

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

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

**REPLY COMMENTS OF WINDSTREAM SERVICES, LLC
AND NTCA–THE RURAL BROADBAND ASSOCIATION**

Windstream Services, LLC and NTCA–The Rural Broadband Association respectfully submit these Reply Comments regarding potential reforms to the 8YY intercarrier compensation framework.¹

I. Introduction.

The record in this docket confirms that any abuse of the 8YY intercarrier compensation system is limited to a handful of bad actors; indeed, the toll-free providers who will reap enormous benefits from the Commission’s proposed reforms concede that point. The Commission can and should shut down the loopholes that allow this abuse. That said, moving all 8YY traffic to bill-and-keep would be an overbroad response to a minor problem that can be effectively remediated with more targeted reforms. Additionally, because the majority of commenters agree that the proposed reforms would harm consumers by saddling them with new, unexpected costs and by upending the traditional toll-free paradigm, it would be poor public policy to move to bill-and-keep for all 8YY traffic. Instead, presented with allegations of narrow arbitrage by a small set of bad actors, the Commission should take limited action to address

¹ *In re 8YY Access Charge Reform*, WC Docket No. 18-156, Further Notice of Proposed Rulemaking, FCC 18-76 (rel. June 8, 2018) (“*FNPRM*”).

abuse based on data-driven, evidence-backed findings and exercise care to avoid a result that harms consumers.

II. The Record Does Not Support the Need for Broad 8YY Originating Access Reform.

In the FNPRM, the Commission indicated that it sought to build a “robust record” by soliciting “comment on the existence, prevalence, and impact” of arbitrage in the current 8YY compensation scheme.² But, even after the initial comments, there is little evidence of any fraud and abuse—let alone evidence of *any* widespread industry abuse. In short, the Commission’s purported justification for its dramatic proposal to take all 8YY traffic to bill-and-keep finds remarkably little or no support in a far less than “robust” record.

ILECs, CLECs, and cable companies agree that (1) there is no persuasive evidence of system-wide abuse and that (2) to the extent such abuse exists at all, it is limited to only a handful of bad actors. WTA, for example, “is aware of no specific instances of 8YY fraud and arbitrage” and “has seen little evidence detailing the prevalence of such behavior.”³ West Telecom disagrees with the notion that there is widespread arbitrage and fraud; much like the proponents of reform themselves, it suggests that there are merely “a few ‘bad actors’” that have engaged in practices that are “not typical,” such as making fraudulent calls in furtherance of arbitrage schemes.⁴ The Nebraska Rural Independent Companies (“NRIC”) note there is “an uncertain factual basis” for the Commission’s apparent belief that there is widespread fraud and abuse in the 8YY system, and they argue that the presence of such fraud has not been proven by

² FNPRM ¶ 24.

³ Comments of WTA—Advocates for Rural Broadband at 4, WC Docket No. 18-156 (Sept. 4, 2018) (“WTA Comments”); *see also id.* (noting that WTA “knows of none of its RLEC members that has engaged in actual or alleged abuses of the intercarrier compensation system with respect to 8YY service”).

⁴ Comments of West Telecom Services, LLC at 1-2, 10, WC Docket No. 18-156 (Sept. 4, 2018) (“West Telecom Comments”).

“data-driven analysis.”⁵ Teliix and Peerless similarly underscore that the record includes only “anecdotal evidence that some LECs may route calls inefficiently in some circumstances.”⁶ Finally, ITTA reports that its members’ originating 8YY access minutes decreased markedly in 2016; given that decrease, ITTA believes that it “misses the mark” for the Commission to suggest that “significant 8YY arbitrage and access stimulation opportunities exist that the Commission can reduce” by moving to bill-and-keep.⁷

Furthermore, the comments of the 8YY providers present no evidence of pervasive arbitrage. Instead, those comments reinforce the conclusion that the problem, to the extent it exists, is limited to a small number of bad actors and does not call for (or justify) a system-wide fix.

AT&T’s comments—despite claiming that LECs and CLECs are “increasingly exploiting this arbitrage opportunity”—provide no specific examples of abuse and instead merely outline how such abuse could theoretically be accomplished.⁸ Indeed, the bulk of AT&T’s argument is yet again premised on the notion that “CLEC 8YY originating access minutes have exploded even as the number of ILEC 8YY originating minutes has declined.”⁹ However, as Windstream and NTCA have previously explained, even if repeated again and again, such anecdotal evidence is not proof that arbitrage is occurring.¹⁰ The increase in 8YY minutes could also be explained

⁵ Comments of the Nebraska Rural Independent Companies at 5-6, WC Docket No. 18-156 (Sept. 4, 2018) (“NRIC Comments”).

