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

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OFFICE OF THE SECRETARY

In the Matter of	)	
	)	CC Docket No. 96-262
Access Charge Reform	)	

PETITION FOR RECONSIDERATION OF EXCEL TELECOMMUNICATIONS, INC.

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Excel Telecommunications, Inc.("Excel"), by undersigned counsel and pursuant to Section 1.429 of the Federal Communications Commission's ("FCC") rules, submits this Petition for Reconsideration of the FCC's First Report and Order[1] published on June 11, 1997 in the Federal Register.

I. INTRODUCTION

Excel is one of the fastest growing providers of interexchange long distance services and the fifth largest long distance carrier in the United States.[2] Through its operating subsidiaries, Excel offers its subscribers a variety of communications products and services under the Excel brand name, including residential service, commercial service, paging service and calling cards. Excel's operating subsidiaries are authorized by the various state public service commissions to provide resold interexchange telecommunications services nationwide. Excel's operating

[1] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997) ("Access Reform Order").

[2] On June 6, 1997, Telco Communications Group, Inc. and Excel Telecommunications, Inc.'s parent company, Excel Communications, Inc., issued a press release which announced their intent to merge. Both Telco Communications Group, Inc. and Excel Communications, Inc. will survive as wholly-owned subsidiaries of a new holding company.

subsidiaries are also authorized to provide competitive local exchange services in approximately 30 states, and have applications pending for competitive local exchange authority in the remaining 20 states.

Excel filed Comments in the FCC's Access Reform proceeding. In those Comments, Excel urged the FCC to replace its current access charge system with a new system which accurately reflects underlying costs. In order to eliminate the current system's network of support mechanisms and subsidies, and minimize regulation, Excel supported the FCC's use of the Total Service Long Run Incremental Cost ("TSLRIC") pricing methodology to reform access charges to reflect the forward-looking costs of providing access services.

In its Comments, Excel strongly opposed allowing any exceptions to the use of forward-looking costs. Contrary to Excel's recommendations, the FCC did not employ forward-looking cost principles and instead adopted a market-based approach which relies on competition and rate restructuring to reduce access charges to cost.[3] While Excel strongly disagrees with the FCC's rejection of the prescriptive, forward-looking cost approach, Excel's Petition for Reconsideration focuses solely on the FCC's decision to eliminate the unitary rate structure for tandem-switched transport. Numerous rate restructurings included in the Access Reform Order heap additional charges on the customers of tandem-switched transport without requiring incumbent local exchange carriers ("LECs") to reduce those charges to costs. The FCC's elimination of the unitary rate structure adds insult to injury by further burdening customers of tandem-switched

[3]Access Reform Order at ¶¶6-7.

transport and moving farther away from the forward-looking cost-based prices that would prevail in a competitive market. Excel therefore files this Petition for Reconsideration to urge the FCC to reconsider its decision and retain the unitary rate structure.

II. UNBUNDLING TANDEM-SWITCHED TRANSPORT INTO THREE COMPONENTS WILL NOT PROMOTE COMPETITION UNLESS THE UNBUNDLED COMPONENTS ARE PRICED ON A TSLRIC BASIS

As Excel argued in its Comments, forward-looking costing, the TSLRIC methodology in particular, is a concrete and verifiable measure of pricing that will best unwind the mystery of cross-subsidies which presently envelop interstate access charges. Forward-looking costs are economically rational in that they charge carriers only for the network capacity which they use, thereby encouraging efficiency and discouraging uneconomic bypass. Although there is some dispute in the record regarding whether incumbent LECs' interstate transport costs are priced above or below TSLRIC,[4] the historical existence of implicit subsidies in the interstate access regime makes the former more likely.

Regardless of whether tandem-switched transport costs are priced above or below TSLRIC, since access services and interconnection services are functional equivalents,[5] any difference in

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[4]Compare Teleport Communications Group ("TCG") Comments at pg. 14 and Association for Local Telecommunications Services ("ALTS") Comments at pg. 22 (arguing tandem-switched transport prices under the unitary rate structure are below-cost) with WorldCom Reply Comments at 26 (disagreeing with the argument that tandem-switched transport is currently underpriced).

