

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

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of )

Access Charge Reform )

Price Cap Performance Review )  
For Local Exchange Carriers )

MCI Telecommunications Corporation )  
Emergency Petition for Prescription )  
Of Access Charges )

Consumer Federation of America )  
Petition for Rulemaking )

CC Docket No. 96-262

CC Docket No. 94-1

CC Docket No. 97-250

RM - 9210

COMMENTS OF  
NEXTLINK COMMUNICATIONS, INC.

NEXTLINK Communications, Inc. ("NEXTLINK") hereby files its Comments in response to the Commission's October 5, 1998 Public Notice asking parties for additional comment on the record in the Access Charge Reform and Price Cap dockets.<sup>1</sup> NEXTLINK is a national, facilities-based provider of competitive telecommunications services that currently operates eighteen (18) high-capacity, fiber optic networks providing switched local and long-distance services in thirty-three (33) markets in eleven states.<sup>2</sup> NEXTLINK is one of the largest

<sup>1</sup> Access Charge Reform, CC Docket No. 96-262, 12 FCC Rcd 15982 (1997) ("Access Charge Reform Order"), aff'd sub nom. Southwestern Bell Tel. Co. v. FCC, No. 97-2618 (8th Cir. Aug. 19, 1998); Price Cap Performance Review for Local Exchange Carriers, CC Docket 94-1, 12 FCC Rcd 16642 (1997), appeal pending sub nom. USTA v. FCC, No. 97-1469 (D.C. Cir.).

<sup>2</sup> NEXTLINK Communications, Inc. provides local exchange, access and interexchange services through its affiliate companies: NEXTLINK Tennessee, L.L.C., NEXTLINK Illinois, Inc., NEXTLINK Ohio, Inc., NEXTLINK California, Inc., NEXTLINK Washington, Inc., NEXTLINK Utah, Inc., NEXTLINK Pennsylvania, L.P., NEXTLINK Georgia, Inc., NEXTLINK New York, Inc., NEXTLINK New Jersey, Inc., and Telecommunications of Nevada, L.L.C. All references to NEXTLINK are to NEXTLINK Communications, Inc., and the operations of all its local exchange affiliate companies unless otherwise noted.

competitive local exchange carriers (“CLECs”) in the country and is a provider of competitive access services in a number of and varied markets. NEXTLINK has a significant interest in the Commission’s continuing efforts to reform its rules governing access charges.

## **I. Introduction**

NEXTLINK’s comments focus on two key issues raised by the Public Notice: the market-based approach to access charge reform adopted by the Commission, and specific pricing flexibility proposals filed by Bell Atlantic and Ameritech.<sup>3</sup> NEXTLINK supports the Commission’s market-based approach to reform,<sup>4</sup> but must emphasize that, as was the case with other monopoly markets in the past, the Commission must complete the hard work necessary to move access markets to competition before it can begin to deregulate the market. If the Commission acts to deregulate non-competitive markets before actual competition is firmly in place, then the Commission’s market-based approach will be doomed to failure. The Commission thus must be careful to ensure that critical competitive conditions exist before relaxing rules necessary to push the market towards competition.

NEXTLINK therefore opposes the pricing flexibility proposals made by Bell Atlantic and Ameritech. Those proposals would provide substantial deregulation of access markets without

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<sup>3</sup> Letter from Kenneth Rust, Director, Federal Regulatory Affairs, Bell Atlantic, to Magalie Roman Salas, Secretary, Federal Communications Commission, April 27, 1998; Letter from Anthony M. Alessi, Director, Federal Relations, Ameritech, to Magalie Roman Salas, Secretary, Federal Communications Commission, June 5, 1998.

