Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	CC Docket No. 99-249
Low-Volume Long-Distance Users	)	

Notice of Inquiry

Adopted: July 8, 1999 Released: July 20, 1999

Comment Date: September 20, 1999
Reply Date: October 20, 1999

By the Commission: Commissioner Ness issuing a statement; Commissioner Furchtgott-Roth dissenting and issuing a statement; Commissioner Powell concurring and issuing a statement.

I. Introduction

1. As part of our efforts to ensure that all Americans benefit from a robust and competitive communications marketplace, we seek comment in this *Notice of Inquiry* on the impact of certain flat-rated charges on single-line residential and business customers who make few, or no, interstate long-distance calls. The primary focus of our inquiry concerns flat-rated charges attributable to universal service and access charge reform, although we recognize that other pro-competitive reforms also have resulted directly or indirectly in charges on consumers' bills. We will continue in our *Access Charge Reform* and *Universal Service* proceedings to phase in an economically rational common line rate structure, to eliminate per-minute common line charges, and to reduce the support burden on high-volume long-distance and business customers. The inquiry we commence today will help us do so in a manner that ensures all customers—including low-volume residential and single-line business consumers—share in the benefits of those reforms. We also hope that this inquiry will yield information that will help us to understand and manage the impact on consumers of end-user charges resulting from all of our competitive reforms, including charges attributable to actions other than access and universal service reform.

II. Background

A. The Historical Access Charge System

2. To provide interstate telecommunications services, interexchange carriers (IXCs) usually rely on most of the same telephone infrastructure that incumbent local exchange carriers (incumbent LECs) use to provide local telephone service. The incumbent LEC's local loop, for example, connects a customer to the LEC network so that the customer can make and receive local calls. Customers also use the local loop to make and receive interstate calls. To reach the IXCs' networks, those interstate calls typically traverse the switches and interoffice trunks that make up the LEC network. Consequently, a portion of the costs an incumbent LEC incurs in providing this common infrastructure is allocated to intrastate service and recovered pursuant to state regulation, and a portion is allocated to interstate service and

recovered pursuant to regulations of the Federal Communications Commission.

3. The Commission adopted uniform access charge rules in 1983 to govern the way incumbent LECs recover that portion of the costs of the common infrastructure allocated to interstate service.[1] Under these rules, the Commission allows incumbent LECs to recover some of the interstate costs of providing the local loop through a flat, monthly end-user common line charge (EUCL)—sometimes called a subscriber line charge (SLC)—that they assess on end users.[2] The Commission limited the amount of the SLC, however, because of concerns that an excessively high SLC might cause end users to disconnect their telephone service.[3] The Commission allowed the incumbent LECs to recover the remainder of their interstate costs attributable to the local loop through a per-minute carrier common line charge (CCLC) that they assess on IXCs.[4]

4. The IXCs, in turn, recovered much of their costs from their customers through per-minute charges for long-distance service. This usage sensitive retail pricing of interexchange service reflected the fact that incumbent LECs recovered in per-minute access charges the costs of originating and terminating long-distance calls, while a portion of the flat, per-line costs of interexchange access was paid directly by end users in the form of the SLC that appeared to be part of the user's local telephone bill. Thus, historically, telephone users have grown accustomed to paying for long-distance service only to the extent that they generate minutes of long-distance use. That is, in any given period, customers have generally expected that they would pay their presubscribed IXC only if they placed long-distance calls, regardless of whether the convenience of being presubscribed imposes any cost on the IXC.

5. Unfortunately, the historical access charge rate structure generated inefficient and undesirable economic behavior. Under principles of cost-causation, it is most economically efficient for incumbent LECs to recover the costs of providing interstate access in the same way that they incur them. Under such principles, incumbent LECs should recover their traffic-sensitive costs of interstate access through per-minute charges, and should recover their non-traffic-sensitive costs through flat charges. The incumbent LECs' costs of providing the local loop do not change with the number, length, or type of telephone calls customers make, and so are non-traffic sensitive. Because of the cap on SLCs, however, incumbent LECs recover some of these non-traffic-sensitive loop costs through the traffic sensitive CCLC.

6. By requiring the use of per-minute access charges where flat-rated fees would be more appropriate, the historic rate structure increased the per-minute rates paid by IXCs and long-distance

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1 *See* MTS and WATS Market Structure, Third Report and Order, 93 FCC.2d 241 (1983 Access Charge Order), *recon.*, 97 FCC.2d 682 (1983), *second recon.*, 97 FCC.2d 834 (1984).

2 *See 1983 Access Charge Order*, 93 FCC.2d at 243, 279; Access Charge Reform, First Report and Order, 12 FCC Rcd 15982, 16007-08 (1997) (Access Charge Reform Order), *aff'd sub nom.* Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523 (8th Cir. 1998).

3 *See 1983 Access Charge Order*, 93 FCC.2d at 243, 290; *Access Charge Reform Order*, 12 FCC Rcd at 16007.

