

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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

CC Docket No. 96-61

OPPOSITION TO PETITIONS FOR RECONSIDERATION

Pursuant to Section 1.429 of the Commission's Rules, AT&T Corp. ("AT&T") hereby opposes the petitions for reconsideration of the Second Report and Order<sup>1</sup> ("Order") in this proceeding filed by AllTel Communications, Inc. ("AllTel"), the Anchorage Telephone Utility ("Anchorage"), the National Telephone Cooperative Association ("NCTA"), and the United States Telephone Association ("USTA"). AllTel and USTA seek reconsideration of the Commission's decision to continue, in connection with the provision of in-region interstate interexchange services by incumbent independent LECs ("ICOs"), the separations safeguards

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<sup>1</sup> Second Report and Order, Regulatory Treatment of LEC Provision Of Interexchange Services Originating In The LEC's Local Exchange Area, CC Docket No. 96-149, FCC 97-142, released April 18, 1997 ("Order").

established in the Competitive Carrier rulemaking's Fifth Report and Order; Anchorage and NTCA argue more narrowly that the Commission should revise § 64.1903(b) of its rules to remove the requirement that ICOs offer such services through an affiliate that is a "separate legal entity" from the ICO. These requirements are, if anything, modest safeguards, given the Order's finding that the ICOs have market power by virtue of their control of bottleneck facilities.<sup>2</sup> They impose a minimal burden on ICOs, which the Commission has weighed and found to be fully justified by the threat to competition these companies present. The petitions offer no basis for the Commission to revise its conclusions.

Most significantly, the Commission has thoroughly considered (and rejected) the petitioners' arguments concerning whether ICOs possess market power.<sup>3</sup> Presented with essentially the same contentions raised by the instant petitions, the Commission concluded that:

**an independent LEC, like a BOC, potentially could use its market power in the provision of exchange access service to advantage its interexchange affiliate by discriminating against the affiliate's interexchange competitors with respect to the provision of exchange and exchange access services. This discrimination could take the form of poorer quality interconnection or unnecessary delays in satisfying a competitors' request to connect to the independent LEC's network.<sup>4</sup>**

The Order also expressly found that ICOs have "the ability and incentive to use their bottleneck facilities to harm interexchange competition" by misallocating costs from their interexchange

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<sup>2</sup> The separations safeguards require the affiliate to: (i) maintain separate books of account; (ii) not jointly own transmission or switching facilities with the LEC; (iii) acquire any services from its affiliated exchange company at tariffed rates, terms, and conditions, or on the same basis as requesting carries that have negotiated interconnection agreements pursuant to Sections 251 and 252 of the Act; and (iv) be a separate legal entity. See id., ¶¶ 162-165.

<sup>3</sup> See id., ¶¶ 146-147.

services to their monopoly local exchange and exchange access services,<sup>5</sup> and by attempting to price squeeze.<sup>6</sup>

The Commission also correctly concluded that although its ICO affiliate requirements "impose some regulatory burdens . . . these burdens are not unreasonable in light of the benefits these requirements yield in terms of protection against improper cost allocation, unlawful discrimination, and price squeezes."<sup>7</sup> In particular, the Commission's separations requirements reduce opportunities for misconduct and enable the Commission better to monitor and audit transactions between the operating company and its interexchange affiliate, and therefore are essential to enforcement of nondiscrimination requirements and to deterrence of cost misallocation.<sup>8</sup> Moreover, as the Commission has made clear, to the extent any of the separations requirements would cause undue burdens in light of an ICO's special circumstances, that ICO may seek waiver of that requirement.<sup>9</sup> In short, the Commission has already properly weighed and considered the petitioners' claims, and they present no basis for the Commission to reconsider its decision.

Likewise, there is no basis to reconsider the specific requirement of separate legal entities. At bottom, the petitioners' complaint is simply that the ICO affiliate rules are, in

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<sup>4</sup> Id., ¶ 160.

<sup>5</sup> See id., ¶ 159.

<sup>6</sup> See id., ¶ 161.

<sup>7</sup> Id., ¶ 167.

