

telecommunications services; (iv) prohibit the joint marketing -- and bundling -- of local exchange/exchange access and interexchange services, requiring the LEC to maintain separate sales forces, conduct separate marketing campaigns and offer local and interexchange services as separate offerings; (v) require the LEC to conduct all transactions with its long distance service affiliate on an "arm's-length" basis, making the associated products and services available to competitors on the same terms; and (vi) prohibit the joint ownership and/or sharing of ancillary facilities and equipment such as databases and other facilities used for call routing/verification purposes.

Requiring an LEC long distance services affiliate essentially to stand on its own for purposes of securing the funding necessary to conduct its business provides a critical separation between the LEC's monopoly local exchange and the long distance operations. Permitting a long distance affiliate to obtain financing by pledging the assets of the LEC as a whole allows the affiliate to share in the value derived from the local exchange/exchange access monopoly in a manner less direct, but no less consequential, than a direct asset transfer for less than adequate compensation.

Prohibiting the sharing of office space and personnel minimizes the potential for one of the more insidious, and certainly more difficult to detect, forms of cost/asset misallocations. Commonality breeds cooperative activity which is generally paid for by the monopoly operation, providing the competitive activity with an unearned benefit.

Sharing of customer proprietary network information and other proprietary data can be one of the more detrimental forms of wrongful cost/asset shifting, particularly if the information and data relates to a competitor's customers. While such information sharing is now

illegal under the '96 Act,<sup>46</sup> data of this sensitivity and value should not be shared in such a way that invites abuse.

Prohibitions on joint marketing are necessary to ensure that LECs do not leverage their relationships with existing monopoly local exchange customers to secure an undue competitive advantage for their long distance services affiliates over rival providers of interstate, interexchange telecommunications services. Even if such a long distance services affiliate is only providing service outside its affiliated LEC's local service area, the LEC is nonetheless well-positioned to "influence" the "out-of-region" service decisions of "in-region" multi-location businesses (or residential customers with more than one residence). Apart from simple use of the established LEC/local exchange customer relationship, the LEC could also offer local service incentives, both positive -- *e.g.*, preferred pricing or service arrangements -- and negative -- *e.g.*, slower provisioning or extended repair intervals -- to entice or compel multi-location customers to take "out-of-region" long distance service from its long distance services affiliate.

Extension of the "arm's length" dealing and general availability requirements the Commission now applies to network services to all transactions between an LEC and its long distance services affiliate would provide further protection against cross-subsidization through "sweetheart deals," as well as further reduce the potential for discrimination. Likewise, expanding the prohibition against joint ownership of switching and transmission facilities to database and other ancillary activities would further limit opportunities not only for cross-subsidization, but preferential treatment, of the LEC long distance services affiliate by the LEC.

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<sup>46</sup> 47 U.S.C. § 222.

**4. A Balance Of Costs And Benefits Weighs Heavily  
In Favor Of Retention Of Structural Separation  
Requirements**

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An assessment of the burden of structural-separation requirements on LEC provision of interstate, interexchange telecommunications services must by necessity involve a balancing of public and private costs and benefits. TRA submits that the imbalance here is dramatic. Whatever burdens structural separation may impose on LECs is far outweighed by the public interest in preserving existing, and promoting new, competition in the provision of telecommunications products and services.

In this calculus, the costs of structural separation are essentially private costs borne by individual LECs. In exchange for non-dominant treatment of their interstate, interexchange telecommunications offerings, the LECs must give up certain scale economies and competitive advantages, all of which, it bears emphasis, flow directly and exclusively from the LECs' historical position as monopoly providers of local exchange/exchange access services. There are seemingly no public costs associated with retention of structural-separation requirements. The RBOCs and LECs will enter the interstate, interexchange telecommunications services market irrespective of whatever action the Commission may take with respect to structural separation of LECs and their long distance services affiliates. Moreover, the Commission has concluded that the interstate, interexchange telecommunications services market is already competitive, evidencing both high supply and demand elasticities.<sup>47</sup> Thus, it is unclear what, if any, adverse impact a structural-separation requirement would have on the consuming public.

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<sup>47</sup> See generally AT&T Non-dominance Order, FCC 95-427.

In contrast, the public benefits of requiring LECS to be structurally separated from their long distance services affiliates are potentially enormous. As TRA has shown, LECs retain monopoly, or near monopoly, control of local exchange/exchange access "bottlenecks" and that "bottleneck" control enables them to disadvantage rival providers of interstate, interexchange telecommunications services and to ultimately undermine competition in this marketplace. This concern has recently been magnified many times by the looming market entry of the RBOCs.