4 *See 1983 Access Charge Order*, 93 FCC.2d at 244, 280; *Access Charge Reform Order*, 12 FCC Rcd at 16007-08.

consumers, thus artificially suppressing demand for interstate long-distance services.[5] Furthermore, because non-traffic-sensitive costs, by definition, do not vary with usage, recovering these costs on a usage-sensitive basis creates an implicit subsidy from high-volume users of interstate toll services to low-volume users of interstate toll services.[6] These implicit subsidies have a disruptive effect on competition, impeding the efficient development of competition in both the local and long-distance markets.[7] For example, where rates are significantly above cost, consumers may choose to bypass the incumbent LEC's switched access network, even if the LEC is the most efficient provider.[8] Conversely, where rates are subsidized (as in the case of consumers in high-cost areas), rates will be set too low and an otherwise efficient provider would have no incentive to enter the market.[9]

7. Moreover, this system of implicit subsidies and support flows is sustainable only in a monopoly environment in which incumbent LECs are guaranteed an opportunity to earn returns from certain services and customers that are sufficient to support the high cost of providing other services to other customers.[10] The 1996 Act removes barriers to entry in the local market, generating competitive pressures that make it difficult for incumbent LECs to maintain access charges above economic cost.[11] As competition develops, incumbent LECs may be forced to lower their access charges or lose market share, in either case jeopardizing the source of revenue that has permitted the incumbent LEC to offer service to other customers, particularly those in high-cost areas, at below-cost prices.[12]

B. The Presubscribed Interexchange Carrier Charge (PICC)

8. Consequently, in the May 1997 *Access Charge Reform Order*,[13] the Commission adopted for price cap LECs a new common line rate structure to align cost recovery with the manner in which costs are incurred. That structure, when fully implemented, will recover all interstate-allocated common line costs through flat SLCs assessed on end users, and flat PICCs assessed on IXCs. The Commission retained in its new plan the existing $3.50 ceiling on SLCs for primary residential lines and single-line business lines, while increasing the SLC ceilings on non-primary residential lines and on multi-line business lines. As of January 1, 1999, the SLC ceiling for non-primary residential lines is $6.07, and for

[5] *See Access Charge Reform Order*, 12 FCC Rcd at 15995-96.

[6] *See id.* at 15986.

[7] *See id.* at 15996.

[8] *See id.*

[9] *See id.*

[10] *See id.* at 15996-97.

[11] *See id.*

[12] *See id.*.

[13] *See id.*, 12 FCC Rcd 15982.

multi-line businesses is $9.20. Most price cap carriers charge a multi-line business SLC well below the ceiling, because that is all they need to recover all of the interstate portion of the fixed cost of a line.

9. The PICC was designed to be phased in over several years. The initial PICC ceilings were 53 cents for primary residential and single-line business lines, $1.50 for non-primary residential lines, and $2.75 for multi-line business lines. These ceilings originally were scheduled to increase January 1, 1999, by 50 cents plus inflation for primary residential and single-line business lines, $1.00 plus inflation for non-primary residential lines, and $1.50 plus inflation for multi-line business lines. The ceilings were then to continue to increase by these amounts on July 1, 2000, and on each July 1 after that. Over time, the actual PICC charges on single lines were expected to increase until the combination of the $3.50 SLC and the PICC recovered all of the interstate costs of a line. The actual PICC charges for non-primary residential lines and multi-line business lines were expected to begin decreasing for most LECs after the first year or two of the plan. In October 1998, the Commission postponed the January 1, 1999, increase in the PICC ceilings to July 1, 1999. The Commission did so to avoid rate churn that might otherwise occur if PICC charges were increased to the new ceilings in January and then decreased in July as a result of expected general reductions in access rate levels.[14] The PICC ceilings increased on July 1, 1999, to $1.04 for primary residential and single-line business lines, $2.53 for non-primary residential lines, and $4.31 for multi-line business lines. Thus, between the SLC and the PICC, price cap LECs currently asses up to $4.54 in flat charges on primary residential and single-line-business lines.

III. Discussion

10. The Commission recognized when it changed the common line rate structure in 1997 that, by replacing the CCLC with PICCs and increased SLCs, it was reducing, and gradually eliminating, support flows that had previously run from high-volume to low-volume end users.[15] For two reasons, however, the Commission did not anticipate that these changes would have immediate, significant effects on the telephone bills of those low-volume users. First, the Commission initially set the primary residential and single-line business PICCs at levels approximately equal to a universal service charge that the Commission eliminated when it adopted the PICC.[16] Second, IXCs had not previously imposed flat charges on end users to recover that universal service charge. In any case, the Commission believed that, even if IXCs did pass on the modest initial PICCs as flat charges, most consumers would enjoy benefits in the form of lower long-distance rates, and that those benefits would outweigh the burden of a small, flat monthly charge. That belief has proven correct for some consumers, in that long-distance rates overall have continued to decline.[17]

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14 *See* Access Charge Reform, Third Order on Reconsideration, 13 FCC Rcd 21525 (1998).

15 *See Access Charge Reform Order*, 12 FCC Rcd at 15994-95, 16013.

16 The 53 cent PICC was approximately equal to the presubscribed per-line charges that IXCs contributed toward the Universal Service Fund and Lifeline Assistance plan that the Commission eliminated in the *Universal Service Order* that it adopted concurrently with the *Access Charge Reform Order*. *See id.* at 16020-21.

