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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 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
	)	
End User Common Line Charges	)	CC Docket No. 95-72

COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

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COMMUNICATIONS HOLDINGS INC.

August 18, 1997

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COMMENTS OF TIME WARNER COMMUNICATIONS HOLDINGS INC.

Time Warner Communications Holdings Inc. ("TWComm"), by its attorneys, hereby files its Comments on certain of the petitions for reconsideration and clarification of the First Report and Order issued by the Commission in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

TWComm responds herein to petitions for reconsideration or clarification that fall into two broad categories. First, TWComm opposes petitions filed by several small long distance carriers and their industry associations. Those petitioners ask the Commission either to abandon or substantially modify its primary interexchange carrier charge ("PIC charge" or "PICC") applicable

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1 Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; and End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, First Report and Order (released May 16, 1997) ("Access Charge Order").

to long distance carriers serving multi-line business and non-primary residential end users ("multi-line PIC charge" or "multi-line PICC"). These petitioners essentially assert that their profit margins depend on the continuation of the current system in which they generally do not have to pay for the subsidies built into interstate common line charges. They complain that requiring them to pay for a proportionate share of the subsidy is somehow impermissible because their profit margins will be lowered.

These petitioners predict a similar result if the Commission allows its reforms of the transport rate structure to go into effect. Although some of the petitioners attempt to show that the Commission's reforms do not in fact result in increased efficiency, the essence of their claims is similar to those in the multi-line PIC charge context. Even where there should be no question that the Commission's reforms will enhance efficiency by requiring cost causers to pay for interstate access rate elements, the petitioners complain that the reforms will increase their costs and harm their business prospects.

With regard to both the multi-line PIC charge and the transport rate reforms, the petitioners' arguments should be rejected. The Commission should continue to focus on establishing the preconditions for a competitive access market. It should resist pleas for protection from those carriers that may be harmed by the reforms required to establish those preconditions.

Second, TWComm supports those petitions that seek immediate implementation of the rule that long distance carriers purchasing switched transport from competitive access providers ("CAPs") need not pay the transport interconnection charge ("TIC"). There is no reason to delay the beneficial effects of this rule.

II. THE PIC CHARGE RULES ARE A REASONABLE TRANSITION TO MORE EFFICIENT ACCESS CHARGE PRICING.

Several petitioners have asked the Commission to reconsider its multi-line PIC charge rules. Those parties variously argue that the Commission's adoption of a higher interim cap for multi-line PIC charges than for PICCs on primary residential and single business lines ("single line PICCs" or "single line PIC charges")(1) violates the non-discrimination provisions of Section 202(a) of the Communications Act; (2) violates the Equal Protection Clause, (3) violates the Regulatory Flexibility Act; (4) creates new implicit subsidies in violation of Section 254(e), and (5) should be modified to account for the characteristics of Centrex lines. As explained below, none of these arguments holds up under close scrutiny.

A. The Multi-line PIC Charge Is Consistent With Section 202(a).

The parties challenging the multi-line PIC charges argue that the Commission's decision to place a higher cap on multi-line PICCs than on single line PICCs is unlawfully discriminatory. They assert that the Commission is not permitted to apply different rate caps to long distance carriers serving different classes of end users because the "service" in question

(use of the local loop to originate and terminate interstate toll calls) is the same. These arguments are unconvincing.

Section 202(a) prohibits a common carrier from making "any unjust or unreasonable discrimination in charges . . . for or in connection with like communication service."[2] As the D.C. Circuit has stated, "[t]he Communications Act thus does not prevent all discrimination -- disparities in prices for similar service -- but only *unreasonable* discrimination."[3]

Applying this standard to the instant situation, the Commission's decision to set a higher multi-line PIC charge ceiling is reasonable. The Commission has initially imposed a lower PIC charge cap for primary residential and single business lines "[i]n order to provide incumbent LECs and IXCs with adequate time to adjust to this rate structure change [moving to flat-rate access charges]"[4] and "to avoid an adverse impact on residential customers."[5] The Commission found that the temporarily higher multi-line PIC charges were "sustainable" because costs not recovered at first from single-line PIC charges and subscriber line charges ("SLCs") would be spread over all multi-line access lines.[6] Moreover, over time, the differential

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2 See 47 U.S.C. § 202(a).

