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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Amendment of the Commission's Rules: Regulatory Access Charge Reform and Price Cap Performance Review for Local Exchange Carriers	)	RM 9210
	)	
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 EXCEL TELECOMMUNICATIONS, INC. IN SUPPORT OF PRESCRIPTIVE ACTION TO ESTABLISH COST-BASED ACCESS CHARGES

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SUMMARY

Excel Telecommunications, Inc. submits these comments to urge the Commission to initiate a rulemaking proceeding that will prescribe access charges for incumbent local exchange carriers at cost-based rates. When the Commission adopted its current rules reforming the ILEC access charge regime, it specifically found that ILEC access charges contained hidden subsidies and were set at levels grossly in excess of economic costs. The Commission found that these access charges imposed unnecessarily high costs on consumers and impeded the growth of competition for local services, and concluded that these rates must be driven down to levels that reflect economic cost. The Commission adopted a market-based approach that relied heavily on the availability of unbundled ILEC network elements as the mechanism to achieve such rate reform.

Since the Commission took this action, the Eighth Circuit Court of Appeals issued an order that effectively eliminates the use of unbundled network elements for most competitive carriers. The impact of this decision -- especially on residential service markets -- cannot be overstated: one study conducted by a national trade association shows that the Court's action will reduce the percentage of residential customers that will have access to competitive local services from 85 percent to as little as eight percent. This conclusion is consistent with recent decisions by the Commission rejecting applications of BellSouth and Ameritech for interLATA relief. These rejections were based, in part, on the Commission's findings that neither carrier made unbundled network elements available as required to meet the pro-competitive goals of the Telecommunications Act of 1996.

As a result of the Eighth Circuit decision, the market-based approach chosen by the Commission to effect access charge reform is now inviable. The Commission is now

compelled to take prescriptive action to set ILEC access charges at the cost-based levels that are essential to the development of local service competition.

The existing access charges have been found by this Commission and by a U.S. Court of Appeals to include excessive and non-cost elements that are unjustifiable as a matter of law, equity and public policy. Retention of these charges would unreasonably inflate consumer costs and have a profoundly adverse impact on competition, subjecting competitive carriers to a "price squeeze" that could effectively keep them out of local markets. The Commission cannot blindly maintain an ineffective market-based access reform policy, but must affirmatively and aggressively pursue policies that will have a demonstrable effect in reducing access charges to cost-based levels.

Finally, the prescriptive action urged by Excel will avoid unnecessary litigation in the future. Currently, proceedings considering the application of access charges to internet service are pending before the Commission, the courts and state regulators. This debate exists solely because the excessive access charges that apply to services over the circuit switched network create artificial arbitrage opportunities for traffic carried over the developing packet-switched data network. Prescribing access charges that set rates at economic cost will eliminate this debate, spare the Commission and the industry from expending enormous resources on litigation, and will stimulate the development of an efficient and state-of-the-art public switched network.

For these reasons, Excel urges the Commission to take prompt, prescriptive action that will establish access charges at cost-based levels.

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COMMENTS OF
EXCEL TELECOMMUNICATIONS, INC.
IN SUPPORT OF PRESCRIPTIVE ACTION TO ESTABLISH
COST-BASED ACCESS CHARGES

Excel Telecommunications, Inc., ("Excel") by its undersigned counsel and in response to the Petition for Rulemaking filed jointly by the Consumer Federation of America, the International Communications Association, and the National Retail Association,[1] hereby submits its comments urging the Commission to take prescriptive action to eliminate the excessive and non-cost elements of the currently effective access charges imposed by incumbent local exchange carriers ("ILECs").

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[1] Petition for Rulemaking, filed jointly by The Consumer Federation of America, International Communications Association, and National Retail Federation in CC Docket No. 96-262, dated December 9, 1997.

