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July 11, 1997

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

William F. Caton, Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: CC Docket No. 96-262 - Access Reform

Dear Mr. Caton:

Transmitted herewith, on behalf of the Rural Telephone Coalition, are an original and nine copies of its petition for reconsideration of the Commission's First Report and Order in the above-referenced proceeding.

In the event of any questions concerning this matter, please communicate with me or one of the other association representatives identified in the filing.

Very truly yours,

Margot Smiley Humphrey

Margot Smiley Humphrey

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

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JUL 11 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
Usage of the Public Switched Network by Information Service and Internet Access Providers	)	CC Docket No. 96-263

PETITION FOR RECONSIDERATION

OF THE

RURAL TELEPHONE COALITION

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

In the Matter of	)	
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Access Charge Reform	)	CC Docket 96-262
	)	
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Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
Usage of the Public Switched Network by Information Service and Internet Access Providers	)	CC Docket No. 96-263

PETITION FOR RECONSIDERATION OF THE RURAL TELEPHONE COALITION

The Rural Telephone Coalition (RTC) submits this petition for reconsideration of the First Report and Order, FCC 97-158, released May 16, 1997 in the above-captioned proceeding.[1] The RTC is comprised of the National Rural Telecom Association (NRTA), the National Telephone Cooperative Association (NTCA) and the Organization for the Promotion and Advancement of Small Telecommunications Companies (OPASTCO). Together the three associations represent more than 850 small and rural telephone companies. The members are incumbent local exchange carriers (ILECs) that provide interstate access services subject to this Commission's rate of return regulation and Part 69 of its Rules and Regulations.

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[1] Access Charge reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate; Structure and Pricing; End User Common Line Charges, CC Docket No. 96-262, et al., FCC 97-158 (released May 16, 1997) (Access Order), review pending, sub nom. Southwestern Bell Tel. Co. v. FCC, No. 97-2618 and consolidated cases (8th Cir.).

The RTC has participated actively in this proceeding and will be affected by the decisions and any changes in them on reconsideration because some of the rules and policies apply directly to rate of return as well as price cap ILECs, others will stand as precedents and models for future access charge reform applicable to rate of return LECs and others involve the timing and focus of such upcoming review of access charges for small and rural ILECs in light of the adoption by Congress and implementation by this Commission of the national telecommunications policies embodied in the Telecommunications Act of 1996. The impact of the Access Order on rate of return ILECs is also closely linked to the Commission's Universal Service Order,[2] Local Competition Order[3] and upcoming review of jurisdictional separations issues.

INTRODUCTION AND SUMMARY

The Rural Telephone Coalition requests reconsideration and modification with regard to two main issues decided in the Access Order and explained in the Stay Denial in this proceeding: First, the Commission's decision to increase the SLC caps on non-primary access lines and multi-line business connections for customers served by price cap LECs and, second the Commission's decision to prohibit both price cap and rate of return ILECs from imposing interstate access charges on origination and termination of interexchange carriers' long distance services when unbundled network elements (UNEs) are involved.

The Commission should abandon or cushion the universal service impact of its decision to

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[2] First Report and Order, FCC 96-325, Implementation of the Local Competition Provisions of The Telecommunicatins Act of 1996, CC Docket No. 96-98 (released August 8, 1996 (Local Competition Order or Interconnection Order).

[3] State Joint Board on Universal Service, CC Docket No. 96-45 (released May 8, 1997) (Universal Service Order).

increase the caps on interstate subscriber Line Charges (SLCs) for two classes of customers -- subscribers to second residential lines and lines for second residences and multi-line business connections. The decision already conflicts with the 1996 Act's mandates for "reasonably comparable" rural and urban rates and services in spite of a $9 cap and may jeopardize the mandate for nationwide "affordable" rates. The impact will depart even further from these national policies and goals if the change is extended to rate of return ILECs and will increase the pressure on the rural and urban, state and interstate state toll rate averaging the law requires. Beyond that, requiring different rates for some kinds of residential connections will be an administrative burden and will force ILECs to invade their customers' privacy to police what connections should be denied the long-established policy of spreading the higher cost of serving low density rural markets nationwide.