<sup>4</sup> The prescriptive approach is an important backstop for the Commission’s market-based approach. As the Commission continues to develop the necessary cost-modeling tools, *i.e.*, its recently released hybrid cost proxy model, that backstop will become more effective. See Commission Adopts Model Platform for Use in Determining Universal Service Support for High Cost Areas, Common Carrier Action, Report No. CC 98-36, CC Docket Nos. 96-45 and 97-160 (Oct. 22, 1998).

real evidence that competition actually exists in these markets, let alone evidence that these markets have evolved to the point where they are irreversibly open or subject to effective competition. In the Access Charge Reform Order, the Commission was clear that competition must precede deregulation in order to protect consumers from the dangers of unregulated monopoly power.<sup>5</sup> This is the foundation of the market-based approach adopted by the Commission: if competition has not developed to the point where competition can effectively control the pricing and other behavior of the incumbent local exchange carrier (“ILEC”), then all of the dangers of monopoly control are still present. It is not the mere hint of a threat of competition that will impose market-based controls on the behavior of ILECs in access markets, but real, substantial competition.

While NEXTLINK will support moving towards pricing flexibility<sup>6</sup> subject to meaningful Commission oversight, it is simply too early to take such steps today. Before the Commission considers deregulatory measures to provide the ILECs with pricing flexibility, the Commission should identify and eliminate the barriers to full competition that have prevented parties from providing ILECs with significant competition in access markets. Efforts by the Commission to do so will be the most productive steps the Commission can take towards advancing its market-based approach to access charge reform.

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<sup>5</sup> Access Charge Reform Order, 12 FCC Rcd at 16097-98, para. 270.

<sup>6</sup> NEXTLINK does not consider the pricing flexibility proposals of Bell Atlantic and Ameritech to be well founded or properly designed. Such a proposal must tie the presence of competitive conditions to the degree of pricing flexibility and minimize the risk of cross-subsidization and other abuses.

## **II. The Commission should continue its market based approach to Access Charge Reform**

### **A. Market Forces Are Developing in Access Markets**

The Commission adopted a market-based approach to reforming access charges, reasoning that competitive markets would be superior to a prescriptive effort in determining cost-based rates for access, and for identifying the subsidies implicit in the current access charge regime. The Commission's use of a market-based approach has begun the development of competition in access markets.

Based on the Commission's decision not to impose a prescriptive or regulatory approach to access charges, but to allow market forces to reform access charges, the investment community has had the confidence to make substantial investments in the competitive local exchange carriers, including companies like NEXTINK. The Commission's decision to allow market forces to reform access markets has spurred capital funding of over twenty billion dollars in investments by CLECs in facilities and other local infrastructure that will be utilized to provide competition in access markets. The investment by these new entrants have resulted in the deployment of literally hundreds of switches as well as thousands of miles of fiber that would not have been as economically feasible absent the Commission's commitment to a market-based approach to access reform.

The important steps the Commission has taken have started to take hold. As progress continues from the investment being made to create a fully competitive access market, the Commission must stay its course. The use of a prescriptive approach in the midst of market-driven reform could chill the current positive environment for CLEC investment and freeze the

development of actual competition in access markets.

As discussed below, there are a number of barriers that have made progress towards competition in access markets more difficult than the Commission might have initially expected when it released its Access Charge Reform Order. At the time that the Commission took this approach, competitors to ILECs in access markets had approximately three percent of the market.<sup>7</sup> As with all efforts that the Commission has undertaken to move a monopoly market to competition, this process will continue to require significant Commission oversight and involvement in order to promote competition as well as to protect consumers from abuses resulting from remaining monopoly power.

