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

In the Matter of	)	
REQUEST FOR 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**

REPLY COMMENTS OF THE TELECOMMUNICATIONS RESELLERS ASSOCIATION

The Telecommunications Resellers Association ("TRA"), through undersigned counsel and pursuant to Section 1.405(b) of the Commission's Rules, 47 C.F.R. § 1.405(b), hereby replies to comments submitted in opposition to the Petition for Rule-making ("Petition") filed in the captioned proceeding by the Consumer Federation of America ("CFA"), International Communications Association ("ICA"), and National Retail Federation ("NRF") (collectively, the "CFA/ICA/NRF Petitioners"). Specifically, TRA herein responds to the comments filed by the United States Telephone Association ("USTA"), Ameritech, the Bell Atlantic Telephone Companies (collectively,

"Bell Atlantic"), BellSouth Corporation and BellSouth Telecommunications, Inc. (collectively, "BellSouth"), Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell (collectively, "Southwestern Bell"), U S WEST, Inc. ("U S WEST"), GTE Service Corporation ("GTE"), and Bay Springs Telephone Company, Inc., *et al.* (collectively, "Incumbent LEC Opponents").

In their Petition, the CFA/ICA/NRF Petitioners urged the Commission to "initiate a rulemaking addressing the immediate prescription of interstate access rates to cost-based levels."[1] TRA urged the Commission to grant the relief requested by the CFA/ICA/NRF Petitioners not only because actions by the U.S. Court of Appeals for the Eighth Circuit ("Eighth Circuit") have cast serious doubt on the Commission's judgment that market forces could be relied upon to drive access charges to the forward-looking economic cost of traffic origination and termination, but because access charge reform has proven to be an unmitigated disaster for non-facilities-based resale carriers (and to a lesser degree, partially "switch-based" resale carriers) . As TRA explained, because the limited access charge reductions that have resulted from the Commission's access charge reforms have not been passed through to many non-facilities-based and partially switch-based resale carriers, these so-called "reforms" have served only to dramatically increase the operating costs of small to mid-sized providers of interexchange service, undermining their competitive and financial viability and adversely impacting their primarily small business customers. Accordingly, TRA urged the Commission to initiate a rule-making to revisit its access charge reforms, not only prescribing therein immediate and dramatic reductions in access charges, but ensuring the competitive neutrality of that action by mandating the pass-through of the resultant savings in access costs to non-facilities-based and partially switch-based resale carriers.

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

The Incumbent LEC Opponents oppose the CFA/ICA/NRF Petition on a variety of procedural and substantive grounds. The Incumbent LEC Opponents' procedural objections can be summarily dismissed. The bulk of the substantive challenges raised by the Incumbent LEC Opponents are more appropriately addressed in the rule-making sought by the CFA/ICA/NRF Petitioners. And critically, the data offered by the Incumbent LEC Opponents in opposition to the CFA/ICA/NRF Petition actually serve to confirm the critical need for the Commission to revisit its access charge reforms in light of Eighth Circuit rulings undermining the Commission's reliance upon market forces to drive access charges downward.

A number of the Incumbent LEC Opponents urge the Commission to deny the CFA/ICA/NRF Petition as a late-filed petition for reconsideration of the Commission's *First Report and Order* in CC Docket No. 96-262.[2] Contrary to the Incumbent LEC Opponents' contentions, the CFA/ICA/NRF Petitioners have not asked the Commission to reconsider its *First Report and Order*. Rather, the CFA/ICA/NRF Petitioners have identified subsequent and unanticipated occurrences which render the Commission's current access charge rules contrary to the public interest,[3] and have

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[2] *See, e.g.,* Comments of Bell Atlantic (at 2 - 6), BellSouth (at 2 - 7), and U S WEST (at 2 - 6).

