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

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In the Matter of)	
)	
Request for Amendment of the)	RM No. 9210
Commission's Rules Regarding)	
Access Charge Reform and)	
Price Cap Performance Review)	
for Local Exchange Carriers)	

COMMENTS OF AT&T CORP.
IN SUPPORT OF PETITION FOR RULEMAKING

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January 30, 1998

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SUMMARY

The Consumer Groups' Petition rests on four undeniable truths. First, by any measure, interstate access charges far exceed competitive market levels. Petition at 3. Indeed, there can be no serious dispute that incumbent local exchange carriers ("LECs") continue to collect each year *billions* of dollars in excess of their cost of providing access.

Second, whatever its historical antecedents, this state of affairs can no longer be tolerated. Whether deemed implicit subsidies or supracompetitive profits, the multi-billion dollar annual surplus of access revenues over access costs is, at a minimum, flatly inconsistent with Congress' mandate in section 254 of the Telecommunications Act of 1996 ("Act") that subsidies, if any, be "explicit." 47 U.S.C. § 254(d). Nor can access charges that greatly exceed costs -- in some cases by more than 1,000 percent -- conceivably be considered just, reasonable, and nondiscriminatory. See 47 U.S.C. §§ 201, 202. More importantly, massively inflated access charges both directly harm consumers and have a destructive and "disruptive effect on competition, impeding the efficient development of competition in both the local and long-distance markets," and ultimately "threaten[ing] the long-term viability of the [nation's] telephone systems." Access Reform Order ¶¶ 30, 165; see also Petition at 2 ("excessive access charges are harmful to telephone consumers and to the American economy"). Thus, as the Commission recognized in the Access Reform Order (¶¶ 262-67), it is essential that mechanisms be in place that will move access charges toward competitive levels.

Third, materially changed circumstances have now made it certain that the primary mechanism endorsed by the Commission in the Access Reform Order -- network element competition -- will not in the foreseeable future seriously constrain incumbent LECs' abilities to

maintain access charges well above competitive market levels. As described more fully below, the incumbent LECs' anticompetitive campaigns of litigation, lobbying, and intransigence have successfully forestalled local exchange and exchange access competition across the country. For example, in the wake of the Eighth Circuit's recent decisions to vacate rules that the Commission had properly identified as integral to network element-based exchange access competition, and upon which it explicitly premised its market-based access reforms, it is now unclear whether and when competition through network elements will even be feasible, much less widespread.

The bottom line, as the Consumer Groups point out, is that "[m]eaningful local competition is not developing rapidly, let alone any time soon." Petition at 8 (emphasis omitted). Indeed, the incumbent LECs' concerted anticompetitive efforts have met with sufficient "success" to allow at least one incumbent to declare that "it will not even *try* to comply with the Commission's local competition 'checklist.'" *Id.* at 6 (emphasis in original). The unavailability of network element combinations at efficient cost-based prices means that competition simply will not generate the correcting "market" effect and discipline on access charges that the Commission had concluded would obviate the need for a more "prescriptive" approach. Thus, absent corrective action, there will be no access reform and access charges will remain bloated and unlawful for the foreseeable future.

Fourth, recent developments confirm that corrective action is needed *now*, and that further delay could result in massive and potentially irreversible harm to consumers and competition. As the Consumer Groups stress, the harm to consumers is not limited to excessive charges, although that alone would justify immediate action. *See* Petition at 9 ("If American telephone consumers are not to receive the immediate benefits of meaningful competition, the Commission has an

obligation to ensure that they at least pay charges that accurately reflect today's costs"). Rather, there is now direct evidence of what should be obvious as a matter of simple logic: recent initiatives by GTE and SNET demonstrate that a regime in which incumbent LECs alone enjoy cost-based access and the ability to offer the "bundled" local and long distance services that consumers increasingly demand is a regime that seriously undermines competition in the provision of both local and long distance services and that ultimately reduces consumer choice and welfare.

In short, the case for expedited consideration and adoption of meaningful access charge reforms is clear and undeniable. Such reforms can be identified and implemented on an expedited basis. Although incumbent LECs' efforts to avoid such reforms (and to preserve the enormous advantages that excessive access charges provide them) have been, and undoubtedly will continue to be, herculean, the Commission is well equipped to address the problem. Indeed, there are a multitude of possible solutions that the Commission should consider (individually and in combination) that could provide meaningful reform in the immediate future and be consistent with the Commission's concerns about administrative burdens and potential "rate shock." Although the rulemaking proceeding itself will be the place to identify and explore potential solutions in detail, such mechanisms include reinitialization of price cap indices -- on the basis of cost estimates approved by the states for equivalent network elements or cost models used in universal service proceedings -- and the acceleration of the filing by incumbent LECs of access cost studies, an option the Commission specifically contemplated in the Access Reform Order. Access Reform Order ¶ 267.