⁶ Comments of Teliix, Inc. and Peerless Network, Inc. at 15, WC Docket No. 18-156 (Sept. 4, 2018) (“Teliix/Peerless Comments”).

⁷ Comments of ITTA—The Voice of America’s Broadband Providers at 8-9, WC Docket No. 18-156 (Sept. 4, 2018) (“ITTA Comments”).

⁸ Comments of AT&T at 2, 8-9, WC Docket No. 18-156 (Sept. 4, 2018) (“AT&T Comments”).

⁹ *Id.* at 4.

¹⁰ Comments of Windstream Services, LLC, Frontier Communications Corporation, and NTCA—the Rural Broadband Association at 9, WC Docket No. 18-156 (Sept. 4, 2018).

by a migration to 8YY conference calls and market shifts toward cord cutting and away from standalone long distance service.¹¹ In any event, AT&T's own data confirm that any increase in 8YY minutes is being driven by a small handful of LECs, and therefore that access stimulation is not an industry-wide problem. AT&T has estimated that 20% of its originating access spend in September 2016 was attributable to only 17 carriers and that 80% of its spend was attributable to 1,300 other carriers.¹² AT&T has further observed that “[t]he explosion in CLEC minutes has occurred as overall *originating 8YY minutes are down significantly* (and, indeed, ILEC 8YY originating minutes are *barely a third of their 2007 totals*).”¹³

Verizon claims that fraud and abuse in the 8YY system is “growing,” but then focuses in general terms on how such schemes “typically” work rather than providing a list of examples of real-world fraud.¹⁴ To the extent that Verizon purports to identify specific evidence of abuse, LECs have rebutted Verizon’s description of events on the ground.¹⁵

The lack of specificity and detail in the toll-free providers’ comments is glaring. Indeed, the 8YY providers have failed to define exactly what the purported “arbitrage” is. Although they make general complaints about the aggregation of traffic in some manner that will maximize rates, details are few. Before the Commission can solve a problem, it first needs to diagnose the problem. The toll-free providers’ inability to provide even the most basic information about allegedly pervasive “arbitrage” confirms that their self-serving position is driven less by an effort

¹¹ *Id.*

¹² Letter from Matthew Nodine, Assistant Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, WC Docket No. 16-363, attachment at 10 (May 11, 2017).

¹³ Comments of AT&T at 8, WC Docket No. 10-90 (July 31, 2017) (emphasis added).

¹⁴ Comments of Verizon at 1-3, WC Docket No. 18-156 (Sept. 4, 2018) (“Verizon Comments”).

¹⁵ To the extent that the Commission’s proposals are rooted in allegations of “mileage pumping” made by AT&T and Verizon, Teliix and Peerless report that their “experience with these carriers is strikingly different than what is portrayed in the FNPRM” and that there is insufficient record evidence for the suggestion that excessive mileage is charged. Teliix/Peerless Comments at 15.

to identify and stamp out abuse and more by a desire to hasten reforms from which they will receive a financial windfall. If the IXCs truly know of specific parties that they believe to be bad actors and specific schemes they believe constitute arbitrage, they should be compelled to move beyond labels and provide detailed information to the Commission so that the problematic carriers can be investigated and the specific arbitrage schemes put to an end.

Moreover, to the extent any 8YY arbitrage is caused by unlawful robocalls,¹⁶ the Commission recently adopted an Order aimed at curbing such robocalls.¹⁷ Thus, to the extent that robocalls are contributing to the problem of 8YY abuse, that abuse should be remediated as providers begin to operationalize the Commission's new robocall Order and as other measures aimed at the same objective come online. This further underscores the fact that additional, system-wide 8YY reform is unnecessary.

In short, the Commission is proposing an industry-wide fix in the absence of an industry-wide problem. Indeed, a bill-and-keep solution to this narrow (and poorly defined) problem would be so overbroad as to rise to the level of arbitrary and irrational action under the Administrative Procedure Act. In the face of a sledgehammer taken to a system that could have been effectively reformed with only surgical revisions, a reviewing court would have “no difficulty concluding that [a transition to bill-and-keep] is both arbitrary and capricious because it is irrationally overbroad.”¹⁸

At the very least, the Commission must have a better sense of the size and impact of the purported problems in the 8YY market before undertaking the dramatic reforms contemplated in

¹⁶ *FNPRM* ¶¶ 1, 17, 27, 32; *FNPRM* at 47, Statement of Chairman Ajit Pai; *see also* Verizon Comments at 4 (suggesting that “8YY arbitrage schemes [are] fueled by robocalls”).

