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

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Federal Communications Commission
Office of Secretary

In the Matter of	)	
Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses	)	GN Docket No. 96-113

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REPLY COMMENTS OF AT&T CORP.

Pursuant to Section 1.415 of the Commission's Rules, and the Notice Of Inquiry released May 21, 1996 ("Notice"), AT&T Corp. ("AT&T") submits this reply to the comments of other parties on potential barriers to small businesses seeking to enter telecommunications and related markets.[1] See 47 U.S.C. § 257.

AT&T fully supports the Commission's efforts to identify regulatory requirements that disproportionately burden small entities. It is clear, however, that the scope of the review authorized by § 257 is not unlimited. Congress' primary purpose in enacting the Telecommunications Act of 1996 ("1996 Act") was to promote competition in telecommunications markets. As the 1996 Act recognizes, that purpose cannot be achieved without eliminating subsidies and other economic distortions that prevent

[1] A list of parties submitting comments and the abbreviations used to identify them are set forth in an appendix to this document.

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competitive forces from determining the winners and losers in the telecommunications marketplace.[2] The 1996 Act is premised on the notion that competition will promote lower prices, better service and more rapid innovation than can be obtained through regulation. It would therefore be contrary to the fundamental objectives of the Act to conclude that Congress intended § 257 to "shelter" small businesses from competitive forces by subsidizing them, or by setting aside certain market segments as their preserves.

I. THE COMMENTS SHOW THAT THERE ARE NO SIGNIFICANT BARRIERS TO SMALL BUSINESS ENTRY INTO INTEREXCHANGE RESALE

Alleged "market entry barriers" to interexchange resale are like the emperor's new clothes -- some commenters insist that they exist, but all evidence is entirely to the contrary. Indeed, all of the data provided to the Commission in this proceeding demonstrate that hundreds of small firms have entered interexchange resale in recent years, and that they continue to do so in sizable numbers.

The Telecommunications Resellers Association ("TRA"), the leading resellers' trade group, accurately boasts that there are "literally thousands of small, but growing, resale providers of an increasing number and variety of telecommunications services."[3] The TRA has also stated in published reports that it has difficulty obtaining an

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2 See AT&T, p. 2.

3 TRA, p. 7.

accurate census of resellers "because so many are coming into the market every day."[4] CompTel estimates that there are approximately 750 resellers of interexchange services, and it is confident that well over 70% of these firms have annual revenues under $25 million.[5] CompTel thus concludes that "small telecommunications carriers are numerous and growing."[6]

An enormous number of small companies have entered interexchange resale in the past decade, and these firms are sufficiently profitable that other small businesses continue to be attracted to the market. Although most resellers appear to be small businesses, many have grown and thrived. The TRA states that resellers comprise nearly half of the 20 largest providers of long distance service in the United States.[7] In short, there is simply nothing before the Commission that even remotely indicates that there are significant barriers to small business entry into interexchange resale.

Likewise meritless are the sweeping allegations made by some commenters of anticompetitive behavior by IXCs. For example, the TRA alleges that "[a] resale

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4 AT&T, p. 4 (quoting TRA: Small Long Distance Company Ranks Vastly Undercounted, LEXIS, IAC Newsletter Database, IAC-ACC-No. 2494073, Aug. 29, 1994).

5 CompTel, pp. 2-3 (stating that its survey shows at least 70% of resellers have revenues under $25 million per year, but that it the actual percentage "is undoubtedly much higher."). The TRA has estimated that there are more than one thousand interexchange resellers in the United States. See AT&T, p. 3.

6 Id., p. 4.

7 TRA, p. 7.

provider cannot currently obtain from any interexchange network provider rates equal to those available to large corporate users with comparable traffic volumes."[8] This claim is both unsupported and unsupportable. In fact, AT&T's tariffed rates are generally available to all customers, including resellers. If a reseller believed it had been denied service, it would have recourse to the Commission's complaint procedures.[9] The Commission may not rely on generalized and wholly unsubstantiated claims to support a finding that there are market entry barriers to interexchange resale, particularly not when the evidence in the record compels precisely the opposite conclusion.

II. THE COMMENTS OFFER NO EVIDENCE THAT DEPOSIT REQUIREMENTS DETER SMALL BUSINESS ENTRY INTO INTEREXCHANGE RESALE

No commenter disputes that interexchange carriers have the right and need to impose reasonable deposit requirements on resellers. Some commenters object, however, to deposits that they allege to be "anticompetitive,"[10] "prohibitive,"[11]

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8 Id., p. 23.

