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

In the Matter of	)	
AMENDMENT OF THE COMMISSION'S RULES REGARDING ACCESS CHARGE REFORM AND PRICE CAP PERFORMANCE REVIEW FOR LOCAL EXCHANGE CARRIERS	)	RM NO. 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 THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

TELECOMMUNICATIONS RESELLERS ASSOCIATION

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February 2, 1998

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SUMMARY

The Telecommunications Resellers Association ("TRA"), an organization consisting of more than 650 entities engaged in, or providing products or services in support of, telecommunications resale, urges the Commission to grant the Petition for Rulemaking filed by the Consumer Federation of America, International Communications Association, and National Retail Federation and "initiate a rulemaking addressing the immediate prescription of interstate access rates to cost-based levels." TRA urges the Commission to grant the relief requested by Petitioners not only because, as Petitioners correctly point out, actions by the U.S. Court of Appeals for the Eighth Circuit have undermined the Commission's reliance on market forces to drive access charges towards cost, but because access charge reform has proven to be an unmitigated disaster for non-facilities-based resale carriers (and to a lesser degree, for partially "switch-based" resale carriers) . Because the limited access charge reductions that have resulted from the Commission's access charge reforms have not been passed through to non-facilities-based and partially "switch-based" resale carriers, these so-called "reforms" have served only to dramatically increase the operating costs of these small to mid-sized providers, undermining their competitive and financial viability and adversely impacting their primarily small business customers.

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COMMENTS OF THE
TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.405(a) of the Commission's Rules, 47 C.F.R. § 1.405(a), hereby submits the following comments in support of the Petition for Rulemaking ("Petition") filed in the captioned proceeding on December 9, 1997, by the Consumer Federation of America ("CFA"), International Communications Association ("ICA"), and National Retail Federation ("NRF") (collectively, the "Petitioners"). In their Petition, Petitioners urge the Commission to "initiate a

rulemaking addressing the immediate prescription of interstate access rates to cost-based levels."[1] TRA urges the Commission to grant the relief requested by Petitioners not only because, as Petitioners correctly point out, actions by the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") have undermined the Commission's reliance on market forces to drive access charges towards cost, but because access charge reform has proven to be an unmitigated disaster for non-facilities-based resale carriers (and to a lesser degree, for partially "switch-based" resale carriers). Because the limited access charge reductions that have resulted from the Commission's access charge reforms have not been passed through to non-facilities-based and partially "switch-based" resale carriers, these so-called "reforms" have served only to dramatically increase the operating costs of these small to mid-sized providers, undermining their competitive and financial viability and adversely impacting their primarily small business customers.

I.

STATEMENT OF INTEREST

A national trade association, the Telecommunications Resellers Association represents more than 650 entities engaged in, or providing products and services in support of, telecommunication resale. TRA was created, and carries a continuing mandate, to foster and promote telecommunications resale, to support the telecommunications resale industry, and to protect and further the interests of entities engaged in the resale of telecommunications services.

Virtually all of TRA's resale carrier members are providers of interstate telecommunications services, and hence, are required to pay interstate access charges to originate

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[1] CFA/ICA/NRF Petition at 2.

and/or terminate interstate, interexchange traffic. Fully half of TRA's resale carriers members operate as "switchless" providers, while the large majority of the remainder provide a significant percentage of their service on a "switchless" basis.[2] Non-facilities-based interexchange carriers generally do not purchase exchange access directly from local exchange carriers ("LECs"); rather, they obtain end-to-end service from their underlying interexchange network service providers. Accordingly, TRA's non-facilities-based resale carrier members benefit from access charge reductions only if cost savings associated with such reductions are passed through to them by their underlying network service providers.

