

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF SECRETARY

In the Matter of )  
)  
Policy and Rules Concerning )  
the Interstate, Interexchange Marketplace )  
)  
Implementation of Section 254(g) of the )  
Communications Act of 1934, as amended )

CC Docket No. 96-61

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REPLY COMMENTS OF THE STATE OF HAWAII

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## EXECUTIVE SUMMARY

The comments reflect wide support among public utility commissions, state consumer advocates, other state agencies, and LECs for the proposition that geographic averaging and rate integration are essential to protecting consumer welfare and that, in codifying these policies, Congress intended that they be applied as basic "rules of the road" to ensure consumers in all locations enjoy the benefits of efficient telecommunications. However in their comments, several IXC's urge the Commission to carve out sufficient exceptions to Section 254(g), or to torture its legislative history, so as to gut the provision altogether. The State dedicates the bulk of its reply comments to respond to these IXC efforts. In particular, the State makes the following points:

- Contrary to certain IXC's contentions, the rules of statutory interpretation will not allow any exception to Section 254(g) other than those which meet the forbearance criteria of new Section 10.
- Although several IXC's have presented argumentation and sweeping claims as to why forbearance will foster competition, competition is only one of several considerations under Section 10's forbearance test, and in no case can broad claims about promoting competition alone justify forbearance in these circumstances.
- Each IXC argues for forbearance from some aspect of geographic averaging or rate integration for certain of its services or activities. These arguments are insufficiently substantiated. They do not give the Commission a factual predicate for forbearance. Even in light of the precious little information which has been provided, the claims are unavailing. The IXC's arguments do not justify how Congress's overarching public interest goals would be served by forbearance.
- Indeed, with regard to rate integration, the State continues to believe that no such arguments could be proffered if the Commission is to continue to ensure against undue rate discrimination between regions of our diverse country.

The State also notes that virtually all parties (including IXC's) have roundly criticized as ineffectual the Notice's proposal to enforce Section 254(g) by relying on carrier certifications and the Commission's complaint process. The depth of this criticism indicates that, at a minimum, the Commission should require IXC's to file basic tariffs or some other public report which clearly demonstrates compliance.

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**REPLY COMMENTS OF THE STATE OF HAWAII**

The State of Hawaii (the "State"), by its attorneys, hereby replies to the comments filed on April 19, 1996, with regard to Section VI of the Commission's Notice of Proposed Rulemaking ("Notice") in the above-captioned proceeding<sup>1</sup> -- i.e., with regard to that part of the Notice concerning the implementation of Congress's recent legislative mandate that interexchange carriers geographically average their rates, and that they offer integrated rate structures across their service areas. In particular, the State opposes the arguments primarily advanced by interexchange carriers ("IXCs") which, if countenanced, would effectively eviscerate these two policies despite the fact that Congress just codified and expanded upon them in enacting Section 254(g) of the Communications Act of 1934, as amended (the "Act").

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<sup>1</sup> The State also has one comment with respect to Section V of the Notice. Specifically, the State supports retention of the requirement for structural separation between a local exchange carrier's ("LEC's") local operations and its (or its affiliates) interstate interexchange operations. This is especially important in Hawaii where GTE Hawaiian Telephone Company has a clearly dominant position in the provision of local exchange, intrastate interexchange, and international telecommunications markets.

The State understands that certain carriers are concerned with the implications of Section 254(g), as they are probably concerned with other provisions added by the Telecommunications Act of 1996 (the "Telecommunications Act"). The Telecommunications Act is multifaceted and embodies a number of different policies and a number of compromises. Consequently, it should come as no surprise that, in addition to provisions such as Sections 251 and 253 which should greatly benefit interexchange carriers, there are other provisions which may constrain IXCs' conduct to assure that all Americans enjoy the benefits of efficient telecommunications and of our National Information Infrastructure policy. Effective implementation and enforcement of Section 254(g) will further these national goals.

## **I. INTRODUCTION**

In its initial comments, the State argued that, to effectuate Section 254(g) and congressional intent, geographic rate averaging and rate integration requirements must apply to all interexchange carriers and services; the Commission should adopt a pro-active mechanism for enforcing these requirements; any request for an exception to the geographic rate averaging requirement must be carefully measured against the specific forbearance criteria set forth in new Section 10 of the Act; the statute does not contemplate forbearance from rate integration policies; and in all events, AT&T should not be relieved of its October 1995 commitments to geographic rate averaging and rate integration because those commitments are in harmony with Congress's recent statutory mandates.

