless of whether it adopts a move of 8YY tandem switching and transport to bill-and-keep only where the originating carrier also owns the tandem.[59]

3. If the Commission Eliminates 8YY Access Charges, it Must Facilitate Access Revenue Recovery by Price Cap and Rate-of-Return Carriers Alike

The *FNPRM* seeks comment on whether, if the Commission adopts bill-and-keep for 8YY access charges, ILECs should be able to recover their lost access charge revenues from their end users.[60] It also seeks comment on whether rate-of-return carriers should be afforded additional CAF ICC support to replace 8YY originating access revenues lost as the result of a transition to bill-and-keep.[61] ITTA answers both queries with an emphatic yes. As discussed above, if the Commission applies bill-and-keep to originating 8YY traffic, without replacement of this significant revenue stream, the financial distress, especially of rural LECs, will increase, thus making them less capable of servicing existing debt and further hindering their ability to make the investments required to deploy broadband. Different solutions may be appropriate for price cap carriers and rate-of-return carriers.

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[59] *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17934-35, Fig. 9; *see also FNPRM* at 17, para. 54 (seeking comment on whether to adopt different transition periods for originating end office access charges and for tandem switching and transport charges).

[60] *See FNPRM* at 20, para. 64.

[61] *See id.* at 21, para. 67.

Price Cap Carriers. As the *FNPRM* describes, in the *USF/ICC Transformation Order and FNPRM*, the Commission adopted a transitional recovery mechanism to mitigate revenue reductions ILECs would experience due to intercarrier compensation reform measures. This recovery mechanism did not apply to CLECs who, lacking market power for the provision of interstate switched access services, were free to recover reduced access revenue through regular end-user charges. Subsequently, the Commission found ILECs, like CLECs, to be non-dominant in their provision of interstate switched access services, meaning they, too, "should be able to recover revenues they may lose as a result of [the *FNPRM*'s] proposals directly from their end users, subject only to the discipline of the market."[62]

Therefore, the Commission should confirm that price cap carriers may adjust their subscriber line charges (SLCs) to account for revenues lost as a result of transitioning 8YY access charges to bill-and-keep. In addition, in light of pragmatic concerns with LECs' ability to recover foregone 8YY access revenues via rates in the event of a transition to bill-and-keep,[63] the Commission should permit ILECs to recover lost revenues through the Access Recovery Charge (ARC).[64] ILECs have now had several years' experience with the ARC mechanism. As such, revenue recovery through the ARC is an established, proven process, and there is no sense tinkering by creation of a new, separate recovery mechanism. As part and parcel of the ARCs as an additional recovery mechanism, the Commission should raise the $30 residential rate cap in order to foster sufficient revenue recovery.[65] It is also merited insofar as nearly seven years have

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[62] *Id.* at 19-20, paras. 62-63.

[63] *See supra* note 24 (discussing such concerns); *see also id.* at 20, para. 64 & n.142 (seeking comment on whether there are reasons LECs may not be able to adjust their end-user rates to recover such lost revenues, such as state or local regulations that may prevent them from doing so, and noting that the treatment of ILECs as non-dominant in their provision of interstate switched access services does not currently relieve them from compliance with the SLC cap).

[64] *See id.* at 20, para. 64.

[65] *See id.*

elapsed since adoption of the *USF/ICC Transformation Order and FNPRM* and establishment of the residential rate cap, and raising the cap would account for price changes during that time as well as potential increases in state, local and other components of residential rates that are factored into whether the cap has been reached.