17 The PICC first took effect in January 1998. The Consumer Price Index (CPI) for interstate toll service dropped from 75.2 in December 1997 to 74.6 in December 1998, or 0.8 percent in absolute terms and 2.4 percent once adjusted for inflation. PHIL CHEILIK, FEDERAL COMMUNICATIONS COMMISSION, REFERENCE BOOK OF RATES,

11. The Commission's goal, and that of the Congress that passed the Telecommunications Act of 1996, is to bring to all Americans the benefits of a robust and competitive communications marketplace. Since passage of the Act, competition has created greater choice and value for many consumers. Some customers of long-distance service, however, are now paying additional flat charges that IXCs claim recover some of the costs that the customers were previously paying in per-minute charges under the old access charge regime. A number of factors the Commission did not anticipate have affected consumers who make few interstate long-distance calls.

12. First, AT&T, MCI, and Sprint each charge their residential customers with a single presubscribed line a flat, averaged, monthly PICC pass-through charge of $1.51, $1.07, and 85 cents, respectively.[18] In the *Access Charge Reform Order*, the Commission did not prohibit IXCs from using such charges to recover their PICC costs. The Commission did, however, take steps intended to make it more likely that any such charges would be modest in size. Specifically, as discussed above, we decided to phase the PICC in gradually, setting the initial price-cap LEC ceiling for the charge on primary residential lines at 53 cents. Notwithstanding these prudent steps, we recognize that access reform requires the Commission to unravel and rationalize an entrenched, complex web of implicit subsidies, all at a time when competition and technological innovation are making unprecedented changes to the industry. Reforms of this magnitude and complexity will sometimes yield unanticipated effects, regardless of how careful we are to avoid them. Second, since the *Access Charge Reform Order*, AT&T and MCI have initiated monthly minimum usage charges for their basic-rate residential customers, which their customers must pay even if they make no long-distance calls in a month. AT&T residential customers are subject to a $3.00 minimum.[19] Residential customers who subscribed to an MCI calling plan before January 3, 1998, are subject to a $5.00 minimum; thereafter, customers who subscribed to any MCI residential service are subject to a $3.00 minimum.[20] Third, AT&T also has chosen to recover some of its contribution to the Universal Service Fund through a flat charge of 99 cents per month on its residential customers, even though its contributions are not calculated as a flat charge.[21] Thus, a residential customer with a single telephone line who selects AT&T as her presubscribed carrier, but who makes no interstate long-distance

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PRICE INDICES AND EXPENDITURES FOR TELEPHONE SERVICE Tbls. 4.1 & 4.2,at 68, 78 (June 1999). The CPI dropped another 4.1 points to 72.5 between December 1998 and May 1999, making the total decline 3.6 percent from December 1997, without adjusting for inflation. *See* BUREAU OF LABOR STATISTICS, CONSUMER PRICE INDEX—ALL URBAN CONSUMERS: INTERSTATE TOLL CALLS (Series ID: CUUR0000SS27051) (available at the Bureau of Labor Statistics web site, <http://146.142.4.24/cgi-bin/srgate>).

[18] *See* AT&T Tariff FCC No. 27, 3rd Rev. P. 24-555, at § 24.1.18.C (eff. July 1, 1999); MCI Tariff FCC No. 1, 14th Rev. P. 16.3, at § C.1.061111 (eff. July 1, 1999); Sprint Tariff FCC No. 1, 4th Rev. P. 38.2, at § 3.11.10 (eff. Oct. 17, 1998).

[19] *See* AT&T Tariff FCC No. 27, 1st Rev. P. 4-7.3, at § 4.1.1.N (eff. June 15, 1999); 1st Rev. P. 24-57.39, at § 24.1.1.U.2 (eff. Sept. 5, 1998).

[20] *See* MCI Tariff FCC No. 1, 140th Rev. P. 19.1, at § C.3.021211 (eff. Feb. 1, 1999); 3rd Rev. P. 19.183, at § C.3.421 (eff. Jan. 3, 1998).

[21] *See* AT&T Tariff No. 27, 3rd Rev. P. 24-555, at § 24.1.18.D (eff. July 1, 1999).

telephone calls in a particular month, may pay $5.50 to AT&T that month.[22] An MCI customer with the same calling pattern will pay $6.07 or $4.07, depending on how recently the customer signed up for service. Previously, such customers would have paid nothing to their presubscribed IXCs in a month in which they made no long-distance calls.

13. In light of these significant developments, we wish to inquire whether the flat charges imposed on consumers who make few long-distance calls are appropriate. We emphasize our continued commitment to implementing needed access charge and universal service reforms. Thus, we do not mean to signal a change in our intention to phase in an economically rational common line rate structure, to eliminate per-minute common line charges, and to reduce the support burden on high-volume long-distance and business customers. At the same time, however, we want to ensure that all customers—including low-volume residential and single-line business consumers—share the benefits of a rational rate structure in an equitable manner. We intend to do so consistent with the pro-competitive, deregulatory framework of the 1996 Act. Thus, we seek comment on a number of issues.