The comments reflect wide support among public utility commissions, state consumer advocates, other state agencies, and LECs for the proposition that geographic

averaging and rate integration are essential to protecting consumer welfare and that, in codifying these policies, Congress intended that they be applied as basic "rules of the road" to ensure consumers in all locations enjoy the benefits of efficient telecommunications.<sup>2</sup> However in their comments, several IXC's urge the Commission to carve out sufficient exceptions to Section 254(g), or to torture its legislative history, so as to gut the provision altogether.

The State dedicates the bulk of its reply comments to respond to these IXC efforts. As set forth more fully below, the rules of statutory interpretation will not allow any exception to Section 254(g) other than those which meet the forbearance criteria of new Section 10. In this regard, IXC's have presented argumentation and sweeping claims as to why forbearance will foster competition. But competition is only one of several considerations under Section 10's forbearance test, and in no case can broad claims about promoting competition alone justify forbearance in these circumstances. According to Section 10, the Commission must find for specific services and markets that forbearance (1) will not jeopardize the reasonableness and nondiscriminatory nature of carriers' rates and practices; (2) will not undermine consumer protection; and (3) is otherwise in the public interest. Competitive considerations are relevant to the third factor only.

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<sup>2</sup> See Alabama Public Service Commission at 8; State of Alaska at 3; Governor of Guam at 5-7; Guam Public Utilities Commission at 2; Iowa Utilities Board at 3; Missouri Public Service Commission at 4; Commonwealth of Northern Mariana Islands, passim; Ohio Consumers' Counsel at 4; Pennsylvania Office of Consumer Advocate at 5; Pennsylvania Public Utility Commission at 3 & 13-17. See also GTE Service Corporation at 13-14; Rural Telephone Coalition at 3; TCA, Inc. at 2-4; TDS Telecommunications Corporation at 2 & 5; United States Telephone Association at 1-4. [N.B. All above references and subsequent references to comments are to those filed in CC Docket No. 96-61 on April 19, 1996.]

No IXC arguments concerning forbearance from geographic averaging or rate integration address the criteria under Section 10 or develop a sufficient factual predicate for forbearance. Nor do the IXCs' arguments describe how the public policy goals underlying these congressional mandates would be served by forbearance. Indeed, with regard to rate integration, the State continues to believe that no such arguments could be proffered if the Commission is to continue to ensure against undue rate discrimination between regions of our diverse country.

The State also notes that virtually all parties (including IXCs) have roundly criticized as ineffectual the Notice's proposal to enforce Section 254(g) by relying on carrier certifications and the Commission's complaint process. The depth of this criticism indicates that, at a minimum, the Commission should require IXCs to file basic tariffs or some other public report which clearly demonstrates compliance.

## **II. SECTION 254(g) IS CLEAR ON ITS FACE: IT APPLIES TO ALL INTEREXCHANGE CARRIERS AND SERVICES WITHOUT EXCEPTION**

The breadth of Section 254(g)'s mandate is unambiguous:

[T]he Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State.<sup>3</sup>

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<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56, 73 (1996).

As the State initially commented, the statute exempts no interexchange carrier or service from its reach.

Notwithstanding the lack of any qualification in this language, some IXCs have suggested that the legislation and its history justify limiting the scope of the provision to a subset of interexchange services or carriers.<sup>4</sup> AT&T claims, for example that based on the legislative history the "unqualified rules proposed in the NPRM should be substantially revised."<sup>5</sup>

These comments essentially ask the Commission to skip directly to the legislative history to interpret the scope of a provision which is otherwise clear on its face. Yet, "the starting point for interpreting a statute is the language of the statute itself."<sup>6</sup> And, agencies are not at liberty to interpret a statute so as to contradict its plain language.<sup>7</sup> Specifically, the Commission is not at liberty to interpret the statute's reference to "interexchange telecommunications services" as a reference to a subset of those services. Nor is the Commission at liberty to interpret the statute's reference to "providers" as a reference to only certain providers.

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<sup>4</sup> See, e.g., Competitive Telecommunications Association at 8-9 (alleging that the overall context of 254(g) limits its scope to a carrier's "standard offering"); AT&T Corp. at 38-39 (alleging that forbearance from 254(g) for non-dominant carriers is consistent with the provision).

<sup>5</sup> AT&T Corp. at 32.

<sup>6</sup> MCI Telecommunications Corp. v. FCC, 765 F.2d 1186, 1191 (D.C. Cir. 1985) (cites omitted).