Furthermore, the Commission should freeze the annual 10 percent straight-line decline in Eligible Recovery to which price cap LECs are currently subject.[66] In the alternative, at a minimum, rather than reducing Price Cap Eligible Recovery relative to the initial Baseline of 90 percent of relevant FY2011 revenues,[67] the Commission instead should apply the annual reduction relative to the amount of revenues lost as a result of the transition of 8YY access charges to bill-and-keep. Finally, in the absence of granting all of ITTA's requested pricing relief, or in the absence of all of these measures combining to replace price cap carrier revenue foregone as result of moving 8YY access charges to bill-and-keep, the Commission should afford price cap LECs CAF ICC support anew.[68]

Rate-of-Return Carriers. As far as the ability to recover foregone 8YY access revenues, resulting from a move to bill-and-keep, through increases in end-user rates, the *FNPRM* properly recognizes that many rate-of-return carriers are distinguishable from price cap LECs insofar as such rate-of-return carriers "already require CAF ICC support to keep end-user rates at acceptable levels."[69] Therefore, it is eminently appropriate that, in the event of a transition of

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[66] *See* Frontier *Ex Parte* at 2; *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17971, para. 879 (describing annual decline in Price Cap Eligible Recovery).

[67] *See USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17971, para. 879.

[68] To the extent price cap carrier CAF ICC support is currently phasing down, *see id.* at 17996, para. 920, any CAF ICC support deserved as a result of lost 8YY access revenues should be immune from this phase-down process.

[69] *FNPRM* at 21, para. 66.

8YY originating access to bill-and-keep, the Commission provide additional, commensurate CAF ICC support to replace the lost 8YY access revenues.

ITTA believes that this is precisely what is required as part of the functioning of the CAF ICC recovery mechanism as it applies to rate-of-return carriers. Under the *USF/ICC Transformation Order and FNPRM*, if ARC revenues are insufficient to cover all of a LEC's Eligible Recovery, the LEC is "permitted to recover the remainder from CAF ICC support."[70] Moreover, "as part of the [CAF ICC] mechanism, [the Commission] permit[s] incumbent LECs to recover Eligible Recovery that they do not have the opportunity to recover through permitted ARCs."[71]

Although the *USF/ICC Transformation Order and FNPRM* provides that "a carrier can petition for a Total Cost and Earnings Review to request additional CAF ICC support,"[72] the purpose of such review is not to cover the effects of regulatory changes adopted by the Commission. Rather, it is to enable individual ILECs to demonstrate that the recovery mechanism paradigm as a whole, as structured in the *USF/ICC Transformation Order and FNPRM*, is not sufficient to afford the ILEC a reasonable return on its investment, and that additional recovery is needed to prevent an unconstitutional taking.[73] This suggests that there is no process necessitating that LECs request additional CAF ICC support where their Eligible Recovery relative to their ARC revenues warrants it.[74] Instead, rate-of-return LECs being

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[70] *USF/ICC Transformation Order and FNPRM*, 26 FCC Rcd at 17990, para. 910.

[71] *Id.* at 17994, para. 918. "The ICC-replacement CAF support for carriers that are eligible and elect to receive it is the remainder of Eligible Recovery not recovered through ARCs." *Id.* at n.1818.

[72] *Id.* at 17998, para. 926.

[73] *See id.* at 17997, para. 924.

[74] Of course, the Commission will need to establish a calculation for adjusting Eligible Recovery to accommodate the rate-of-return LEC revenue replacement needs wrought by a move of 8YY access charges to bill-and-keep.

deprived of 8YY access revenue as a result of a transition to bill-and-keep should be considered, under the provisions of the *USF/ICC Transformation Order and FNPRM* , as *entitled* to additional CAF ICC support.