9 The TRA also quotes at length from a Commission decision which found that certain conditions in AT&T's Virtual Telecommunications Network Service ("VTNS") discriminated against resellers. TRA, p. 21. Its comments neglect to mention that this decision was later overturned by the D.C. Circuit, and so provides no support for the TRA's argument. See AT&T v. FCC, 86 F.3d 242 (D.C. Cir. 1996).

10 ACTA, p. 20.

11 Nevadacom, p. 3.

"unreasonable,"[12] or too "high."[13] None of the commenters, however, offers a single example of a specific IXC deposit requirement to which they take exception. Indeed, none of them even attempts to define what an "unreasonable" deposit requirement might be. The Commission is presented only with generalized assertions that unreasonable deposit requirements might, if any existed, tend to discourage small business entry into resale.

This is plainly not a sufficient basis for Commission action on the issue of resale deposits. Moreover, as AT&T showed in its comments, there is no reason to believe that deposit requirements would tend to be "too high" in interexchange resale markets in any event.[14] No IXC currently possesses market power, and so each of these carriers is in competition with other IXCs to attract customers. As the TRA recognizes, "even small resale carriers are large customers, representing substantial sources of revenue for their underlying carriers."[15] Thus, it is not in an IXC's self-interest to set deposit requirements so high as to lose the opportunity to make a sale to a customer who is in fact a good credit risk. Competing IXCs will seek to set their deposit requirements at an economically optimal level that maximizes the total of their revenues from sales, net of any losses due to uncollectible accounts. If an IXC sets its deposit requirements at a level that

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12 Integrated, p. 4.

13 CTA, p. 5; SCBA, p. 11.

14 AT&T, pp. 4-7.

15 TRA, p. 11.

causes it to turn away good credit risks, its competitors will seek to exploit this opportunity by selling to those customers.

There is thus no reason to believe that IXCs would set deposit requirements that are "too high."[16] If the Commission sought to regulate deposits, it would be required to substitute its own assessments in place of IXCs' business judgment concerning the markets in which they compete. Such a course would be the very antithesis of the procompetitive goals of the 1996 Act.

The TRA offers an additional complaint concerning deposits, arguing that "deposit requirements which are tied to the percentage of a customer's annualized commitment that will be generated initially or shortly after initiation of service adversely impact resale carriers alone because unlike other corporate users, resale carriers 'ramp-up' usage over the course of their service terms."[17] As a general matter, as explained above, IXCs will not impose such requirements unless, in their business judgment, they need to obtain security for the risk that a reseller will not be able to sell all of the minutes of use that it has agreed to purchase in order to obtain a specified volume discount. Market

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16 Indeed, as AT&T stated in its comments, although it applies the same deposit requirements to both resellers and non-resellers, as of approximately one year ago its uncollectible expense percentage was eight times greater for SDN resale than for SDN commercial accounts, and other measures of delinquency showed similar differentials. See AT&T, p. 5. These data suggest that, if anything, AT&T accepts greater risk to serve resellers than to serve other commercial accounts, although its tariffed rates are the same for both groups.

17 TRA, p. 21.

forces will determine what level of risk is commercially reasonable.[18] There is no reason for the Commission to require IXCs to bear the risk that a reseller will not meet its contractual commitment to use a specified volume of services.[19]

III. THE COMMISSION SHOULD CONTINUE TO HOLD THAT INCUMBENT LECs ARE "DOMINANT IN THEIR FIELD," BECAUSE THEY HAVE MARKET POWER BY VIRTUE OF THEIR CONTROL OVER "BOTTLENECK" LOCAL EXCHANGE FACILITIES

Since the early 1980s, the Commission has concluded that incumbent LECs ("ILECs") are "dominant in [their] field of operation," and accordingly has not regarded them as "small businesses" as that term is defined in the Regulatory Flexibility Act ("RFA").[20] Two commenters contend that ILECs with 1,500 or fewer employees should be considered "small" for RFA purposes.[21] AT&T strongly supports the Commission's

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18 As AT&T explained in its comments, its tariffs require "shortfall deposits" only when a customer's estimated shortfall charge exceeds $300,000 and projected annualized charges are less than 50% of the customer's annual commitment at the time service is initiated. After a six-month "ramp-up" period, a deposit is due if the total shortfall charge exceeds $300,000 and annualized charges (measured according the one of two methods which yields the highest percentage) are less than 85% of the customer's commitment. See AT&T, p. 7 n.11.