<sup>7</sup> See K Mart Corp. v. Cartier, Inc., 108 S.Ct. 1811, 1819 (1988).

These commenters ultimately ask the Commission to stand cardinal principles of statutory interpretation on their head. By initially proposing to incorporate the provisions of Section 254(g) into its rules without any exceptions, the Commission already (if implicitly) recognizes that this is not an option.<sup>8</sup> It would be inappropriate to deviate from this course.

**III. THE LEGISLATIVE HISTORY IS ALSO CLEAR: ANY EXCEPTION TO GEOGRAPHIC AVERAGING MUST MEET THE THREE-PART FORBEARANCE STANDARD IN SECTION 10**

**A. The Conference Committee Report Unambiguously Instructs the Commission to Only Use Section 10 of the Act to Consider Limited Exceptions to the General Statutory Rule**

To the extent the legislative history is relevant in shedding light on the meaning of Section 254(g), that history is similarly clear. It confirms the broad reach of the statute's general rule -- geographic averaging and rate integration policies should apply to carriers without exception. The relevant portion of the history bears repeating:

New section 254(g) is intended to incorporate the policies of geographic rate averaging and rate integration of interexchange services in order to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers. The Conferees intend the Commission's rules to require geographic rate averaging and rate integration . . . .<sup>9</sup>

Like the language of the statute itself, the quoted language indicates that Congress saw no need to statutorily exempt any group of services or carrier from the general rule requiring geographic averaging and rate integration.

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<sup>8</sup> See Notice ¶¶ 67 & 76.

<sup>9</sup> H.R. Rep. No. 458, 104th Cong., 2d Sess., at 132 (1996) ("Conference Report") (emphasis added).

Of course, Congress was aware that the Commission "has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances."<sup>10</sup> In recognition of this, the Conference Report states:

[T]he 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. Further, the conferees expect that the Commission will continue to require that geographically averaged and rate integrated services, and any services for which an exception is granted, be generally available in the area served by a particular provider.<sup>11</sup>

Thus, the procedure for considering any exception to the geographic averaging requirement, and the conditions to be placed on any such exception, are equally clear.

In light of the specific statutory language and its history's clear guidance on implementation, any allegation that the statute and its legislative history give the Commission more flexibility than exhibited in the NPRM's proposed rules (which track the Act) is untenable.

**B. If Anything, the Earlier Legislative History Reinforces the Applicability of the Geographic Averaging Requirement to All Carriers**

In support of the argument that Section 254(g) does not apply as broadly as the its plain language indicates, several IXCs place great weight on a single phrase extracted from the Conference Report's description of the original and superseded Senate bill, S. 652. AT&T and others allude to the following statement: "Subsection (g) of new Section 253

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<sup>10</sup> Id.

<sup>11</sup> Id.

simply incorporates in the Communications Act the existing practice of geographic rate averaging and rate integration."<sup>12</sup> Reliance on this statement is misplaced. Although the statute does incorporate existing policies, it also clearly expands their scope. Indeed, in context, the quoted statement only highlights the inappropriateness of using a single sentence from the legislative history to "trump" otherwise straightforward statutory language.

A review of the larger context surrounding the statement demonstrates how it masks the actual issues which the Conference Committee was facing. In S. 652, the Senate originally approved a two-pronged approach to geographic averaging and rate integration. Proposed Section 253(g) would have been only one prong. It would have applied to all interexchange carriers.<sup>13</sup> Proposed Section 214(d)(7) would have been the other prong. It concerned the designation of "essential telecommunications carriers," and it would have required those carriers to provide their interstate services "at nationwide geographically averaged rates" and to ensure that those rates were not unreasonably discriminatory.<sup>14</sup> Thus, the Senate originally had a general plan and a specific plan concerning geographic averaging and rate integration.

H.R. 1555, as originally passed by the House, contained no provision for essential carriers, but did contain a provision nearly identical to S. 652's proposed Section

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<sup>12</sup> Conference Report at 129. See AT&T Corp. at 32; Frontier Corporation at 8-9; LDDS WorldCom at 13.

<sup>13</sup> See S. 652, § 253(g), 141 Cong. Rec. S8575 (June 16, 1995) and S. Rep. No. 23, 104th Cong., 1st Sess., at 30 (1995) ("Senate Report").

<sup>14</sup> S. 652, § 214(d)(7), 141 Cong. Rec. at S8576 and Senate Report at 32-33.

