

ORIGINAL

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

RECEIVED

OCT 26 1998

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
)
Access Charge Reform)
)
Price Cap Performance Review for Local Exchange Carriers)
)
Consumer Federation of America, et al.,)
Petition for Rulemaking)
)
_____)

CC Docket No. 96-262

CC Docket No. 94-1

RM-9210

COMMENTS
OF
AMERICA'S CARRIERS TELECOMMUNICATION ASSOCIATION
("ACTA")

America's Carriers Telecommunication Association ("ACTA"), by its attorneys, submits these comments in the above-referenced proceedings pursuant to Sections 1.415 and 1.419 of the Commission's Rules and the Commission's *Public Notice*¹ of October 5, 1998.

I. INTRODUCTION

Founded in 1985, ACTA is a national trade association with over 265 members including interexchange carriers ("IXCs"), competitive local exchange carriers ("CLECs"), information and data services providers and related vendors. ACTA's small to mid-sized interexchange carriers are most affected by the Commission's recent access orders. Although many of ACTA's smaller IXC members are attempting to enter local services markets as CLECs, such operations are not

¹ Commission Asks Parties to Update and Refresh Record for Access Charge Reform and Seeks Comment On Proposals for Access Charge Reform Pricing Flexibility, CC Docket Nos. 96-262, 94-1, 97-250, RM-9210 (rel. October 5, 1998).

No. of Copies rec'd _____
List A B C D E

024

profitable for a variety of reasons - not the least of which is incumbent LEC resistance and subversion. Still other small IXCs may never enter local markets due to the hostile regulatory and economic environment created by LEC intransigence. If the Commission continues on its present course of merely fine-tuning the complex machinery of the current access charge regime, rather than departing from the status quo and radically revising the access system to reflect contemporary economic realities, once the Regional Bell Operating Companies ("RBOCs") are allowed into in-region interLATA long distance under Section 271 of the Act, local competition will suffocate as IXC/CLECs continue to be forced, as a matter of law, to subsidize their monopoly competitors. Consequently, the Commission should delay implementing any new pricing flexibility rules until local competition develops further.

In repeated attempts to convince the Commission to alter its present course, ACTA has filed comments in numerous access charge-related dockets over the past several years. Our message throughout has been constant: access charges must come down to true cost using a forward-looking TELRIC-style prescriptive methodology. Competition in local markets has not grown sufficiently to create the competitive access environment needed to drive access rates closer to cost. In fact, as the bottleneck monopolies continue to be subsidized by potential competitors through inflated access charges, their incentive to lower such charges diminishes. Meanwhile, not only do potential new entrants face LEC intransigence in such areas as operations systems support, collocation and interconnection, but recent equity capital markets for CLEC ventures have all but dried up precisely because the legal, regulatory and economic environment favors the incumbent

LECs. Without the financial resources needed to build their networks and market their services, CLECs will never have any hope of becoming viable competitors against the recalcitrant monopolies.

Furthermore, the Commission must change its habit of violating the Regulatory Flexibility Act by not adequately analyzing the effect of its rules on small businesses. This is not merely ACTA's point of view, but that of the expert agency in charge of advocating small business interests, the Office of Advocacy of the U.S. Small Business Administration as well as the Chairman and Ranking Member of the Senate Small Business Committee.

Due to time constraints, ACTA will address other matters raised in the *Public Notice* in its reply comments.

II. ARGUMENT

A. **The Continued Lack Of Viable Local Competition Is Further Proof That The Commission Must Prescribe A TELRIC-Style Access Regime And Reject Any LEC Pricing Flexibility Proposals.**

As ACTA has stated before, the Commission erred in relying on the hope that local competition would flourish and bring access charges down to true cost. *See Access Charge Reform Order*² at ¶ 267. In fact, the Commission has not found evidence sufficient to prove the existence of viable local competition since the 1996 Act was enacted. For instance, the

² *Access Charge Reform*, CC Docket No. 96-262 *et al.* First Report and Order, 12 FCC Rcd. 15982 (1997) (“*Access Charge Reform Order*”), *aff’d sub nom. Southwestern Bell Tel. Co. v. FCC*, ___ F.3d ___ (8th Cir., Aug. 19, 1998); Order on Reconsideration, 12 FCC Rcd. 10119 (1997), Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd. 16606 (1997). Petitions for reconsideration, including one filed by ACTA on July 11, 1997, are pending before the Commission.