I. INTRODUCTION

Excel is the fifth largest interexchange carrier in the United States, and is one of the fastest growing providers of telecommunications services in the country. Through resale and increasingly through use of its own facilities, Excel offers residential and business telephony, international service, paging, 800 service and calling cards to customers in all 50 states. While Excel currently offers predominantly interexchange service, it is now also pursuing the provision of competitive local exchange services -- Excel's wholly-owned subsidiaries are currently authorized to provide competitive local exchange service in over 30 states, and soon will be certified in all 50. As of year end 1997, Excel provided service to approximately 4.5 million customers, of which approximately 98% were residential customers.

Excel submits these comments to urge the Commission to adopt a prescriptive approach to establish ILEC access charges at cost-based levels. Excel has been an active participant in this docket, and in comments filed over a year ago, discussed at length how competitive carriers would be harmed if hidden subsidies and excessive costs were not eliminated from ILEC access charges.[2] In the year since those comments were filed, it has become abundantly clear that competitive forces alone are inadequate to drive ILEC access charges to economic cost. Below, Excel discusses the compelling need for prescriptive action by the Commission to set ILEC access charges at cost-based and pro-competitive levels.

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[2] Comments of Excel Telecommunications, Inc., filed in CC Docket No. 96-262 on January 29, 1997 (*"Excel Initial Comments"*).

II. THE EIGHTH CIRCUIT'S RECENT DECISION ELIMINATING THE OBLIGATION OF ILECS TO COMBINE UNBUNDLED NETWORK ELEMENTS COMPELS THE COMMISSION TO PRESCRIBE COST-BASED ACCESS CHARGES

As Excel discusses below, the Commission's access charge reform rules were premised on the assumption that the interconnection and network unbundling requirements of the Telecommunications Act of 1996 would unleash competitive market forces that would drive ILEC access charges to cost. Subsequent to that decision, however, a ruling by the United States Court of Appeals for the Eighth Circuit renders that premise -- and the Commission's reliance on market forces to effect access reform -- untenable.

A. The Commission's market-based approach to access reform was premised on the assumption that the availability of unbundled network elements would place competitive pressures on ILEC access charges.

When the Commission adopted its access charge reform rules in May of 1997, it found that the currently effective ILEC access charges were composed of a "patchwork quilt of implicit and explicit subsidies" that yielded excessive rates and impeded "the development of competition in both the local and long-distance markets."[3] In seeking to drive these rates down to levels that reflect economic cost, the Commission adopted an approach that relied predominantly on market forces. The Commission clearly explained that the availability of unbundled network elements to competitors was critical to the development of these market forces:

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[3] *Access Charge Reform*, CC Docket No. 96-262, FCC 97-158, released May 16, 1997 at para. 30 ("*Access Reform Order*").

> If we successfully reform our access charge rules to promote the operation of competitive markets, interstate access charges will ultimately reflect the forward-looking economic costs of providing interstate access services. This is so, in part, because Congress established in the 1996 Act a cost-based pricing requirement for incumbent LECs' rates for interconnection and unbundled network elements, which are sold by carriers to other carriers. As we have recognized, interstate access services can be replaced with some interconnection services or with functionality offered by unbundled elements. Because these policies will greatly facilitate competitive entry into the provision of all telecommunications services, we expect that interstate access services will ultimately be priced at competitive levels even without direct regulation of those service prices.[4]

In so stating, the Commission assumed that IXCs and CLECs would use unbundled ILEC network elements to gain rapid and effective entry into local markets. These carriers presumably would use unbundled network elements to provide transport and termination functions to their end user customers, and would use these facilities and functionalities to sell competing services to other carriers. The Commission envisioned that both applications would yield competitive alternatives to ILEC access services, and would generate market forces strong enough to drive ILEC access charges to economic cost over time. Given these assumptions, the Commission found that the availability of market forces made a more regulatory approach unnecessary, and removed the need to prescribe reductions in ILEC access charges.[5] As Excel discusses below, recent action by the Eighth Circuit Court of Appeals has severely restricted the availability of unbundled network elements and effectively has eliminated a market-based approach to driving access charges to cost-based levels.