253(g).<sup>15</sup> The House, however, interpreted its provision as requiring "interstate long distance rates [to] be maintained at the same levels in rural and urban areas," thereby "continu[ing] the principle of toll rate averaging."<sup>16</sup> The Initial House Report was silent as to how this language would effectuate rate integration. It only indicated that geographic rate averaging would be a fundamental requirement in the new regulatory environment.

The Conference Committee faced the prospect of reconciling the two chambers' divergent views on the future role of geographic averaging and rate integration, as well as the different focuses on geographic averaging within the Senate bill itself.

This effort, moreover, was not conducted in a vacuum. Subsequent to the passage of both bills, the Commission issued its Report and Order in the AT&T Reclassification Proceeding.<sup>17</sup> In this proceeding, AT&T had tried to limit its geographic averaging and rate integration obligations. In response to concerns of the State and others, AT&T did make certain voluntary commitments. However, those commitments fell far short of prior Commission policy statements regarding geographic averaging and rate integration.<sup>18</sup> The Commission's AT&T Reclassification Order, by accepting AT&T's

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<sup>15</sup> See H.R. 1555, § 248(e), 141 Cong. Rec. H9983 (Oct. 12, 1995).

<sup>16</sup> H.R. Rep. No. 204, 104th Cong., 1st Sess., at 82 (1995) ("Initial House Report").

<sup>17</sup> See Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, FCC 95-427 (released Oct. 23, 1995) ("AT&T Reclassification Order"), recon. pending.

<sup>18</sup> Compare AT&T Reclassification Order at Appendix II (accepting AT&T's commitment to provide five days' notice of any effort to deaverage residential direct dial rates) with Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 2873, 3133 (1989) ("We therefore pledge that any AT&T tariff that proposes to deaverage rates will be subject to the full 90-day notice period provided for under Section 203 . . . , and will be suspended for the full five-month period provided for under Section 204 . . . . We also pledge to investigate any such filing by AT&T. In

significantly watered down commitments, threw into question the Commission's commitment to maintaining the geographic averaging and rate integration policies which it previously had strongly endorsed.

Given this background, the clearest statement of Congress's intent can only be found in the Conference Committee's plain and straightforward guidance regarding the final, adopted provision.<sup>19</sup>

#### **IV. THE COMMENTS DO NOT PROVIDE A SUFFICIENT RECORD ON WHICH TO CREATE, AT THIS POINT, AN EXCEPTION TO THE GEOGRAPHIC RATE AVERAGING REQUIREMENT**

Although certain IXCs recognize that Section 254(g) establishes a general rule applicable to all services and all carriers, each IXC, in one fashion or another, argues that the general rule should not be applied to its services -- or at least to anything but its most

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the course of such an investigation, AT&T would bear the burden of justifying its proposal, and, given our strong commitment to geographically averaged rates, the showing will be difficult to meet").

<sup>19</sup> AT&T's also asserts that, by instructing the Commission to adopt rules implementing geographic rate averaging and rate integration, Congress intended to give the Commission flexibility. See AT&T Corp. at 33. There is no support for such conjecture. As mentioned, AT&T had just limited its commitment to geographic averaging to its residential rates, and in the Commission's other recent decision the Commission had focused on the rate integration of MTS and WATS services. See Application of Alascom, 11 FCC Rcd 732, 743-44 (1995). The more logical inference from the wording of the statute is that Congress called upon the Commission to assure through rulemaking effective implementation of the now codified and expanded geographic rate averaging and rate integration policies. Indeed, AT&T's argument proves too much. The Commission cannot revise a statutory mandate through its rulemaking process unless clearly authorized to do so by Congress. Cf. MCI Telecommunications Corp. v. AT&T, 114 S.Ct. 2223 (1994) (Commission's statutory authority to "modify" tariff filing requirements does not permit it to eliminate statutory requirement that carriers "shall" file tariffs).

basic services. In short, notwithstanding the mandate of Section 254(g) and the guidance which the legislative history provides, IXC's have asked the Commission to undermine the provision before it is implemented. Moreover, they have done so without meaningfully articulating how such forbearance would be consistent with Section 10 of the Act or the Act's general public interest goals. Congress's statutory scheme cannot accommodate either a broad retreat from Section 254(g) or an unsubstantiated, case-by-case retreat.