14. Long-distance companies have alleged that some of the charges that have appeared on end users' bills are justified. For example, AT&T, MCI, and Sprint originally argued that they collected an averaged PICC pass-through charge because the bills they receive from price cap LECs do not enable them to determine which of their customers have primary residential lines and which have non-primary lines. We have since addressed that issue, however, by requiring price cap LECs to provide IXCs with more detail about the status of customers' lines.[23] Some IXCs argue that the minimum usage charges are designed to recover the costs they incur maintaining account and billing records for their customers.[24] Some also claim that the Universal Service Fund (USF) charges they assess are designed to recover not only their USF contributions, but also the contributions of some incumbent LECs, which have themselves sought to recover USF contributions from the IXCs. Thus, as a threshold matter, we seek comment on the validity of these arguments. Commenters evaluating these arguments and the amounts being imposed should do so with specificity, including whatever data or calculations are necessary to support or refute these arguments. We also seek comment on whether, for purposes of assessing the impact of carriers' actions on consumers, we should consider consumers as a whole, or low-volume consumers relative to

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[22] We acknowledge that AT&T has argued, since at least 1995, that its basic schedule residential rates were below cost for low volume users. *See* Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, 11 FCC Rcd. 3271, 3314 (1995) (AT&T Reclassification Proceeding). We also recognize that certain of the commitments AT&T made in the *AT&T Reclassification Proceeding* were intended to protect low-volume residential customers, including a commitment not to raise basic schedule rates above a specified level. *Id.* at 3315-17. Finally, we note that AT&T's imposition of a $3.00 minimum usage requirement followed the expiration of its three-year commitments made in the *AT&T Reclassification Proceeding*.

[23] *See* Access Charge Reform, Second Order on Reconsideration and Memorandum Opinion and Order, 12 FCC Rcd 16606, 16610 (1997) (requiring price cap LECs to provide IXCs with customer-specific information about the PICCs they assess on them); MCI Emergency Petition for Prescription, Memorandum Opinion and Order, 13 FCC Rcd 11127, 11127 (Common Carrier Bur. 1998) (requiring price cap LECs to include a "class of customer" indicator on Customer Account Record Exchange (CARE) transactions for new customer notifications).

[24] In an attempt to alleviate such costs, some IXCs have indicated an intention to move some low-volume consumers to bimonthly, or even quarterly, billing schedules.

high-volume consumers. In addition, we seek comment on whether the impacts on any subset of consumers, or consumers generally, are sufficiently significant, unanticipated, inequitable and/or uneconomic to warrant regulatory intervention.

15. Commenters should address the nature of any other fixed costs that IXCs incur in serving low-volume presubscribed users. Commenters should also address whether the introduction of flat rate charges or minimum usage requirements is the result of competitive market dynamics, and whether it is reasonable to assume that implicit subsidies could be eliminated and competition introduced into previously regulated markets without some customers (those previously subsidized) paying more. We also invite commenters to address whether the introduction of minimum charges has caused an adverse effect on telephone subscribership.

16. We also seek comment on the extent to which the Commission should rely on competition to provide services suitable to the needs of low-volume residential customers. We note that a telephone customer is not required to have a presubscribed interexchange carrier in order to place long-distance calls. A customer who chooses not to presubscribe will pay the PICC directly to the LEC, but may not have to pay marked up, minimum-usage, or universal-service charges. That customer will not be able to make a long-distance call simply by dialing "1+area code+number," but will be able to "dial around" by first dialing a seven digit code (typically "10-10-XXX"). Dial-around carriers advertise heavily, and some have plans that feature favorable per-minute rates without additional monthly or per-call charges. We seek comment on whether the availability of dial-around services means that we do not need to take special measures to protect low-volume users. We also seek comment on what evidence of consumer choice would be sufficient to indicate that customers have adequate alternatives to calling plans that include these types of non-usage sensitive charges. For example, would a decline in the number of customers subscribing to a particular carrier's basic plan be evidence that the market is providing alternatives?

17. We also observe that, as mentioned above, some of the costs presubscribed IXCs claim users impose on them even when they make no calls may be attributable to account and billing maintenance. The customers' LECs, on the other hand, already incur that kind of cost in providing local exchange service to the customers, and would presumably experience little incremental costs if they became the customers' presubscribed IXCs as well. We seek comment, therefore, on whether the entry of Bell Operating Companies (BOCs) into the long-distance market will mitigate the problems currently experienced by low-volume long-distance users. We also seek comment on whether any changes to our rules, or forbearance from enforcing any part of the Act, would be necessary to ensure that low-volume users receive the fullest benefits possible from BOC entry into the long-distance market, pursuant to section 271 of the 1934 Act, as amended.[25]

18. In the event we determine based on the record that regulatory intervention is warranted to protect consumers from some of the actions described above, we seek comment on the scope, method, and our jurisdiction for such intervention. Are there measures we can take that do not require direct regulation of IXCs, but that would give this Commission greater control over the manner in which access charges and universal service assessments are passed on to consumers? Specifically, should we require

[25] *See* 47 U.S.C. § 271.