Forbidding all ILECs from continuing to impose access charges when their networks are used to allow interexchange carriers (IXCs) to pick up and deliver long distance calls whenever the ILECs must provide their networks as unbundled network elements (UNEs) will violate the Eighth Circuit's stay on an earlier rule that forbade access charge recovery in connection with UNEs. This is so regardless of the FCC's current focus on section 201 and its access charge authority (rather than its local competition role) in reimposing the stayed requirement here. The same Circuit has ruled in the Comptel case that Congress intended the FCC <u>not</u> to jeopardize universal service by interrupting ILECs' traditional recovery of universal service support that remains implicit in access charges — at least until the completion of an adequate updated universal service system.

The FCC's claim that it is only denying interstate access charge collection to ILECs that

no longer actually provide access service is far-fetched and ineffective to excuse its across-the-board interruption of access charge payments ILECs earn when their networks meet the needs of IXCs for traditional local distribution of their interstate service. The FCC has mistaken traditional interstate access service for the equivalent of and statutory substitute for the right of new local providers to compete with ILECs using UNEs. However, the 1996 Act gave these new rights under section 251(c)(3) to new competitive providers of local service, including IXCs, only to the extent they become competing local exchange carriers. At the same time, the new law carefully preserved the interstate access charge regime, which the Comptel case emphasizes has not been changed by virtue of enactment of the local competition measures in sections 251 and 252. The plain language of the statute and its definitions of "exchange access" and "network elements" leave no doubt that what ILECs' networks are providing to originate and terminate long distance services for IXCs is included in the broad definition of "exchange access" services subject to access charges — with or without the use of UNEs.

The FCC is well aware that it has not removed implicit subsidies from access charges and that the ILEC embedded costs and other supposedly non-"economic-cost-based" elements they still compensate have not been quantified and evaluated. Thus, the FCC cannot know, as it must under section 254(e), whether high cost support will be "sufficient" and "predictable." Awarding these ILEC-based access charges to CLECs on the fiction that their access to UNEs transforms them into the actual access provider, excusing them from passing universal service costs through to their customers and allowing them to qualify for up to 100% of what they pay for UNEs for providing "universal service" without deploying a single facility of their own. This not only compounds the irrationality of the FCC's preferential treatment for CLECs, but also will transfer

an implicit subsidy to these local competitors which there is no reason to believe they will use for section 254 universal service purposes. The scheme will put ILECs at a competitive disadvantage that is anything but "competitively neutral," the FCC's favorite implementation goal.

Persisting in its present course will flout the clear policies and requirements of the 1996 Act, thwart the intent of Congress to advance universal service and competition in tandem and violate the Eighth Circuit stay. The FCC should reconsider and retract its unlawful, unfair and anti-universal service exemption from access charges for UNE users.

I. THE COMMISSION'S DISPARATE TREATMENT OF SECOND AND MULTILINE BUSINESS LINES VIOLATES THE ACT

A. The Second Line SLC Increase Violates the "Comparability" Provisions in Section 254(b)

The Commission limits its increases in the SLC ceiling for non-primary lines and multi-line businesses to lines served by incumbent price cap LECs. It states that it is maintaining a ceiling on the SLCs for lines served by rate of return carriers to ensure that subscribers in the high cost areas served by these carriers do not pay rates that greatly exceed the national average.[4] The RTC agrees that it is necessary to retain the existing SLC cap on these lines to maintain "affordable" and "comparable" rates in the rural regions of the country.

However, the RTC takes little comfort in the Commission's decision to limit application of the adjusted SLC ceiling to incumbent price cap carrier lines and to non-primary lines, since (a) the precedent set by this decision unavoidably undermines the "affordability" and "comparability" provisions in Section 254(b) of the Act, (b) the Access Order (para.74) states the Commission's

[4] Access Order, para. 81.

intention to continue to consider the closely-related issue of limiting high cost support to primary residence and single line business connections and (c) we understand that some parties are urging the same SLC increases and cap for rate of return LECs.