**A. Broad Brush Arguments Attacking Geographic Averaging Because of Its Theoretical Effect on Competition Are Unavailing**

The IXC's' sweeping efforts to undermine Section 254(g) are troubling from a policy perspective, but from a legal perspective are ineffective. Several IXC's argue at great length about how geographic averaging could impair their ability to compete against low cost regional carriers, or force carriers to abandon high cost areas in order to compete in low cost regions.<sup>20</sup> In a similar vein, they argue that geographic averaging and rate integration policies were developed to address specific circumstances involving either non-competitive interexchange markets or the provision of service to distant points.<sup>21</sup> The arguments boil down to claims that geographic averaging and rate integration are inappropriate policies in light of the forthcoming infusion of competitive forces into the interexchange market. The

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<sup>20</sup> See AT&T Corp. at 29-31; Sprint Corporation at 10-13; Telecommunications Resellers Association at 29-32.

<sup>21</sup> See, e.g., Sprint Corporation at 10 & 18-20 (opposing geographic averaging in a competitive market and incorrectly suggesting that rate integration is applicable to monopoly providers of MTS); see also Columbia Long Distance Services, Inc. at 4-5 (incorrectly suggesting that rate integration is premised upon distance insensitive costs between distant locations).

allegations fly in the face of Congress's explicit, contrary findings.

In enacting Section 254(g), Congress was not ignorant of the state of competition in the interexchange market. The Commission already had determined that all extant IXC's were non-dominant in the domestic market.<sup>22</sup> Nor was Congress ignorant of the regional disparities in underlying interexchange access costs. The very purpose of geographic rate averaging is to ameliorate the impact which regionally disparate costs otherwise impose on consumers in different parts of the country. Yet armed with this knowledge, Congress codified geographic rate averaging and rate integration. Moreover, it did so in the provision concerning universal service, and at the same time, it took landmark steps to facilitate regional competition in the interexchange market.<sup>23</sup>

To the extent IXC's believe broad geographic rate averaging and rate integration policies impair competition (which is not accurate),<sup>24</sup> those arguments were appropriate when Congress was considering Section 254(g) and its predecessors. In fact, the arguments advanced by certain IXC's appear to track legislative proposals advanced by them and rejected by Congress. For example, at one point, Congress was urged by IXC's to limit the scope of Section 254(g) to "residential rates." Now that Congress has acted more broadly, it has affirmed that these policies are to play a vital role in protecting consumer

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<sup>22</sup> See AT&T Reclassification Order, *passim*.

<sup>23</sup> Indeed, the provisions concerning the future of the interexchange market, opening it to regional competition from Bell Operating Companies ("BOCs"), were the most hotly contested and the nation's major IXC's were at the very middle of the debate.

<sup>24</sup> See note 31's (*infra*) accompanying text.

interests, as opposed to individual carriers' interests.<sup>25</sup> It takes no citation to support the proposition that the Commission must follow the law as enacted and not as individual IXCs, in this instance, might have preferred.

These same considerations require rejection of any suggestion that nationwide IXCs should be relieved of geographic rate averaging obligations where "competitive necessity" arises.<sup>26</sup> The proposal simply rehashes the argument that regional disparities in levels of competition might burden individual, non-regional carriers. In addition, both the broad brush arguments against Section 254(g) and the arguments for a competitive necessity exception would run roughshod over the legislative history of the provision. The arguments completely ignore the Conference Committee's admonition that exceptions to Section 254(g) must meet Section 10's three-part test. As noted above, Section 10 has three separate elements each of which must be met before forbearance can be granted. And according to Section 10's terms, only with respect to the third element -- the public interest test -- is the Commission instructed to evaluate competitive factors.<sup>27</sup>

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<sup>25</sup> If as AT&T alleges certain carriers now de-average their rates and put other carriers at a competitive disadvantage, such problems should be addressed through the Commission's enforcement mechanisms as violations of Section 254(g). AT&T has achieved what it has long sought -- comparable regulatory treatment of all carriers. The ability of carriers to "cheat" cannot justify abandoning a statutory mandate, but must be addressed through enforcement.

<sup>26</sup> See AT&T Corp. at 40-42; LDDS WorldCom at 14.

<sup>27</sup> The Commission shall forbear from applying a regulation or a provision of the Act if it determines that:

- (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with [a] telecommunications carrier or telecommunications service are just and reasonable and are not unjustly

These conclusions should come as no surprise. The Telecommunications Act of 1996 has at least two goals. There are provisions aimed at increasing competition.<sup>28</sup> There also are provisions specifically aimed at assuring that services are broadly available on reasonable terms,<sup>29</sup> or are specifically targeted at selected groups of customers.<sup>30</sup> Thus, it is inappropriate to assume that implementation of Section 254(g) is simply a matter which can be disposed of by reference to antitrust and competition concepts.

