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Federal Communications Commission

FCC 97-229

DISPATCHED

Before the  
Federal Communications Commission  
Washington, D.C. 20554

In the Matter of	)	
	)	
Regulatory Treatment of LEC Provision	)	CC Docket No. 96-149
of Interexchange Services Originating in the	)	
LEC's Local Exchange Area	)	
	)	
and	)	
	)	
Policy and Rules Concerning the	)	CC Docket No. 96-61 ✓
Interstate, Interexchange Marketplace	)	

**ORDER ON RECONSIDERATION**

**Adopted:** June 25, 1997

**Released:** June 27, 1997

By the Commission:

1. In the Classification of LEC Long Distance Service Report and Order, the Commission revised its regulatory treatment of the provision of domestic, interstate, interexchange, and international services by the Bell Operating Companies (BOCs) and independent local exchange carriers (LECs).<sup>1</sup> Pursuant to section 1.108 of the Commission's rules,<sup>2</sup> on our own motion, we make minor modifications to paragraphs 173 and 188 of the Classification of LEC Long Distance Service Report and Order to correct and clarify the meaning of these paragraphs. We also amend rule 64.1903(c) adopted in the Classification of LEC Long Distance Service Report and Order so that it is consistent with the Report and Order adopted in this proceeding. Finally, we change the effective date of the Classification of LEC Long Distance Service Report and Order to comply with the requirements of the

<sup>1</sup> Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area: Policy and Rules Concerning the Interstate, Interexchange Marketplace, CC Docket Nos. 96-149, 96-61. Second Report and Order and Third Report and Order, FCC 97-142 (rel. April 18, 1997) (Classification of LEC Long Distance Service Report and Order).

<sup>2</sup> 47 C.F.R. § 1.108.

Paperwork Reduction Act of 1995, Pub. L. No. 104-13, 109 Stat. 163 (1995).

2. In paragraph 173 of the Classification of LEC Long Distance Service Report and Order, we concluded that independent LECs must provide in-region, interstate, interexchange services through a separate affiliate that satisfies the Fifth Report and Order separation requirements.<sup>3</sup> We also acknowledged that we were aware of three independent LECs, Union Telephone Company (of Wyoming) (Union), GTE Hawaiian Telephone, and Micronesia Telephone Company (MTC), that currently provide in-region interexchange services on an integrated basis subject to dominant carrier regulation. In paragraph 173 we concluded that the costs of complying with the Fifth Report and Order separation requirements faced by a going concern could be greater than the costs of complying with these requirements for independent LECs that are currently providing these services on a separated basis. We, therefore, directed Union, GTE Hawaiian Tel., and MTC to comply with the Fifth Report and Order separation requirements no later than one year from the date of release of the Classification of LEC Long Distance Service Report and Order, *i.e.*, no later than April 18, 1998.<sup>4</sup> Upon further reflection, we recognize that there may be other independent LECs, of which we are not currently aware, that may be providing interexchange services on an integrated basis subject to dominant carrier regulation as of the date of release of the Classification of LEC Long Distance Service Report and Order.<sup>5</sup> We therefore find that any other such independent LECs also have until April 18, 1998 to comply with the Fifth Report and Order separation requirements. We hereby revise the text of paragraph 173 (footnotes omitted) to read:

173. Based on the foregoing, we conclude that we should require independent LECs to provide in-region, interstate, interexchange services through a separate affiliate that satisfies the Fifth Report and Order separation requirements. We further conclude that, in light of our finding that independent LECs do not have the power to raise and sustain interexchange rates above competitive levels, it would be inconsistent with our analysis to allow independent LECs to choose whether to be regulated as a dominant carrier when providing in-region, interstate, domestic interexchange services. We are aware, however, of three independent LECs, Union Telephone Company (of Wyoming) (Union), GTE Hawaiian Tel., and MTC, that currently

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<sup>3</sup> Classification of LEC Long Distance Service Report and Order at ¶ 173. See Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor, CC Docket No. 79-252, Fifth Report and Order, 98 FCC 2d 1191 (1984) (Fifth Report and Order).

<sup>4</sup> Classification of LEC Long Distance Service Report and Order at ¶ 173.