[3] Certainly, the Commission did not anticipate that the Eighth Circuit would relieve incumbent LECs of the responsibility to provide "assembled platform(s) of combined network elements (or any lesser existing combination of two or more elements)," licensing them to disassemble such platforms and combinations for the sole purpose of rendering competitive entry through use of unbundled network elements more costly and complex. Iowa Utilities Board v. FCC, 1997 U.S. App. LEXIS 28652 (8th Cir. Oct. 14, 1997). After all, the Commission made clear in the *First Report and Order* released in its Access Charge Reform rule-making its belief that competition 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," explaining that "interstate access services can be replaced with some interconnection services or with the functionality offered by unbundled network elements." Access

[footnote continued on next page]

urged the Commission to initiate a proceeding to evaluate the viability of its existent access charge regime in light of these occurences. The Commission's Rules allow "[a]ny interested person . . . [to] petition for the issuance, amendment or repeal of a rule or regulation" without imposing any particular time constraints.[4]

Most of the substantive challenges presented by the Incumbent LEC Opponents to the CFA/ICA/NRF Petition involve legal and policy matters which can and should be addressed in a rule-making proceeding conducive to broad participation by the public and the industry. Matters such as the public policy justification for and the nature and scope of prescriptive measures, as well as the constitutional and legal authority of the Commission to adopt such measures, are the very types of broad-based policy issues that notice and comment rule-making proceedings are intended to accommodate. Indeed, the central purpose of the rule-making provisions of the Administrative Procedure Act is to provide the public an opportunity to participate in agency policy and rule

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[footnote continued from preceding page]

Charge Reform (First Report and Order), CC Docket No. 96- 262, FCC 97-158, ¶ 262 (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). And as the Commission has recognized, "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." 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, ¶ 195 (released Dec. 24, 1997). The Commission clearly did not foresee the lengths to which incumbent LECs would go both in the marketplace and in the courts to resist competitive entry into the local market. And the Commission could not have contemplated that various Bell Operating Companies would challenge in a Federal District Court in northern Texas the constitutionality of legislation they helped to enact.

[4] 47 C.F.R. § 1.401(a).

making.[5] Rule-making procedures after all are "designed to assure fairness and mature consideration of rules of general application."[6]

The sole pertinent objection raised by the Incumbent LEC Opponents to the CFA/ICA/NRF Petition and the rule-making proceeding the CFA/ICA/NRF Petitioners seeks is the claim that local competition is in fact generating the market forces that the Commission anticipated would in a matter of a few years drive interstate access charges toward the forward-looking economic cost of traffic origination/termination. Each of the Incumbent LEC Opponents recites the mantra that all legal, economic and operational obstacles to market entry have been removed and that full-fledged competition has already taken root. Thus, the Incumbent LEC Opponents tout the large numbers of competitive local exchange carriers ("LECs") that have been certified and network access/ interconnection and resale agreements into which they have entered. They further proclaim the purportedly large competitive losses they have suffered at the hands of new market entrants. Unfortunately, the very data upon which the Incumbent LEC Opponents rely in opposing the CFA/ ICA/NRF Petition actually undercut their position, serving to confirm the critical need identified by the CFA/ICA/NRF Petitioners for the Commission to assess anew its existing access charge regime.

For example, BellSouth opines that "CFA's judgment regarding the state of local competition and efforts by the incumbent local exchange carriers ("ILECs") to meet the requirements of the 1996 Act are totally distorted."[7] According to BellSouth, it and other incumbent LECs "have deliberately and conscientiously engaged in those processes required under the 1996 Act to open their networks

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5 Texaco v. Federal Power Commission, 412 F.2d 740 (3d Cir. 1969).

6 National Labor Relations Board v. Wyman-Gordan Co., 394 U.S. 759, 764 (1969).

7 Comments of BellSouth at 3.

to competition."[8] And to prove its point, BellSouth notes that "[a]s of the end of calender year 1997, there were 437 wireline competitive LEC certifications which had been approved by state commissions in BellSouth's nine-state operating territory, 302 interconnection and resale agreements, 9,276 unbundled loops and 218,045 resold lines."[9]

First, BellSouth has not fully "open[ed] . . . [its] network[] to competition." To the contrary, the Commission has found not once, but twice, that "BellSouth has failed to demonstrate that it complies with the competitive checklist contained in section 271 of the Act."[10] Moreover, the Commission concluded that the deficiencies in BellSouth's applications are "ones which . . . are likely to frustrate competitors' ability to pursue entry through the use of unbundled network elements or resale, the two methods of entry that promise the most rapid introduction of competition."[11]

Second, the number of competitive LECs that have been certified or have entered into network access/interconnection or resale agreements are irrelevant unless the certifications and agreements have translated into meaningful competition. And with respect to exchange access competition, the number and market penetration of competitive *resale* LECs is not consequential because incumbent LECs do not make exchange access available for resale. Thus, the only data of

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[8] Id. at 4 - 5.