As an aside, it should be noted that IXCs' parade of evils regarding the impact of regional competition are decidedly simplistic and vastly overstated.<sup>31</sup> Historically, AT&T's principal competitors have rushed to offer services nationally. Recall that MCI started as a regional carrier and that Sprint has its roots in a regional carrier and later in

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or unreasonably discriminatory;

(2) enforcement of such regulation or provision is not necessary for the protection of consumers; and

(3) forbearance from applying such regulation or provision is consistent with the public interest.

Telecommunications Act, 110 Stat. at 128 (emphasis added) enacting new Section 10(a) of the Act. However, this provision adds that "In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions." Id.

<sup>28</sup> See id. 110 Stat. at 61-66 & 70-71 (adding Sections 251 and 253 to the Act, which benefit IXCs, respectively, by establishing interconnection procedures and by eliminating barriers to competition in the local exchange market).

<sup>29</sup> See id. at 110 Stat. 71-76 (adding new Sections 254 and 255 to promote universal service and to facilitate disabled persons' access to telecommunications services, respectively).

<sup>30</sup> See id. at 110 Stat. 73-75 (adding new Section 254(k) to provide additional rate protection for health care facilities in regional areas and educational institutions).

<sup>31</sup> See note 20 supra.

smaller LECs. One can realistically expect the major regional players, and in particular the BOCs and GTE, to rapidly become providers of nationwide and global service, albeit sometimes using the facilities of others. These companies are already large and have national and international interests. Their expansion is even more likely given the merger trend.<sup>32</sup> Thus, even these new entrants will have national (and international) cost components underlying their offerings through the acquisition of services from other interexchange carriers, and there will be plenty of averaging of costs by all carriers. Moreover, while the IXC's complain about regionally disparate costs, they do not discuss the countervailing economies of scale and other incentives to operating nationwide networks. The State wonders whether existing nationwide IXC's could be sincere in suggesting that they might abandon high cost markets and, thereby, lose the good will inherent in nationwide status -- especially since, as AT&T indicates, geographic averaging will only be burdensome until access charge structures are reformed.<sup>33</sup>

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<sup>32</sup> See, e.g., Wall Street Journal, May 2, 1996, at p. A3 (discussing the plans of Ameritech, Bell Atlantic, NYNEX, BellSouth, Pacific Telesis, and SBC Communications to offer long distance service outside their regions, including internationally; the latter three "recently asked the nation's long-distance carriers to submit bids for handling calls that originate in their respective territories," and this is expected to be a major opportunity for AT&T).

<sup>33</sup> See AT&T Corp. at 34 ("The Act thus contemplates and requires that the access charge mechanism be completely overhauled, so that subsidies are removed and prices are driven to efficient, forward-looking cost-based levels. After this occurs, of course, access prices will be far lower and more uniform than they are today, and a reasonable averaging policy should impose fewer burdens and anomalies").

**B. The Comments Do Not Provide Sufficient Evidence Which Would Warrant Exempting Specific Services from Geographic Rate Averaging Requirements**

In their comments, IXCs variously requested exceptions from Section 254(g) for single-customer offerings, promotional offerings, special calling plans, private lines, and other high end business services.<sup>34</sup> AT&T and MFS also suggest, respectively, that the Commission should forbear from applying Section 254(g) to nondominant carriers and to carriers with less than five percent of the relevant market.<sup>35</sup> But no IXC has attempted to address in sufficient detail the specific forbearance criteria set forth in Section 10. Each request, instead, is focused principally on the competitive impact that forbearance (or non-forbearance) would have. There is no meaningful discussion as to how these exceptions would protect consumers, or as to how they would ensure against unreasonably discriminatory rates and charges (including unreasonable regional discrimination). Indeed, there is precious little detail regarding the types of single-customer offerings, special plans, promotions and high end business services for which forbearance is sought.

Yet, Section 10 sets forth a very precise analytical structure: forbearance is appropriate only for individual carriers and services, classes of carriers and services, and specific geographic markets where each of Section 10(a)'s elements are met. It is axiomatic that the Commission cannot forbear from applying Section 254(g)'s geographic averaging mandate to particular carriers, services, or markets without the appropriate factual predicate or without a clear definition of those carriers, services, and markets.

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<sup>34</sup> See Part VI of the State's reply comments infra.