Commission yet again denied a RBOC application for in-region interLATA authority earlier this month because of BellSouth's foot dragging in fully and irreversibly opening its markets to competition.³ See generally, *Application of BellSouth Corporation, et al., for Provision of In-Region, InterLATA Services in Louisiana*, Memorandum Opinion and Order, CC Docket No. 98-121 (rel. Oct. 13, 1998) ("*BellSouth Order*"). Specifically, the Commission found that BellSouth had failed to comply with eight of the fourteen points on Section 271's checklist.⁴ Among BellSouth's failures were its refusal or "inability" to comply with Congressional mandates governing: interconnection, access to unbundled network elements, unbundled local loops, unbundled local transport, unbundled local switching, access to directory assistance and operator services, number portability and resale. See, e.g., *BellSouth Order* at ¶¶ 6-11. As the Commission aptly noted, "the Department of Justice concludes that BellSouth still faces no significant competition in local exchange service in Louisiana." The Commission elaborated:

[T]he Department of Justice concludes that BellSouth has maintained policies of physically separating critical pre-existing combinations of UNEs, as well as policies which impose unnecessary costs and technical obstacles on competitors that seek to combine UNEs. The Department of Justice states that, "[c]ollectively, these policies seriously impair competition by firms that seek to offer services using combinations of unbundled network elements."

³ The Department of Justice first advanced the "fully and irreversibly open to competition" standard in its evaluation of SBC's Section 271 application for Oklahoma. *Application by SBC Communications, Inc. Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-Region, InterLATA Services in Oklahoma*, Memorandum Opinion and Order, 12 FCC Red. 8685 (1997) ("*SBC Oklahoma Order*").

⁴ See 47 U.S.C. § 271(c)(2)(B).

BellSouth Order at ¶¶ 16, 17 (quoting Department of Justice Evaluation at 4).

Here, the Commission and Department of Justice could be writing about any of the RBOCs. In short, after reviewing a plethora of evidence in numerous Section 271 proceedings, the Commission and the Department of Justice consistently, and rightfully, reach the same conclusion: local markets are not open to competition due to RBOC intransigence.⁵ Therefore, it is inconsistent and capricious for the Commission to conclude, in the context of a 271 application review, that local competition does not exist, and simultaneously opine that competition is sufficient to bring access charges down to true cost as it has during these proceedings. If the Commission feels the need to prescribe RBOC behavior through the denial of a Section 271 application, then it should also be compelled to prescribe RBOC access charge reductions. The two are inextricably linked. Accordingly, the Commission should not adopt any new pricing flexibility rules until local markets are fully and irreversibly open to competition.

Fortunately, in the *First Report and Order*, the Commission paved itself a pathway out of this problem with an alternative policy. It foresaw that relying purely on market forces might not fulfill Congress's goal of breaking up the local monopolies when it promised to implement a prescriptive approach to access charges "if competition is not developing sufficiently for our market-based approach to work." *First Report and Order* at ¶ 267. With the near evisceration of the Commission's implementation of the Act at hand, especially the destruction of the UNE

⁵ The Commission had it partly correct when it stated in the *BellSouth Order*, "BellSouth and other BOCs hold the keys of their success with respect to section 271 approval in their own hands." *BellSouth Order* at III Executive Summary. It should have added that the RBOCs also hold the keys to the success of the local competition provisions of the 1996 Act as well. So long as they maintain their choke hold on the local bottleneck and resist attempts to open their markets to competition, the goal of the Act will continue to be thwarted.

platform option,⁶ the time has come for the Commission to make good on its promise to author a prescriptive regime that ends the long-standing practice of implicitly subsidizing the monopolies. In doing so, the Commission should heed its own observation that interstate access charges must be set at the "forward-looking economic cost of providing these services" (*Id.* at ¶ 269; *accord id.* at ¶¶ 43, 44, 274) and that excessive access charges produce "inefficient and undesirable economic behavior" and have "a disruptive effect on competition, impeding the efficient development of competition in both the local and long-distance markets." *Id.* at ¶ 30. Or, more importantly, "non-cost-based rate structures can . . . threaten the long-term viability of the nation's telephone system." *Id.* at ¶ 165. Accordingly, ACTA requests that the Commission adopt a prescriptive access regime and reject any pricing flexibility proposals for the foreseeable future.

B. The Commission Must Conduct An Adequate Analysis Under The Regulatory Flexibility Act, Unlike What It Did In The *First Report and Order*.