3 See National Ass'n of Reg. Util. Comm'rs v. FCC, 737 F.2d 1095, 1136 (D.C. Cir. 1984) ("NARUC v. FCC") (emphasis in original).

4 See Access Charge Order at ¶ 94.

5 See id. at ¶ 101.

6 See id.

treatment will disappear as the single line PIC charges increase and the multi-line PIC charges decline.[7]

It is well within the Commission's authority to establish temporarily different prices for similar services where necessary to "avoid unnecessary 'customer impact or market displacement.'"[8] The differential application of PIC charges is therefore completely permissible.[9]

B. The Multi-line PIC Charges Are Consistent With Section 254(e).

CompTel argues that the multi-line PIC charges violate the provision in Section 254(e) stating that universal service support mechanisms "should be explicit and sufficient."[10] CompTel asserts that the multi-line PIC charges create new implicit subsidies, something that Section 254(e) does not permit.[11] This assertion is without foundation.

While the multi-line PIC charges result in subsidy flows, these are anything but "new" subsidies. In fact, these charges

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7 Indeed, single line PIC charges will likely be higher than multi-line PIC charges after a transition period of about three or four years.

8 See NARUC v. FCC 737 F.2d at 1137 (citations omitted).

9 It also would be reasonable in TWComm's view for the Commission to expedite the transition to full recovery of interstate common line revenues from the long distance carriers serving single line end users. This could be accomplished either by increasing the initial level of single line PICCs or by increasing the increment by which those charges increase each year.

10 See 47 U.S.C. § 254(e).

11 See CompTel Petition at 5-6.

are designed to recover costs currently recovered through the carrier common line charge ("CCLC") and the TIC. These per-minute charges have required payment by long distance carriers serving high-volume users. The subsidies recovered in the multi-line PICCs are the same, they are just recovered from long distance carriers on a different basis.

Indeed, far from increasing the subsidies in interstate access charges, the multi-line PIC charges are part of an overall system for phasing out those subsidies. As the Commission explained:

> We recognize that the modifications we adopt in this Order do not eliminate all the existing support flows. The modifications, however, do move to eliminate subsidies built into the current rate structure, to an extent that is compatible with preserving the universal service goals of providing support to primary residential and single-line business and to customers in high-cost areas pursuant to the mandate of section 254.[12]

Specifically, the support flows will diminish as the single line PIC charges increase and eventually recover the common line revenues associated with single lines. The multi-line PIC charges will then recover only non-common line revenues, an amount that itself will diminish over time. It is hard to see this regime as causing the introduction of new subsidies. Instead, the multi-line PIC charge would be better characterized as a transition mechanism to achieve a more equitable access charge system.

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[12] See Access Charge Order at ¶ 105.

C. The Commission Correctly Applied The Multi-line PICC To All Centrex Access Lines.

In their petitions for reconsideration, USTA and the County of Los Angeles ("LACO") urge the Commission to reconsider its decision to apply the multi-line PICC to Centrex lines in the same manner as it applies the SLC to those lines. Instead, these parties ask the Commission to apply the multi-line PICC to Centrex lines on a trunk-equivalency basis.[13] The current rule, according to these parties, will distort the market in favor of PBX service, which requires only one trunk line between the customer and the LEC's switch.[14] This argument should be rejected.

The multi-line PICCs on Centrex access lines perform the same function as other multi-line PICCs: they recover common line and other revenue shortfalls. If the Commission were to eliminate the multi-line PICC on Centrex lines, it would invite requests by other multi-line business users for similar treatment, threatening to undermine the scheme for recovering costs not otherwise recovered from common line charges.

LACO argues that rates for Centrex lines already fully recover costs and that the imposition of the multi-line PICC on

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13 See USTA Petition at 2-3; LACO Petition at 6-10.