[9] Id. at 5, fn. 10.

[10] 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 at ¶ 6; 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 Louisiana, CC Docket No. 98-231, FCC 98-17, ¶ 1 (released Feb. 4, 1998).

[11] 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 at ¶ 14.

consequence offered by BellSouth in support of its contention that market forces are disciplining access pricing are the 9,276 unbundled loops the carrier claims are being used by competitive LECs.

BellSouth serves in excess of 21 million access lines in its 9-state region, meaning that competitive LECs using unbundled network elements provide less than five one hundredths of one percent of the access lines in that geographic area.[12] The U.S. Department of Justice ("Justice Department") estimated that BellSouth's share of the local exchange market in its service area in South Carolina was 99.8% based on access lines, including resold access lines.[13] In the State of Louisiana, the Justice Department concluded that "actual competitive entry . . . is still extremely limited; BellSouth's market share of local exchange in its service area is about 99.61% based on access lines."[14]

Other Bell Operating Companies and incumbent LECs offer no more impressive data. For example, Ameritech proclaims that "the local market has been opened in the Ameritech region."[15] Ameritech further touts the 68,636 unbundled loops used by competitive LECs in its 5-state region.[16] For its part, USTA emphasizes the "47 CLEC switches deployed" in the Ameritech region.[17]

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[12] Kraushaar, J.M., Infrastructure of the Local Operating Companies Aggregated to the Holding Company Level 1991 - 1995, Table 3(a) (March 13, 1997). Of course, BellSouth experienced a record increase in the number of access lines it served during 1997, thereby minimizing what minimal competitive impact was occasioned by new market entrants' efforts.

[13] 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 at ¶ 22, fn. 39.

[14] Evaluation of the Justice Department filed in CC Docket No. 97-231, Appx. B, p. 3 on December 10, 1997.

[15] Comments of Ameritech at 4.

[16] Id. at Att. C.

[17] Comments of USTA at 8.

Ameritech serves over 19 million access lines and has deployed over 1,400 local switches in its five-state region.[18] Competitive LECs using unbundled network elements thus provide less than four tenths of one percent of the access lines in the States of Illinois, Indiana, Michigan, Ohio and Wisconsin. In this same five-state area, competitive LECs operate roughly three percent of the deployed switches.[19] Not surprisingly, the Justice Department concluded that "granting Ameritech's application [for in-region, interLATA authority in the State of Michigan] would not be consistent with the public interest, because local markets in Michigan are not irreversibly open to competition."[20] The Commission agreed, rejecting Ameritech's application because the carrier had not "implemented fully the competitive checklist and ha[d] not complied with the requirements of section 272."[21]

Southwestern Bell urges the Commission to "note the advance of competition and the success thus far of the market-based strategy," emphasizing that "[h]undreds of thousands of lines have been lost to competition."[22] Supplementing the carrier's showing, USTA touts the 174,000 interconnection trunks that have been provided to competitors" and the "close to the 2400

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18 Kraushaar, J.M., Infrastructure of the Local Operating Companies Aggregated to the Holding Company Level 1991 - 1995 at Table 1(a).

19 Id.

20 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, ¶ 42 (Aug. 19, 1997). The Justice Department calculated that "the aggregate market share of CLECs, measured by total number of access lines statewide using all forms of competition (separate facilities, unbundled loops and resale), appears to be between 1.2% and 1.5%." Evaluation of the Justice Department filed in CC Docket No. 97-137, Appx. B, p. 3 on June 25, 1997.