The Commission recognizes that its upward adjustment will lead to higher SLCs in high-cost areas, but concludes summarily that a $9.00 SLC cap will keep high cost area SLCs "reasonably comparable" to the SLC in urban areas.[5] The Commission utterly fails to provide any basis for arriving at this conclusion. It does not attempt to define what section 254(b)'s "comparability" requirement entails. Instead, the Commission reasons that "comparability" is achieved because the $9.00 ceiling is equivalent to what the $6.00 business SLC ceiling would have amounted to in 1996 if it had been adjusted for inflation.[6] This analysis fails to account for the fact that the comparability mandate is a recent addition to national policy and that the $6.00 multi-line business SLC ceiling and the $3.50 residential SLC ceiling have previously not been different for second lines in low cost areas. And the higher $6.00 SLC ceiling has not applied in the past to any non-business secondary lines. The fact remains that the new upward adjustment in the SLC ceiling on non-business second lines will obviously result in different SLCs and contribute to disparate rates between rural and urban areas. In addition, for ILECs that serve both metropolitan areas with competitive entry and high-cost rural areas, there will be mounting pressure to geographically deaverage SLCs within their service areas, which, in turn undercuts the

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[5] Id., para. 82.

[6] Id.

geographically averaged toll rate requirement of section 254(g).[7] The end result is that customers in rural areas with higher costs will pay higher rates unless the Commission adopts a universal service mechanism that ameliorates this disparity. The Act does not leave room for the Commission to sanction these disparities. It must either abandon the higher ceiling or adopt universal service mechanisms that cushion the disparity.

B. The Second Line SLC Increase Will Create Insurmountable Enforcement Problems for Carriers

The Commission insists that LECs will be able to identify second lines on the basis of its conclusion that "additional telephone lines are a well-established telecommunications product marketed by LECs" and its belief that this product is supported by a marketing and billing infrastructure that will enable LECs to distinguish non-primary and primary residential lines.[8] Even if the Commission defines "primary" and "non-primary," as it indicates it will, LECs will be forced into an untenable policeman's role as a result of these distinctions. The different rates resulting from the different SLC will most surely create incentives for customers to avoid the higher SLCs no matter how the Commission defines "primary" and "non-primary." A host of enforcement problems will be created. For example, what treatment will LECs be required to apply to the following scenarios: Second lines in one account, two lines subscribed to by unrelated customers (college roommates, for instance) at one residential address, different "primary" subscriptions by different members of one family (with or without different surnames) living in

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[7] The Order points out that RBOCs and GTE have already begun to argue for deaveraged SLCs. While the FCC has maintained service area-wide averaged SLCs for the time being, it has indicated its intention to address the timing and degree of geographic deaveraging in an upcoming order (para.87).

[8] Id., para. 83.

one residence, separate subscriptions by one person for multiple residences in different carriers' service territory? The Commission may well be able to design a rule that defines which of these situations represents a non-primary line. Even if it does, LECs should not be required to do the type of snooping that will be needed to enforce such a rule. There is no overreaching public interest or benefit that justifies the invasion of consumers' privacy inherent in a rule that would require LECs to monitor or gather the type of intrusive information needed to enforce the "primary"/"non-primary" distinction with any degree of fairness. The Commission should abandon all attempts to impose a different SLC on second residential lines.

II. THE COMMISSION'S DECISION TO EXEMPT USERS OF UNBUNDLED NETWORK ELEMENTS FROM PAYING ACCESS CHARGES FOR INTERSTATE ACCESS EXCEEDS THE COMMISSION'S AUTHORITY, CONFLICTS WITH THE TELECOMMUNICATIONS ACT, UNDERCUTS THE GOALS OF NATIONAL TELECOMMUNICATIONS POLICY AND IGNORES THE INTENT OF CONGRESS

The Access Order (para. 337) adopted an across-the-board policy "to exclude unbundled network elements ["UNEs"] from part 69 access charges" and announced that "[t]his conclusion applies to all incumbent LECs." Its primary rationale (ibid.) was that payment to ILECs for "cost-based" UNEs provided and priced pursuant to sections 251-252 of the Communications Act, as amended, 47 U.S.C. secs. 251-252, recovers a providing ILEC's entire cost of the UNE facilities and functions. From this, the Order concluded that recovery of access charges would overcompensate ILECs. The Order further stated (para. 338) that "failure to recover universal service support subsidies built into the access charge regime" would not "dramatically affect the ability of price cap LECs to fulfill their universal service obligations" and that unbundled element users would have to contribute to support universal service. Its access reform measures would, in

the Commission's view, reduce the impact of lost access charge contributions, and ILECs could also mitigate the adverse impact of lost universal service support by deaveraging their charges for unbundled elements to recover more of the cost of their higher cost network elements directly from UNE users.[9] Finally, the Order denied (para. 340) that exempting UNEs, while applying access charges to resellers of local services, would result in any unwarranted disadvantage or discrimination between ILECs and UNE users or between carrier-customers of telecommunic ations services argued to be "like" UNEs, resale of local and access services.