[5]*See*, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 at ¶717 (1996) ("Local Competition Order") (carriers that purchase unbundled network elements from incumbent LECs may use those elements to provide originating and terminating interstate access).

the pricing of those services will promote one service over the other. Both access and interconnection services allow for the interconnection between different companies' networks and the same type of equipment used to interconnect long distance companies to local telephone companies can also be used to interconnect two local telephone companies. Unbundling the unitary rate structure into three components will increase the opportunities for competitive LECs to compete with the incumbent LECs' tandem-switched transport services. However, the FCC will have created a hollow opportunity if tandem-switched transport components are priced below TSLRIC. On the other hand, if tandem-switched transport components are priced above TSLRIC, the three-part rate structure will create uneconomic bypass of the incumbent LECs' facilities. Therefore, by not requiring TSLRIC pricing of the unbundled tandem-switched transport rate structure, the FCC does not move closer to its goal of introducing market-based competition (*i.e.*, no regulatory incentives or distortions) in the tandem-switched transport market.

III. THE FCC FAILED TO FULLY CONSIDER THE OVERALL IMPACT ITS TRANSPORT RESTRUCTURING WOULD HAVE ON PURCHASERS OF TANDEM-SWITCHED TRANSPORT

As a reseller of interexchange services, Excel is an indirect purchaser of tandem-switched transport. Because Excel does not purchase tandem-switched transport directly from the incumbent LECs, it is very difficult for Excel to estimate the impact the transport restructuring will have on Excel. Even if Excel did purchase tandem-switched transport directly from incumbent LECs, Excel still would have difficulty assessing the impact because most of the information necessary to prepare such estimates is exclusively held by the incumbent LEC.

However, based on the record to date, it is clear which carriers believe they will benefit from the elimination of the unitary rate structure (a group comprised principally of incumbent LECs and AT&T),[6] and which carriers believe they will be harmed (all other IXCs).

The FCC noted that its transition from the current rate structure to a "cost-based"[7] rate structure would risk the potential of rate shock.[8] The numerous rate restructurings included in the Access Reform Order that heap additional charges on the customers of tandem-switched transport include:

- new rate elements for the multiplexing equipment on each side of the tandem switch;[9]
- a flat-rated element for dedicated trunk ports on the serving wire center side of the tandem;[10]

[6]Excel recognizes that TCG and ALTS also supported elimination of the unitary rate structure to promote competition in the tandem-switched transport market. However, as discussed above, if incumbent LECs are not required to price the unbundled components of tandem-switched transport on a forward-looking cost basis, the FCC merely creates a different, but still unlevel, playing field in the tandem-switched transport market.

[7]The phrase "cost-based" is placed in quotes to distinguish it from the forward-looking cost-based approach advocated by Excel and numerous other parties. *See, e.g.,* AT&T Comments at 19 (Total Element Long Run Incremental Costs ("TELRIC") or TSLRIC); California PUC Comments at 9 (TSLRIC plus reasonable share of joint and common costs); CompTel Comments at 17 (TSLRIC); IXCLD Comments at 2-3 (TELRIC); MCI Comments at 18 (TELRIC estimates made by proxy cost models); Sprint Comments at 49-50 (TELRIC); Texas PUC Comments at 27 (TELRIC).

[8]Access Reform Order at ¶166.

[9]Access Reform Order at ¶170.

[10]Access Reform Order at ¶174.

- reallocation (from the Transport Interconnection Charge ("TIC") to tandem switching rate elements) of 80% of the tandem-switching revenue requirement currently recovered by the TIC;[11] and
- elimination of the 9,000 minutes of use assumption currently used to calculate common transport rates.[12]

Excel acknowledges that some of these changes were required by the Court's remand in *Competitive Telecommunications Ass'n v. FCC*, 87 F.3d 522 (D.C. Cir. 1996). Others arguably conform with the FCC's overall theme of phasing out non-traffic sensitive ("NTS") costs from usage-sensitive charges and recovering those costs through flat-rated charges.[13] Although Excel does not necessarily agree with the four changes listed above, Excel **strongly** disagrees with the FCC's decision to eliminate the unitary rate structure. Elimination of the unitary rate structure was not required by the Court's decision. Furthermore, as Excel shows below, although the three-part rate structure appears to move NTS costs from usage-sensitive charges to flat-rated charges, the disadvantages of the three-part rate structure outweigh any potential benefit of this change.