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IN SUPPORT OF PETITION FOR RULEMAKING**

Pursuant to Rule 1.4 of the Commission's rules (47 C.F.R. § 1.4) and Public Notice, Report No. 2246 (issued December 31, 1997), AT&T Corp. ("AT&T") hereby supports the Petition for Rulemaking filed by the Consumer Federation of America, International Communications Association, and National Retail Federation (collectively, "The Consumer Groups").¹ As the Consumer Groups correctly conclude, "plain common sense now shows that": (1) "access charges today massively exceed the cost-based levels found appropriate by the Commission," (2) "excessive access charges are harmful to telephone consumers and to the American economy," (3) "competition is not developing sufficiently to restrain and reduce access charges," and (4) as a result, "residential and business consumers will be forced to continue

¹ In re Access Charge Reform, Petition for Rulemaking, CC Docket No. 96-262 (submitted December 9, 1997), designated RM No. 9210 ("Petition").

paying bloated interstate access rates in the absence of swift Commission action.” Petition at 2, 3, 8. Accordingly, AT&T strongly supports, on an expedited basis, appropriate additional reforms to interstate access charge regulation that are necessitated by the materially changed circumstances that have rendered the central premise of the First Report and Order in Access Charge Reform, CC Docket No. 96-262, no longer sustainable.²

I. THERE IS AN URGENT NEED FOR IMMEDIATE COMMISSION ACTION TO REDUCE ACCESS CHARGES TOWARD EFFICIENT LEVELS.

A. Access Charges Currently Far Exceed Efficient Levels.

Incumbent LECs’ interstate access charges have long been constrained only by the Commission’s price cap regulation, and those price caps were never intended to generate the efficient cost-based rates that would exist in a competitive market. Rather, “the access charges of price cap LECs originally were set at the cost-of-service levels that existed at the time they entered price caps.” Access Reform Order ¶ 26; see also Southwestern Bell Tel. Co. v. FCC, No. 97-2618, Br. for Federal Communications Commission at 83 (filed Dec. 16, 1997) (“FCC 8th Circuit Access Brief”) (“The Commission traditionally . . . had set interstate access charges on the basis of historical book costs”). Under the pre-existing cost-of-service rules, “revenue requirements are based on [the] embedded or accounting costs allocated to individual services.” Access Reform Order ¶ 26. “[I]nterstate revenue levels still generally reflect the accounting and cost allocation rules used to develop access rates to which the price cap formulae were originally

² First Report and Order, Access Charge Reform, CC Docket 96-262 (May 16, 1996) (“Access Reform Order”).

applied,” id. ¶ 27 (emphasis added), because price cap regulation “does not sever the connection between accounting costs and prices entirely.” Id.

As a result, today’s price caps -- and therefore the incumbent LECs’ current access charges -- are substantially above the levels that would prevail in a competitive market. Id. ¶¶ 42, 46, 262, 338; see also FCC 8th Circuit Access at 21 (“access service rate levels . . . currently reflect[] the embedded inefficiencies of historical cost ratemaking”); Petition at 3 (“access charges today massively exceed the cost-based levels found appropriate by the Commission”). Each year incumbent LECs collect access charges that vastly exceed their economic costs, causing enormous harm to both consumers and competition.

Even beyond the enormous direct harm associated with consumer charges that are billions of dollars higher than competitive market levels, inflated access charges loaded with implicit subsidies “generate[] inefficient and undesirable economic behavior.” Access Reform Order ¶ 30. For example, “[i]mplicit subsidies [] have a disruptive effect on competition, impeding the efficient development of competition in both the local and long-distance markets.” Id. “[T]his inefficient system of access charges retards job creation and economic growth in the nation,” id. ¶ 30, and estimates of the total social costs of the current interstate access system range as high as \$45 billion per year. See Robert Crandall and Jerry Ellig, *Economic Deregulation and Customer Choice: Lessons for the Electric Industry*, Center for Market Processes, George Mason University (January 1997). And the bulk of this access charge surplus serves no legitimate purpose whatsoever -- rather than ensuring consumers more affordable local telephone rates, it simply reflects supracompetitive profits that far exceed competitive market returns.

B. Given The Events Since The Commission Issued Its Access Reform Order, A “Market-Based” Approach Will Not Reduce Access Charges To Efficient Levels Any Time In The Foreseeable Future.

In the Access Reform Order the Commission focused on two proposed solutions to the problem of inefficient and unlawful interstate access charges: (i) reliance on expected competition and market forces to drive access charges toward cost, and (ii) reinitialization of price caps to levels more reflective of forward-looking costs. Access Reform Order ¶¶ 44-46. Concluding that neither approach alone would satisfy the Commission’s goal of immediate and significant downward pressure on access rates without “rate shock,” the Commission adopted a combination of the two approaches. Id. ¶ 48. In the first instance, “market forces” -- i.e., the threat of bypass of incumbent LEC access by network element purchasers -- would be given a chance to reduce access charges to cost-based levels. As the Commission noted, “where competition [is] develop[ing], it should be relied on as much as possible to protect consumers and the public interest.” Id. ¶ 263 (emphasis added).

The Commission’s decision to rely in the first instance, and for several years, on market forces to constrain access charges was expressly based on the assumption that network element-based competition would seriously constrain incumbent LECs’ abilities to act on their anticompetitive incentives, at least in many locations. As the Commission explained:

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.