The answer then is clear. Conditioning LEC participation in the interstate, interexchange telecommunications services market on structural separation of its monopoly local exchange/exchange access and competitive interexchange operations will not result in significant, if any, public interest costs. The benefits, in contrast, are substantial; structural separation is necessary to safeguard against anticompetitive abuse by LECs of "bottleneck" power, with its attendant adverse impact on competition in the provision of interstate, interexchange telecommunications services. At such time as meaningful local exchange/exchange access competition emerges, the Commission can revisit this matter, but for now a regulatory framework which acknowledges the incentive and the ability of LECs to act anticompetitively and thus seeks to protect against discrimination and cross-subsidization will best serve the public interest.

**B. Geographic Rate Averaging And Rate Integration Should Be Implemented In A Manner Consistent With The Aims Of Section 254(g) And The General Pro-competitive, De-regulatory Policies Underlying The '96 Act**

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Section 254(g) of the '96 Act directs the Commission to adopt rules implementing its mandate that the rates at which each IXC provides long distance service shall be (i) no higher for subscribers in "rural and high cost areas" than for subscribers in "urban areas" and (ii) no higher for subscribers in one State than for subscribers in "any other State."<sup>48</sup> In fulfilling this statutory mandate, the Notice (at ¶¶ 68-73, 76-79) seeks comment on a variety of issues ranging from the extent to which it could and/or should preempt State actions to the mechanisms by which it should enforce its geographic rate averaging and rate integration requirements. Critically, the Notice (at ¶ 69) also recognized that there might well be, and sought comment regarding, "competitive conditions or other circumstances that could justify Commission forbearance from enforcing the proposed geographic rate averaging requirement with respect to particular interexchange telecommunications carriers or services."

TRA submits that in implementing the Section 254(g) mandate, the Commission should not reach beyond the congressional intent reflected in that mandate. The Congress clearly sought in Section 254(g) to provide for the availability to consumers in all States and in all areas of the country of affordable rates for long distance service. Just as obviously, however, the Congress did not intend in Section 254(g) to restructure the entire telecommunications services environment. Indeed, it is apparent from the legislative history of the '96 Act that the Congress intended to codify the manner in which the Commission has incorporated geographic rate averaging and rate integration into its current regulatory regime.

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<sup>48</sup> 47 U.S.C. § 254(g).

Thus, the Conference Report indicated that the conferees intended for the Commission to codify policies it had adopted and refined over the last two decades as such policies are currently applied.<sup>49</sup> Confirming this approach, the Conference Report expressly noted that the conferees were "aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances (such as services offered under Tariff 12 contracts)," and "intend[ed] that the Commission, where appropriate, could continue to authorize limited exceptions to the general geographic rate averaging policy using the authority provided by new Section 10 of the Communications Act."<sup>50</sup> Moreover, the Conference Report makes clear that "the conferees do not intend that [Section 254(g)] would require the renegotiation of existing contracts for the provision of telecommunications service."<sup>51</sup>

The Commission's current geographic rate averaging and rate integration policies essentially require that traditional message toll telephone service ("MTS") must be provided between the contiguous States and Alaska, Hawaii, Puerto Rico, and the Virgin Islands at rates that are equivalent to those prevailing for comparable distances within the contiguous States.<sup>52</sup> Consistent with its mandate under the Communications Act of 1934, as amended, the

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<sup>49</sup> H.R. Rep. No. 104-458, 104th Cong., 2nd Sess., p. 132 (Jan. 31, 1996) ("The conferees intend the Commission's rules . . . to incorporate the policies contained in the Commission's proceeding entitled 'Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the United States Mainland and the Offshore Points of Hawaii, Alaska and Puerto Rico/Virgin Islands (61 FCC2d 380 (1976))").

<sup>50</sup> Id.

<sup>51</sup> Id.

<sup>52</sup> See generally Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers Between the United States Mainland and the Offshore Points of Hawaii, Alaska, and Puerto Rico/Virgin Islands, 61 F.C.C.2d 380 (1976); 72 F.C.C.2d 715 (1979); 9 FCC Red. 2196 (1993); 9 FCC Red. 3023 (1994)

Commission has thus ensured that affordable interstate, interexchange telecommunications services have been available to "all the people of the United States."<sup>53</sup> In so doing, however, the Commission has not handicapped the competitive provision of products and services. The Commission should continue to follow such a reasoned course in implementing Section 254(g).

To this end, the Commission should ensure that each carrier makes standard MTS service available throughout the United States at rates which do not discriminate between urban and rural areas or between and among States, but should not otherwise interfere with the market-driven provision of telecommunications services. Thus, as recognized by the Conference Report, geographic rate averaging and rate integration requirements should not be imposed on contract-based or other negotiated offerings. Nor should such requirements be extended to promotional or other temporary offerings. Finally, carriers should not be required to advertise and promote contract-based or promotional offerings in all States and locales.