LECs to bill the residential PICC directly to the end user, rather than bill it to the IXC?[26] Would such a requirement help ensure that single-line customers do not pay an averaged residential PICC? Similarly, should we stop allowing LECs to recover their universal service contributions from IXCs through the so-called "flow-back" mechanism and instead require LECs to recover those payments from their own end users, at the same percentage rate at which the universal service contribution is assessed to the LEC? Would this action help ensure that residential consumers do not pay a disproportionate share of universal service support? Would such measures help ensure that end users, not just IXCs, benefit from any decrease in LEC contributions to universal service caused by increased participation of other interstate telecommunications service providers? We also seek comment on whether efforts by the Commission, states, and consumer groups to educate consumers regarding choices they can exercise in the marketplace—choices which could minimize the impacts on consumers of these sorts of actions by carriers—could be used to reduce or eliminate the need for additional regulation to accomplish the same purpose. We also seek comment on whether, and the extent to which, government intervention despite the availability of competitive choices may be in tension with the deregulatory emphasis of the Act. In addition, we seek comment on any opportunity costs associated with these potential government actions.

19. We also seek comment on the relationship between the impact of access reform and universal service charges on low volume consumers and our universal service obligations pursuant to section 254 of the Act. In particular, we seek comment on:

a. whether a correlation exists between income and long-distance telephone usage;

b. whether the concept of universal service should include some amount of affordable interstate interexchange service for low-volume users;

c. whether the definition of "affordability" under section 254 should allow a customer who ordinarily makes few long-distance calls to avoid minimum use charges or unreasonably high usage rates;

d. whether the affordability of long-distance service is adequately addressed by other policies, such as rate integration;[27]

e. whether lowering off-peak access charges or implementing capacity-based access charges would ameliorate some of the concerns regarding low-volume users;

f. whether, if it is demonstrated that IXCs are recovering more than their universal service or access charge contributions (*e.g.*, PICCs) through end-user charges, the Commission can and should correct such over-recovery and, if so, how;

g. whether the Commission can, consistent with the objectives of universal service and access reform, prohibit IXCs and LECs from recovering charges associated

[26] *See, e.g.*, MCI Petition for Prescription, CC Docket No. 97-250, at 8 (Feb. 24, 1998).

[27] *See* 47 U.S.C. § 254(g).

with those reforms through flat charges, or require any such recovery to be on a percentage basis that mirrors the manner in which the contributions are assessed upon the carriers.

20. Commenters addressing these issues should assess both the advantages and disadvantages of these proposals, both generally and in relationship to the principle, which we reaffirm here, that the Act requires that we phase in an economically rational common line rate structure, eliminate per minute common line charges, and reduce the support burden on high-volume long-distance and business customers. We further seek comment on the extent to which some or all of these questions should be answered in consultation with the Joint Board, including whether there are jurisdictional or other reasons why consultation would be appropriate.

21. In addition, we seek comment on whether, consistent with the continued treatment of IXCs as non-dominant carriers, the Commission should require all or some subset of IXCs:

a. to maintain rate plans that do not include a minimum monthly charge, to the extent they have not done so voluntarily;

b. to pass through a specific portion of interstate switched access charge reductions to a basic rate plan;

c. to pass through a PICC calculated as a percentage of the bill, capped at a certain dollar level;

d. to include consumer education inserts with their bills detailing alternative ways consumers can obtain long-distance service.

22. To the extent commenters contend that these actions would not be consistent with non-dominant treatment, we seek comment on the advantages and disadvantages of taking these actions nonetheless. In particular, we note the many competitive benefits associated with our deregulation of the long-distance market (expanded consumer choice, new products and services, and overall lower prices), and we seek comment on whether the opportunity costs associated with taking the above actions outweigh the benefits of doing so.

23. We note that some of the federally regulated charges are reduced or eliminated for qualifying low-income consumers eligible under our Lifeline program,[28] and IXCs sometimes exempt low-income consumers from certain of their charges or minimums.[29] Thus, low-income consumers taking advantage of these exemptions may not be adversely affected by the IXC minimum charges, PICC pass-

[28] *See* 47 C.F.R. §§ 36.711, 52.33, 54.400, 54.401, 54.403, 54.405, 54.409.

[29] *See, e.g.*, AT&T Tariff FCC No. 27, 2nd Rev. P. 3-19.5, at § 3.5.12.C (eff. June 15, 1999) (exempting low-income subscribers from AT&T's PICC charge), 2nd Rev. P. 3-19.6, at § 3.5.12.D (eff. July 1, 1999) (exempting low-income subscribers from AT&T's USF charge); MCI Tariff FCC No. 1, 140th Rev. P. 19.3, at § C.3.021212 (eff. Feb. 1, 1999) (exempting customers subscribed to a low-income program from the monthly minimum charge).

throughs, and flat charges to collect contributions for the Universal Service Fund. Should we create similar protections for low-volume residential consumers not qualified under our Lifeline program? Is the Lifeline program not reaching certain groups of consumers?