While the telecommunications resale industry is a maturing market segment comprised of an eclectic mix of established, publicly-traded corporations, emerging, high-growth companies and newly-created enterprises, the "rank and file" of TRA's membership is still comprised of small to mid-sized carriers serving small to mid-sized businesses. The average TRA resale carrier member has been in business for five years, serves 10,000 customers, generates annual revenues of $10 million and has in the neighborhood of 50 employees.[3] More than half of TRA's resale carrier members are non-facilities-based providers, with many of the remainder being "switch-based" only for a portion of their traffic. In other words, the average TRA resale carrier member is an

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[2] Source: TRA's "1997 Reseller Membership Survey & Statistics" (Oct. 1997).

[3] Roughly 30 percent of TRA's members have been in business for less than three years and over 80 percent were founded less than a decade ago. While the growth of TRA's resale carrier members has been remarkable, the large majority of these entities remain relatively small. Nearly 35 percent of TRA's members generate revenues of $5 million or less a year and less than 20 percent have reached the $50 million revenue threshold. Additionally, nearly seventy-five percent of TRA's resale carrier members employ less than 100 people and nearly 50 percent have workforces of 25 or less. Nonetheless, more than a third of TRA's resale carrier members provide service to 25,000 or more customers. Source: TRA's "1997 Reseller Membership Survey & Statistics" (Oct. 1997).

entrepreneurial entity, which has gained a solid, but nonetheless competitively precarious, foothold in the telecommunications industry.

The average customer of a TRA resale carrier member is a commercial account generating $100 to $1,000 of usage a month. TRA's resale carrier members provide their small to mid-sized business customers with access to rates otherwise available only to much larger users. They also offer these small to mid-sized business customers enhanced, value-added products and services, including a variety of sophisticated billing options, as well as personalized customer support functions, that are generally reserved for large-volume corporate users. And TRA's resale carrier members have been at the forefront of industry efforts to diversify and expand service and product offerings, endeavoring in so doing to satisfy in a convenient and cost effective manner not only all of the telecommunications needs, but other requirements, of small to mid-sized business customers.

TRA's resale carriers have also been the source of, or one of the driving forces behind, many of the service innovations that have helped to fuel the dramatic growth of telecommunications use and revenues over the last decade. For example, prepaid services, including pre-paid calling cards, pre-paid local service and pre-paid wireless services had their genesis in the resale community.[4] Likewise, international call-back and many of the other alternative international services that have exerted downward pressure on accounting rates and on foreign calling prices were

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[4] Pre-paid services serve a variety of public interest functions. For example, the Commission has recognized that pre-paid calling card services, among other things, are often "[l]ow-cost services targeted to meet the needs of those with low incomes or non-permanent living arrangements." The Commission's Rules and Policies to Increase Subscribership and Usage of the Public Switched Network (Notice of Proposed Rulemaking), 10 FCC Rcd. 13003, ¶ 38 (1996).

developed and originated by resale carriers.[5] Resale carriers have been among the leaders both in developing affinity programs through which a percentage of telecommunications revenues are contributed to organizations or causes and in identifying and accommodating underserved market niches.[6] And resale carriers have played a key role in the dramatic growth in the availability and use of internet services, including internet telephony. Indeed, given the far greater size and financial, marketing and operational resources of their principal competitors, resale carriers have no choice but to continue to innovate if they are to survive and prosper.

The impact of regulatory requirements on TRA's resale carrier members tends to be magnified because of their smaller size and relatively limited financial resources. Smaller carriers do not have the traffic volumes over which to spread large new regulatory levies without significantly increasing rates. Nor do smaller carriers have the operating margins within which to absorb such assessments without adversely impacting their financial viability. Hence, the imposition of large new regulatory costs presents smaller carriers with a "Hobson's Choice." Do they attempt

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[5] The Commission, for example, concluded that "[c]all-back advances the public interest, convenience and necessity by promoting competition in international markets and driving down international phone rates." Via USA, Ltd. and Telegroup, Inc., 10 FCC Rcd. 9540, ¶ 1 (1995)