Access Reform Order ¶ 262. The Access Reform Order repeatedly makes clear that network element based competition is the primary and nearly exclusive mechanism the Commission expected to generate competition over the next several years. Indeed, almost without exception, the Commission's examples of how competitive pressure will constrain access prices involve a competitive LEC leasing unbundled network elements. See, e.g., id. ¶¶ 32, 337; see also FCC 8th Circuit Access Brief at 21.

At the time of the Access Reform Order, the Commission believed that competitive entry into the local and exchange access markets would actually affect the level of access charges. The Commission had promulgated the Local Competition Order,³ in which it had established national rules requiring incumbent LECs to permit new entrants to purchase unbundled network elements in combinations, and at rates based on forward-looking cost. Access Reform Order ¶ 269 (“We anticipate that the pro-competitive regime created by the 1996 Act, and implemented in the Local Competition Order and numerous state commission decisions, will generate competition over the next few years”). Moreover, the Commission had paved the way for entrants to compete with incumbents in the exchange access market by specifying in its rules that a new entrant using network elements could act as the exchange access provider and collect access charges itself, rather than having to pay the incumbent access charges (either interstate or intrastate). See id. ¶¶ 337-40; Local Competition Order ¶ 721. Much has changed in the ensuing months.

³ First Report and Order, Implementation of Local Competition Provisions in Telecommunications Act of 1996, 11 F.C.C.R. 15499 (1996), aff'd in part and vacated in part, Iowa Utils. Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997) (“Local Competition Order”).

Despite extensive commitments of resources, new entrants have been unable to date, and will likely continue to be unable for some time to come, to provide sufficient competition to the incumbents' access monopolies meaningfully to constrain access rates. Incumbents have proven especially adept at forestalling competitive entry by pursuing endless litigation over, and in many instances defying outright, the requirements of the Act and the orders of this Commission and of state commissions. Further, as the CFA recently noted, "RBOCs have entered into a series of regulatory, arbitration and contractual agreements with potential entrants but have repeatedly failed to live up to the terms of those agreements." Consumer Federation of America, Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996 55 (1998) ("CFA Study"). Every inch of ground gained by competitive carriers in securing rights to the necessary access and interconnection arrangements has required enormous litigation efforts in multiple forums, for many of the incumbent LECs file parallel cases in state and federal court, seek stays and preliminary injunctions, and raise numerous groundless statutory and constitutional claims that must be resolved before any progress can be made.⁴

⁴ See, e.g., U S WEST Communications, Inc. v. Hix, No. 97-D-152, Mot. for T.R.O. & Prelim. Inj. (D. Colo. Nov. 13, 1997); U S WEST Communications, Inc. v. Garvey, No. 97-913, Mem. in Supp. of Mot. for Prelim. Injunctive Relief (D. Minn. Sep. 5, 1997); U S WEST Communications, Inc. v. Thoms, No. 4-97-CV-70082, U S WEST Communications, Inc.'s Mot. for Prelim. Inj. (S.D. Iowa Feb. 3, 1997); Bell Atlantic-Delaware, Inc. v. McMahon, No. 97-312, Compl. for Declaratory J., T.R.O. and Prelim. and Permanent Injunctive Relief (D. Del. June 18, 1997); In re Petitions for Approval of Agreements & Arbitration of Unresolved Issues Arising Under §252, No. 8731, Phase II, Petition for Recons. & Request for Stay (Md. P.S.C. Oct. 9, 1997); U S WEST Communications, Inc. v. Thoms, No. 4-97-CV-70082, Compl. at 5 (S.D. Iowa Feb. 7, 1997) (arguing that denial of a cross examination opportunity was violation of due process). In addition, the incumbent LECs have raised takings claims in most proceedings where unbundled network element rates have been based on forward-looking cost methodologies.

This strategy of massive resistance has found its most obvious success in the Eighth Circuit's decisions in Iowa Utilities Board v. FCC, 120 F.3d 753 (8th Cir. 1997), as amended on rehearing, vacating the Commission's pricing rules and its rules requiring incumbents to provide new entrants with network elements without first disassembling them. These developments in market and regulatory conditions have rendered unsustainable the general presumption that market forces will drive down access charges to competitive levels in the foreseeable future. Indeed, as the Commission has acknowledged, these and other recent events "will irreversibly convert the 1996 Act, designed as a catalyst for immediate competition, into an engine of duplicative and obstructionist litigation." FCC v. Iowa Utils. Bd., No. 97-831, Reply Brief for the Federal Petitioners at 1 (filed December 1997). See also id., Petition for Certiorari at 27-28 (filed November 1997) (the Eighth Circuit's decision to vacate 47 C.F.R. 51.315(b) "imperils the competition that Congress sought to bring to local telephone markets by granting new entrants rights of unbundled access to existing networks").

Access charges are not now being reduced by competitive pressures, because no significant such pressures exist. One year ago incumbent LECs retained control of "approximately 99.1 percent of the local service revenues" in "local exchange and exchange access" markets. First Report and Order and Further Notice of Proposed Rulemaking, Implementation of Non-Accounting Safeguards of Sections 271 and 272 of Communications Act of 1934, as amended, 11 FCC Rcd. 21905, ¶ 10 (1996). That number has not since changed appreciably. See CFA Study at 16-20 (local competition affects little more than 1% of the local market and an even lower percentage of residential service); id. at 20 ("Facilities-based competition, even in New York, is barely large enough to be considered rounding error"). In fact,

“[t]he most recent information in this docket demonstrates that CLECs terminate less than one percent of total long-distance minutes in each and every state, and are less than one-tenth of one percent (0.1%) in the vast majority of states.” Petition at 5. It therefore can be no surprise that incumbent LECs have reduced their exorbitant access charges only where ordered to do so by the Commission or state regulators.