<sup>35</sup> See AT&T Corp. at 39-40; MFS Communications Company at 8-10.

**V. SECTION 10 AND SECTION 202(a) DO NOT PERMIT EXCEPTIONS TO THE RATE INTEGRATION REQUIREMENT**

The comments reflect persisting confusion over the purpose of rate integration policy. As the State mentioned in its comments, rate integration requires that a carrier serving remote (or so-called offshore) locations employ the same rate structure or rate scheme for those locations that it employs for non-remote locations. Put another way, the policy requires prices for a particular service to be calculated using the same basic methodology, irrespective of where in the nation those services are provided. Rate integration does not require the use of any particular pricing methodology (e.g., geographic averaging). Rate integration requires a carrier to use the same methodology for the same service throughout its service territory.<sup>36</sup>

The Commission has pursued rate integration in its efforts to incorporate remote points into the fabric of the national telecommunications market. However, the source of the rate integration policy is Section 202(a) of the Act. Section 202(a) prohibits unreasonable discrimination based on a customer's location.<sup>37</sup> Rate integration is a necessary corollary of Section 202(a) because it ensures against location-specific discrimination in the methodology of calculating prices. The Commission has noted, "a rate structure that uses different ratemaking methods to determine the rates that different users pay for comparable services is inconsistent with the national policy prohibiting unjust or

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<sup>36</sup> See MTS and WATS Market Structure, 81 F.C.C.2d 177, 192 (1980).

<sup>37</sup> See 47 U.S.C. § 202(a) ("It shall be unlawful for any common carrier . . . to make or give any undue or unreasonable preference . . . to any . . . locality, or to subject any . . . locality to any undue or unreasonable prejudice or disadvantage").

unreasonable rate discriminations, as expressed in Section 202(a)."<sup>38</sup>

New Section 10 of the Act, at subsection (a)(1), restates the fundamental prohibition of the nation's telecommunications policy against unreasonable discrimination and, thereby, restates rate integration as a necessary corollary.<sup>39</sup> As a further outgrowth of this analysis, the State cannot imagine how the Commission could forbear from the rate integration requirement. It essentially would be tantamount to forbearing from applying Section 10 -- a result which Congress could not have intended.

**VI. THE IXCs' PROPOSALS, WITHOUT MORE, ALSO WOULD UNDERMINE THE PUBLIC INTEREST GOALS SERVED BY GEOGRAPHIC RATE AVERAGING, RATE INTEGRATION, AND THE REMAINDER OF THE ACT**

It should be reiterated that the public policy underlying Section 254(g) is "to ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers."<sup>40</sup> Moreover, one of the intrinsic purposes of Telecommunications Act is to ensure that, as competition develops, consumers are protected and the core nondiscrimination policies of the Act are preserved.<sup>41</sup> As indicated above,

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<sup>38</sup> Integration of Rates and Services for the Provision of Communications by Authorized Common Carriers between the Contiguous States and Alaska, Hawaii, Puerto Rico and the Virgin Islands, Notice of Proposed Rulemaking, 1985 FCC LEXIS 2532 at ¶ 10. See also MTS and WATS Market Structure, 81 F.C.C.2d at 192.

<sup>39</sup> See Telecommunications Act, 110 Stat. at 128 (to justify forbearance the Commission must ensure that the forborne carriers' classifications shall remain "just and reasonable and . . . not unjustly or unreasonably discriminatory").

<sup>40</sup> Conference Report at 132.

<sup>41</sup> See 47 U.S.C. §§ 201(b) & 202(a); Telecommunications Act, 110 Stat. at 128 (adding Section 10 to the Act).

various parties have suggested that the strictures of Section 254(g) ought not to apply in specific situations, but have provided precious little support (if any). The following is an analysis of such claims and why, as formulated, they do or do not comport with the spirit of Section 254(g), Section 10, or with the overarching public interest goals of the Act:

1. Extension of Service. It is claimed that Section 254(g) does not require a carrier to provide service nationwide.<sup>42</sup> The State agrees. Section 254(g) applies to the rate structure of the carrier for its extant services and service area. However, wherever a service is extended, Section 254(g) and prohibitions against unreasonable regional discrimination apply. This furthers the statute's universal service goals and notions of regional parity.
2. Availability of Service Options, Including Discount Plans and Private Lines. It is claimed that Section 254(g) does not require a carrier to offer all of its "service options" in all of the locations that it serves.<sup>43</sup> The State suggests that these contentions require further analysis. If the claim is that services which are necessarily different in terms of technical components can be offered in only certain areas, then there may be merit in the claim. For example, if the carrier offers certain analog private services in all areas, but only offers certain digital services in another area, this may not violate Section 254(g) or 202(a). This may raise questions under the Commission's basic integration policies which cover both rate integration and service integration. Such a

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<sup>42</sup> See, e.g., Cable & Wireless, Inc. at 4.