24. As we have stated, in addition to seeking comment on the consumer impact of charges associated with access and universal service reform, we also would like suggestions on how best to understand and manage the impact on consumers of charges attributable to pro-competitive actions other than access and universal service reform. For example, to eliminate a barrier to local market entry, section 251(b)(2) of the Act requires that incumbent LECs provide local number portability.[30] The Act also states that carriers shall bear the costs of this pro-competitive reform in a competitively neutral manner.[31] The Commission has implemented its obligation to provide for such cost recovery, in part, by allowing carriers to assess per-line charges on their customers.[32] The Commission has reviewed these charges to ensure that carriers recover only costs directly attributable to local number portability.[33]

25. In addressing the consumer impact of charges associated with access charge and universal service reform on consumers, should the Commission consider the impact of end user charges resulting from other reforms, such as number portability? Should the Commission consider requiring carriers to combine charges associated with all of our pro-competitive reforms into a single line item or allow carriers to identify these charges in some other way? On what statutory authority could the Commission rely if it were to adopt such a "one-line" requirement? Moreover, should the Commission assess the overall cost impact of all of our pro-competitive reforms on consumers in a single proceeding or in the context of separate proceedings? Which proceeding or timeframe is best suited for assessing the cost impacts of our various reforms on consumers? We seek comment on these questions. Commenters addressing these questions should do so with specificity, making detailed proposals where appropriate.

26. We also seek comment on whether providers in other industries impose minimum usage requirements or flat rate charges that apply regardless of usage. Are there other examples of such charges in the communications industry? Is there any reason for the Commission to object to flat rate pricing for all long distance services? Should the Commission intervene if a customer chooses such a plan, and the Commission later determines that a usage rate plan would result in a nominally lower bill for the

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[30] 47 U.S.C. § 251(b)(2).

[31] 47 U.S.C. § 251(e)(2).

[32] *See* Telephone Number Portability, Third Report and Order, 13 FCC Rcd 11701 (1998).

[33] *See* Long-Term Telephone Number Portability Tariff Filings, CC Docket No. 99-35, Reconsideration of Decision to Suspend and Investigate Tariff Filings of Sprint Local Telephone Companies, DA 99-475 (Common Carrier Bureau Competitive Pricing Div. rel. March 8, 1999); Reconsideration of Decision to Suspend and Investigate Tariff Filings of Bell Atlantic Local Telephone Companies, DA 99-707 (Common Carrier Bur. Competitive Pricing Div. rel. April 15, 1999); Reconsideration of Decision to Suspend and Investigate Tariff Filings of BellSouth Telecommunications Inc, DA 99-1157 (Common Carrier Bur. Competitive Pricing Div. rel. June 14, 1999); Memorandum Opinion and Order, FCC 99-158 (rel. July 16, 1999) (addressing filings of Ameritech, GTE, Pacific Bell, and Southwestern Bell); Memorandum Opinion and Order, FCC 99-169 (rel. July 16, 1999) (addressing filings of U S WEST).

consumer?

IV. Procedures

27. Pursuant to Sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments no later than September 20, 1999, and reply comments no later than October 20, 1999. Interested parties may file using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies. *See* Electronic Filing of Documents in Rulemaking Proceedings, 63 Fed. Reg. 24,121 (1998). All filings should reference the CC Docket No. 99-249.

28. Parties submitting pleadings through the ECFS can send their comments and replies as electronic files via the Internet to <http://www.fcc.gov/e-file/ecfs.html>. Generally, interested parties need to file only one copy of an electronic submission. If multiple docket or rulemaking numbers appear in the caption of this proceeding, however, interested parties must transmit one electronic copy of the pleading to each docket or rulemaking number referenced in the caption. In completing the transmittal screen, interested parties should include their full name, postal service mailing address, and the applicable docket or rulemaking number. Interested parties may also file by Internet e-mail. To get filing instructions for e-mail submission, interested parties should send an e-mail message to ecfs@fcc.gov, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

29. Interested parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appear in the caption of this proceeding, interested parties must submit two additional copies for each additional docket or rulemaking number. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, 445 12th Street, S.W., Counter TWA 325, Washington, D.C. 20554. Filings are no longer accepted at the Commission's facilities located at 1919 M Street, N.W., Washington, D.C. 20554. Subject to the provisions of 47 C.F.R. § 1.1203 concerning "Sunshine Period" prohibitions, this proceeding is exempt from *ex parte* restraints and disclosure requirements, pursuant to 47 C.F.R. § 1.1204(b)(1). For additional information regarding this proceeding, contact Neil Fried at (202) 418-1530; TTY: (202) 418-0484.

V. ORDERING CLAUSE

30. Accordingly, IT IS ORDERED that, pursuant to sections 201-05, 208, 254, and 403 of the Communications Act, 47 U.S.C. §§ 201-05, 208, 254, and 403, this Notice of Inquiry IS ADOPTED.

Federal Communications Commission

Magalie Roman Salas

Magalie Roman Salas
Secretary

Separate Statement
of
Commissioner Susan Ness

Re: Low-Volume Long-Distance Users (CC Docket No. 99-249)

Today, most consumers are reaping the benefits of thriving competition in the long distance market—choice is abundant, innovation is rampant, and per-minute rates are the lowest they have ever been. But some consumers are being left behind. Low-volume consumers, in particular, are facing an array of new line-item charges that may exceed the offsetting benefits of per minute rate reductions. For some unknown number of consumers, the most important line—the bottom line—is increasing.