21 Id.

22 Comments of Southwestern Bell at 2.

competitors' hi-cap lines in service."[23] Yet competitive access providers have deployed only roughly five percent of the fiber miles deployed by incumbent LECs.[24]

Finally, Bell Atlantic trumpets that its "competitors are providing about 500,000 lines using their own facilities" in its 14-state region.[25] Bell Atlantic emphasizes the State of New York in particular in arguing that competition is pervasive, although in so doing, it concedes that in admittedly the most competitive local market in the nation, the "total market share" of competitive LECs in New York is only three percent.[26] USTA confirms that region-wide, Bell Atlantic provides only 35,000 unbundled loops or less than one one-hundredth of one percent of the total access lines served by Bell Atlantic.[27]

In short, local competition, much less facilities-based local competition, has not taken meaningful root anywhere, much less everywhere, and therefore is not disciplining the pricing of interstate exchange access. In a recent report, the CFA quantified the extent of the competitive intrusion into the local market, debunking incumbent LEC claims of intense local competition. Therein, CFA demonstrates that the installed base of switches, as well as the fiber deployment, of incumbent LECs exceeds that of competitors by a factor in excess of 20 to 1.[28] Likewise, CFA

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[23] Comments of USTA at 8.

[24] Kraushaar, J. M., Fiber Deployment Update End of Year 1996, Tabs. 6, 14 (July, 1998).

[25] Comments of Bell Atlantic at 8.

[26] Id. at 7 - 8.

[27] Comments of USTA at 7; Kraushaar, J.M., Infrastructure of the Local Operating Companies Aggregated to the Holding Company Level 1991 - 1995 at Table 1(a).

[28] CFA, Stonewalling Local Competition: The Baby Bell Strategy to Subvert the Telecommunications Act of 1996, 15 - 16 (January, 1998).

faults "[o]verblown claims of competition," calculating that competitors of BellSouth and Southwestern Bell serve "less than one percent of the customer base" in their respective regions.[29] With respect to Bell Atlantic, CFA finds:

> Restricting ourselves even to New York, we find that competition has gained a 3 percent market share, primarily in the business sector and at most 1 percent in the residential sector. This is overwhelmingly resale competition. Facilities-based competition, even in New York, is barely large enough to be considered rounding error. Most ironic is Bell Atlantic's claims that almost 5 billion minutes of use have been interchanged with competing carriers. Bell Atlantic New York handles over 150 billion minutes of use per year.[30]

As succinctly stated by MCI Telecommunications Corporation ("MCI"), "incumbent LECs are handling over 99.9 percent of terminating switched access minutes in all but two states."[31] Indeed, MCI shows that "in the two states with the most access competition, competing local carriers are handling only 1.32 percent and 1.57 percent of terminating switched access minutes."[32] And for this reason, it is the rare price cap LEC that is not pricing exchange access at the maximum allowed by the pertinent price cap indices.[33]

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[29] Id. at 16. USTA's repeated emphasis on growth rates experienced by competitive LECs is obviously without pertinence given the minimal levels of existing competition. The percentage increase from one one-hundred of one percent to one tenth of one percent is massive, but without consequence.

[30] Id. at 20 (footnotes deleted).

[31] Comments of MCI at 4.

[32] Id.

[33] Id. at 3.

It is thus apparent that "competition is not developing sufficiently for . . . [the Commission's] market-based approach to work."[34] Indeed, it is clear that "a market-based approach . . . [will now] take [far more than] several years to drive costs to competitive levels."[35] Accordingly, the Commission should take the prescriptive actions it committed to take "to ensure that all interstate access customers receive the benefits of more efficient prices, . . . in those places and for those services where competition does not develop quickly."[36]

To this end, the Telecommunications Resellers Association once again urges the Commission to grant the Petition for Rule-making filed by the Consumer Federation of America, International Communications Association, and National Retail Federation, and promptly initiate a rule-making to revisit its access charge reforms with the aim of prescribing immediate and dramatic reductions in access charges to the forward-looking economic cost of traffic origination and termination. Of course, in so doing, the Commission should ensure the competitive neutrality of its new reforms by

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[34] Access Charge Reform (First Report and Order), CC Docket No. 96-262, FCC 97-158 at ¶ 267.

[35] Id. at ¶ 44.

[36] Id. at ¶ 267.

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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