Nor is there any basis to believe any longer that competition will be able to force incumbent LECs to reduce access charges any time soon. As the Commission has correctly noted, “new entrants currently are providing no more than a de minimis share of industry-wide access service through the use of unbundled elements.” In re Access Charge Reform, Order Denying Stay, FCC 97-216, ¶ 15 (released June 18, 1997). Even incumbent LECs in those states that are “at the forefront” of efforts to open local markets to competition have thus far lost only a tiny share of the local market, and the Commission has confirmed that there is no reason to expect the crawling pace of competition to accelerate “dramatic[ally]” in the near future. See U S WEST, Inc. v. FCC, Nos. 97-3576 et al. (8th Cir.), Opp’n of Federal Communications Commission to Mot. for Stay Pending Judicial Review, pp. 14-15 (filed October 14, 1997).

The environment for access competition has grown even more hostile -- and substantially so -- in the months since the issuance of the Access Reform Order. The Eighth Circuit has struck down critically important Commission rules concerning combinations of unbundled network elements (47 C.F.R. § 51.315(b)-(f)). See Iowa Utils. Bd. v. FCC, Nos. 96-3321 et al., Order on Pets. for Reh’g (8th Cir., October 14, 1997). In particular, in vacating Rule 51.315(b), the Eighth Circuit held that the 1996 Act does not prohibit the incumbent LECs from separating network elements that already exist in combined form before providing any two or more of those elements

to their competitors, forcing entrants to incur costs, delays, and service interruptions that were not and could not have been foreseen by the Commission when it adopted its market-based approach to access reform.⁵

As a result, incumbent LECs, including Ameritech, Bell Atlantic, U S WEST, BellSouth and GTE are refusing to provide combinations of network elements, and have proposed ripping apart network elements such as the loop and the switch and requiring entrants seeking to provide network element-based service to “combine” these elements in collocation space purchased from the LEC. As a result, the incumbent will be able to activate service or change service features for its own customers with just a few keystrokes on a computer, while new entrants will have to dispatch personnel (or pay the incumbent to dispatch its own personnel) to “combine” the elements that the incumbent has taken apart. In addition to enormous cost disparities, such discriminatory arrangements threaten unnecessary service outages every time a customer switches from the incumbent to a competitive carrier. See, e.g., Application by BST Corp. for Provision of In-Region, InterLATA Services in Louisiana, Comments of AT&T Corp. in Opp’n, Aff. of Robert V. Falcone and Michael E. Leshner, Exh. E (submitted November 25, 1997 in CC Docket No. 97-231).

Bell Atlantic’s “offer” of network element combinations in New York is a good example of how incumbents are making such combinations effectively impossible to use. Bell Atlantic has

⁵ See, e.g., *Court Ruling May Close Door On Leasing Of Network Elements By CLECs*, Communications Today, Oct 16, 1997, quoting AnnaMaria Kovacs of Janney, Montgomery, Scott; Seth Schiesel, *Local Bells Win Another Victory To Block Rivals*, The New York Times, Oct. 15, 1997, at 1 (“The plans of long-distance telephone companies to get into local telephone markets were dealt a major blow yesterday as a Federal appeals court threw out regulations that were intended to foster competition with local telephone incumbents”).

made clear that an entrant must obtain collocation arrangements "in every central office [where] it wishes to . . . combine unbundled loops and switching ports."⁶ Even apart from the fact that forcing entrants to enter into such arrangements is inherently discriminatory, these restrictions will dramatically slow down the pace at which widespread network element competition can occur in New York, because Bell Atlantic has stated that it is capable of provisioning a total of only 15 to 20 collocations per month (for all entrants). Assuming Bell Atlantic could meet that standard, at that rate AT&T could not even obtain the collocation arrangements necessary for competition throughout the state for years. Moreover, Bell Atlantic has stated that physical collocation is unavailable due to space constraints in half of the offices where entrants have requested it.⁷ Therefore, in many offices entrants must resort to virtual collocation -- but there is a substantial backlog of virtual collocation requests and, to AT&T's knowledge, Bell Atlantic has not even scheduled for completion a single virtual collocation arrangement. As a practical matter, such anticompetitive restrictions render network element based competition completely infeasible.

Other incumbents seek the same result through anticompetitive pricing. In some states, BellSouth, for example, has agreed to provide combinations of network elements, but only to entrants willing to pay a resale service rate, rather than the cost-based network element rates mandated by the Act. AT&T Communications v. BellSouth Telecomms, Inc., No. 3:97-CV-400-WS, Compl. for Declaratory and Other Relief Under the Telecommunications Act

⁶ Reply Comments of Bell Atlantic - New York in Support of Its Proposed Tariff Amendments Relating to the Provision of Unbundled Network Elements on a Combined Basis, Case 97-C-1963, p. 21 (Dec. 16, 1997).