On June 18, 1997, the Commission denied [10] a joint request from Southwestern Bell and others for a stay pending court review.[11] The request was based in part on the petitioners' challenge to the Access Order's ruling (para. 337) that access charges will not apply toUNEs made available pursuant to sections 251 and 252. The Stay Denial defended the Commission's authority and revised its reasons for exempting UNE users from paying access charges for using facilities and functions provided by the ILEC-owned network to originate and terminate long distance calls. The petitioners for stay had attacked the UNE exemption from access charges for (a) violating the stay imposed by the Eighth Circuit on the Commission's rules implementing sections 251 and 252, (b) depriving ILECs and their customers of universal service support that is

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[9] Deaveraged, unbundled elements, when purchased by an IXC, will place pressure on the IXC to deaverage toll rates. Thus far, a persuasive showing has yet to be made to prompt the FCC to forbear from Section 254(g) of the ACT -- and, in the RTC's view, the forbearance criteria of Section 10(a) will remain virtually impossible to satisfy for the foreseeable future. This, it is up to the FCC to develop mechanisms which help to mitigate such toll deaveraging pressure.

[10] Order, CC Dockets No. 96-262 et al., FCC 97-216 (released June 18, 1997) (Stay Denial).

[11] Southwestern Bell Tel. Co., et al., Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review, filed May 7, 1997.

still implicit in access charges and (c) for unlawfully ignoring the statutory duties and Commission policies requiring both recovery of universal service costs from all providers of interstate services and treatment of purchasers of "like" services without discrimination or competitive disadvantage.

A. The Commission Cannot Lawfully Evade the Eighth Circuit's Stay By Downplaying the Role of Its Pricing Rules for UNEs in Its Access Charge Exemption Decision

The Commission defends its UNE access charge exemption decision from the challenge that it violates the Eighth Circuit's stay of Sec. 51.515(a) of the FCC Rules, which also explicitly exempted UNE users from the duty to pay access charges, by a sort of definitional sleight of hand. It first seeks (para. 6) to redefine the scope of the earlier rules that had been stayed by the court of appeals to encompass only the Commission's implementation of sections 251 and 252. The Commission has not discussed the real impact of downplaying the section 251 full "cost-based" compensation for ILECs rationale, which expressly invokes the UNE pricing rules and standards that lie at the heart of the judicial stay. But it has clearly gone astray in claiming that the current access charge ruling bars access charge recovery when ILECs provide UNEs because then they "do not in fact provide interstate access service" (Stay Denial, para.6), which is exactly what access charges are designed to compensate.

The proper classification of what ILECs do has joined in importance the issue of what the court has told the Commission it cannot do until the stay is terminated. The same Circuit that imposed the stay on the earlier prohibition of access charges for unbundled elements has recently also held that the Commission "did not intend all access charges to move to cost-based pricing" and to substitute the adjusted rates for the "access charge regimes already in place."[12] The

[12] Competitive Telecommunications Association v. FCC, Case No. 96-3604, (8th Cir., decided June 27, 1997) slip op. at 8-9 (Comptel).

