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

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| **In the Matter of:** | ) | |
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| Policy and Rules Concerning the | ) | |
| Interstate, Interexchange Marketplace | ) | |
| as a Non-Dominant Carrier | ) | |
| | ) | CC Docket No. 96-61 |
| Implementation of Section 254(g) | ) | |
| of the Communications Act of 1934, | ) | |
| as amended | ) | |

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## REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

**Summary**

The Commission should not forbear from enforcing the geographic rate averaging and rate integration requirements of Section 254(g) of the 1996 Telecommunications Act amendments. The Conference Report accompanying this legislative provisions expressly provides that "the conferees intend the Commission's rules to require geographic rate averaging and rate integration." Additionally, the criteria for forbearance are not met. Forbearance is appropriate where regulation is unnecessary; here, meaningful enforcement is necessary to protect rural consumers and ensure that rates are not unreasonably discriminatory. Additionally, the public interest in promoting competition can be accomodated consistent with the geographic rate averaging provisions of the law, and therefore forbearance is not needed to promote competition. Rather, the public interest in universal service mandates meaningful enforcement, not loopholes for selective discounts.

The Commission should eliminate the separation requirements imposed as a condition of non-dominant regulation of LEC interexchange service. Nowhere on the record does any party explain how these separation requirements are necessary to prevent the anticompetitive harms alleged. Additionally, no party explains why a LEC new entrant should be regulated as dominant when competing against AT&T, who is regulated as non-dominant but still holds 70% of the interexchange market. Instead, the Commission should be taking quick action to introduce new competition into the market, as well as ensuring that interexchange carriers flow-through access charge reductions, as suggested by the American Petroleum Institute. At a minimum, the Commission should not delay consideration of Independent provision of in-region interexchange service by considering it along with unrelated issues concerning the Act's conditions for Bell company in-region interexchange service.

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## REPLY COMMENTS OF THE UNITED STATES TELEPHONE ASSOCIATION

The United States Telephone Association (USTA) respectfully submits these reply comments in response to the Federal Communications Commission's (Commission)'s Notice of Proposed Rulemaking dated March 25, 1996.[1] USTA is the principal trade association of the local exchange carrier industry. Its members provide a wide variety of telecommunications services, including interstate, interexchange service.

### I. The Commission May Not Forbear From Enforcing the Geographic Rate Averaging Provisions of the Act

In the Notice, the Commission proposes to adopt a rule to implement the geographic rate averaging requirements regarding interexchange services mandated by the Act. Notice, para. 67. As the Notice provides, the legislative history states that Congress explicitly enacted the policies of geographic rate averaging for interexchange services, "in order to ensure that subscribers in rural and high cost areas receive intrastate and interexchange rates

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[1]In the Matter of Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket No. 96-61, FCC 96-123, Notice of Proposed Rulemaking (released March 25, 1996)("Notice").

at rates no higher than those paid by urban subscribers." Notice, para. 68, citing Joint Explanatory Statement of the Conference Committee, 104th Cong., 2nd Sess. at 132 ("Conference Report"). Congress could not have been more explicit as to what it intended the Commission to do to implement this section: " the conferees intend the Commission's rules to require geographic rate averaging and rate integration." Conference Report at 132.

Notwithstanding explicit Congressional intent that the Commission codify a long-standing policy (the policy benefits of which are enumerated by the Commission, see Notice, para. 66), some parties suggest that the Commission should flaunt this intent by forbearing from the 1996 Act's requirements. See, e.g., Comments of AT&T at 39. As the Commission recites in the Notice, para. 17, Congress has authorized the Commission to forbear from applying any provision of this Act, if the Commission determines that:

1) Enforcement is not necessary to ensure that charges, practices, classifications or regulations for such carrier or service are just and reasonable, and are not unjustly or unreasonably discriminatory;

2) Enforcement is not necessary for the protection of consumers;

3) Forbearance is consistent with the public interest.

Applying these three criteria to the interexchange geographic rate averaging provisions of Section 254(g) demonstrates that the requirements for forbearance of Section 254(g) are not present. As explained above, both Congress and the Commission have found that geographic rate averaging for interstate, domestic, interexchange services is in the public interest. The Commission could not therefore conclude that forbearance from enforcement of this policy is consistent with the public interest.