⁷ Petition of New York Telephone Company for Approval of its Statement of Generally Available Terms and Conditions, Case 97-C-0271, Transcript of Technical Conference, p. 1287 (Maguire, Bell Atlantic) (December 4, 1997) & Affidavit of Karen Maguire (November 3, 1997).

of 1996 at 15-16 (S.D. Miss. June 6, 1997). And SWBT has convinced the Texas PUC to inflate rates above the cost of providing network element combinations because “SWBT has the right to ‘uncombine’ and then recombine UNEs. Thus, the [SWBT approved rates] reflect the recombining of uncombined UNEs.” Arbitration Award, Petition of AT&T Communications for Compulsory Arbitration, Docket No. 16226, Appendix C, p. 1 (Tex. P.U.C. Dec. 19, 1997). In other words, SWBT’s rates would reflect additional charges (from which SWBT itself is exempt) for “combining” network elements that were already combined in the first place.

The Commission has correctly identified the consequences of such anticompetitive conduct. It constitutes the essence of discrimination against new entrants, for its sole purpose is to “impose costs on competitive carriers that incumbent LECs would not incur.” See Implementation of Local Competition Provisions in Telecommunications Act of 1996, Third Order on Reconsideration, 12 FCC Rcd 12460 ¶ 44 (Aug. 18, 1997), pets. for review pending, No. 97-3389 (and consolidated cases) (8th Cir.). Indeed, the costs that incumbent LECs are seeking to impose for the “combination” of already-combined elements are so high that they render competition through unbundled network elements prohibitively expensive in many states.⁸ Even if the Eighth Circuit’s decision miraculously fails to destroy the economics of network

⁸ See U S WEST Communications, Inc. v. MFS Intelenet, Inc., No. C97-222WD, Orders on Mots. for Summ. J. at 7 (W.D. Wash. Jan. 6, 1998) (approving “a recombination fee equal to the difference between the [unbundled network element cost] and the wholesale rate for finished service.”); In re Application by BellSouth Corp. for Provision of In-Region, InterLATA Services in Louisiana, CC Docket No. 97-231, Comments of AT&T Corp., Aff. of Robert V. Falcone and Michael E. Leshner at 43 (filed Nov. 25, 1997) (Exh. E) (BellSouth’s collocation proposal for manual recombination of unbundled network elements “would render large scale UNE-based service economically impractical.”).

element competition, it still would render it impossible for new entrants to provide such service at parity with the incumbent LEC.

And even beyond the substantive impact of the Eighth Circuit's decisions, incumbents have already used those decisions to inject still further delay into an interconnection arbitration process that has already dragged on for years. U S WEST, for example, used the Eighth Circuit's decisions to convince a federal court considering its § 252(e)(6) appeal of Iowa PUC arbitration determinations to stay the appeal proceedings and remand dozens of issues to the state commission. See U S WEST Communications, Inc. v. Thoms, No. 4-97-CV-70082, Ruling Granting the Board and Board Members' Mot. for a Limited Remand, and Order (S.D. Iowa, Jan. 14, 1998). Other incumbent LECs have sought the same relief directly from state commissions -- efforts that can only further significantly delay the onset of competition.

Of course, the Eighth Circuit also struck down the Commission's national pricing rules. There is thus no basis at present to assume, as the Commission did in the Access Reform Order, that the rates for network elements will be cost-based in all parts of the country. Incumbent LECs are citing the Eighth Circuit's decision as grounds for reopening state proceedings for the purpose of establishing embedded costs as the cost standard for determining network element prices. Alternatively, exploiting the absence of the Commission's detailed pricing regulations, incumbents have sought to inflate rates with embedded costs and network architectures through the guise of purportedly forward-looking cost models. That strategy has met with some success. See, e.g., In re Review and Consideration of BellSouth's TSLRIC and LRIC Cost Studies, Order No. U-222022/22093-A (Consolidated), Docket Nos. U-222022/22093 (La. P.S.C. Oct. 24, 1997) ("Louisiana Permanent Rate Order"). Where the state commissions themselves are unwilling,

incumbents have asked federal courts to order state commissions to base UNE rates on embedded costs.⁹

In addition, incumbent LECs have persuaded State commissions to permit them to continue to impose intrastate access charges on purchasers of unbundled network elements, which, if sustained, will further reduce the economic viability of this form of competition.¹⁰ And, incumbents are also trying to keep their potential competitors out by adding exorbitant “non-recurring charges.” Although the network element rates already reflect the costs to construct, maintain and operate all of the facilities that an efficient incumbent would need to provide basic local telecommunications services, incumbents seek literally billions of dollars more to recover purported “one-time” and “non-recurring” costs.¹¹ Thus, the Eighth Circuit’s holding that the

⁹ See, e.g., GTE California Inc v. Conlon, No. C-97-1756 SI, Mem. of P. & A. in Supp. of Mot. for Summ. J. of Pl. & Counter-Def. GTE California Inc. at 6-13 (N.D. Cal. Dec. 12, 1997); Southwestern Bell Tel. Co. v. AT&T Communications, Inc., No. A-97-CA-132-SS, Mot. for Summ. J. of Southwestern Bell Telephone Company Based on Violations of Statutory Standards & Supporting Br. at 19-30 (W.D. Tex. Apr. 30, 1997).