19 If a reseller fails to qualify for a volume discount that an IXC has extended to it because it is unable to sell a sufficient volume of calls, then the IXC must assume the risk and expense of collecting the additional monies owed to it when the appropriate, higher per-minute rate is applied.

20 See, e.g., Implementation of Section 402(b)(1)(A) of the Telecommunications Act of 1996, CC Docket No. 96-187, Notice of Proposed Rulemaking, FCC 96-367, ¶ 41, released September 6, 1996 (tracing history of Commission's treatment of ILECs under RFA).

21 NCTA, pp. 8-11; SBA, pp. 14-16; see also ITTA, pp. 2-4 (LECs with less than 2% of nation's access lines should be regarded as "small businesses").

longstanding position on this issue. ILECs' control of critical "bottleneck" facilities gives them the ability to exercise market power and compels the conclusion that they are dominant in their field of operation, without regard to the number of workers they employ.[22]

The RFA requires federal agencies to consider as part of the rule making process alternatives to proposed rules that might "minimize any significant economic impact" on small businesses.[23] That statute relies on the Small Business Act's definition of "small business concern," which expressly requires that in order to be considered a small business, a firm must not be "dominant in its field of operation."[24] An unbroken line of

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22 Two commenters contend that the Commission cannot determine that ILECs are "dominant in their field of operations" without first consulting with the SBA. See SCBA, pp. 23-24; SBA, pp. 14-16. These parties purport to rely on 15 U.S.C. § 632(a)(2)(C), which provides that federal agencies may not "prescribe a size standard" to define the term "small business" for RFA or Small Business Act purposes without SBA approval. However, the Commission's longstanding decision to regard ILECs as dominant cannot reasonably be deemed a "size standard," as it is not based on a measure such as number of employees or gross receipts. Instead, the Commission's conclusion rests on its understanding of the fundamental structure of telecommunications markets, its primary area of expertise (and the field in which it is the federal agency best-qualified to assess what constitutes "dominance").

23 See 15 U.S.C. §§ 603(c), 604(a). The Commission has for over fifteen years analyzed the impacts of its policies on small businesses pursuant to the Regulatory Flexibility Act. These deliberations closely parallel the inquiry required by § 257. In light of this prior scrutiny of its regulations, the Commission "must supply a reasoned analysis" to justify any decision to modify the conclusions it reached previously under the RFA. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 42 (1983).

24 See 15 U.S.C. § 601(3) (RFA); id. § 632(a)(1) (Small Business Act).

Commission decisions, dating from its earliest RFA analyses, recognizes that ILECs possess market power because of their effective monopoly over local exchange service. In 1982, the Commission held that "Exchange carriers, even small ones, enjoy a dominant monopoly position in their local service area."[25] ILECs control a critical input, access to local exchange facilities, that virtually all other providers of telecommunications services must obtain in order to provide service. The owner of a small interexchange reseller made this point plainly at the Commission's recent Forum On Small Business Market Entry Barriers, explaining that her company "depends totally upon the incumbent local exchange carrier for access to our existing and potential customers."[26]

It is clear that an ILEC's ability to exercise market power does not depend on the size of its workforce or on the number of access lines it serves. The Commission has long recognized that "the smallest exchange carriers are probably even more dominant than the large ones, because bypass competition is very unlikely to develop in the areas they serve."[27] Repeated decisions by the Commission and the courts make plain that ILECs' control over bottleneck facilities gives them market power.[28] The commenters in

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25 MTS and WATS Market Structure, Third Report and Order, 93 F.C.C. 2d 241, ¶ 360 (1983).

26 Statement of Katherine L. Haycock, President and CEO, Call-America, delivered at Federal Communications Commission Forum On Small Business Market Entry Barriers, Sept. 24, 1996, p. 1.

27 MTS and WATS Market Structure, 93 F.C.C. 2d at ¶ 360.

28 See, e.g., AT&T Comments, filed April 19, 1996, pp. 11-12, in Policy and Rules Concerning the Interstate Interexchange Marketplace, CC Docket No. 96-61, Notice of Proposed Rule Making, FCC 96-123, released March 25, 1996.

this proceeding offer nothing that suggests any reason for the Commission to reconsider this conclusion.

Respectfully submitted,

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October 11, 1996

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Association of Directory Publishers
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National Wireless Resellers Association

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Press Broadcasting Company, Inc.

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The Rural Cellular Association

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I, Terri Yannotta, do hereby certify that on this 11th day of October, 1996, a copy of the foregoing "AT&T Reply Comments" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

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