14 See USTA Petition at 3; LACO Petition at 6. In addition to proposing the trunk equivalency ratio, USTA proposes, in the alternative, that LECs be permitted to assess the multi-line PICC on Network Access Registers ("NARs") instead of on station lines for Centrex customers. USTA Petition at 2. In advocating the trunk equivalency method, LACO states that this should not be done on a "grandfathered" basis. LACO Petition at 10, n.11.

Centrex access lines will impose an unnecessary additional burden on Centrex customers.[15] The Commission, however, readily acknowledged that the new access charge regime will require multi-line business customers to shoulder a disproportionate share of single-line (and other) costs.[16] The Commission reasoned that the imposition of the multi-line PICC represented a redistribution of charges collected from a few high-volume users to business users generally and that such redistribution makes the access charge regime "sustainable" during this transition period.[17] The fact that some customers temporarily shoulder a greater proportion of the burden than others is a readily accepted, and necessary, aspect of reform.

The application of the multi-line PICC to Centrex access lines is also consistent with the Commission's treatment of multi-channel ISDN lines. The Commission determined that Primary Rate Interface ("PRI") ISDN service should be subject to a SLC rate equal to five times the ILEC's average per-line common line costs. It also determined that the Basic Rate Interface ("BRI") ISDN service should be subject to a SLC based on the ILEC's average per-line costs.[18] The Commission then imposed up to five PICCs on PRI ISDN service and only one PICC on BRI ISDN

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15 See LACO Petition at 8.

16 See Access Charge Order at ¶ 101.

17 See id.

18 See id. at ¶ 116.

service,[19] thereby applying the PICC where it applied the SLC.

Just as the Commission applied PICCs based on the number of SLCs with respect to ISDN service, it applied multi-line PICCs to Centrex lines based on the number of SLCs applicable to that service. If the Commission were to carve out an exception to the PICC-to-SLC principle pervading the Access Charge Order, it would invite requests for similar exceptions, unraveling an otherwise consistent system of access charges.

D. The Multi-line PIC Charge Does Not Result In A Violation Of The Equal Protection Clause.

ACTA asserts that the Commission's PIC charges establish distinctions among long distance carriers in violation of the Equal Protection Clause of the U.S. Constitution.[20] ACTA apparently believes that the effect of the multi-line PIC charges is not rationally related to a legitimate governmental interest. The petitioner provides no basis for this argument except to cite a Supreme Court case that has no bearing on the facts at issue.[21] In any event, as explained above, the Commission has adopted a

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19 See id. at 118. See also 47 C.F.R. § 69.153(f).

20 See ACTA Petition at 9.

21 ACTA cites to City of Cleburne, Texas v. Cleburne Living Center, 473 U.S. 432 (1985) which concerned a Court of Appeals decision to review the denial of a special use permit for a group home for the mentally retarded under the standard applicable to "quasi suspect" classifications. In contrast, there is no question that (as ACTA implicitly concedes) a court would review the Commission's access charge rules under the most lenient standard of Equal Protection Clause review since they do not implicate classification according to race, alienage or national origin. See id. at 440.

set of distinctions among long distance carriers serving different classes of end users that is rationally related to the legitimate governmental interest in increasing the efficiency of the interstate access rules.[22] ACTA's weak Equal Protection Clause argument is therefore easily rejected.

E. The Commission Fulfilled Its Obligations Under The Regulatory Flexibility Act.

In a vain effort to find some basis upon which to challenge the multi-line PIC charges, ACTA argues[23] that the Access Charge Order is susceptible to challenge under the Regulatory Flexibility Act ("RFA").[24] As the petitioner points out, Section 611 of the RFA now permits judicial review of an agency's compliance with the final regulatory flexibility requirements.[25] Since the Commission fully complied with the relevant statutory requirements in its Access Charge Order, however, ACTA's argument should be rejected.

The RFA requires an agency adopting rules in a notice and comment proceeding to prepare a regulatory flexibility analysis that includes, among other representations, a statement containing the following:

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22 See id. (applying rational relationship test as the most lenient standard of review under the Equal Protection Clause).