<sup>8</sup> See id., ¶ 163.

application, more restrictive than the Competitive Carrier regime on which they are based, because of application of the "separate legal entity" provision. The petitioners maintain – as acknowledged in the Order<sup>10</sup> – that during the ten years since the Fifth Report and Order requirements, there have been few substantiated complaints against ICOs for discrimination, and contend that there is therefore no basis for more stringent application of the Commission's rules.<sup>11</sup> But this claim ignores the fact that the Telecommunications Act of 1996 establishes a new national policy goal to introduce competition into monopoly local exchange markets. The threat of such competition, especially for bundled, "all-distance" offerings, creates new and more powerful incentives for ICOs to protect what have heretofore been local monopolies by engaging in discrimination, cost misallocations, and price squeezes against interexchange carriers that enter their local markets. In this regard, the very existence of the separations requirements should foster entry into ICO local markets by interexchange carriers, by providing some measure of protection against potential ICO misconduct in the interexchange market.

Also unavailing is USTA's suggestion that the NPRM failed to give adequate notice that a "separate entity" requirement might be imposed.<sup>12</sup> The Notice made clear that the Commission was broadly soliciting comments as to how ICO affiliates should be treated under the new law:

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<sup>9</sup> See id., ¶ 173, n.518.

<sup>10</sup> See id., ¶ 165.

<sup>11</sup> See NTCA, pp. 5-6; AllTel, p. 6.

<sup>12</sup> See USTA, pp. 14-16.

some level of separation may be necessary in order to minimize the potential that an independent LEC could use its control of local bottleneck facilities to improperly shift costs or discriminate against interexchange competitors. .... Accordingly, we seek comment on whether we should require independent LECs to provide in-region, interstate, domestic interexchange services subject to the Competitive Carrier separation requirements or a variation of those requirements. *We seek comment on whether the existing Competitive Carrier requirements are sufficient safeguards to apply to independent LECs to address any potential competitive concerns. Commenters proposing to modify or add to these requirements should address the extent to which there is a possibility of improperly allocating costs or other discriminatory or anticompetitive conduct, and if so, specifically how the proposed modification or addition would mitigate such conduct.*<sup>13</sup>

Moreover, the comments in this proceeding suggested a wide range of safeguards, including many measures far more restrictive than those the Commission adopted.<sup>14</sup>

To the extent that the petitioners otherwise question the imposition of separations requirements, they also simply recycle arguments that the Commission properly considered and rejected. For example, petitioners argue that, because Congress applied the § 272 separate affiliate requirements only to the Bell operating companies, it would somehow be inappropriate to apply any separations rules to the ICOs.<sup>15</sup> Once again, the Order considered and rejected this very claim.<sup>16</sup> At bottom, § 272 reflects the judgment of Congress that separate affiliate requirements are essential for the Bell operating companies; it does not foreclose consideration of whether, and which, separations requirements may be appropriate for the ICOs. Instead, it left

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<sup>13</sup> Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as Amended, CC Docket No. 96-149, FCC 96-308, released July 18, 1996, ¶ 158 (emphasis added).

<sup>14</sup> See, e.g., Order, ¶ 152 (discussing AT&T's proposal that the Commission impose the full panoply of § 272 requirements on ICO affiliates).

<sup>15</sup> See AllTel, p. 2 n.3; Anchorage, pp. 2-4; USTA, pp. 2-3.

that determination to the Commission. And, here, the Commission did not impose § 272 on the ICOs, but instead applied only those requirements it deemed necessary to protect the public interest, given the changes in the marketplace wrought by the 1996 Act, and ICO market power.<sup>17</sup>

The petitioners also contend that the ICOs are too small to discriminate.<sup>18</sup> However, it is control of bottleneck facilities, not size, that gives rise to the ability to discriminate, and that was the basis of the Commission's finding that the ICOs possess market power.<sup>19</sup> Indeed, the Order specifically observed that "neither a carrier's size nor the geographic characteristics of its service area will affect its incentives or ability to improperly allocate costs or discriminate against rival interexchange carriers."<sup>20</sup> Nothing in the petitioners' arguments calls that conclusion into question.