[6] As the Commission has recognized, "small businesses are able to serve narrower niche markets that may not be easily or profitably served by large corporations, especially as large telecommunications expand globally." Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113, ¶ 6 (1996).

to absorb these levies and suffer the adverse financial consequences, or do they attempt to pass them through to customers and suffer the adverse competitive consequences?[7]

When through imposition of regulatory levies and other actions, the Commission drives up the costs of non-facilities-based and partially-switch-based resale carriers relative to their far larger facilities-based competitors, it hinders the ability of these small to mid-sized providers to compete, accomplishing what market forces have been unable to do directly -- *i.e.*, thin the ranks of resale carriers. Certainly, Congress did not intend to decimate through implementation of the Telecommunications Act the most vibrant and dynamic segment of the long distance telecommunications industry. In determining whether to revisit its access charge reforms, TRA urges the Commission to look closely at the adverse financial and competitive impacts its existing access charge regime, as well as its mechanisms for funding universal service support and other rules and regulations adopted in implementing the Telecommunications Act, have had, and are having, on small to mid-sized resale carriers.

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[7] The small business customers of TRA's resale carrier members are highly resistant to the imposition of additional charges, particularly large, unanticipated assessments. The experience of TRA's resale carrier members in attempting to pass through payphone compensation, paid by them either directly to payphone service providers or to underlying network service providers, has confirmed the intensity of this resistance, as well as the adverse competitive ramifications of attempting to impose large new charges on small commercial accounts. As the Commission has recognized, "[a]s competition intensifies in the markets for local and interexchange services in the wake of the 1996 Act, it will likely lessen the ability of carriers and other providers of telecommunications to pass through to customers some or all of the former's contribution to the universal service mechanisms." Federal-State Joint Board on Universal Service, 12 FCC Rcd. 8776, ¶ 855 (1997), *recon.* CC Docket No. 96-45, FCC 97-420 (1997), *pet. for rev. pending sub. nom.* Texas Office of Public Utility Counsel v. FCC, No. 97-60421 (5th Cir., June 24, 1997).

II.

ARGUMENT

A. The Commission's Access Charge Reforms Have Been An Unmitigated Disaster For Non-Facilities-Based Resale Carriers

As noted above, non-facilities-based resale carriers generally purchase end-to-end service from their underlying interexchange network service providers and hence do not acquire exchange access directly from LECs. Such end-to-end service is generally acquired at fixed usage-sensitive rates -- *i.e.,* X¢ per minute -- which incorporate not only inter-city carriage, but traffic origination and termination as well. Resale carriers generally purchase such end-to-end service pursuant to extended term contracts, trading term, as well as volume, commitments for price concessions.[8] Given the disparity in bargaining power,[9] these long-term contracts generally provide for the "pass-through" of new governmental levies, as well as new or increased assessments by exchange access providers, but seldom require a like pass-through of decreases in access costs.

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[8] Three years is perhaps the most common resale contract term, with terms generally ranging between one and five years.

[9] As the Commission has recognized in another context, negotiations between facilities-based and resale carriers "are not analogous to traditional commercial negotiations in which each party owns or controls something the other party desires." Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499, ¶ 55 (1996), *recon.* 11 FCC Rcd. 13042 (1996), *further recon.* 11 FCC Rcd. 19738 (1996), *further recon.*, FCC 97-295 (Oct. 2, 1997), *aff'd in part, vacated in part sub. nom.* Iowa Utilities Board v. FCC, 120 F.3d 753 (1997), *modified* 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997), *pet. for cert. pending sub. nom* AT&T Corp. v. Iowa Utilities Board (Nov. 17, 1997), *pet. for rev. pending sub. nom.,* Southwestern Bell Telephone Co. v. FCC, Case No. 97-3389 (Sept. 5, 1997).