<sup>5</sup> After release of the Classification of LEC Long Distance Service Report and Order, we were notified informally by members of the industry that other independent LECs may also be providing interexchange services on an integrated basis subject to dominant carrier regulation.

provide interexchange services on an integrated basis subject to dominant carrier regulation. We recognize that the costs of complying with the Fifth Report and Order separation requirements faced by a going concern could be greater than the costs of complying with these requirements for independent LECs that are currently providing these services on a separated basis. Accordingly, Union, GTE Hawaiian Tel., MTC, and any other independent LEC that is currently providing interexchange service on an integrated basis subject to dominant carrier regulation shall have one year from the date of release of this Order to comply with the Fifth Report and Order separation requirements. Until that time, the Commission will continue to regulate these independent LECs as dominant carriers. The record in this proceeding does not reflect special circumstances necessary for a waiver of one or more of these requirements. To the extent that special circumstances exist, however, independent LECs may petition us to establish the necessity of a waiver of the Fifth Report and Order requirements.

3. In the Classification of LEC Long Distance Service Report and Order, we determined that our separation requirements should be imposed only on incumbent independent LECs that control local exchange and exchange access facilities.<sup>6</sup> We also adopted the same rules for an incumbent independent LEC's provision of in-region, international, interexchange services as we adopted for an independent LEC's provision of in-region, interstate, domestic, interexchange services.<sup>7</sup> Specifically, we stated that, in light of our decision to classify independent LECs as non-dominant in the provision of in-region, interstate, domestic, interexchange services and to impose the Fifth Report and Order requirements, we will classify an independent LEC as non-dominant in the provision of in-region, international services, unless it is affiliated with a foreign carrier that has the ability to discriminate in favor of the independent LEC through control of bottleneck services or facilities in a foreign destination market.<sup>8</sup>

4. Upon further reflection, we conclude that we should revise paragraph 188 of the Classification of LEC Long Distance Service Report and Order to state clearly that only incumbent independent LECs providing in-region, international, interexchange services must comply with the Fifth Report and Order separation requirements. This clarification is consistent with our conclusion in paragraph 179 of the Classification of LEC Long Distance Service Report and Order, which imposes the Fifth Report and Order separation requirements

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<sup>6</sup> Classification of LEC Long Distance Service Report and Order at ¶ 176.

<sup>7</sup> Id. at ¶ 188.

<sup>8</sup> Id. at ¶ 189.

on incumbent independent LECs that control local exchange and exchange access facilities.<sup>9</sup> This clarification is also consistent with our discussion in paragraph 191 of the benefits to small incumbent LECs of our decision to adopt the same rules for an independent LEC's provision of in-region, international, interexchange services as we adopted for an independent LEC's provision of in-region, interstate, domestic, interexchange services.<sup>10</sup> Therefore, we hereby revise the text of paragraph 188 (footnotes omitted) to read:

188. We confirm our tentative conclusion that we should adopt the same rules in this proceeding for an independent LEC's provision of in-region, international, interexchange services as we adopt for its provision of in-region, interstate, domestic, interexchange services. As discussed above with regard to BOC provision of in-region, international services, the relevant issue, with respect to both domestic interexchange and international services, is whether an independent LEC can exercise its market power in local exchange and exchange access services to raise and sustain prices of interexchange or international services above competitive levels by restricting its own output. We find no practical distinctions between an independent LEC's ability and incentive to use its control over bottleneck facilities in the provision of local exchange and exchange access services to improperly allocate costs, unreasonably discriminate against, or otherwise engage in anticompetitive conduct against unaffiliated domestic interexchange competitors as opposed to international services competitors. Consistent with our conclusion to limit application of the Fifth Report and Order requirements to incumbent independent LECs that control local exchange and exchange access facilities, for independent LECs providing in-region, international, interexchange services, we also limit application of the Fifth Report and Order separation requirements to incumbent independent LECs that control local exchange and exchange access facilities.

5. We also modify rule 64.1903(c) published in Appendix B of the Classification of LEC Long Distance Service Report and Order, as released by the Commission on April 18, 1997, so that the dates in rule 64.1903(c) are consistent with the release date of Classification of LEC Long Distance Service Report and Order. The complete corrected final rules are attached as Appendix A to this Order.

6. Rule 64.1903(c) is corrected to read as follows:

(c) An incumbent independent LEC that is providing in-region, interstate, domestic,

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<sup>9</sup> Id. at ¶ 179.

<sup>10</sup> Id. at ¶ 191.

interexchange services or in-region international interexchange service prior to April 18, 1997, but is not providing such services through an affiliate that satisfies paragraph (a) of this section as of April 18, 1997, shall comply with the requirements of this section no later than April 18, 1998.