¹⁰ See, e.g., GTE California Inc. v. Conlon, No. C-97-1756 SI, Mem. of P. & A. in Supp. of Mot. for Summ. J. of Pl. & Counter-Def. GTE California Inc. at 33-37(N.D. Cal. Dec. 12, 1997).

¹¹ For example, BellSouth apparently intends to collect *at least* \$126.17 in non-recurring charges when AT&T orders unbundled 2-wire analog loop and unbundled switching, not including any “recombination” charges, a figure that increases to \$283.58 for a 4-wire configuration. See Louisiana Permanent Rate Order, Attachment “A,” items A.1.1, A.1.4, A.4.3, A.4.1, A.11.1, A.11.2, B.1.1, B.1.2, B.1.9, B.1.10. See also Interconnection Agreement Between Ameritech Information Industry Services and AT&T Communications, Sch. 30.19, at 3, In re AT&T’s Petition for Arbitration with Ameritech, No. 96-752-TP-ARB (Ohio P.U.C. Jan. 28, 1997) (non-recurring charges would exceed \$50.21 for a customer served with an unbundled loop; Agreement for Local Wireline Network Interconnection & Service Resale Between AT&T Corp. & U S WEST Communications, App. A at 3, In re AT&T Communications Interconnection Arbitration Application, No. PU-453-96-497 (N.D. P.S.C. May 23, 1997) (imposing a switching port non-recurring charge of \$97.97); AT&T Communications & U S WEST Interconnection Agreement, Att. 1 at 2-3, In re the Interconnection Contract Negotiation Between AT&T Communications and U S WEST, No. 96A-345T (Colo. Aug. 29, 1997) (imposing an unbundled loop non-recurring charge of \$70.00, Remote Call Forwarding initial setup non-recurring charge (continued . . .)

Commission does not have jurisdiction over the pricing of network elements has called into serious question the extent to which the rates for network elements will in fact be based on forward-looking economic cost -- and therefore the extent to which they can put any economic or market pressure on access charges.¹²

Incumbent LECs have likewise resisted the Commission's requirement that shared transport be provided as a network element. This requirement was adopted in the Local

(... continued)

of \$10.00 and a Direct Inward Dial non-recurring charge of \$10.00); Interconnection, Resale and Unbundling Agreement Between AT&T Communications and GTE Florida Inc., Att. 14, at 11,13, In re Petitions by AT&T, MCI MCIMetro for Arbitration with GTE Florida, No. 960847-TP (Fla. P.S.C. June 5, 1997) (imposing an unbundled loop or port service ordering charge \$47.25, a non-recurring initial service order of \$16.00, a customer service record charge of \$5.25); Interconnection Agreement Between Ameritech Information Industry Services and AT&T Communications, Ill. Pricing Schedule at 3-4, In re AT&T Communications Petition for Arbitration, No. 96 AB-003 (Ill. C.C. Jan. 14, 1997) (imposing a line connection non-recurring charge of \$36.54, an initial port connection charge per line of \$64.57, and initial line port service ordering charges of \$17.37).

¹² Carriers that wish to use LEC network elements in conjunction with their own facilities face these costs plus exorbitant collocation charges. For example, BellSouth charges AT&T \$4,910 just to submit an application for physical collocation *at each wire center*. See Louisiana Permanent Rate Order, Attachment "A." With over 200 wire centers in Louisiana, an entrant attempting to provide state-wide service must pay \$1,000,000 simply to apply for collocation, with no guarantee that its applications will be approved. See also Agreement for Local Wireline Network Interconnection & Service Resale Between AT&T Corp. & U S WEST Communications, Sch. 1 Att. 1, In re the Petition of AT&T for Arbitration with U S WEST, No. U-2428-96-417 (Ariz. C.C. July 18, 1997) (U S WEST will assess a "quote preparation fee" of \$1,055.76); Interconnection, Resale and Unbundling Agreement Between AT&T Communications and GTE Florida Inc., Att. 14, at 11,13, In re Petitions by AT&T, MCI MCIMetro for Arbitration with GTE Florida, No. 960847-TP (Fla. P.S.C. June 5, 1997) (BellSouth will assess a "physical engineering fee" of \$6,946.00 per request, building "Modification Costs" from \$13,484.00/per office to \$23,514.00 per office, and a cage enclosure charge of \$4,559.00 per cage); Interconnection Agreement Between Ameritech Information Industry Services and AT&T Communications, Collocation Ex. PS-VII, PS-1, In re the Petition of AT&T Communications for Arbitration with Ameritech Indiana, No. 40571-INT-01 (Ind. U.R.C. Feb. 25, 1997) (Ameritech will assess a central office build out fee of \$31,913.53 for the first 100 sq. ft., and \$14,241.37 for each additional 100 sq. ft.).