23 See ACTA petition at 3-8.

24 See 5 U.S.C. §§ 601-612.

25 See 5 U.S.C. § 611(a)(1), (2). The statute does not permit judicial review of the agency's compliance with the initial regulatory flexibility analysis requirements. See id.

> [A] description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rules and why each one of the other significant alternative to the rule was rejected.[26]

ACTA apparently believes that the Commission failed to comply with this requirement.

This is simply not true. The Commission provided a fully adequate description of the agency's consideration of issues relating to small entities in Section E of its Final Regulatory Flexibility Analysis.[27] The Commission explained the measures it has taken to minimize the impact of its rules on small entities.[28] It also described the alternatives it considered and its reasons for rejecting those alternatives.[29] The Act requires no more.

III. Claims That The New Access Charge Rules Threaten The Viability Of Small Long Distance Carriers Should Be Rejected.

Several petitioners argue that the Commission should have considered the implications of the new transport rate structure and multi-line PIC charges for small long distance carriers and their customers.[30] These parties make a range of arguments, all

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26 See 5 U.S.C. § 604(a)(5).

27 See Access Charge Order at ¶¶ 433-439.

28 See id.

29 See id.

30 See Call America and Yavapai Telephone Exchange Company ("YTE") petition; ACTA Petition; CompTel Petition; TRA Petition.

of which come back to the claim that the small long distance carriers will lose profits and may exit the market as a result of the rules established in the Access Charge Order. These arguments should be rejected.

The Commission adopted its multi-line PIC charge rules with the goal of improving the efficiency of its access charge rate structure as part of its larger goal in implementing the '96 Act, i.e., to increase competition in local markets which benefits all consumers of telephony services. As mentioned, the high CCLC (generally passed through to long distance customers) has caused a relatively small number of high-volume interstate long distance users to pay for the interstate loop costs of other customers as well as for certain other costs. Because of the increased efficiency of recovering these non-usage sensitive costs in the manner in which they are incurred, the Commission has now decided to recover them (as well as certain other costs) through flat monthly charges. Moreover, rather than simply impose the flat charges solely on the parties that currently pay the CCLC (mostly high-volume users), the Commission sensibly decided to spread them over as large a group of access lines as possible.[31] There is no question that this regime will lead to a much more

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[31] See Access Charge Order at ¶ 101. As mentioned, the disproportionate burden placed in multi-line access lines is largely temporary, since after a short interim period multi-line PIC charges should drop to about $1.00.

efficient rate structure, a course that is eminently reasonable.[32]

The Commission adopted a similarly sound approach to increasing the efficiency of the transport rate structure. Specifically, LECs are required to allocate service-related costs currently recovered through the TIC to the rate elements to which they are fairly attributable (with a gradual transition for tandem switching costs). Moreover, tandem-switched transport costs must now be recovered in the manner in they are incurred.

The small long distance carriers complain that this more efficient scheme will harm them by raising their costs. These increased costs will cause the small long distance carriers to lose market share or possibly exit the market because their slim profit margins do not permit them, unlike their larger competitors, to absorb the costs without increasing their rates.[33] Petitioners seeking special privileges and subsidies generally ask the Commission to remedy the problem by (1) requiring other long distance carriers to pay a disproportionate share of the subsidies by setting the multi-line PIC charge at

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32 See Competitive Telecommunications Ass'n. v. FCC, 87 F.3d 522 (D.C. Cir. 1996) (overturning several FCC transport rate structure rules and remanding the issues to the Commission with the requirement that the Commission either establish a cost-based rate structure for transport service or provide a reasonable basis for not doing so) ("CompTel v. FCC").