Rates are being restructured in part because of the market segmentation that naturally occurs in a substantially competitive and unregulated market. Additional causes of rate changes are the ongoing changes in interstate access charges and universal service support. What remains to be determined is whether some of the charges that are being imposed are attributable to marketplace imperfections, or distortions, and whether the operation of market forces alone can reasonably be expected to correct any consumer abuses that may be occurring.

I continue to believe the Commission was right in looking to competition, rather than entry, exit, and price regulation, as the primary mechanism for disciplining behavior in the long distance market. I also believe that the Commission has generally followed the appropriate path in reforming the collection of universal service support revenues and in allowing local exchange carriers to recover a greater share of their fixed costs through non-traffic sensitive charges to interexchange carriers. These developments are consistent with the Telecommunications Act of 1996; they are fair to all parties; and they promote increased economic efficiency, which should benefit all consumers.

But it is entirely appropriate to examine how these decisions are being implemented in the marketplace. There is anecdotal evidence that some consumers are being charged monthly fees that represent more than their allocated share of any associated universal service support payments or "presubscribed interexchange carrier charges" and are, in addition, being assessed monthly minimum fees whose reasonableness has yet to be established. Are low-volume consumers paying their fair share of the costs of interstate access, universal service, and carriers' costs of maintaining accounts—or more than their fair share? If the latter, we need explore what corrective actions might be taken—by this Commission, by our colleagues on state commissions, by the carriers, or by consumers themselves.

In short, we have a responsibility to assess the cumulative impact of our orders, and of the carriers' billing practices, on consumers as well as on competitors. Through this notice of inquiry, we are presenting these issues for discussion. I underscore that this is a notice of inquiry, not a *notice of proposed rulemaking*. We must understand market conditions and carriers' practices before we can properly conclude that there is a problem, much less determine how it should be fixed. This is precisely the right manner in which to proceed, cautiously, with open minds, and a willingness to understand the situation before we decide what should or should not be done.

Dissenting Statement
of
Commissioner Harold Furchtgott-Roth

Re: Low-Volume Long-Distance Users (CC Docket No. 99-249)

I respectfully dissent from this Notice of Inquiry regarding the impact of flat-rated and minimum usage charges on low-volume users. I write to express my ardent opposition to this inquiry because I believe that the mere suggestion of re-regulating a competitive market is antithetical to the Telecommunications Act of 1996. Moreover, the scope of this inquiry greatly exceeds what I believe is necessary to meet the stated goal of this proceeding and cannot be justified. Finally, I am concerned about the use of limited Commission resources on an exercise driven by questionable motives.

I. This Notice of Inquiry is Antithetical to the Telecommunications Act.

The Telecommunications Act of 1996 was landmark legislation. Historically, telecommunications markets were micromanaged by both federal and State regulation and were largely closed to competition. Throughout the Telecommunications Act's various statements of objectives, the concepts of competition and deregulation for telecommunications markets are often repeated. The message from Congress is clear: federal regulators must refrain from intruding in competitive markets.

The Commission has long recognized that the market for long distance services is substantially competitive.[1] In reclassifying AT&T as a non-dominant carrier, the Commission noted "intense rivalry" in the long distance market, and found that no long distance carrier had the ability to control prices in the market.[2] On numerous subsequent occasions, the Commission has acknowledged that the long distance market is substantially competitive.[3] Indeed, in announcing this inquiry to the press, the Commission

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1 In 1991, the Commission found that certain business and toll-free services had become substantially competitive. *See* Competition in the Interexchange Marketplace, CC Docket No. 90-132, Report and Order, 6 FCC Rcd 5880 (1991). By 1995, the Commission had concluded that most major segments, and the vast majority, of long-distance services were subject to substantial competition. Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, Order, FCC 95-427, 11 FCC Rcd 3271 (1995).

2 *Id.* at para. 26, 72.

3 *See, e.g.,* Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579, 13 FCC Rcd 11810, Report to Congress, FCC No. 98-85 (1998)(Commission stating that, because long distance markets are substantially competitive, it would expect long distance companies to pass through access charge reductions to their customers.); *see also* Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, CC Docket No. 96-61, Second Report and Order, 11 FCC Rcd 20730 (1996) recon. pending. (the development of a substantially competitive market for interstate interexchange services enables the Commission to seek to eliminate tariffs for non-dominant interexchange carriers); Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area, Second Report and Order, FCC No. 97-142 (1997) ("Because we previously have found that markets for long distance services are substantially competitive in most areas, marketplace forces should effectively deter carriers that face competition from engaging in the practices that Congress sought to address through the section 214 requirements.").

acknowledged "the competitive nature of the long distance industry in this country."[4]

Despite the unambiguous mandate from Congress to refrain from regulating competitive markets, like the one for long distance services, the majority insists on suggesting the possibility of "regulatory intervention." Today's Notice of Inquiry is replete with suggestions of federal government intrusion into the competitive long distance market.[5] Inquiries about whether the pricing decisions made by market participants "are appropriate" or whether their charges "are justified" are vestiges of cost-based regulation. How can it be that the Commission must still ask "whether, and the extent to which, government intervention despite the availability of competitive choices may be in tension with the deregulatory emphasis of the Act."[6] Opening this type of inquiry will undoubtedly have a chilling effect in this competitive industry. I find it impossible to reconcile the mere suggestion of re-regulation of this market with the deregulatory objectives of the Telecommunications Act.