Forbearance from a provision of the Act is only appropriate where regulation is not necessary because market forces or other means will effectively achieve the result desired by Congress, e.g., interexchange rates in rural areas are no higher than in urban areas. Here,

there is ample evidence that, left unregulated, interexchange rates in rural areas will be significantly higher than in urban areas. Essentially, the major interexchange carriers are not arguing that forbearance is required because rural consumers will be adequately protected from discrimination without regulation. Rather they argue that the public interest would be better served if interexchange carriers were permitted to engage in such discrimination. See, e.g., Comments of AT&T at 29-31. But disagreement with Congressional goals is not a basis for forbearance.[2]

Specifically, AT&T argues that enforcement of the geographic rate averaging rules would impede competition. Comments of AT&T at 40, citing Notice, para. 69, n. 154; see Comments of MCI at 29-30. First and foremost, Congress enacted Section 254(g) and the other universal service portions of the bill with the understanding that these sections were intended to mitigate the harms to rural areas which might result from a more competitive market. Moreover, implementation of the geographic rate averaging requirements need not impede competition. The Conference Report makes clear that Congress did not intend that existing contracts for the provision of telecommunications services be renegotiated. Congress also notes that the Commission has permitted interexchange carriers to offer non-averaged rates for services in some limited situations, such as Tariff 12 contracts, and expects this practice to continue. Conference Report at 132.

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[2]Congress contemplated that the Commission could authorize limited exceptions to the general geographic rate averaging policy under the forbearance authority to permit existing contracts to continue. Joint Explanatory Statement on the Telecommunications Act of 1996, 104th Cong., 2nd Sess., at 132 ("Conference Report"). (Quoted in full as Appendix A). Thus, Congress implicitly intended that the Commission should not forbear from the entirety of Section 254(g). The Conference Report also states that the Commission will continue to require that any service for which an exception is granted must continue to be generally available in the carriers' service area. Accordingly, failure to offer otherwise generally available discount plans in rural areas would violate the rate averaging rules.

As MCI explains, long-standing Commission policy on rate averaging can accommodate the needs of competition. MCI Comments at 31. Consequently, the public interest in encouraging competition is not a basis for concluding that forbearance from the geographic rate averaging requirements of Section 254(g) of the 1996 Act would be in the public interest. Moreover, the Commission's suggestion that regional discounts should be permitted through forbearance, Notice, para. 69, n.154, offers no explanation how the criteria for forbearance are met in these circumstances, i.e., how enforcement is not necessary to ensure that charges for interexchange services in rural areas are not unreasonably discriminatory. Essentially, this loophole would write Section 254(g) out of the Act, contrary to Congressional intent that the Commission's rules require geographic rate averaging.[3]

On the contrary, enforcement of this rule through some meaningful mechanism will be necessary to protect consumers in rural areas from unreasonably discriminatory rates. Numerous other commenters support the geographic rate averaging requirements of the Act, and urge the Commission to adopt meaningful enforcement measures. See, e.g., Comments of GTE at 17; Comments of Cable & Wireless at 7; see also Comments of Pacific Telesis at 10 (supporting geographic rate averaging requirements).

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[3]MCI admits that "there simply can be no other answer," as to the question of whether promotional rates which are offered in urban areas, but not to rural subscribers, constitute geographic rate deaveraging. Comments of MCI at 35. AT&T is considerably more bold - stating that while such pricing constitutes geographic rate deaveraging, it should not be restricted. AT&T Comments at 36. Selective offering of promotional discounts to urban subscribers, but not to rural subscribers, is prima facie geographic rate deaveraging, in violation of the Act. While the Conference Report refers to contract tariffs, it does not sanction selective discounts for generally available interexchange services. See Comments of Pacific Telesis at 11. Forbearance from enforcing the Act with respect to promotional discounts on basic interexchange service rates would also unreasonably discriminate against rural consumers, impede rural economic development, and would not be in the public interest.