<sup>43</sup> See, e.g., id. at 5; see also AT&T Corp. at 36-39.

scenario might track item 1 above in that all services need not be extended nationwide. On the other hand, if it is suggested that certain pricing options for comparable services are available in only certain locales, that would almost certainly be a violation of Sections 254(g) and 202(a). As mentioned, the national policy is to prohibit regionally discriminatory rate structures in order to foster parity of rate schemes throughout the country.

3. Promotional Discounts. It is claimed that Section 254(g) should not bar promotional discounts from being offered in only certain areas.<sup>44</sup> This claim raises a number of problems. The scope of such an exception is not defined with any precision, either as to the characteristics of the geographic area, the nature of the discount employed, the duration of the discount, the plan for making the discounts available in different geographic areas, or other features. Until there is more precision, it is impossible to grant relief without running the risk of violating Section 254(g) and 202(a). Given that any such exception to Section 254(g) would be in derogation of a statutory norm, the burden of justification should squarely rest on the carrier asking for an exception. The carrier must have the burden of demonstrating how a discount does not the national policy against regionally discriminatory rate structures. Accordingly, the State cannot make definitive comments on this matter.

MCI suggests that the Commission has permitted geographically limited

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<sup>44</sup> See MCI Telecommunications Corporation at 34-35 (stating that promotional plans constitute deaveraging).

promotions because of their de minimis discriminatory impact and role in stimulating demand (but does not cite any such case).<sup>45</sup> For purposes of argument, it would be easier to contemplate a discount that was for a very short period of time and where the plan calls for offering such discounts in all geographic areas over time, because the threat of unreasonable regional discrimination would be reduced. Nonetheless, even this approach is troubling given the Act's clear non-discriminatory mandates.

4. Custom-Type Tariffs. It is claimed that Section 254(g) should not bar carriers from offering rates like those embedded in custom-type tariff arrangements, like AT&T Tariff No. 12.<sup>46</sup> This claim raises problems similar to those articulated above with respect to promotional discounts. First, the scope of such exception is not defined with any precision. Until there is such precision, relief should not be granted. Second, given that any such exception could be in derogation of a statutory norm, the burden of justification should squarely rest on the carrier asking for the exception.

For the sake of argument, it would be easier to contemplate such arrangements when: (a) rates are averaged; (b) a similar offering is made available to large users in all states and locations which the carrier serves; and (c) the structure for such transactions is not potentially discriminating. Ultimately, the State

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<sup>45</sup> See id. at 34-35; see also AT&T Corp. at 36-38 ("promotions are universally accepted marketing practices," they have a de minimis impact on the market, and they put downward pressure on prices).

<sup>46</sup> See, e.g., AT&T Corp. at 37-39.

cannot fully comment on the merits of this claim without reviewing specific details, such as how the public will be assured that the custom tariff is available throughout the carrier's service area and how the public could assess the relevant rate structure.

5. Competitive Response. By far the broadest claims are those which would sanction an exception any time that there needs to be a response to competition.<sup>47</sup> As mentioned, the State opposes any such interpretation, because it flies in the face of the express terms of Section 254(g) -- which intends that even in competitive markets the principles of geographic averaging and rate integration should apply. Any exception such also would start the Commission down a slippery slope leading to the ultimate abrogation of the Act's nationwide universal service goals. It is difficult to imagine how the Commission could define a competitive situation so precisely that exceptions based on such situations would not begin to swallow the rule.
6. Interexchange Market. It is claimed that the fact that there is no dominant domestic interexchange carrier is in some way determinative of the issue.<sup>48</sup> Again, the State opposes such an interpretation, because it would read Section 254(g) out of the Act. Congress was aware of the market situation when it passed the Telecommunications Act, yet it expressly imposed geographic rate

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<sup>47</sup> See AT&T Corp. at 29-31; Sprint Corporation at 10-13; Telecommunications Resellers Association at 29-32.

<sup>48</sup> See AT&T Corp. at 39-40; Sprint Corporation at 14. See also MFS Communications Company, Inc. at 8-10 (seeking forbearance for small IXCs).