**B. The Commission Needs to Continue to be Vigilant to Identify and Remove Barriers to the Evolution of Access Markets Towards Competition**

The Commission has substantial and well-known past experience reforming the formerly monopolistic long-distance market, leading to the eventual deregulation of AT&T.<sup>8</sup> As is the case with current efforts to move local exchange markets to competition, it takes much more than

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<sup>7</sup> Table 1 of the Access Charge Reform NPRM indicates that total 1995 interstate and intrastate access charge revenue is \$30.7 billion for Class A ILECs. The 1997 Annual Report on Local Telecommunications Competition (New Paradigm Resources Group, Inc. and Connecticut Research, 8th Ed. 1997) reports that year-end 1996 total competitive access charges revenues were \$890 million (at 27). Assuming ILEC access revenues grew 6% by year-end 1996, this means CLECs have only 2.7% of the total access market by revenue, and less than one percent of the total telecommunications market. If ILEC switched access represents 80% of total ILEC access revenues, CLEC switched access revenues of \$282 million are barely 1 percent of that amount.

<sup>8</sup> See Competition in the Interstate Interexchange Marketplace, Report and Order, 6 FCC Rcd 5880 (1991). See also Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Therefor, Notice of Inquiry and Proposed Rulemaking, 77 FCC 2d 308 (1979); First Report and Order, 85 FCC 2d 1 (1980); Further Notice of Proposed Rulemaking, 84 FCC 2d 445 (1981); Second Report and Order, 91 FCC 2d 59 (1982), recon. denied, 93 FCC 2d 54 (1983); Second Further Notice of Proposed Rulemaking, 47 Fed. Reg. 17308 (1982); Third Further Notice of Proposed Rulemaking, 48 Fed. Reg. 46791 (1983); Third Report and Order, 48 Fed. Reg. 46791 (1983); Fourth Report and Order, 95 FCC 2d 554 (1983); Fourth Further Notice of Proposed Rulemaking, 49 Fed. Reg. 11856 (1984); Fifth Report and Order, 98 FCC 2d 1191 (1984); Sixth Report and Order, 99 FCC 2d 1020 (1985), rev'd and remanded sub nom., MCI Telecommunications Corp. v. FCC, 765 F.2d 1186 (D.C. Cir. 1985).

a simple statement that a market is competitive to effectively transform a monopoly into a competitive environment.

Commenters in the Access Reform dockets and other dockets have identified several regulatory barriers that impede the development of competition in access markets including: (1) ILEC control over bottleneck facilities and abuse of that power; (2) state and local regulations inconsistent with competition; and (3) additional barriers created by entities such as building owners and utilities. The Commission has taken important steps to remove some of these barriers including the adoption of its Local Competition Order, and its Notice of Proposed Rulemaking on Section 706 of the 1996 Act in which the Commission proposed removing additional barriers in existing collocation rules.<sup>9</sup> The Commission needs to continue the hard work necessary to eliminate all barriers to entry and to irreversibly open the market to competition.

Over the last eighteen months, progress has come much slower than the Commission undoubtedly expected because of countless challenges to the Commission's pro-competitive rules for local competition, universal service and even access charge reform. ILECs have challenged interconnection agreements; state competition orders and refused to comply with their obligations in a nondiscriminatory manner. Indeed one of the major pieces of what the Commission often referred to as the 1996 Act's "trilogy," the Local Competition Order, is only now under review by the Supreme Court.<sup>10</sup> Too many pieces of the Commission's overall

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<sup>9</sup> In the Matter of Deployment of Wireline Services Offering Advanced Telecommunications Capability, Memorandum Opinion and Order and Notice of Proposed Rulemaking, CC Docket No 98-147 (rel. Aug. 7, 1998) ("Advanced Telecommunications Capability NPRM").

<sup>10</sup> Implementation of the Local Competition Provisions in the Telecommunications Act of 1996,

approach to moving telecommunications markets to competition have been stymied over the last eighteen months as a result of ILECs' actions.