¹⁷ *In re Advanced Methods to Target and Eliminate Unlawful Robocalls*, Report and Order and Further Notice of Proposed Rulemaking, 32 FCC Rcd 9706 (2017).

¹⁸ *Nat'l Mining Ass'n v. Babbitt*, 172 F.3d 906, 913 (D.C. Cir. 1999).

the FNPRM. At present, both the Commission and industry participants are so uninformed about this market that even basic data such as market size and the potential impact of fraud on consumers are not known. To short-circuit a fulsome investigation by eliminating an entire cost recovery system based upon unsubstantiated claims and labels would be premature, arbitrary, and profoundly unfair to both consumers and to thousands of LECs across the country.

The record further underscores the widespread negative impacts that would arise from bringing all 8YY traffic to bill-and-keep. WTA, for example, has encouraged the Commission to adopt targeted measures to avoid arbitrage instead of moving to bill-and-keep—a system that could harm consumers and RLECs by imposing local exchange service rate increases on consumers who do not make 8YY calls.¹⁹ Similarly, ITTA opposes a move to bill-and-keep, which it views as a premature “boil-the-ocean approach” that is much too broad a reform given the current record.²⁰ Charter views the proposed transition to bill-and-keep as “unnecessary and unfair to end users and originating carriers,” not least because it would lead to higher rates for consumers.²¹ NRIC²² and West Telecom²³ also view bill-and-keep as an overbroad solution to an isolated problem caused by a handful of bad actors.

III. Transitioning to Bill-and-Keep Would Upend the Toll-Free Paradigm and Harm Consumers.

The Commission’s proposal upends the traditional understanding of “toll free” calling by placing the cost on the caller rather than the provider, even though the very value that the provider delivers to its customer is derived from a commitment that the call will be delivered

¹⁹ WTA Comments at 3-8.

²⁰ ITTA Comments at 3-4.

²¹ Comments of Charter Communications, Inc. at 1, WC Docket No. 18-156 (Sept. 4, 2018) (“Charter Comments”).

²² NRIC Comments at 5-11.

²³ West Telecom Comments at 6-13.

without charges incurred by the caller.²⁴ As numerous commenters have explained, this will be a disaster for consumers. For example, Charter has emphasized that the Commission’s proposed transition of 8YY originating access charges to bill-and-keep conflicts with the very notion of toll-free calling. So too does that proposed transition conflict with the underlying concept of bill-and-keep, since 8YY is primarily a business service to 8YY subscribers and is entirely one-way.²⁵ Moreover, moving 8YY traffic to bill-and-keep would be harmful to incumbent LECs—and particularly rural LECs. Under a bill-and-keep framework, LECs will be forced to bear the costs of originating 8YY calls and then be compelled somehow to bill their subscribers—which include both 8YY and non-8YY callers—to recover such costs. The result is that consumers will pay more for service, even if they do not place 8YY calls.

Because rural LECs have fewer customers among whom to spread this new financial burden, their smaller customer base will inevitably be forced to carry an even greater burden. Indeed, saddling rural LECs with the burden of bill-and-keep just to deliver a victory to major 8YY providers would only serve to expand the digital divide and undermine universal service.

IV. Conclusion.

For these reasons, the Commission should decline to bring all 8YY traffic to bill-and-keep. Instead, because the record in this proceeding only specifies that a limited set of bad actors

²⁴ The Commission itself recently recognized and reaffirmed the ubiquity of this paradigm by continuing to refer to 8YY numbers as “toll free” numbers in a draft Report and Order released less than a month ago. *See In re Toll Free Assignment Modernization*, WC Docket No. 17-192, Draft Report and Order, FCC-CIRC1809-07 (rel. Sept. 5, 2018). The same Draft Report and Order states that “toll free numbers are in high demand,” *id.* at Fact Sheet, which shows that 8YY numbers are valuable and that 8YY subscribers are willing to pay for them.

²⁵ *See* Charter Comments at 2-3. Bill-and-keep is premised on the idea that both parties (*i.e.*, the calling and receiving party) benefit from a call being made. Unlike in the case of traditional calling, however, the 8YY subscriber (*i.e.*, the receiving party) willingly agrees to foot the bill for the call in order to provide a service to its customers. They do so because it is good for their business.

are abusing the existing framework, the Commission should adopt targeted measures to address 8YY arbitrage.

Respectfully submitted,

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