Accordingly, non-facilities-based resale carriers generally benefit from access charge reductions only in two circumstances. An underlying network service provider might voluntarily elect to pass through access charge reductions to its resale carrier customers during the term of a contract which does not require them to do so. As might be expected, this has proven to be an exceedingly rare occurrence. Reduced switched access charges will also likely be reflected in new agreements negotiated as existing contracts expire. The difficulty here, however, is manifest -- during the one, two, three or more year term of the existing contract, the resale carrier is disadvantaged competitively and financially.

Things would be bad enough for resale carriers if they were simply denied the benefits of access charge reform. Access charge reform, however, has also spawned new charges and assessments which were intended to be offset, at least in part, by reductions in switched access charges. Thus, the Commission imposed on interexchange resale carriers preferred interexchange carrier charges ("PICCs"), which because resale carriers serve primarily small business customers, require a payment of $2.75 per line, per month. The Commission has further levied on interexchange resale carriers a nearly four percent assessment to fund universal service support. Because contributions to loop cost recovery and universal service funding were built into the fixed usage-sensitive rates they pay their underlying network services providers, non-facilities-based and partially switch-based resale carriers continue to make these contributions, while at the same time paying PICCs and contributing to the Commission's new universal service funding mechanisms.

In short, non-facilities-based and partially-switch-based resale carriers have either had their operating margins eliminated, resulting in financial disaster, or they have been forced to pass-through these new levies, creating a substantial competitive disadvantage. It is the rare business, and

even the rarer small business, that can experience cost increases in the ten to twenty percent range without in turn imposing commensurate cost increases on its customers.[10] And it is the rare small business which can remain competitive if it, but not its largest competitors, must increase costs in this manner.

Access charge reform has thus seriously skewed the competitive calculus in the interexchange market, tilting the balance against the smallest providers in favor of the largest.[11] In so doing, regulation has taken on an "Alice Through the Looking Glass" feeling, punishing entities without market power and advantaging providers which retain such power. Certainly this result was neither intended by the Congress in enacting the Telecommunications Act nor anticipated by the

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[10] The multi-line business PICC alone more than doubles the cost of interstate access for most non-facilities-based resale carriers.

[11] This skewing of the competitive calculus results not only from the imposition of additional regulatory assessments on non-facilities-based and partially-facilities-based resale carriers without benefit of any access charge reductions, but from the inflated level of the multi-line business PICC as well. The multi-line business PICC is set at a level five times the level of the primary residential line PICC and nearly twice the level of the second and additional residential line PICC. As the Commission acknowledged, this disparity "require[s] customers with multiple telephone lines to contribute, for a limited period, to the recovery of common line costs that incumbent LECs incur to serve single-line customers." Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158, ¶ 102 (1997), *recon.* 12 FCC Rcd. 10119 (1997), *second recon.* CC Docket No. 96-262, FCC 97-368 (Oct. 9, 1997), *pet for stay denied* FCC 97-216 (June 18, 1997), *pet. for rev. pending* Southwestern Bell Telephone Company v. FCC, Case No. 97-2620 (and consol. cases) (8th Cir. June 16, 1997). The inflated multi-line business PICC impacts small carriers far more dramatically than it does large providers. Large carriers have far greater numbers of customers, including large business and residential users, and far greater traffic volumes over which to spread, and generally much larger operating margins within which to absorb, the multi-line business PICC. Moreover, the effective per-minute increases which large volume corporate users would experience as a result of the pass-through of the multi-line business PICC would be substantially less than those which would be experienced by the predominantly low volume small business customers served by resale carriers. It is one thing to spread a $2.75 charge over a thousand minutes and quite another thing to spread such a charge over a hundred minutes.