There are several proceedings where Commission action is needed to address remaining barriers to competitive alternatives in access markets. For instance, the Commission needs to review and revise its Expanded Interconnection rules<sup>11</sup> as well as conform the rates and practices of ILECs to those revised rules. ILECs' Expanded Interconnection and other collocation practices have a tremendous impact on the efficacy of competing access providers.<sup>12</sup> The Commission must also act to strengthen its network element rules to ensure nondiscriminatory access to unbundled loops for competing providers.<sup>13</sup>

The Eight Circuit's decision overturning parts of the Commission's Local Competition Order, and the Supreme Court's current review of that decision also have created great uncertainty in the marketplace as to what the current rules mean and which rules will stand for any period of time. Although the Commission cannot alter the process for review of its rules, the Commission must recognize that such review has had a large and generally negative impact on the development of all telecommunications markets, including access markets. Once the Supreme Court has confirmed the scope of the Commission's review, further action will be

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11 FCC Rcd 15499, 15507-08, paras. 6-9 (1996) ("Local Competition Order") aff'd in part and vacated in part sub nom. Competitive Telecommunications Ass'n v. FCC, 117 F.3d 1068 (8th Cir. 1997) and Iowa Utilities Bd. v. FCC, 120 F.3d 753 (8th Cir. 1997), modified on reh'g, No. 96-3321 (Oct. 14, 1997), petition for cert. granted, Nos. 97-826, 97-829, 97-830, 97-831, 97-1075, 97-1087, 97-1099, and 97-1141 (U.S. Jan. 26, 1998).

<sup>11</sup> See e.g., Local Competition Order, 11 FCC Rcd at 15787-89, paras. 565-569.

<sup>12</sup> See e.g., NEXTLINK Comments in Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

<sup>13</sup> See Advanced Telecommunications Capability NPRM.

required to promote competition and certainty in those markets.

In short, the Commission's market-based approach should not be abandoned before its benefits can be fully realized simply because ILEC challenges have slowed some of the Commission's market-opening initiatives.

### **III. Public Policy, and Commission Precedent Are Firmly Against Granting ILECs Premature Pricing Flexibility.**

#### **A. Bell Atlantic's and Ameritech's Proposals**

Ameritech and Bell Atlantic recently have offered pricing flexibility proposals to the Commission. As an initial matter, NEXTLINK believes that it is incumbent on the Commission to explain in greater detail exactly what is being proposed by these parties in their ex parte contacts with the Commission. The bare information filed by Bell Atlantic and Ameritech, without an additional explanation, cannot be a sufficient basis for action without a further opportunity for interested parties to comment.

NEXTLINK understands generally that the proposals from Bell Atlantic and Ameritech argue that increased competition has created an immediate need for industry-wide pricing flexibility.<sup>14</sup> Both companies have described a three-phase approach to providing greater amounts of pricing flexibility to incumbent LECs.

Phase one would provide immediate relief under either BOCs' proposal. Ameritech proposes that phase one begins when it has only a "negotiated or state approved agreements or

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<sup>14</sup> Ameritech, for example, states that as of April 1998, it had 123 approved interconnection agreements (including resale), is provisioning 83,000 UNE loops, and that there are 400 Ameritech wire centers with collocation. In comparison, Ameritech had 23, 817,211 access lines as of December 31, 1997 according to the Common Carrier Bureau's "Statistics of Communications Common Carriers."

SGATs for: UNEs, transport and terminating compensation, [and] resale,” and Bell Atlantic proposes only slightly more stringent requirements: negotiated or state-approved agreements for unbundled network elements, resold services and transport and termination of traffic, interim number portability, and one hundred unbundled loops in service. In phase one, ILECs would be able to engage in geographic deaveraging, and offer volume and term pricing. New services provided by ILECs would not be subject to the Part 69 public interest test<sup>15</sup> and ILECs would not need to file cost support.

Both parties seem to agree that the second phase would be triggered when competitors have demonstrated (under some undefined test) the capability to provide service to 25% of the market area, while the third phase would be triggered when competitors have demonstrated the capability to provide service to 75% of the market area. Under phase two, the incumbents would be free to offer even more extensive geographic deaveraging of rates without submitting cost support, and also would be able to bundle services, engage in contract pricing and “growth pricing.” Phase three, again subject to an undefined test for commencement, would provide complete deregulation, moving switched access services from Price Cap regulation entirely.