Commission, trying to avoid the pricing issues subject to the stay, has resorted to the argument that its access decision applies to a different type of ILEC relationship with a class of carrier customers that excludes carriers who take UNEs in a different capacity from customers of traditional ILEC access services. It asserts (paras. 6-13) that its Access Order prohibiting access charges for access by means of UNEs implements only section 201 and has nothing to do with sections 251 and 252. Section 201, it explains, gives the Commission "exclusive jurisdiction" over a LEC's provision of interstate access to "IXCs such as AT&T and MCI, by connecting long-distance calls carried by the IXCs from the IXCs' facilities to end-users' telephones" (Stay Denial, para.7) (footnote omitted). Consequently, according to the Commission (para. 10), its access charge decision does not involve or affect the rates ILECs may charge CLECs to lease network elements. These charges, it points out, are currently established by state commissions as a result of the Eighth Circuit stay on the pricing rules. Thus, the Access Order involves only "the different question of whether the ILEC or the CLEC may charge IXCs for providing interstate access when the CLEC uses network elements to originate and terminate interstate long distance calls" (Stay Denial, para 10). Its Access Order, concludes the Commission, involves a "different rule" from the contested UNE standard it developed to implement sections 251 and 252, which applies to determining what "IXCs pay CLECs for providing interstate access service when the CLEC leases network elements to provide interstate access." The final link in this chain of reasoning is that the stay cannot reach and prohibit the Commission's exemption of UNEs obtained by CLECs and used to provide interstate access to IXCs.[13] However, the real issue is

[13] The Stay Denial's clarification of the distinction between the new rights given to new competitive entrants to use an ILEC's network for the provision of exchange access and local service in connection with the 1996 Act's adoption of a national policy favoring local competition

not what rates ILECs can charge CLECs that excercise their rights under section 251, but whether IXCs can demand "cost-based" UNE pricing as the sole charge for their networks' role in local distribution of the IXCs', long distance services.

The Commission's effort to draw a sharp line between ILEC dealings with IXCs and with CLECs does not rescue its decision from clashing with the stay of section 51.515(a). First, the Commission has not abandoned its rationale that the UNE charges represent full compensation. It persists (Access Order, para. 335, Stay Denial, para. 21) in the assertion that access charges would involve "double payment" because the UNE charge, which excludes subsidies, includes the "right" for the carrier customer to provide competitive exchange access. Its presumption that the ILEC has no valid claim to payment beyond the UNE charge necessarily relies on the adequacy of the "cost-based" compensation for UNEs set by the contested and stayed rule. Moreover, regardless of the court's reference (see Stay Denial, paras. 8-9) to Commission interference with state jurisdiction, neither the rule it stayed nor its stay decision excludes the interstate component from the ban on applying access charges whenever unbundled elements are involved.[14] The

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may explain why the Stay Denial (para. 5) describes the access charge prohibition at issue here as a refusal to extend access charges to UNE users. In contrast, a far more drastic change is at stake. IXCs had been paying access charges that contained implicit universal service support long before section 251(c)(3) was enacted. For them, the ruling means that they can now evade those charges and their implicit support responsibilities, while continuing to use the same ILEC network facilities and capabilities, simply by requesting the arrangement under a different name — UNEs. This dramatic change may pour old wine into new bottles, but it clearly operates as a new exemption, not simply a refusal to enlarge the sweep of access charges to apply them to novel CLEC arrangements to use ILEC networks for competitive local distribution of third party IXCs' long distance services.

[14] In fact, far from abandoning its claims that the 1996 Act expands its authority beyond the traditional "interstate-intrastate" dichotomy, the Commission has not withdrawn or reduced its support in the judicial review case for the extra-jurisdictional powers it claimed in the Local Competition Order. It has recently claimed similarly expansive jurisdiction in the area of universal

Commission cannot brush aside the judicial stay on its rule shielding UNE users from paying interstate access charges merely by claiming that this time it has not specifically invoked authority over intrastate pricing. The Commission should rescind its access charge exemption for UNE users and refrain from further actions inconsistent with the Eighth Circuit stay for as long as that stay remains in effect.

B. The Commission's Dual Acknowledgment that IXC's Obtain Exchange Access Under Section 201 and CLECs Compete with ILECs Using the Section 251 Aids for Competitor Entry Illustrates Why Access Charges Should Continue to Apply to All IXC Exchange Access Arrangements