7. Final Regulatory Flexibility Certification: In the Classification of LEC Long Distance Service Report and Order, we certified that the rules adopted in that Order would not have a significant impact on a substantial number of small entities, as required by the Regulatory Flexibility Act, as amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996).<sup>11</sup> The changes we adopt in this Order do not affect our certification in the Classification of LEC Long Distance Service Report and Order. We amend our Final Regulatory Analysis, however, to be consistent with the clarification of the timeframe for compliance described in paragraph 2 of this Order. Paragraph 226 is therefore revised to read as follows (footnotes omitted):

226. In this Order, we have found that all incumbent independent LECs, including small incumbent independent LECs, must provide in-region, interstate, domestic, interexchange services through a separate affiliate that satisfies the Fifth Report and Order requirements. We are aware of three companies currently providing interexchange services directly on a dominant basis, Union Telephone Company (of Wyoming), GTE Hawaiian Tel., and MTC. We direct companies that are not currently providing interexchange services through a separate affiliate that satisfies the Fifth Report and Order requirements to comply with the Fifth Report and Order separation requirements no later than one year from the date of release of this Order. We also extend this regulatory regime, which applies to domestic services, to international, interexchange services as well. Pursuant to this Order, all incumbent independent LECs, including small incumbent independent LECs, must provide in-region, interstate, domestic, interexchange services and international, interexchange services through a separate affiliate that satisfies the Fifth Report and Order separation requirements. Specifically, incumbent independent LECs must provide these services through a separate affiliate that must: (1) maintain separate books of account; (2) not jointly own transmission or switching facilities with its affiliated exchange companies; and (3) obtain any services from its affiliated exchange companies at tariffed rates and conditions. In this Order, we have also eliminated the Fifth Report and Order separation requirements as a condition for non-dominant treatment of incumbent independent LECs' provision of out-of-region, interstate, domestic, interexchange services.

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<sup>11</sup> Id. at ¶¶ 214-234.

8. The Classification of LEC Long Distance Service Report and Order contains new or modified collections of information subject to the Paperwork Reduction Act of 1995 (PRA). The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget to comment on the information collections contained in the Classification of LEC Long Distance Service Report and Order, as required by the PRA.<sup>12</sup> In order to comply with the PRA, we are extending the effective date of the Order to 70 days after publication in the Federal Register. Accordingly, we redesignate paragraphs 238 and 239 as paragraphs 239 and 240, revise paragraph 237 to eliminate the language that makes the Order effective within 30 days of publication in the Federal Register, and add a new paragraph 238 to extend the effective date to 70 days after publication in the Federal Register. New paragraphs 237 and 238 read as follows:

237. Accordingly, IT IS ORDERED that, pursuant to sections 1, 2, 4, 201, 202, 251, 271, 272, and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151, 152, 154, 201, 202, 251, 271, and 303(r), the REPORT AND ORDER IS ADOPTED.

238. IT IS FURTHER ORDERED that the REPORT AND ORDER, which imposes new or modified information or collection requirements, shall become effective 70 days after publication in the Federal Register, following approval by the Office of Management and Budget, unless a notice is published in the Federal Register stating otherwise.

9. Finally, we modify paragraph 238, which is redesignated as paragraph 239 as described above, and the rules published in Appendix B of the Classification of LEC Long Distance Service Report and Order to reflect the redesignation of Subpart Q to Subpart T in Part 64 of Title 47 of the Code of Federal Regulations. Accordingly, new paragraph 239 is corrected to read as follows:

239. IT IS FURTHER ORDERED that Part 64, Subpart T of the Commission's rules, 47 C.F.R. Part 64 Subpart T, is ADDED as set forth in Appendix B hereto.

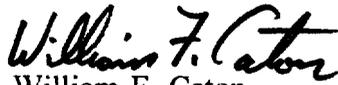
We also modify the rules published in Appendix B of the Classification of LEC Long Distance Service Report and Order, as released by the Commission on April 18, 1997, to correct minor typographical and numbering errors.

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<sup>12</sup> See 5 C.F.R. § 1320.

10. Accordingly, IT IS ORDERED that, pursuant to the authority contained in section 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. § 303(r), and pursuant to section 1.108 of the Commission's rules, 47 C.F.R. § 1.108, the Commission reconsiders its decision in the Classification of LEC Long Distance Service Report and Order on its own motion to the extent specified herein.

FEDERAL COMMUNICATIONS COMMISSION

  
William F. Caton  
Acting Secretary.