In addition, the petitioners attempt to argue that ICOs cannot engage in price squeezes. Specifically, these petitioners propose that competitors could avoid an attempted price squeeze by purchasing unbundled network elements ("UNEs") or building their own facilities.<sup>21</sup> AT&T will welcome the day when such alternatives are, in fact, available at prices and on nondiscriminatory terms that truly would mitigate an ICO's ability to engage in anticompetitive conduct. Given the current absence of any significant availability of UNEs on these terms,

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<sup>16</sup> See Order, ¶¶ 148, 168.

<sup>17</sup> See id., ¶ 168, 170.

<sup>18</sup> See AllTel, pp. 7-8; NTCA, p. 2; USTA, pp. 12-13.

<sup>19</sup> See Order, ¶¶ 159, 183.

<sup>20</sup> Id., ¶ 183.

<sup>21</sup> See AllTel, pp. 10-11; USTA, pp. 10.

however, it would be premature and inappropriate to abandon other safeguards for now.<sup>22</sup> In addition, as the Commission has repeatedly recognized, and the Eight Circuit's decision in Iowa Utilities Board v. FCC<sup>23</sup> affirmed, Congress intended for CLECs also to be able to compete through total services resale – an approach that does not avoid ILEC access services – and not be required to build their own facilities or use unbundled network elements.

These same petitioners also contend that an ICO that offers long distance solely on a resale basis cannot engage in a price squeeze because any increase in access charges will be reflected in higher wholesale prices for the long distance services it must buy.<sup>24</sup> This claim, however, presents just one side of the equation. Even assuming, *arguendo*, that an ICO's costs to provide interexchange services increase with access charges, its increased revenues, in the form of access payments by every IXC completing or originating calls in its territory, will more than make up for those charges.<sup>25</sup> As the order recognizes, price squeezes also can be pursued by way of pricing long distance below the combined costs of wholesale long distance service, retail

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<sup>22</sup> ILECs have already proven reticent to provide UNEs, particularly in combinations, as required by law. In light of that intransigence, it is unclear when UNEs will be available to provide viable alternatives to ILEC services.

<sup>23</sup> No. 96-3321 (8<sup>th</sup> Cir. July 18, 1997), slip op. pp. 26-28.

<sup>24</sup> See AllTel, p. 11; USTA, pp. 10-11. AllTel (pp. 8-9) and USTA (p. 5) also contend that a reseller of interexchange service could not discriminate in interconnection to its own facilities because it has none. But it clearly can discriminate in interconnection with the wholesale carrier's facilities, and against competing interexchange carriers.

<sup>25</sup> The USTA also offers the bizarre contention that a CLEC or IXC attempting to compete with an ICO monopolist "could respond to a price squeeze by engaging in one of its own." USTA, p. 10. It comments do not (and cannot) explain, however, how a new entrant to the local market or an IXC participating in a market in which there are hundreds of

functions, and access charges.<sup>26</sup> This could prove a particularly attractive strategy for an ILEC, because it would stimulate access demand and revenues, even as it disadvantaged interexchange competitors.

Finally, AllTel and the USTA argue that ICOs are not capable of a price squeezes because access charges are subject to regulation.<sup>27</sup> This argument, too, was considered and rejected in this proceeding, and the petitions offer no basis for the Commission to reconsider its findings.<sup>28</sup>

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competing firms could possibly engage in a price squeeze against an incumbent LEC with monopoly control of an essential input.

<sup>26</sup> See Order, ¶ 161.

<sup>27</sup> See AllTel, pp. 10-11; USTA, p. 10.

<sup>28</sup> See Order, ¶¶ 147, 169.

CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration of its First Report and Order in CC Docket No. 96-149.

Respectfully submitted,

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September 8, 1997

**CERTIFICATE OF SERVICE**

I, Helen M. Elia, do hereby certify that on this 8th day of September, 1997, a copy of the foregoing "Opposition To Petitions For Reconsideration" was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached service list.

/s/ Helen Elia  
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