The statute also compels this outcome. As the Commission found in the *USF/ICC Transformation Order and FNPRM*, providing CAF ICC recovery "is consistent with [its] mandate under section 254 [of the Communications Act of 1934, as amended] and the Commission's use of universal service funding as a component of prior intercarrier compensation reforms."[75] Similarly, providing rate-of-return carriers additional CAF ICC support as recompense for the 8YY access revenues vanished as a result of the move to bill-and-keep "comport[s] with the Commission's mandate under section 254 to advance universal service through 'specific, predictable, and sufficient' mechanisms."[76]

Finally, this is an opportune time for the allocation of additional CAF ICC support if a Commission-mandated transition of 8YY originating access to bill-and-keep necessitates it. The Commission is currently evaluating the record in response to a notice of proposed rulemaking seeking comment on the budget(s) for rate-of-return carrier high-cost support, including CAF ICC support.[77] That proceeding presents the Commission with a broad opportunity to establish the budgetary needs of various rate-of-return carrier high-cost support mechanisms, untethered to

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[75] *Id.* at 17995, para. 919 (citing, *inter alia*, 47 U.S.C. § 254(b)(1), (i)).

[76] *FNPRM* at 21, para. 67 (seeking comment on whether 47 U.S.C. § 254(b)(5) undergirds the propriety of the Commission providing additional CAF ICC support as an access revenue recovery mechanism for rate-of-return carriers in this situation). *See also Connect America Fund; ETC Annual Reports and Certifications; Developing a Unified Intercarrier Compensation Regime*, Report and Order, Order and Order on Reconsideration, and Further Notice of Proposed Rulemaking, 31 FCC 3087, 3161, para. 199 (2016) (the underlying purpose of CAF ICC support is "to mitigate the impact of reduced [intercarrier compensation] revenues on carriers and to facilitate continued investment in broadband infrastructure while providing greater certainty and predictability going forward").

[77] *See generally Connect America Fund et al.*, Report and Order, Third Order on Reconsideration, and Notice of Proposed Rulemaking, FCC 18-29 (Mar. 23, 2018).

a predetermined budgetary cap. Therefore, to the extent the merited increase in CAF ICC support in the event of a transition to bill-and-keep could affect results of the budget control mechanism to which legacy rate-of-return carriers are currently subject, the Commission should capitalize upon the flexibility of this budget establishment process to ensure that it does not do so.[78]

For the foregoing reasons, it is incumbent upon the Commission to provide rate-of-return ILECs losing revenue as the result of a transition of 8YY originating access to bill-and-keep a revenue recovery mechanism in the form of additional CAF ICC support.

V. CONCLUSION

The Commission need not and should not transition 8YY originating access to bill-and-keep. Doing so would unjustifiably shift much of the cost of 8YY service from the businesses that benefit from it and their customers who actually use it to all wireline consumers, including those who do not use the service, and fundamentally contravene the "toll free" nature of the service. There are much less drastic and disruptive, but more appropriately pinpointed, measures the Commission can implement to combat any abuses and arbitrage that continue to beset 8YY service. If the Commission adopts any reforms beyond those surgically targeted towards 8YY access abusers, it should limit them to actions addressing database query charges for 8YY calls. And if the Commission moves 8YY access charges to bill-and-keep notwithstanding the harmful

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[78] In fact, in its comments in that proceeding, ITTA urged the Commission to administer CAF ICC outside of the budgets for the rate-of-return model-based (A-CAM) program and legacy mechanisms, collecting via universal service contribution mechanisms sufficient amounts to cover projected CAF ICC funding requirements, but distributing CAF ICC funding as appropriate without regard to the separate budgets applicable to the A-CAM and legacy mechanisms. ITTA suggested that the Commission could conceptualize rate-of-return carrier CAF ICC funding as an exogenous support adjustment, fostering the maintenance of specific and predictable separate budgets for the A-CAM and legacy mechanisms, which would otherwise be compromised by subjecting those budgets to the vagaries of a recovery mechanism that is intended to mitigate the impact of reduced intercarrier compensation revenues. *See* Comments of ITTA, WC Docket Nos. 10-90, 14-58, and 07-135, CC Docket No. 01-92, at 10-11 (May 25, 2018).

effects of doing so on consumers and carriers alike, it must provide for access revenue recovery mechanisms to mitigate the harms to LECs, and other mitigation measures to dilute the public interest harms to consumers and LECs.

Respectfully submitted,

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