Commission in implementing the Congressional mandates embodied therein. Regulatory actions which produce a diminution in the level of competition and/or the number of competitors in telecommunications markets obviously conflict with the pro-competitive purposes of the Telecommunications Act. And regulatory actions which uniquely and adversely impact small carriers are clearly inconsistent with the Congressional desire to foster greater participation by small business in the telecommunications industry.[12]

Unfortunately, access charge reform has had all of these unintended adverse impacts on non-facilities-based and partially-switch-based resale carriers. TRA's resale carrier members have survived and prospered in a market populated with the likes of AT&T, MCI and Sprint. They have done so by providing quality service at affordable prices to markets that the larger carriers have neglected -- *e.g.,* the small business market. Against these opponents and in the face of what have sometimes seemed to be overwhelming market forces, the market share of TRA's resale carrier members has progressively increased. The Commission should not do what competitors and the market have not been able to do. TRA's resale carriers should not be defeated by an ill-conceived regulatory regime which produces unintended, but nonetheless devastating, market distortions.

TRA submits that it is incumbent upon the Commission to undo the harm it has visited upon non-facilities-based and partially-switch-based resale carriers. The CFA/ICA/NRF Petition provides a useful vehicle for doing so. Certainly, the Commission should mandate a pass-through to resale carriers of access charge savings associated with their network usage. Moreover,

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[12] 47 U.S.C. § 257. As the Commission has recognized, "[d]espite the role of small businesses in the economy, and the growth of the telecommunications market, small businesses currently constitute only a small portion of telecommunications companies." Section 257 Proceeding to Identify and Eliminate Market Entry Barriers for Small Businesses (Notice of Inquiry), GN Docket No. 96-113 at ¶ 6.

the Commission should grant TRA's pending Petition for Reconsideration and reduce the multi-line business PICC to the level of the charge applied to primary residential lines. And, as recommended by Petitioners (and by TRA throughout this proceeding), the Commission should prescribe reductions in interstate access charges which will drive them quickly to the forward-looking economic cost of originating and terminating interstate traffic.

B. Actions By The Eighth Circuit Have Undermined the Commission's Market-Based Approach To Access Charge Reform

Throughout this proceeding, TRA has voiced its opposition to reliance by the Commission upon marketplace pressure to drive interstate access charges to cost-based levels. TRA has consistently argued that such a market-based approach would unduly delay access charge reductions, providing, for some indeterminable period of time, incumbent LECs, which have initiated the provision of "in-region," interLATA service, with a powerful anticompetitive advantage in both the interexchange and the local exchange/exchange access markets. In contrast, TRA has repeatedly pointed out that a prescriptive approach to access reform would quickly and predictably drive access charges toward the forward-looking, economic cost of originating and terminating interstate, interexchange traffic, thereby serving to preserve and protect existing interexchange competition and to promote and foster local exchange/exchange access competition. While conceding that such a prescriptive approach would force the Commission into a relatively aggressive regulatory posture, TRA argued that a proactive approach in the short-term would ultimately allow for more expeditious deregulation. As the Commission has elsewhere recognized, in the "new

regulatory regime," the Commission's task is to "affirmatively promote efficient competition using tools forged by Congress."[13]

Contrary to TRA's urging, the Commission adopted "a market-based approach to reducing interstate access charges," arguing that "emerging competition will provide a more accurate means of identifying implicit subsidies and moving access prices to economically sustainable levels."[14] While acknowledging that "a market-based approach . . . may take several years to drive costs to competitive levels," the Commission nonetheless concluded that "where competition is developing, it should be relied upon in the first instance to protect consumers and the public interest."[15] In so concluding, however, the Commission assumed that "rates for interstate access services . . . [would] generally move toward the forward-looking economic cost of providing such services in response to increased competition in local exchange and exchange access markets."[16] And this competition, the Commission anticipated, would emerge "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."[17] As the Commission explained, "interstate access services can be replaced with some interconnection services or with the functionality offered by unbundled network elements."[18]

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[13] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd. 15499 at ¶ 1.

[14] Access Charge Reform, CC Docket No. 96-262, FCC 97-158 at ¶ 44.

[15] Id.

[16] Id. at ¶ 265.

[17] Id. at ¶ 262.

[18] Id.