The Commission's latest explanation of why it thinks CLECs that compete with ILECs for exchange access customers should not pay access charges (Stay Denial, paras. 6-13) discloses the fatal flaw in applying its reasoning to local distribution of an IXC's traffic and the arbitrary and irrational results its reasoning will produce. In Comptel (slip op. at 8-9), the Eighth Circuit not only confirmed that Congress did not intend to withdraw implicit universal service support abruptly before its new universal service directives had been implemented, as the Commission has done here; it also specifically held (slip op. at 9) that the interconnection requirement of Section 251(c) applies -- just as the Commission admits the UNE provision in that subsection applies -- when a "newcomer LEC seeks use of the incumbent LEC's network in order to offer a competing local service," but not to an "IXC. . . seeking to use the incumbent LEC's network to route long-distance calls." The Comptel court thus confirms (ibid.) that "the two kinds of carriers are not, in

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service which, if fully invoked, would enable it even to ordain a share of federal universal service support that states are obligated to recover through their intrastate toll and local rates.

fact, seeking the same services." [15] Hence, unless an IXC deliberately takes on the role of a competing local carrier, "the LECs will continue to provide exchange access to IXCs for long distance service, and continue to receive payment, under the pre-Act regulations and rates." Comptel, slip op. at 9.

Congress did not intend the Commission to change access charge compensation from IXCs without careful rulemaking, as evidenced by subsections 251(g) (maintaining access charges) and (i) (preserving the Commission's authority under section 201). The Commission, thus, is mistaken that either enactment or implementation of sections 251 and 252 automatically gives an IXC leeway to substitute "cost-based" UNEs for its exchange access compensation obligations. The public policy basis is clear: An ILEC will suffer significant exposure to lost universal service support implicit in its existing access charges and encounter an unfair and unlawful competitive disadvantage when an IXC, -- as opposed to a CLEC, or an IXC that becomes a CLEC -- acquires UNEs to accomplish the local origination and distribution of its own interstate long distance calls. The Comptel court concluded (slip op. at 12-13) that eliminating the non-cost-based support from access charges before an effective new universal service plan is in effect would thwart the intent of Congress and "that universal service would soon be nothing more than a memory."

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[15] The court carefully distinguishes the significantly different situation (id. at 10) where the IXC "wants access in order to offer local service (in other words, wants to become a LEC) . . . ."

The Commission, however, has refused to continue to apply its access charges in the face of the drastic change in IXC access arrangements its UNE exemption from access charges would cause. Moreover, it has exposed rate of return ILEC arrangements with IXCs to the impacts of abrupt and premature withdrawal of access charge support — although the Commission (a) has not even commenced the access reform rulemaking for rate of return contemplated by the law before access charge compensation is withdrawn from ILECs and (b) still has far to go in developing and testing the sufficiency of its universal service implementation plan. In short, the Commission has mistakenly invoked its exclusive jurisdiction under sections 201 and 251(g) and (i) over the classic case of exchange access service — arrangements between ILECs and IXCs — to provide IXCs the unlawful immediate option to sidestep the longstanding access compensation mechanism.

The Commission has claimed justification for this unlawful agency policy change by manipulating the meaning of the words and phrases Congress used in the law. For one thing, the Commission has attempted to distinguish the access an IXC would obtain via UNEs as something inherently different from traditional "exchange access service."[16] But one need only read the statute to see where these access charge and UNE interpretations have gone astray from the law and the intent of Congress. The Commission has taken liberties with definitions, inspired by its predisposition to regard stimulating new competitors as more important to Congress than the legislation's multiple goals — competition, universal service, deregulation and infrastructure development — permit. For example, the Interconnection Order (para. 262) first confirmed the

[16] Eg., Interconnection Order, paras. 269, 358, 362.

statutory definition of a "network element" in section 3 (29), 47U.S.C. Sec. 153(29), as "a facility or equipment used in the provision of a telecommunications service," which includes the "features, functions, and capabilities" such facilities and equipment provide. The Commission's purpose in recognizing the facilities component of UNEs in its Universal Service Order (paras.151-153) was to find a way to construe UNEs as "facilities" to get around the statute's limitation of universal service support to carriers that provide some service on their "own facilities." Now, dealing with access reform, the Commission, eager to foster UNE entry as a spur to competition, even when the market cannot support facilities-based entry (para. 337), has leaped to the conclusion (Stay Denial at 13) that the CLEC that purchases the UNE provides the "exchange access service" to IXCs. Its notion rests on its continuing presumption that UNE use is a new form of local competition that an IXC is entitled to choose and which must be spared the continuing responsibility for the full range of costs covered by access charges.[17] This reading flies in the face of the Act's preservation of exchange access compensation recognized in Comptel (slip op. at 8-9) and the reach of section 201 until properly changed by the Commission.