As is discussed further below, the tests for each of these phases are wholly inadequate and imprecise. With regard to the specifics of the pricing flexibility that would result, they are ill-conceived and subject to a tremendous risk of abuse. For instance, deaveraging of access prices must be tied to deaveraging of the UNE building blocks that would be used by competitors. At the same time, adoption of downward pricing flexibility and the ability to

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<sup>15</sup> 47 C.F.R. § 69.4(g). See Access Charge Reform, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry (“Access Charge Reform NPRM”), 11 FCC Rcd 21354, 21490, paras. 309-310.

respond to RFPs must be carefully examined to avoid both obvious and hidden cross-subsidies. Without effective competition in a market, ILECs will use pricing flexibility to attack those markets where the potential for competition at least exists, i.e., where a CLEC is present, and use pricing flexibility solely to destroy prospects for future competition by undercutting any competitive offering that does emerge.<sup>16</sup> The ILEC can engage in such predatory pricing because it can cross-subsidize the lower anti-competitive rates with the continued revenue streams it receives from access charges in markets where there is not even the potential for the development of competition.

**B. Pricing Flexibility Must Be Preceded By Real Competition Not Potential Competition**

The primary concern of the Commission has been and should continue to be the protection of the consumer through the promotion of vigorous competition. While the development of competition in a monopolistic market is not an easy or a quick task, it is absolutely critical to sustaining the level of competition that will continue to thrive and grow as the Commission subsequently moves to greater deregulation of markets. The Commission has recognized in its Access Charge Reform Order<sup>17</sup> that lessening of pro-competitive and pro-consumer rules before the advent of competition poses a serious threat to the welfare of consumers and the very competition that the Commission is attempting to foster in Access

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<sup>16</sup> For instance, the ILEC could employ pricing flexibility to lower prices in a market such as Spokane, Washington, where NEXTLINK has begun to compete, but at the same time maintain its current access charges in rural markets where there is no threat of competition, thereby subsidizing its pricing in Spokane.

<sup>17</sup> Access Charge Reform Order, 12 FCC Rcd at 16097-98, para. 270.

markets. Of course, the difficulty which the Commission faces is determining precisely when competition has developed to such a degree that it can safely take the various deregulatory and pricing flexibility actions that the ILECs advocate.

There is nothing inherently wrong with establishing a framework similar to the “three phases” within both Bell Atlantic and Ameritech’s proposals.<sup>18</sup> A real defect in their approach is defining the level of “competition” necessary to trigger deregulation at such a point that the Commission’s market-based approach will fail for lack of sustainable competition. The triggers for deregulation, and corresponding price flexibility, need to be based on real and verifiable measures of competitive activity in the markets at issue, not upon the potential for competition. To the extent possible the Commission should rely on the most direct measures of competitive activity in access markets possible.

For example the BOCs’ proposals that they immediately be granted authority to use ICB terms and contract tariffs without any finding of competition contradicts previous Commission precedent. In the Interexchange Order, the Commission required substantial competition, the presence of competitors possessing a 45 percent market share, prior to granting AT&T that level of deregulation.<sup>19</sup> The current percentage of the market possessed by competitors to the ILECs is simply too small to give competitors the ability to prevent the types of abuses that could occur should the incumbents be granted pricing flexibility. Such a small share of the market demonstrates the absence of a competitive market, especially given the continued and

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<sup>18</sup> In fact, the Commission itself has proposed a gradual replacement or lessening of regulation as competition develops. Access Charge Reform NPRM, 11 FCC Rcd at 21363, para. 15.