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4 *Id.*, at para. 262 (emphasis added).

5 *Id.*, at para. 263.

B. The Eighth Circuit's action vacating portions of the Commission's interconnection rules has eliminated unbundled network elements as a means of driving ILEC access charges to cost-based levels.

On October 14, 1997, the United States Court of Appeals for the Eighth Circuit issued an order addressing petitions for rehearing of its earlier order vacating several of the Commission's interconnection rules.[6] In that order, the Court interpreted the language of the 1996 Act to mean that ILECs are required to offer network elements to competitive carriers on an unbundled basis, but are *not* required to connect them: "Section 251(c)(3) requires an incumbent LEC to provide access to the elements of its network only on an unbundled (as opposed to a combined) basis. Stated another way, Section 251(c)(3) does not permit a new entrant to purchase the incumbent LECs' assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services."[7]

In response to the Eighth Circuit Order, every Tier 1 ILEC has taken the position that it will not combine unbundled network elements, and that any requests for an unbundled network platform will be treated as a request for resale of tariffed access services.[8] As a result, the availability of unbundled network elements is a fraction of what the Commission assumed when it adopted its market-based approach, and is not adequate to

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[6] *Iowa Utilities Board v. FCC*, 120 F.2d 753, 815 (8th Cir. 1997), as amended by Order on Rehearing filed October 14, 1997, *cert. granted*, *AT&T Corp. v. Iowa Utilities Board*, Case No. 97826 (Jan. 26, 1998) ("*Eighth Circuit Order*").

[7] *Eighth Circuit Order*, Part II(G)(1)(f).

[8] *E.g.*, *Petition of New York Telephone Company for approval of its Statement of generally available terms and conditions pursuant to Section 252 of the Telecommunications Act of 1996 and Draft Filing of Petition for InterLATA Entry pursuant to Section 271 of the Telecommunications Act of 1996*, Case 97-C-0271, Hearing Transcript, testimony of Bell Atlantic/NYNEX witness Smith, at 1020-22, 1026, 1033 and *passim* (Dec. 3, 1997).

impose downward pressure on ILEC access charges. This is particularly the case with residential users. In a recent filing with the South Carolina Public Service Commission, the Competitive Telecommunications Association ("CompTel") produced a study showing that, if the unbundled network platform was available to competitive carriers, 85 percent of residential users would have access to competitive local service. In contrast, without the platform, only 8-29 percent of residential users would have competitive alternatives available to them.[9]

Moreover, while the Supreme Court has recently agreed to hear appeals of the Eighth Circuit Order, it will not hear the case until next term, and a decision is not expected for at least a year. Therefore, there is no prospect that unbundled network elements will become reasonably available to competitors for a year or longer, if indeed they ever become available.

C. In the absence of effective market forces to bring ILEC access charges in line with costs, the Commission is compelled to take prescriptive action.

During the two years since the passage of the Telecommunications Act of 1996, state regulators, the United States Department of Justice, and the Commission have all conducted exhaustive inquiries into the efficacy of the Act's interconnection and unbundling rules in promoting competition in local markets. These inquiries have produced enormous records, and have led the Commission to find consistently that to date, the unbundled element provisions of the 1996 Act have not been implemented in a manner adequate to meet the procompetitive goals of the Act. Indeed, in its most recent statement on the issue -- its

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[9] *Application of BellSouth Corp. et al. for Provision of In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, Opposition of the Competitive Telecommunications Association,* at 12 (Oct. 20, 1997).