## APPENDIX A

## Corrected Version -- Part 64, Subpart T of Title 47 of the Code of Federal Regulations

## PART 64 -- MISCELLANEOUS RULES RELATING TO COMMON CARRIERS

## Subpart T -- Separate Affiliate Requirements For Incumbent Independent Local Exchange Carriers That Provide In-Region, Interstate Domestic Interexchange Services Or In-Region International Interexchange Services

Sec.

64.1901	Basis and purpose.
64.1902	Terms and definitions.
64.1903	Obligations of all incumbent independent local exchange carriers.

## Subpart T -- Separate Affiliate Requirements For Incumbent Independent Local Exchange Carriers That Provide In-Region, Interstate Domestic Interexchange Services Or In-Region International Interexchange Services

## § 64.1901 Basis and purpose.

(a) *Basis.* These rules are issued pursuant to the Communications Act of 1934, as amended.

(b) *Purpose.* The purpose of these rules is to regulate the provision of in-region, interstate, domestic, interexchange services and in-region international interexchange services by incumbent independent local exchange carriers.

## § 64.1902 Terms and definitions.

Terms used in this part have the following meanings:

*Books of Account.* Books of account refer to the financial accounting system a company uses to record, in monetary terms the basic transactions of a company. These books of account reflect the company's assets, liabilities, and equity, and the revenues and expenses from operations. Each company has its own separate books of account.

*Incumbent Independent Local Exchange Carrier* (Incumbent Independent LEC). The term incumbent independent local exchange carrier means, with respect to an area, the independent local exchange carrier that:

- (1) On February 8, 1996, provided telephone exchange service in such area; and
- (2) (i) On February 8, 1996, was deemed to be a member of the exchange

carrier association pursuant to § 69.601(b) of this title; or

(ii) Is a person or entity that, on or after February 8, 1996, became a successor or assign of a member described in paragraph (2)(i) of this section.

The Commission may also, by rule, treat an independent local exchange carrier as an incumbent independent local exchange carrier pursuant to section 251(h)(2) of the Communications Act of 1934, as amended.

Independent Local Exchange Carrier (Independent LEC). Independent local exchange carriers are local exchange carriers, including GTE, other than the BOCs.

Independent Local Exchange Carrier Affiliate (Independent LEC Affiliate). An independent local exchange carrier affiliate is a carrier that is owned (in whole or in part) or controlled by, or under common ownership (in whole or in part) or control with, an independent local exchange carrier.

In-Region Service. In-region service means telecommunications service originating in an independent local exchange carrier's local service areas or 800 service, private line service, or their equivalents that:

- (1) Terminate in the independent LEC's local exchange areas; and
- (2) Allow the called party to determine the interexchange carrier, even if the service originates outside the independent LEC's local exchange areas.

Local Exchange Carrier. The term local exchange carrier means any person that is engaged in the provision of telephone exchange service or exchange access. Such term does not include a person insofar as such person is engaged in the provision of a commercial mobile service under section 332(c), except to the extent that the Commission finds that such service should be included in the definition of that term.

#### **§ 64.1903 Obligations of all incumbent independent local exchange carriers.**

(a) Except as provided in paragraph (c) of this section, an incumbent independent LEC providing in-region, interstate, interexchange services or in-region international interexchange services shall provide such services through an affiliate that satisfies the following requirements:

- (1) The affiliate shall maintain separate books of account from its affiliated exchange companies. Nothing in this section requires the affiliate to maintain separate books of account that comply with Part 32 of this title;
- (2) The affiliate shall not jointly own transmission or switching facilities with its affiliated exchange companies. Nothing in this section prohibits an affiliate from sharing personnel or other resources or assets with an affiliated exchange

company; and

(3) The affiliate shall acquire any services from its affiliated exchange companies for which the affiliated exchange companies are required to file a tariff at tariffed rates, terms, and conditions. Nothing in this section shall prohibit the affiliate from acquiring any unbundled network elements or exchange services for the provision of a telecommunications service from its affiliated exchange companies, subject to the same terms and conditions as provided in an agreement approved under section 252 of the Communications Act of 1934, as amended.

(b) The affiliate required in paragraph (a) of this section shall be a separate legal entity from its affiliated exchange companies. The affiliate may be staffed by personnel of its affiliated exchange companies, housed in existing offices of its affiliated exchange companies, and use its affiliated exchange companies' marketing and other services, subject to paragraph (a)(3) of this section.

(c) An incumbent independent LEC that is providing in-region, interstate, domestic interexchange services or in-region international interexchange services prior to April 18, 1997, but is not providing such services through an affiliate that satisfies paragraph (a) of this section as of April 18, 1997, shall comply with the requirements of this section no later than April 18, 1998.