Competition Order and then restated in the Third Reconsideration Order. Although this requirement was never stayed, many of the LECs have nonetheless simply refused to comply with it. See, e.g., 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 Comments of AT&T Corp., Aff. of Robert V. Falcone and Robert A. Sherry (Exh. J) (filed June 10, 1997), ¶¶ 8-63 (describing Ameritech's history of non-compliance). Incumbents have also challenged this requirement in the Eighth Circuit. See Southwestern Bell Tel. Co. v. FCC, No. 97-3389 (8th Cir. January 15, 1998). As the Commission informed the Court at oral argument, "without access to shared transport . . . unbundled access will no longer be a viable entry strategy." Transcript at 22. In the absence of shared transport, the only new entrants that would be able to provide competitive service through unbundled network elements would be those that serve narrow, niche markets with the exceptionally high concentrations of high-revenue customers that are necessary to make dedicated transport economic. In all other markets, as the Commission found, the unavailability of shared transport would erect "a significant barrier to entry." Third Reconsideration Order, ¶ 35.

Finally, none of the incumbent LECs today has a properly functioning automated and nondiscriminatory operations support system ("OSS") interface for network elements, nor is the development of such an interface imminent. "[C]ompetitors still must wait longer to process their orders and have them filled, run a higher risk of errors in ordering, cannot reserve as many numbers, route their calls efficiently, or brand their services." CFA Study at 58. And OSS

violations are just one of the myriad schemes that incumbents have demonstrated that they will employ where an entrant attempts to enter a local market in spite of these tremendous obstacles.¹³

In sum, network element-based competition is not a reality today, and there is no apparent prospect “that meaningful levels of local telephone service competition will . . . develop in the foreseeable future.”¹⁴ Petition at 2. Accordingly, a “market-based” solution to access reform is no longer a viable option.

C. In Order To Protect Consumers And Promote Competition, The Commission Should Immediately Begin Identifying And Implementing Mechanisms For Reducing Access Charges Toward Efficient Levels.

In these circumstances, the Commission is obliged to consider whether additional access charge reforms are necessary in the current environment to bring interstate access charges into compliance with the Act and the Commission’s own stated policies. Indeed, the courts have made clear that where, as here, a “significant factual predicate of a prior decision on [a] subject . . . has

¹³ For example, SBC is refusing to provide access to unbundled network elements unless the CLEC provides written proof that the CLEC has obtained a license or consent from the vendors of equipment containing embedded intellectual property. In re Petition of MCI for Declaratory Ruling, CCBPol 97-4, Comments of AT&T Corp. at 8 (filed April 15, 1997); id., Reply Comments of AT&T Corp. at 12-17 (filed May 6, 1997); see also Mem. Op. and Order, Application of Ameritech Michigan to Provide In-Region, InterLATA Services in Michigan, CC Docket No. 97-137, ¶¶ 144-221 (August 19, 1997); Mem. Op. and Order, Application of BellSouth Corp. to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, ¶¶ 82-181 (December 24, 1997).

¹⁴ As should be obvious, neither can facilities-based competition exert sufficient downward pressure on access charges to justify reliance on market forces at this stage in the development of competition. This form of entry is virtually nonexistent in most markets. See CFA Study at 5 (“there is virtually no meaningful, facilities-based local competition”). Indeed, even the few “facilities-based” providers typically rely on some unbundled network elements. The unavailability of network element combinations, moreover, undercuts the ability of entrants to employ their own facilities because network elements will be more difficult to obtain, even as a bridge to facilities-based entry.

been removed,” an agency must seriously consider initiating a rulemaking proceeding even if the agency’s prior proceedings on the subject have long since concluded. American Horse Protection Ass’n v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987).¹⁵

The Consumer Groups make a powerful case that the present circumstances call for “a *swift* prescription of interstate access charges to cost-based levels.” Petition at 9 (emphasis in original). The Consumer Groups are surely right that additional reforms are necessary and that time is of the essence.

The Consumer Groups understandably focus on the direct harm that consumers suffer in paying for telecommunications service fees that are inflated by above-cost access charges. There can be no denying that this harm is enormous, amounting to tens of millions of dollars every single day. But consumer harms run much deeper, and, in the absence of swift corrective action by the Commission, access charges pose significant threats to the long-term competitive health of telecommunications markets nationwide.

The conduct of GTE and SNET in recent months has made this all too clear. Freed from any requirement that they open their local markets to competition before making long distance offerings, both have stonewalled efforts to break their local monopolies and both have taken full advantage of the substantial artificial cost advantages their above-cost access charges provide. As a result, both have been able quickly to capture significant long distance market share, not because they are more efficient or innovative, but solely through: (1) their ability to charge their

¹⁵ See also WWHT, Inc. v. FCC, 656 F.2d 807, 819 (D.C. Cir. 1981); Geller v. FCC, 610 F.2d 973 (D.C. Cir. 1979); Competitive Telecomms. Ass’n v. FCC, 87 F.3d 522, 532 (D.C. Cir. 1996) (“the circumstances that may have justified the Commission’s action in 1992 do not justify its continued inaction in 1994”).

long distance competitors, and, ultimately, their competitors' customers, grossly inflated access rates, and (2) their unique positions as the only carriers able to offer customers the choice of a single provider. Indeed, these advantages are so great that GTE and SNET have not even found it necessary to offer customers lower prices. See CFA Study at 32-33 (“[f]or off-peak callers, AT&T, Sprint, and LCI all offer rates that beat GTE’s by 30-35%”).