December 24, 1997 order denying BellSouth's petition for in-region interLATA authority in South Carolina -- the Commission found that:

> the ability of new entrants to use unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market. In particular, a new entrant using unbundled network elements, as well as combinations of unbundled network elements, is integral to achieving Congress' objective of promoting competition in the local telecommunications market.
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> * * *
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> After reviewing the evidence in the record, we conclude that BellSouth has failed to demonstrate that it provides nondiscriminatory access to network elements in accordance with section 251(c)(3) of the Act, and therefore fails to meet item (ii) of the competitive checklist.[10]

Previously, the Commission made a similar finding in its order denying Ameritech's petition for interLATA relief in Michigan.[11]

The Eighth Circuit's ruling on unbundled network elements ensures that no further progress will be made in the ILECs' provision of unbundled network elements, at least until the Supreme Court reviews the Eighth Circuit decision sometime late this year or in 1999. Indeed, the responses of the ILECs to the Eighth Circuit decision indicate that the little progress that has been made in the provision of unbundled network elements to date may be rescinded. Because the extensive evidence compiled by the Commission

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[10] *Application of BellSouth Corporation*, CC Docket No. 97-208, FCC 97-418, at para. 195, 197 (Dec. 24, 1997).

[11] *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services In Michigan*, CC Docket No. 97-137, FCC 97-298 (Aug. 19, 1997) at paras. 316-17 (finding that Ameritech did not provide unbundled local transport in conformance with the Act's requirements); and para. 321 (expressing concern that Ameritech did not provide unbundled local switching in a manner that comports with the 1996 Act's requirements).

demonstrates that UNEs are not now available in sufficient quantity to have a significant competitive impact on access charges -- and are unlikely to be in the foreseeable future -- the Commission can no longer rely on the market-based approach to access reform, but must take prescriptive measures.

III. ABSENT A PRESCRIPTIVE APPROACH, THE COMMISSION WILL PERPETUATE ACCESS POLICIES THAT INFLATE THE COST OF SERVICE AND CREATE SEVERE MARKET DISTORTIONS

When it adopted its market-based approach to access reform, the Commission spoke unequivocally of the need to drive access charges to cost -- the issue was not *whether* such action was necessary, only by *what method* access reform would be accomplished. It is now abundantly clear, however, that these access reductions will not happen under a market-based approach for the foreseeable future. The Commission therefore should take action that will reduce access charges to cost-based levels within a certain and reasonable time frame as a matter of law, equity and sound public policy.

First, because prescriptive action is necessary to reduce access rates to cost-based levels within a reasonable time frame, such action is fully consistent with the recent ruling in *CompTel v. FCC*,[12] where the Court held that two of the central components of ILEC access charges -- the Carrier Common Line Charge and Transport Interconnection Charge -- contained hidden subsidies and other non-cost elements that appeared to violate the Telecommunications Act of 1996. Of course, subsequent to that finding, the Commission adopted access charge reform rules that have largely eliminated the CCLC and TIC as separate elements. Nevertheless, the non-cost amounts that formerly were recovered by

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[12] *CompTel v. FCC*, 117 F.3d 1068 (8th Cir. 1997).

ILECs in the CCLC and TIC were not eliminated, but merely transferred to other access charge elements. The recovery of hidden subsidies and other amounts that grossly exceed economic cost therefore persists in the existing access charges. Because reliance on market forces is insufficient to eliminate these noncost elements, failure to take prescriptive action would violate the spirit, if not the letter, of the Court's ruling in the *CompTel* case.

Second, failure to take prescriptive action will merely prop up a discredited and economically insupportable rate structure. The Commission cannot simply put its market-based access reform rules into effect, and then blindly assume that they will work as predicted. Rather, the Commission must remain engaged, affirmatively and aggressively ensuring that the policy goals it has set are being realized. The maintenance of the access charge status quo will continue to have profoundly adverse effects for the consuming public and for competitive service providers. For consumers, long-distance rates will remain unnecessarily inflated; for interexchange carriers, demand for their services will be artificially suppressed.