The FCC indicates that the four-step, two-year phase in of its "cost-based" transport rate structure should minimize the risk of rate shock. However, without any examination of the increased costs that tandem-switched transport customers will incur under the final rate structure,

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[11]Access Reform Order at ¶¶195-198.

[12]Access Reform Order at ¶¶206-208.

[13]Access Reform Order at ¶6.

it is impossible for the FCC to make such a determination.[14] Excel therefore urges the FCC to require incumbent LECs to provide the FCC and parties with the estimated negative impact of the rate structure changes on IXCs. In order to weigh this negative impact against the benefits of greater service efficiency and competition, the FCC must also attempt to calculate any benefits that will arise from the switch to a mandatory three-part rate structure.[15] Until the FCC evaluates such information, it should reserve judgment on whether or not to completely eliminate the unitary rate structure.

IV. BEFORE ELIMINATING THE UNITARY RATE STRUCTURE, THE FCC MUST INVESTIGATE EVIDENCE THAT FORWARD-LOOKING TANDEM-SWITCHED TRANSPORT COSTS ARE NOT DISTANCE SENSITIVE

As Excel has repeatedly argued, the best way to eliminate the current system's implicit support systems is to move interstate access charges to forward-looking costs. Because record evidence shows that the forward-looking costs of transport may not be distance-sensitive, the movement from the unitary rate structure (with one distance-sensitive charge) to the three-part rate structure (with two distance-sensitive charges) is a step backward, instead of a step toward, the FCC's ultimate goal of reducing prices to the costs that would prevail in a competitive market.

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[14]Excel notes that AT&T argued rate shock would not be a problem if rates were set at TELRIC. AT&T Reply Comments at pg. 37. However, as noted above, the FCC declined to set transport rates at any measure of forward-looking costs.

[15]The FCC lauded the benefits of "even greater service efficiency" under the three-part rate structure without quantifying such benefits. Access Reform Order at ¶180.

The FCC recognized that current transport costs may not be distance-sensitive and that the costs of transport in fiber-optic ring architecture and other modern network designs (*i.e.*, the forward-looking costs that would prevail in a competitive market) may also not be distance sensitive.[16] However, the FCC basically dismissed this evidence by finding that incumbent LECs ***may***, under the Part 69 rules, reduce or eliminate the distance-sensitivity of their transport rates.[17] Although the FCC indicates that it expects incumbent LECs to reduce the distance-sensitivity of transport charges,[18] incumbent LECs are not required to do so under the FCC's current rules. Furthermore, under the FCC's own premises, movement away from distance-sensitive rates hinges on competitive pressures imposed by new market entrants[19] and the FCC's grant of pricing flexibility (which also depends on the existence of a competitive market).[20] Since the FCC has not gone far enough to create the conditions necessary for a competitive market (*i.e.*, has not required incumbent LECs to price transport on a TSLRIC basis), there will be little, if any, competitive pressure on the incumbent LECs to reduce the distance-sensitivity of their transport rates.

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[16]Access Reform Order at ¶154.

[17]*See*, Access Reform Order at ¶¶154, 190.

[18]Access Reform Order at ¶154.

[19]Access Reform Order at ¶¶154, 193.

[20]Access Reform Order at ¶154.

One of Excel's greatest strengths is its residential customer base, which comprises nearly 98% of its approximately 5 million customers. Excel thus epitomizes the Congressional goal of bringing competition to residential telecommunications markets. Because distances between the incumbent LECs tandems and end offices are likely to be much greater in residential areas, allowing incumbent LECs to impose charges that take into account the distance from the tandem to the end office will disproportionately impact IXCs that serve residential customers and, ultimately, the residential customers themselves. This is contrary to the goals of the Telecommunications Act of 1996. Because requiring incumbent LECs to impose two distance-sensitive charges instead of one only serves to distort further the transport rate structure and disproportionately impacts residential customers, the FCC should retain the unitary rate structure option.