As ACTA argued in its Petition for Expedited Reconsideration in these dockets (filed on July 11, 1997), in the *First Report and Order* the Commission's analysis of the effect of its new access charge rules on small business was woefully inadequate as measured by its statutory duties under the Regulatory Flexibility Act ("RFA") 5 U.S.C. § 601-602.⁷ In 1996, Congress enacted

⁶ In relying on its market-based approach, the Commission assumed that local competition would develop through cost-based UNEs. It held that the Act created a "cost-based pricing requirement for incumbent LECs' rates for . . . unbundled network elements, which are sold by carriers to other carriers." *Id.* The Commission also forecast that incumbent local exchange carriers would promptly develop systems, especially operations support systems, that would allow CLECs to order UNEs in volumes large enough to create vigorous competition. The Eighth Circuit's destruction of the UNE option obliterates the Commission's premise that "interstate access services will ultimately be priced at competitive levels even without direct regulation of those service prices." *Id.* at ¶ 262. Thus, the Commission now has no choice but to adopt its alternative prescriptive regime.

⁷ The sentiment that the Commission failed to assess in the *First Report and Order* the negative effect its new access rules would have on small businesses (both small carriers as well as small business users) has been echoed

the Small Business Regulatory Enforcement Act of 1996.⁸ This Act amended the RFA to require agencies to make preliminary and then final "regulatory flexibility analyses" on whether an agency's rules have a significant economic effect on a substantial amount of small entities which includes, *inter alia*, small businesses. 5 U.S.C. §§ 601-612; see also Funk, *More Stealth Regulatory Reform*, *Administrative & Regulatory Law News*, 1-2 (Summer 1996). Under the 1996 amendment, agency compliance with the RFA's requirements was made fully subject to judicial review under the Administrative Procedure Act.⁹ In addition to remanding the rule to the agency, a court can also defer enforcement of the rule against small entities "unless the court finds that continued enforcement of the rule is in the public interest." 5 U.S.C. § 611(a)(4)(b); Funk, *supra*.

by no less than the Office of Advocacy of the U.S. Small Business Administration ("SBA"), the expert agency in charge of advocating the interests of small businesses. See *Ex Parte* Comments and Petition for Reconsideration for Access Charge Reform of the Office of Advocacy of the U.S. Small Business Administration, *et al.*, CC Docket No. 96-262 filed November 21, 1997 ("SBA Comments"). In those comments, the SBA joined ACTA in its call for the Commission to reconsider its *First Report and Order* with a proper RFA analysis.

Additionally, the Chairman and Ranking Member of the U.S. Senate Committee on Small Business have admonished the Commission to adhere to the mandates of the RFA. See Letter to The Honorable William Kennard, Chairman, Federal Communications Commission, from Senator Christopher S. Bond, Chairman, U.S. Senate Committee on Small Business, and Senator John F. Kerry, Ranking Member, November 20, 1997 ("Senate Letter"). "[W]e are troubled by the Commission's failure to analyze the impact of changes to the pricing of interstate access service both on small long distance carriers and on certain small businesses that use long-distance services." *Id.* at 1.

⁸ Congress enacted this provision as part of the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996). See 5 U.S.C. §§ 601-612.

⁹ To quote Senators Bond and Kerry, "Congress enacted the SBREFA . . . to ensure that federal agencies do not impose undue regulatory burdens and costs on small businesses. More specifically, SBREFA amended the Reg Flex Act to ensure that federal agencies (I) conduct meaningful initial and final analyses of their rules, and (II) to the extent possible, choose regulatory alternatives that are less burdensome to small business." Senate Letter at 1.

The Commission is in increasing danger of having its orders stayed due to its continued indifference to conducting proper RFA analyses.¹⁰ For instance, the effect of the *First Report and Order's* adoption of a new tandem-switching rate structure in some cases has caused increased costs of over 300% on small tandem-reliant carriers.¹¹ Ironically, the Commission stated in the *First Report & Order's* Final Regulatory Flexibility Act Analysis section that its adoption of a new tandem-switching rate structure should “reduce and minimize uncertainty” for small businesses. *First Report & Order* at ¶ 433. The Commission adds that since the rate structure and rate levels “are more closely related to the costs of providing the underlying services” this should “minimize the economic impact of these rules on small businesses . . . by minimizing the adverse impacts that can accompany non-cost based regulation.” *Id.*