<sup>19</sup> The Commission only permitted AT&T to streamline its business services upon a finding of substantial competition -- that its market share had dropped to 39%-55%.

acknowledged existence of ILEC control over bottleneck facilities.<sup>20</sup>

Not surprisingly, both proposals confuse competitive potential with actual competition. For instance, the trigger for the first phase would only require that a competitor have an interconnection agreement with the ILEC. Indeed, Ameritech's proposal does not even require that a competitor be "up and running"<sup>21</sup> while both the Bell Atlantic and Ameritech proposals are founded in part on agreements relating to discounted resold services and transport and termination of traffic. These are simply irrelevant to the issue of competitive access service. The proposals also rely excessively on potential competition for the further pricing flexibility proposed for the next two phases. Both proposals depend only on whether a competitor is capable of serving an area. Not only is service "capability" a poor substitute for actual service for determining actual competition; it is unclear whether it would be even feasible to measure "capability."

Regardless, the alleged capability of a competitor to offer service provides little market-driven control on the behavior of the ILEC, in contrast to actual provision of service. Depending on the definition of "capability" employed, there could continue to be significant barriers to actual provision of service and concomitant effective competition. It is too subjective and open to regulatory "game-playing" for the Commission to engage in the predictive exercises necessary to determine whether a competitor is capable of serving part or all of an area. More than that, it is simply a poor substitute for measuring how much market share an active competitor has

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<sup>20</sup> NEXTLINK notes that the Commission has twice begun proceedings to collect general information on the markets. See e.g. Local Competition Data Collection, CCB-IAD 95-110.

<sup>21</sup> The trigger proposed by Bell Atlantic is slightly better than the trigger proposed by Ameritech because it requires that 100 unbundled loops be in service and that interim number portability be available. Nevertheless, 100 loops being in service would hardly show that access competition exists.

managed to acquire. Actual market loss to a competitor is the best sign that at least some percentage of the market believes that a competitive offering exists. If the Commission adopts a measure less than this, the Commission will be imposing its judgment of what is a competitive offering on the marketplace. Pricing flexibility and similar deregulatory actions should be based upon market facts not market potential.

There are many other problems with Bell Atlantic and Ameritech's "criteria" for pricing flexibility. Most tellingly, as a new entrant in local exchange and access markets across the country, NEXTLINK is well aware that the existence of an interconnection agreement no more equals competition than a box of paints equals an Old World masterpiece. In addition, the signing of many interconnection agreements means little because there are carriers that, because of their entry strategy, will never provide a competitive access service. Interconnection agreements are but the first step to providing service. The ability to actually implement an agreement, given the many barriers an ILEC can erect, tells far more about the provision of a competitive service. The Commission itself recognized the numerous barriers remaining in the local bottleneck controlled by the ILEC in its recent Section 706 proceeding.<sup>22</sup> Moreover, many state commissions continue to work through similar market-opening proceedings to eliminate the barriers to competition present in ILECs' control over local bottlenecks.

#### **IV. Conclusion**

The pricing flexibility proposals of Bell Atlantic and Ameritech would not protect consumers, encourage competitive entry or accomplish the other goals of the

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<sup>22</sup> See e.g., NEXTLINK Comments in Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147.

Telecommunications Act of 1996. By putting deregulation before the advent of real competition, the proposed pricing flexibility will only enable to ILECs to harm competition. Given the pace of development of competition in telecommunications markets in the last eighteen months, and the Commission's own recognition that structural barriers to competition remain, it is simply too soon for the Commission to reconsider its market-based approach to reform. The Commission needs to continue the course of market-based reform it set out, insisting that competition come to access markets before pricing flexibility and deregulation are granted.

Respectfully submitted,

NEXTLINK COMMUNICATIONS, INC.



R. Gerard Salemm  
Senior Vice President, External Affairs and  
Industry Relations  
Daniel Gonzalez  
Director, Regulatory Affairs  
NEXTLINK Communications, Inc.  
1730 Rhode Island Avenue, N.W.  
Suite 1000  
Washington, D.C. 20036  
(202) 721-0999