V. THE THREE-PART RATE STRUCTURE DISCRIMINATES AGAINST PURCHASERS OF TANDEM-SWITCHED TRANSPORT VIS-A-VIS PURCHASERS OF DIRECT-TRUNKED TRANSPORT

Many parties argued that because incumbent LECs actually route the traffic of tandem-switched transport customers and direct-trunked transport customers over the same facilities, the three-part rate structure discriminates against tandem-switched transport customers.[21] The FCC rejected this discrimination argument based on its required/optional distinction -- tandem-switched transport **customers require** the incumbent LEC to route their traffic through the tandem but

[21] *See, e.g.*, CompTel Comments at pg. 26; WorldCom Reply Comments at pp. 27-28.

incumbent LECs only route direct-trunked transport customers' traffic through the tandem at the incumbent **LEC's option**.

If, however, transport costs are not distance-sensitive, then it does not matter if the tandem-switched transport customer requires incumbent LECs to route their traffic through the tandem (because the incumbent LEC will not incur any additional transport costs based on the additional distance it takes to go through the tandem). The tandem-switched transport customer pays the incumbent LEC a separate charge for **requiring** the incumbent LEC to use its tandem switch. Thus where the tandem-switched transport customer pays the tandem switching charge and transport rates are not distance-sensitive, the three-part rate structure discriminates in favor of direct-trunked transport customers.

VI. A RATE STRUCTURE THAT REWARDS IXCS WITH POPS AT OR NEAR INCUMBENT LEC TANDEMS DISCRIMINATES AGAINST "RECENT" ENTRANTS IN THE INTEREXCHANGE MARKET

The FCC cites, as one of the primary reasons for eliminating the unitary rate structure, the fact that it does not best promote "full and fair" interexchange competition because it was partially designed to facilitate the growth of "small" IXCs.[22] It concludes that because no carrier is currently dominant in the interexchange market, the unitary rate structure's protection of "pluralistic supply in the interexchange market" is no longer necessary.[23]

[22]Access Reform Order at ¶180.

[23]Access Reform Order at ¶180.

Whether or not any dominant carriers remain in the interexchange market, one carrier retains its historical advantage of having established Points of Presence ("POPs") near the incumbent LECs' tandems and its market share advantage of high volumes of traffic that justify direct-trunked transport. Although the three-part rate structure might, in the future, cause IXCs to locate their POPs at or near incumbent LECs' tandems, neither the equal charge rule nor the interim transport rate structure created such economic incentives. Thus whether or not AT&T is dominant in the interexchange market, it retains a distinct advantage vis-a-vis all other IXCs under the three-part rate structure based on its historical relationship with the incumbent LECs. Therefore, if the FCC, contrary to Excel's recommendation, eliminates the unitary rate structure on July 1, 1998, it must order the incumbent LECs to waive the non-recurring charges of establishing POPs at or near incumbent LECs' tandems in order to ameliorate the legacy-based discrimination inherent in the three-part rate structure.

CONCLUSION

The FCC has ordered the adoption of a final "cost-based" transport rate structure that will significantly increase costs to purchasers of tandem-switched transport. It has done so without full information regarding the adverse impact of the final structure on these carriers or the potential economic gains that will result from the final rate structure. The elimination of the unitary rate structure moves tandem-switched transport prices further away from the forward-looking cost-based prices that would prevail in a competitive market, disproportionately impacts residential customers and the carriers that serve them, and discriminates against small IXCs. The

FCC should therefore reverse its decision and retain the unitary rate structure until tandem-switched transport rates are reduced to their forward-looking costs.

Respectfully submitted,

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July 11, 1997

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I, Wendy Mills, hereby certify that on the 11th day of July, 1997, a copy of the foregoing Petition for Reconsideration of Excel Telecommunications, Inc. was served via courier on the following:

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