However, the Commission’s analysis failed to discuss or recognize the vast and disproportionate cost that will be borne by small carriers as a result of the new tandem switching rate structure. As a result of long-standing Commission policy, small interexchange carriers depend on tandem routing much more than larger carriers. Thus, small carriers are now forced to pass on these higher rates to their customers.¹² Such enormous price increases are starting to

¹⁰ “[I]f data in the [RFA] analysis . . . demonstrates that the rule constitutes such an unreasonable assessment of social costs and benefits as to be arbitrary and capricious, 5 U.S.C. § 706(2)(A), the rule cannot stand. . . . [I]f a defective [RFA] analysis caused an agency to underestimate the harm inflicted upon small business to such a degree that . . . harm clearly outweighs the claimed benefits of the rule, then the rule must be set aside.” *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984).

¹¹ A recent study conducted by ACTA indicates that per minute tandem-switched transport costs have increased anywhere from 74 percent to 311 percent since July 1, 1998 depending on the LATAs involved. Such increases are typical for tandem-reliant small carriers and are due to the Commission’s elimination of the unitary price structure. ACTA will brief the Commission on its study in more detail at a later date.

¹² Absorbing such exorbitant cost increases is obviously not an option.

exacerbate competitive disadvantages between small and large carriers. This brutal blow to the competitive IXC community is clearly inconsistent with the pro-competition mandates of the 1996 Act and the ostensible policies of the Commission itself.

In any future orders, the Commission should more thoroughly analyze, for RFA purposes, how the new rate structure hurts small businesses further by also failing to meet the goal of cost-based pricing that underscores the 1996 Act. The unitary rate structure was a fairly close approximation of the forward-looking costs of tandem switching. However, the new rates bear little relation to actual economic costs as they are based on embedded cost loadings. Direct trunk routing, however, is spared these embedded costs, and, thus, more closely reflects actual costs. Therefore, direct trunk routing will become the more attractive option for consumers to the detriment of smaller carriers that are forced to offer tandem-switched routing due to long-standing Commission policy. In short, the Commission's capricious and arbitrary pricing differential between tandem switching and direct trunk routing not only flies in the face of Congress' intent to foster equitable and rationally priced telecommunications competition as embodied in the 1996 Act, it violates the RFA by needlessly harming small businesses as well. ACTA implores the Commission to rectify this devastating error with new access charge rules before it embarks on granting the monopolies further liberties through new pricing flexibility plans. In the alternative, ACTA demands that the Commission at least exercise the honesty and forthrightness called for by the RFA and explain in detail the harm its decisions have on small businesses. *See* SBA Comments at 7 - 10.

III. CONCLUSION

For the reasons enumerated above, ACTA strongly urges the Commission to adopt new rules mandating access pricing based on forward-looking costs and to restore the unitary rate structure for tandem-reliant small carriers before adopting any new pricing flexibility proposals.

Respectfully submitted,

AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION

By: *Robert M. McDowell*

Robert M. McDowell
Executive Vice President and General Counsel
AMERICA'S CARRIERS
TELECOMMUNICATION ASSOCIATION
8180 Greensboro Drive
Suite 700
McLean, Virginia 22102
(703) 714-1311 (Telephone)
(703) 714-1330 (Facsimile)
rmcdowell@ACTAssociation.org (E-mail)

Dated: October 26, 1998

rmm/070/access/comment2

CERTIFICATE OF SERVICE

I, Robert M. McDowell, do hereby certify that on this 26th day of October, 1998, I have served a copy of the following document via messenger to the following:

The Hon. William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, N.W., Room 814
Washington, DC 20554

International Transcription Service
Federal Communications Commission
1919 M Street, N.W., Room 246
Washington, DC 20554

The Hon. Harold Furchtgott-Roth
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 802
Washington, DC 20554

Competitive Pricing Division
Common Carrier Bureau
Federal Communications Commission
1919 M Street, N.W.
Room 518
Washington, D.C. 20554

The Hon. Susan Ness
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 832
Washington, DC 20554

The Hon. Michael K. Powell
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 844
Washington, DC 20554

The Hon. Gloria Tristani
Commissioner
Federal Communications Commission
1919 M Street, N.W., Room 826
Washington, DC 20554

Mr. Larry Strickling
Chief, Common Carrier Bureau
Federal Communications Commission
1919 M Street, NW
Room 500
Washington, DC 20554

Magalie Roman Salas
Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, DC 20554



Robert M. McDowell