## II. The Commission Should Eliminate Separation Requirements for LEC Provision of Interexchange Services

### A. No Party Explains How Separation Requirements Are Necessary to Protect Competition

A number of commenters argue that the Commission must retain, or even strengthen, the separation requirements imposed as a condition of non-dominant treatment of interexchange services provided by a LEC. See, e.g., Comments of CompTel at 4-5; Comments of AT&T at 24; Comments of MCI at 11. These parties generally argue that LEC market power over local services can be used to obtain an anticompetitive advantage over other IXCs. While these parties recite a litany of hypothetical scenarios, alleging various types of improper cost-shifting and discrimination, they fail to demonstrate how either the separation requirements or dominant regulation addresses these potential harms.

Instead, these comments simply allege that rate regulation, cost allocation rules, and many of the new requirements of the 1996 Telecommunications Act will somehow not address the very scenarios these parties document. Their only answer is to pile on more regulation, regardless of whether it serves any purpose or not. But these comments are completely void of any analysis demonstrating why, e.g., LECs should be precluded from joint marketing out-of-region interexchange services with local exchange services. See Comments of AT&T at 27; Comments of CompTel at 4.[4]

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[4]The suggestion to subject LECs to this prohibition is particularly preposterous. LECs already advertise and market a variety of non-regulated services using the LEC brand name, without a separate affiliate. An appropriate allocation of costs related to non-regulated services is made under the Part 64 rules; for larger LECs, through a cost allocation manual (CAM). And, it is self-evident that where a LEC seeks to provide a bundled package of its out-of-region interexchange services with local exchange services, the local services will be offered out-of-region also. There is no basis to hamstring competition in this manner.

Rate regulation and cost allocation rules already prohibit the anticompetitive conduct at issue. As BellSouth notes, LECs are also unlikely to provide inferior service to their most important customers, particularly in light of increasing competition. Comments of BellSouth at 22. Other regulatory bodies note that LECs have no control over access facilities outside of its region, and therefore should not be treated as dominant. Comments of Florida Public Service Commission at 12. The 1996 Act is also likely to increase the pace of entry by competitors, which provides further insurance against LEC anticompetitive behavior.[5]

The separation requirements adopted in the Competitive Carrier proceeding require, inter alia, that LECs not share transmission or switching facilities with their long-distance services. At a minimum, the Commission should eliminate this requirement.[6] Given the expected local exchange and exchange access competition from cable operators, interexchange carriers, wireless carriers and others, all of whom will provide interexchange services over their own facilities, regulatory parity mandates that LECs not be precluded from making efficient use of their own facilities also.

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[5]MCI claims that incumbent LECs are resisting full and prompt implementation of the interconnection and unbundling requirements of Section 251 of the 1996 Act. MCI Comments at 19. Such inflammatory accusations are not helpful, particularly when they are unsupported by any evidence. It is difficult to see how LECs could engage in such resistance since LECs have been entering into interconnection agreements in various states across the country. Moreover, it is unclear what requirements MCI refers to, since the Commission's Notice on these issues was only released two weeks ago.

[6]Other separation requirements are also unnecessary. For example, the purpose of the requirement that a LEC purchase access at tariffed rates is equally fulfilled where a LEC uses its own access service and simply imputes to itself an amount for exchange access that is no less than the amount charged to any unaffiliated interexchange carrier. See 1996 Act, Section 272(e)(3)(Providing that a BOC shall either charge its affiliate or impute to itself non-discriminatory access charges).

Particularly where all other interexchange carriers, including the major incumbents, will be regulated as non-dominant, there is no basis for subjecting LECs to the burdens of dominant regulation as they seek to compete with these established carriers. Ameritech documents this point with several important facts: LECs will be competing against some 500 incumbent carriers, including four nationwide facilities-based carriers. The largest of these, AT&T, has total revenues of almost $80 billion, and 70% of the nation's presubscribed lines. See Comments of Ameritech at 5. If AT&T is unable to exercise market power, a LEC interexchange provider -- particularly a new entrant -- could hardly be considered dominant.

### B. At A Minimum, the Commission Should Consider the Appropriate Treatment of Independents and BOC In-Region Interexchange Services Separately

In the Notice, the Commission states that it intends to consider the appropriate treatment of a LEC with respect to the provision of interstate, interexchange services in areas where it provides local access services in an upcoming proceeding. Notice, para. 53, n. 122. The Commission should not defer consideration of Independent in-region interexchange services until the BOC in-region proceedings. Such consideration would unnecessarily dely consideration of the appropriate regulation of Independents and confuse the issues.