33 See TRA Petition at 8-11; Call America and YTE Petition at 3-8; ACTA Petition at 2; CompTel Petition at 2-6, 9-10, 20.

the level of the single line PIC charge;[34] and (2) departing from its cost-causation principles by retaining the previous pricing rules for tandem switching[35] and the "unitary" option for tandem transport.[36]

The Commission must deny these requests. In both the case of the multi-line PIC charge and the transition to cost-based tandem switched access, the Commission has provided for a more than reasonable transitional mechanisms (i.e., the phase-in of the PICC and tandem-switching charges).[37] It cannot do more. The Commission should, as it has, pursue the course that will increase efficiency. Indeed, as the D.C. Circuit has stated:

> The failure of inefficient firms is to be expected in a competitive market, not deplored as a sign that the market has failed. The test of a competitive market is whether consumers are offered the lowest possible price or more or better services. As the Commission itself once put it, the

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34 See TRA Petition at 11-12; ACTA Petition at 2. See also CompTel Petition at 6 (asserting that the multi-line PIC charge should be eliminated altogether).

35 See CompTel Petition at 15-16.

36 Call America and YTE Petition at 9; CompTel Petition at 18-23.

37 Given that the Commission has promised to implement tandem switching at least since 1992, it is doubtful that there is in fact any need for a transition to cost-based tandem switching. See Transport Rate Structure and Pricing, Report and Order and Further Notice of Proposed Rulemaking, 7 FCC Rcd 7006, 7009-7010 (1992). Indeed, in light of its rule that the TIC should not apply to long distance carriers using CAP-provided transport service, the Commission should consider allowing ILECs to apply for an expedited transition to full cost-based tandem switching. See Opposition of Time Warner Communications Holding Inc., filed in NYNEX Petition for Stay Pending Judicial Review, CC Docket No. 96-262; CCB/CPD 97-36 at 12 (August 8, 1997) ("TWComm Stay Opposition").

goal of the agency "is to promote competition in the interexchange marketplace, not to protect competitors."[38]

In a complex proceeding where the Commission has chosen to follow a rational set of efficiency-based principles, it is inevitable that some parties will suffer adverse affects as a result of those rules changes. As the D.C. Circuit observed when reviewing the Commission's adoption of the original access charge rules, there will be "winners and losers galore as a result of the FCC's plan which will eventually place the cost of services provided upon those who use the facilities."[39] It is the efficiency goal itself that must be protected, not particular carriers.

IV. THE COMMISSION SHOULD ALLOW SECTION 69.155(c) TO GO INTO EFFECT IMMEDIATELY.

Several petitioners have asked the Commission either to clarify or modify its rules to ensure that Section 69.155(c) of its rules,[40] which exempts long distance carriers from paying the TIC where a CAP provides transport service, should go into effect immediately.[41] There is no reason to delay the introduction of increased competition in switched transport service. The faster this measure is allowed to take effect, the faster long distance

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38 CompTel v. FCC, 87 F.3d at 530 (citations omitted).

39 See NARUC v. FCC, 737 F.2d at 1147.

40 See 47 C.F.R. § 69.155(c).

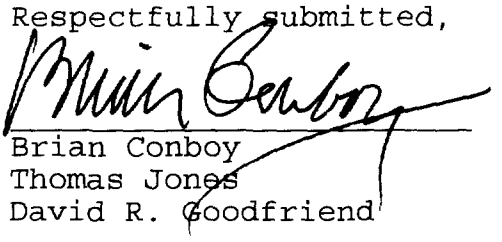
41 See Teleport Petition at 2-4 (asking the Commission to reverse the Errata change made by the Commission implementing Section 69.155(c) beginning January 1, 1998); AT&T Petition at 10-12.

carriers and their consumers will begin to benefit from the lower costs of CAP alternative transport.[42]

V. CONCLUSION

For the reasons described herein, the Commission should deny the Petitions for Reconsideration challenging the Commission's adoption of the multi-line PIC charges and the revised transport rate structure and should grant the Petitions seeking immediate implementation of Section 69.155(c) of the Commission's rules.

Respectfully submitted,



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42 Indeed, the Commission should also consider, on its own motion, prohibiting the recovery of residual TIC revenues recovered through the multi-line PIC charges where a CAP provides switched transport. See TWComm Stay Opposition at 10.

CERTIFICATE OF SERVICE

I, Catherine M. DeAngelis, do hereby certify that on this 18th day of August, 1997, copies of the foregoing "Comments of Time Warner Communications Holdings Inc." were mailed, first class postage prepaid, unless otherwise indicated, to the following parties:

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