The Commission's careful distinction between ILECs' provision of exchange access on their networks and competitive provision of exchange access by new competitive entrants using UNEs proves more the Commission intends. The section from which the Commission has derived its expansive view of the paramount importance of UNEs (and the other section 251 CLEC entry strategies) to promoting CLEC entry simply does not support the attempted differentiation between providing access service and providing the actual network components that accomplish

[17] Of course, the Commission's rule that access charges would not apply to UNEs is under review in the Eighth Circuit and unquestionably subject to its stay.

that provision. Section 251 (c)(3) requires ILECs to provide "nondiscriminatory access to network elements on an unbundled basis" under "just, reasonable, and nondiscriminatory" terms. The law defines "exchange access" broadly, in Section 3 (16), 47 U.S.C. Sec. 153(16), as the "offering of access to telephone exchange services or facilities for the purpose of the origination or termination of telephone toll services." In sharp contrast to the Commission's effort to define the provision of UNEs to an IXC so as to avoid interstate access charges, the plain language indicates that the underlying ILEC is the carrier "offering ... access to telephone exchange ... facilities for the purpose of the origination or termination of telephone toll services" by that IXC, whether it provides that "exchange" access directly or by mandated offering of access capability in piece parts through UNEs that automatically entitle the "buyer" to the identical "access" to the ILEC's network under a different name.

It is the ILEC that provides access to the facilities used to terminate and originate long distance service. Without this access, IXCs could not have the ability to complete calls. To pretend that there is some metaphysical intermediary CLEC within the IXC that obtains "access to the network elements" and then provides "access to [the same]... telephone exchange or facilities" and embedded capabilities to itself for its IXC services would be absurd. In reality, the Commission went to great lengths in the Interconnection Order (para. 356) to determine that, since section 251(c) provides for the use of UNEs to provide a "telecommunications service," an IXC may, solely by operation of the 1996 Act, obtain and use UNEs for the purpose of originating or terminating its toll services, without being a local competitor. This interpretation is in direct conflict with subsections 251(g) and (i) and, now, at odds with Comptel.

Contrary to the Commission's conclusion in the Local Competition Order (currently stayed) that access charges do not apply to "cost-based" UNEs or, here, that access charges do not apply if UNEs are the vehicle for the "access," the careful definitions of "exchange access" and "network element" provided by Congress in the 1996 Act demonstrate compellingly that the term "exchange access" and the service it describes logically must include access accomplished by UNEs.

C. As Long As Access Charges Contain Implicit Subsidies, the Commission Cannot Brush Aside Impacts on Universal Service and Fairness to Carrier Contributors

It also makes no sense to claim that the UNE purchaser is the carrier that offers exchange access and should get access charges. The relevant public policy concern is that ILECs not lose support before the new universal service mechanisms are complete and "sufficient." The Commission has expressly recognized in this Access Order (para. 343) that access charges are "non-cost-based rates and inefficient rate structures." It recognized again, in its Stay Denial (para. 16), that access charges include the "historical cost of network investment employed [by the ILEC] in providing access," as well as "expenses related to the provision of access" and "implicit ["never precisely quantified"] subsidies of other services";[18] and these, in turn, include universal service support. Until the universal service and separations proceedings have been finally resolved, the Commission cannot rationally presume that charges other than access charges will provide sufficient and predictable universal service support[19] Nor could it rationally presume that

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[18] see, also, Access Order at paras. 17-31.

[19] Again, given the Eighth Circuit litigation and stay, the Commission cannot even presume that the ILEC's supposedly cost-based compensation for providing UNEs will adequately recoup its direct, non-subsidy costs.

the remaining non-cost-based universal service components of these access charges, if paid to new entrants, will be used only for the intended universal service purposes, as section 254(e) expressly requires.

Particularly since UNE purchasers have been relieved of the obligation of passing universal service support contributions through to their customers because such contributions are not a legitimate part of "cost-based" charges,[20] the Commission has put ILECs that must compete with them at a competitive disadvantage. In consequence, the Commission has also violated the mandate in section 254(d) to collect funding for universal services without discrimination from all providers of interstate services. As a further result, the Commission has also violated its own principle of competitive neutrality in universal service policies.