Two years have passed since enactment of the Telecommunications Act and the facilities-based competition the Commission anticipated would drive interstate access charges toward cost has yet to emerge. Incumbent LECs continue to control roughly 99 percent of local markets and what competition exists is generally provided through resale, which does not implicate exchange access.[19] The effectiveness of using unbundled network elements as a market entry strategy has been essentially gutted by the Eighth Circuit. Certainly, the Courts ruling that "§ 251(c)(3) does not permit a new entrant to purchase the incumbent LEC's assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements) in order to offer competitive telecommunications services"[20] increases both the cost and complexity of this entry strategy, rendering it far less likely to provide the prompt competitive impetus anticipated by the Commission.

Incumbent LECs continue to resist competitive entry in the marketplace, as well as before the Commission and in the Courts. None of the Bell Operating Companies that have sought authority to provide in-region, interLATA service have fully complied with the 14-point competitive checklist designed to evidence elimination of economic and operational barriers to entry into the local market. And there is no indication that widespread facilities-based competition can or will emerge on a widespread level absent greater cooperation by incumbent LECs.

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[19] *See, e.g.,* Application of BellSouth Corporation, *et al.* Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in South Carolina, CC Docket No. 97-208, FCC 97-418, ¶ 22 (released Dec. 24, 1997) ("We recognize that local competition has not developed in South Carolina and other states as quickly as many had hoped. . . . [T]he Department of Justice estimates BellSouth's market share of local exchange in its service area in South Carolina is 99.8% based on access lines").

[20] Iowa Utilities Board v. FCC, 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997).

Given this bleak picture, it is clear that the Commission's market-based approach will not drive costs to competitive levels in "several years."[21] TRA agrees with Petitioners that "meaningful levels of local telephone competition will not develop in the foreseeable future."[22] The Commission anticipated just such an eventuality and committed to take prescriptive action "to ensure that all interstate access customers receive the benefits of more efficient prices, even in those places and for those services where competition does not develop quickly."[23] While it initially concluded that "it would be imprudent to prejudge the effectiveness of . . . ['the pro-competitive regime created by the 1996 Act, and implemented in the *Local Competition Order* and numerous state commission decisions'] at creating competitive local markets,[24]" the Commission could not have anticipated in so holding the actions of the Eighth Circuit. There is no point in waiting for "emerging competition to affect access charge rate levels"[25] when no meaningful exchange access competition has yet taken root. Prescriptive action should be taken now, not in the year 2001.

Petitioners have it right. "The Commission should initiate a rulemaking to establish the proper method for accomplishing a *swift* prescription of interstate access charges to cost-based levels which eventually should be based on forward-looking economic cost."[26] Moreover, the Commission should heed Petitioners' concern that "as the Commission lowers access charges to cost-

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21 Access Charge Reform, CC Docket No. 96-262, FCC 97-158 at ¶ 44.

22 CFA/ICA/NRF Petition at 2.

23 Access Charge Reform, CC Docket No. 96-262, FCC 97-158 at ¶ 267.

24 Id. at ¶ 269.

25 Id.

26 CFA/ICA/NRF Petition at 9.

based levels, it should ensure that such access reductions are *fully* flowed through to the ultimate customer, residential and business consumers."[27]

III.

CONCLUSION

By reason of, and consistent with, the foregoing, the Telecommunications Resellers Association urges the Commission to grant the Petition for Rulemaking filed by the Consumer Federation of America, International Communications Association, and National Retail Federation, and initiate a rulemaking to revisit its access charge reforms. In that rulemaking, TRA urges the Commission not only to prescribe immediate and dramatic reductions in access charges to the forward-looking economic cost of traffic origination and termination, but to ensure the competitive

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[27] Id. at 3.

neutrality of its actions in this regard by mandating the pass-through of the resultant savings in access costs to non-facilities-based and partially-switch-based resale carriers.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Marie E. Kelley, hereby certify that copies of the foregoing Comments of the Telecommunications Resellers Association were served by hand-delivery this 2nd day of February, 1998, on the following:

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