Nowhere is this more evident than in the consideration of in-region interexchange service, where the Act provides that BOCs must meet certain pre-conditions before they are authorized to provide such service, and are required to do so through a structurally separate subsidiary. See 1996 Act, Section 271, 272(b). While neither BOCs nor Independents control access facilities outside of their local regions, and while both are subject to adequate regulatory controls against anticompetitive cost-shifting, the difference in regulatory regimes governing their in-region interexchange business established by the Act warrants separate consideration by the Commission.

There is adequate reason at this time to remove immediately the separation requirements in-region, as well as out-of-region, for Independent LECs. See Comments of USTA at 8, n.15. Consideration of this issue should not be delayed while BOC provision of in-region interexchange service is considered. There is ample support in the record for eliminating the separation requirements for Independent in-region interexchange service already, and the BOC proceeding should be kept as simple and focused as possible.

There is also no basis to subject Independents to the same structural separation requirements as the BOCs. LECs have never been subject to structurally separate affiliate requirements as a condition of the provision of interexchange service, nor as a pre-condition to non-dominant status. See Notice, para. 57 (listing separation requirements); compare 1996 Act, Sections 271, 272.[7] Subjecting BOCs and Independents to the same separation requirements would impose new regulatory burdens on Independents' in-region interexchange services and tilt the playing field against those Independents (and in favor of incumbent interexchange providers).[8] The Commission should instead remove regulatory barriers to competition wherever possible, including barriers to in-region provision of interexchange services by BOCs and Independent LECs, and permit all LECs to compete on an equal footing with other non-dominant interexchange providers.[9]

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[7]By requiring a separate subsidiary for BOC in-region interexchange service, Congress implicitly intended that separation requirements were not necessary for out-of-region service.

[8]While GCI opposes elimination of separation requirements, it correctly points out that establishing different rules for Independents in-region service and out-of-region service would also cause an unnecessary burden. Comments of GCI at 5.

[9]In particular, the major incumbent interexchange providers will be providing competitive local services using their own facilities, and be subject to non-dominant regulation. There is no basis for creating regulatory disadvantages for LECs as they compete with these incumbent interexchange carriers.

## III. Interexchange Carriers Should Be Required To Certify that They Will Flow-Through Access Charge Reductions

The American Petroleum Institute ("API") suggests that the Commission require interexchange carriers to flow-through access charge reductions, and to certify that they are in compliance with this requirement. Comments of API at 3-5. As API notes, this requirement would extend to all interexchange carriers, including those carriers affiliated with the Bell Operating Companies. Comments of API at 4, n.5 As BellSouth documents, the existing facilities- based interexchange carriers pay less in access charges, but "residential long distance prices have not reflected these price decreases." Comments of BellSouth at 10, citing Affidavit of Prof. Jerry Hausman at 9.

While USTA supports API's proposal, regulatory certifications cannot substitute for proper market incentives. Just as mere certification is inadequate to enforce the rules regarding geographic rate averaging, certification will not provide the competitive market forces necessary to ensure that residential long distance rates reflect decreases in access charges. As the Notice concluded, the best solution to this problem is expeditious entry by new, facilities-based, interexchange carriers, particularly entry by incumbent LECs. Notice, para. 81; see also Comments of USTA on Price Collusion and CPE Bundling at 2. The comments submitted in this proceeding provide more than adequate support for that conclusion, and the Commission should act promptly to make it so.

## CONCLUSION

The Commission may not forbear from the geographic rate averaging requirements imposed on interexchange services by the Telecommunications Act. The public interest requires that the Commission instead adopt meaningful enforcement measures to fulfill Congressional intent. The Commission should eliminate separation requirements for LEC

provision of interexchange service, and consider separation requirements for BOC in-region interexchange service separately from the appropriate rules for Independent LECs.

Respectfully submitted,

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May 3, 1996

## CERTIFICATE OF SERVICE

I, Robyn L.J. Davis, do certify that on May 3, 1996 reply comments of the United States Telephone Association were either hand-delivered, or deposited in the U.S. Mail, first-class, postage prepaid to the persons on the attached service list.

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