Treating an intermediary CLEC that purchases UNEs as the "exchange access" provider entitled to collect access charges, as the Stay Denial contemplates (para. 11), also is economically misguided. Such misplaced access payments would create or augment uneconomic incentives to enter local exchange and exchange access markets via unbundled elements and to obtain exchange access service from a CLEC using UNEs, at the expense of discouraging genuine facilities-based competition. [21]

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[20] Yet, again, the Eighth Circuit stay would encompass interpretations of what costs fall within the section 252 (d)(1) standards.

[21] The incentives to enter rural LEC markets are already seriously distorted by the Commission's decision to provide windfalls to CLECs that use UNEs to provide "universal service" in rural study areas by allowing them to claim the ILEC's interim averaged support per line, based on the ILEC's embedded costs, for each customer they attract. This bounty for using UNEs in rural study areas entitles the additional universal service provider to up to 100% of what it pays the ILEC to use its facilities and capabilities via UNEs, no matter what the CLEC's real cost of serving such customers may be.

D. The Commission Denied Access Charges to Rate of Return LECs Without Any Exploration of the Impact of Losing Revenues

The Commission surmised in the Access Order (para. 338) and Stay Denial (para.15) that denying access charges for interexchange access via UNEs would not hurt price cap LECs for various reasons. Whatever the potential merit of conclusions about the impact on the largest ILECs, assurances of moderate impact on price cap companies do not support or take the place of a finding or conclusion that rate of return carriers and their rural customers will not be injured. Nevertheless, as noted, the Access Order applied the UNE access charge ban to all incumbent LECs (para. 337). The Commission inconsistently (para 332) delayed most access reform issues for a separate rate of return access reform proceeding because of the same "unique circumstances" faced by small and rural rate-of-return LECs that it failed to consider in denying them access charges where UNEs are involved.

The Commission has reiterated (para. 337, n.485) its often-repeated recitals that rural LECs enjoy section 251(c) exemption relief under section 251(f)(1) until statutory tests are met and that states may grant discretionary suspension and modification relief from section 251(b) and (c) for non-price cap carriers under section 251(f)(2). Here again, the Eighth Circuit's pending review of the Local Competition Order continues the controversy over the accuracy of such reassurances: Unless and until the Commission's deliberate weakening of the section 251(f) relief and the Commission-created obstacles to its availability as other than a rare and costly-won exception are cured by judicial reversal in that case, the Commission's professions of belief that rural LECs will avoid harmful consequences from subsidized cream-skimming in their thin, high

cost markets under provisions the Commission has done its best to eviscerate amount to crying crocodile tears.

CONCLUSION

The Commission's Access Charge Order will increase price cap ILECs' SLCs for all but one primary residential line to a customer's main residence and single line business connections, increasing the disparity between charges in higher and lower-cost study areas in contravention of the Congressional mandate for "reasonably comparable" rural and urban rates and services and nationwide affordable rates. The disparity will be even worse if the same notion is unlawfully extended to rate of return LECs. The administration and enforcement of the second line distinction will burden ILECs and force them to invade their customers' privacy by policing their telephone line ordering and living arrangements without sound legal or public policy reasons. The Commission should abandon the SLC increase scheme unless it can rectify the problems with adequate universal service measures and without, in effect, deputizing ILECs as federal telephone enforcement officers.

The Commission's adoption of a second prohibition on continuing to impose access charges when UNEs are involved in providing interstate exchange access on ILEC-deployed networks will violate the Eighth Circuit's stay on the first such prohibition, discriminate against ILECs and discourage other forms of local entry, incorrectly interrupt recover universal service, support and other ILEC costs remainig in charges for exchange access, without ensuring sufficient universal service support, and replace the definitions and purposes deliberately enacted by Congress. The Commission should retract its ban on imposing access charges for exchange access involving UNEs and maintain access charge compensation, as the Act and the Comptel

court require, since access to ILEC networks for local distribution of interstate services and access to UNEs for purposes of competing -- as CLECs -- with ILEC local offerings are entirely different services involving entirely different carrier-to-carrier relationships.

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