Even more important, the retention of access charges at their current levels will have a disastrously anticompetitive effect if and when Bell operating companies are granted authority to enter the in-region interLATA service markets. In comments filed in response to the Notice of Proposed Rulemaking in this proceeding, Excel voiced concerns that, once BOCs are provided interLATA relief, they are in a position to place competing IXCs in a "price squeeze."[13] Specifically, the BOCs could impose the full non-cost based

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[13] *Excel Initial Comments*, at 4-5.

access charges on its competitors, while setting the rates for its own competing service packages designed to recover only the actual economic costs of providing service.[14]

Significantly, in the *Access Reform Order*, the Commission acknowledged the validity of this concern, stating that "an incumbent LEC's control of exchange and exchange access facilities may give it the incentive and ability to engage in a price squeeze . . . ."[15] The Commission went on, however, to state its belief that existing regulatory safeguards, such as the accounting and structural separations requirements adopted in the Commission's *Competitive Carrier* and *Non-Accounting Safeguards* proceedings, will suffice to inhibit such behavior.[16]

The safeguards identified by the Commission have simply not been tested in a market entered by BOCs, however, and their effectiveness in deterring the acknowledged threat of price squeeze behavior is purely speculative. Moreover, these safeguards represent a more burdensome regulatory approach than the prescription of cost-based rates, and create their own diseconomies and market distortions. In fact, prescriptive action that reduces access charges to economic cost is the most efficient available substitute for market forces.

Finally, taking prescriptive action to drive access charges to cost will prevent unnecessary litigation before the Commission and the federal courts, and will extinguish a

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[14] There is at least anecdotal evidence that this is already happening. There are many instances in which residents served by a Bell operating company conduct a large volume of long distance calls to a limited population in another state (for example, calls between residents in New York and Florida, or the West Coast states and Arizona). It has been reported that at least one BOC is offering its in-region customers a package of services that includes out-of-region long distance. Reportedly, the long distance service is being offered at a discount that is equivalent to the BOC's originating access charges.

[15] *Access Reform Order*, FCC 97-158, at para. 278.

[16] *Id.* at paras. 278-282.

debate that may have dramatic consequences for the growth of data networks and data services in the country. Currently, proceedings considering the application of access charges to internet usage are pending before the Commission,[17] the Eighth Circuit Court of Appeals,[18] and numerous state regulatory commissions. These proceedings were initiated for one reason only -- access charges grossly inflate the cost of providing service over the public circuit switched network, and create arbitrage opportunities for carriers providing service over packet switched data networks. Access charges therefore create a false dichotomy between circuit switched networks and new data technologies that distorts the markets for both voice and data services, and sends inefficient pricing signals to equipment manufacturers and facilities-based carriers that are developing their networks.

If the Commission fails to take prescriptive action now, it will simply perpetuate an access charge regime that imposes excessive costs on carriers and consumers. Such inaction is indefensible as a matter of law and public policy, and compels the immediate prescription of cost-based access charges.

IV. CONCLUSION

For the reasons discussed herein, the Commission can no longer rely purely on market forces to ensure that ILEC access charges are driven to cost-based levels. Considerations of equity, public policy and sound economics compel adoption of a prescriptive approach that will eliminate the excessive and non-cost elements of ILEC access

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[17] *ACTA Petition Relating to "Internet Phone" Software and Hardware*, RM No. 8775 (pending); *Usage of the Public Switched Network by Information Service and Internet Access Providers*, CC Docket No. 96-263 (pending).

[18] *Southwestern Bell Telephone Company v. FCC*, Case No. 97-2618 (pending).

charges. Excel therefore urges the Commission to grant the CFA Petition, and to initiate as soon as practicable a rulemaking proceeding that will prescribe ILEC access charges that reflect economic cost.

Respectfully submitted,

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Dated: January 30, 1998

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing "Comments in Support of Prescriptive Action to Establish Cost-Based Access Charges," to be mailed, via first-class mail, postage prepaid, on this 30th day of January, 1998 to the following:

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