It is a simple fact that stand-alone long distance carriers (or long distance carriers that provide local services through resale) cannot compete with incumbent LEC long distance competitors to whom they must pay access charges that the incumbent does not itself incur. For example, SBC has recently announced that, if allowed to offer in-region long distance services, it will charge only \$0.09 per minute for the first year it offers service and \$0.14 per minute thereafter. SBC Communications, Inc. v. FCC, No. 7:97-CV-163-X, Plaintiff’s Opposition to the Intervenor’s Motion to Stay the Judgment, Aff. of Virginia L. Vann on Behalf of SBC Communications Inc. at 2-3 (N.D. Tex., filed January 7, 1997). But, in Texas, SBC charges AT&T approximately \$0.12 per minute for exchange access services alone. Obviously, the only profitable long distance provider in SBC’s region will be SBC itself. Hence, the Commission must take immediate steps to dismantle this access charge barrier to competition or face the real possibility that many consumers -- particularly the millions of rural and other residential customers served by GTE and SNET -- will be as limited in their choices of long distance carriers as they currently are in their choices of local carriers.

The threat to competition -- and the immediacy of the access charge problem -- becomes even clearer when recent events involving the RBOCs that control the bottleneck local facilities that serve the vast majority of the nation’s consumers are considered. Congress could hardly have

made clearer its decision to maintain the consumer protections of the existing Bell System consent decree and to make local competition a prerequisite to RBOC long distance entry. See 47 U.S.C. § 271. Yet incumbent LECs continue their relentless campaign to escape the bargain they sought, to prevent the Commission from carrying out its statutory mandate, and to engage in the very competition-destroying practices that Congress sought to prevent.

RBOCs have convinced one court that the Commission cannot, consistent with the Constitution, have any role whatever in ensuring that the RBOCs open their local markets before they are unleashed on currently competitive long distance markets.¹⁶ The RBOCs have now also persuaded the Eighth Circuit to issue a writ of mandamus that compels the Commission, even if it is allowed to carry out its mandate to ensure that BOC long distance applicants comply with a competitive checklist, “to confine its pricing role under section 271(d)(3)(A) to determining whether applicant BOCs have complied with the pricing methodology and rules adopted by the state commissions and in effect in the respective states in which such BOCs seek to provide in-region, interLATA services.” Iowa Utils. Bd. v. FCC, 96-3321 et al., Writ of Mandamus (8th Cir. Jan. 22, 1998). It is simple economics that no “competitive” checklist that excludes meaningful review of prices -- among the most important factors in assessing whether or not a local market has been opened to competition -- can protect consumers. In addition, the RBOCs promise to inundate the Commission with section 271 applications and to appeal and litigate every issue, all in efforts to ensure that the Commission cannot effectively enforce the statutory prerequisites to long distance entry.

¹⁶ See SBC Communications, Inc. v. FCC, No. 7:97-CV-163-X, slip op. (N.D. Tex. Dec. 31, 1997).

Premature RBOC long distance entry would irreparably debilitate the competitive forces that the 1996 Act was intended to foster. See CFA Study at 5 (“[a]llowing [incumbent LECs] into long distance too soon could permanently set back competition in both local and long distance”). Long distance rates would not fall¹⁷ and might, in fact, actually increase.¹⁸ And the combination of access charges and RBOC service bundling would guarantee that competitive efforts by local entrants could be quickly stifled. See CFA Study at 58 (“[a] market will not be ‘irreversibly’ opened to competition if there is a substantial risk that the input prices on which competitors depend will be increased to inappropriate levels after a section 271 application has been granted”).

This is by no means idle speculation. BellSouth, for one, recently amended its intrastate tariffs in Georgia and Florida to allow its local customers (and only its local customers) to have unlimited intraLATA toll calling for a flat-rate charge.¹⁹ New entrants obviously cannot match

¹⁷ See, e.g., CFA Study at 33 (“GTE’s and [BellSouth’s] tariffs never beat those already in the market.”); id. at n.44 (“Bear Stearns notes that the dramatic success of GTE and SNET has occurred without having to offer large discounts off of current long distances rates, indicating that the margins available to local companies because of a favorable wholesale market go directly to the bottom line.”) (citing Bear Stearns, Telecommunications Services, July 30, 1996; Merrill Lynch, Telecommunications Services, 14 May, 1996; J.P. Morgan, Telecommunications Review, July 16, 1996).

¹⁸ CFA Study at 93 (because an incumbent LEC’s competitors cannot compete on price for local services, an incumbent LEC providing “both access and downstream long-distance sales would prefer to raise, not lower, the average interLATA retail price from today’s level”) (citing In the Matter of Application by BellSouth Corporation, et. al. for Provision of In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, “Evaluation of the United States Department of Justice,” Exhibit 2 (Marius Schwartz, “The ‘Open Local Market Standard’ for Authorizing BOC InterLATA Entry: Reply to BOC Criticisms,” Sep. 30, 1997)).

¹⁹ BellSouth General Customer Service Tariff, § A3.4.4.A.1 (Florida); Georgia General Subscriber Service Tariff, § A3.42.