There are any number of compelling reasons why moderation is essential in the implementation of Section 254(g)'s geographic rate averaging and rate integration mandates. For example, market factors may drive a carrier to provide preferential pricing in a particular geographic market for reasons wholly unrelated to cost differentials between markets. Thus, by way of illustration, a resale carrier may install switching facilities in just those markets in which it has achieved traffic volumes above a certain threshold. Once installed, it is imperative that those threshold traffic volumes be maintained in order to preserve the economic viability of the switching investment. Thus, the resale carrier may only advertise a given promotion in one or

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<sup>53</sup> 47 U.S.C. § 151.

more of the markets in which it has installed switching equipment simply to generate enough traffic to make efficient use of its switching facilities.

Competitive considerations also argue, sometimes strongly, against an overly broad interpretation/implementation of Section 254(g). For example, it is likely that one or more or perhaps all of the RBOCs will focus most, if not all, of their interexchange activities within their respective local service areas; afterall, it is in these geographic enclaves that the RBOCs possess their greatest competitive advantages. If one of these RBOCs happens to serve a low cost area, IXCs which operate nationally would be unable to compete effectively in that RBOC region under a strict geographic averaging/rate integration regime because they could not lower their prices to match the RBOC's without pricing below-market elsewhere.

Other competitive factors are generally customer-driven. Contract-based service arrangements generally reflect the unique needs of individual customers and individual customers often operate within discrete geographic areas. An overly broad reading or application of the Section 254(g) geographic rate averaging/rate integration mandates could hamstring carrier efforts to address the specific needs of individual customers.

Irrespective of whether it is categorized as interpretation or forbearance, geographic rate averaging and rate integration must be implemented in a balanced and reasoned manner if the laudable goal of ensuring the availability of affordable telecommunications services to all is to be met without unduly interfering with market forces.

**C. TRA Endorses The Product And Geographic Market Definitions The Commission Has Proposed To Employ In Assessing Market Power In The Interstate, Interexchange Telecommunications Services Market**

In the Notice, the Commission has proposed to reexamine the definitions of geographic and product markets it uses in assessing market power in the provision of interstate, interexchange telecommunications services. As a generality, the Notice suggests (at ¶ 40) that "more sharply focused market definitions" would aid the Commission in conducting market power analyses. Specifically, the Notice (at ¶ 40) notes that more "refined analytical tools" would aid the Commission in "evaluating whether the BOCs possess market power with respect to the provision of interLATA services in areas where they provide local access service" and assist it in identifying discrete markets in which one or more carriers retain market power. TRA agrees that adoption of the more "refined analytical tools" proposed in the Notice would allow the Commission to better assess markets in which carriers retain market power.

TRA agrees with the Commission that U.S. Department of Justice/Federal Trade Commission 1992 Merger Guidelines<sup>54</sup> provide a useful tool in conducting market power analyses. With respect to geographic market definition, TRA is in accord with the Notice (at ¶ 49) that applying the 1992 Merger Guidelines, "the relevant geographic market for interstate, interexchange services should be defined as all calls from one particular location to another particular location" but supports the view expressed in the Notice (at ¶ 51) that "in most cases," the Commission should "continue to treat interstate, interexchange services as a single national market when examining whether a carrier or group of carriers acting together has market power." And TRA agrees with the Notice (at ¶ 53) that the Commission should retain the flexibility in

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<sup>54</sup> 1992 U.S. Department of Justice/Federal Trade Commission Merger Guidelines, 4 Trade Reg. Rep. (CCH) ¶ 13,104, p. 20,269 ("1992 Merger Guidelines").

special circumstances "to examine a particular point-to-point market (or group of markets) for the presence of market power if there is credible evidence suggesting that there is or could be a lack of competition in that market (or group of markets)."

With respect to product market definition, TRA agrees with the Notice (at ¶ 44) that "a narrower product market" would provide a "more refined analytical tool for evaluating whether a carrier or group of carriers together are exerting market power." To this end, TRA agrees that "demand substitution factors" are key considerations. Thus TRA supports the approach espoused by the Notice (at ¶ 46) that an appropriate product market for interstate, interexchange services is one "for which there are no close substitutes or a group of services that are close substitutes for each other, but for which there are no other close substitutes." And TRA agrees with the Notice (at ¶ 47) that administrative constraints warrant analysis of separate product markets only if "credible evidence suggest[s] that there is or could be a lack of competitive performance with respect to that service (or groups of services)."

TRA commends the Commission for an insightful effort to enhance its ability to undertake meaningful market analyses and urges it to adopt the approach described in the Notice.

**III.**

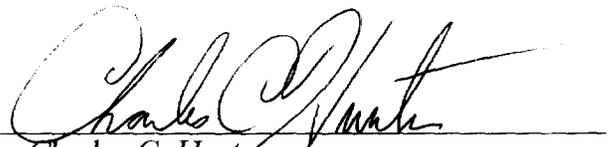
**CONCLUSION**

By reason of the foregoing, the Telecommunications Resellers Association urges the Commission to adopt rules and policies in this docket consistent with the comments set forth herein.

Respectfully submitted,

**TELECOMMUNICATIONS  
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