II. The Scope of this Inquiry Exceeds What is Necessary to Reach Its Stated Goal

If the majority's true concern is to protect low-volume users, the scope of this inquiry far exceeds what is necessary. There are certainly long distance carriers in the market today that offer service without flat-rated or minimum charges. In fact, in a recent press release Chairman Kennard made the entirely rational suggestion to consumers that, if they "see higher flat fees [on their long distance bills] without reduced per-minute rates, they may want to shop around for another long-distance company, or even consider not having a presubscribed long-distance company at all."[7] It seems the Chairman recognizes that consumers are well suited to help themselves in a competitive market. In any event, the Commission could satisfy its stated goal by simply considering whether to collect and to disseminate information regarding the flat-rated and minimum charging policies of each market participant. Make no mistake, I do not believe that this is the proper role of a government agency, nor do I believe that the Communications Act directs the Commission to take such action. Private entities are better suited to serve this function. I merely note that the inquiries in today's item go far beyond this narrow topic. This inquiry indicates that the majority will, at a minimum, consider a return to the methods of micro-management of pricing decisions that Congress has rejected.

III. The Inquiry Cannot Be Justified.

The majority justifies this inquiry on the emergence of a number of factors "it did not anticipate" resulting from its access and universal service reform proceedings. Specifically, the Commission cites as "significant developments:" (1) the decision of three competitive long distance providers to charge a flat,

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4 "FCC to Ensure that All Consumers Benefit from Competition," Commission Press Statement, July 16, 1999.

5 *See, e.g.,* Low-Volume Long-Distance Users, Notice of Inquiry, CC Docket No. 99-249, at paras. 14 (whether conditions "warrant regulatory intervention"), 18 (what scope of regulatory intervention is warranted), 19 (whether the Commission can prohibit long distance carriers from recovering charges through flat charges), 21 (whether the Commission should require long distance carriers to maintain certain rate plans).

6 *Id.* at para. 18.

7 "FCC to Ensure that All Consumers Benefit from Competition," Commission Press Statement, July 16, 1999.

averaged, monthly PICC pass-through charge; (2) the decision of two competitive long distance providers to initiate monthly minimum usage charges for basis-rate customers; and (3) the decision of one competitive long distance provider to recover some of its universal service contribution through a flat charge.[8]

As an initial matter, I am deeply disturbed by the suggestion that a government agency should regulate based on any "anticipated factors" other than those which one would expect in a competitive environment.[9] The public should have full confidence that we, as regulators, have no preconceptions about the results of our decisions other than the belief that a competitive outcome is the best that can occur. The notion of unanticipated factors affecting regulatory action is, at its core, an archaic and anti-consumer concept that suggests a belief that federal bureaucrats, through omniscience and omnipotence, make better decisions than consumers in a competitive market. It is similar bureaucratic arrogance that leads some to believe that government can concoct models to consider every conceivable factor to reach a perfect outcome. When government says that a model can do as well as a market in terms of efficiency, the government is engaging in self-deception.

In any event, it is disingenuous to suggest that the decision of a participant in a competitive market to pass along its costs to its customers is "unanticipated." In fact, this was not unanticipated. For months, I have explained that, in a competitive market, prices are determined by costs. Competitive businesses take prices as given by costs, not by the wishes of outside spectators. Simple economics dictate that competitive businesses must pass along new costs, including new taxes, to their customers.[10] I certainly did not invent this idea. It is one that any college freshman taking a basic economics course could repeat. In fact, the Commission relied on this basic economic principle in touting that recent access charge reductions, *i.e.*, reductions in the costs faced by participants in a competitive market, were likely to lower prices.[11] It seems that the Commission is comfortable with long distance carriers passing through their cost savings, but uncomfortable when those same carriers pass through their fixed costs and newly imposed taxes.

I support the Commission's regulatory reforms designed to eliminate implicit subsidies. Recovering non-traffic-sensitive costs on a usage-sensitive basis creates an implicit subsidy from high-volume users to low-volume users. I agree that these implicit subsidies have a disruptive effect on competition. To the extent the Commission's reforms remove this subsidy, we must now let competitive

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8 Low-Volume Long-Distance Users, Notice of Inquiry, CC Docket No. 99-249, at para. 12.

9 I explain below why these so-called unanticipated factors were entirely predictable given the competitive nature of the long distance market.

10 *See, e.g.,* Dissenting Statement of Commissioner Harold Furchtgott-Roth, Federal-State Joint Board on Universal Service, FCC 98-120.

11 "Access Charges Cut -- Lower Long Distance Rates Should Follow," Commission Press Statement, June 29, 1999 ("'Consumers should be the ultimate beneficiaries of these reductions,' said [FCC] Chairman William E. Kennard.); *see also* Report in Response to Senate Bill 1768 and Conference Report on H.R. 3579 (Commission stating that, because long distance markets are substantially competitive, it would expect long distance companies to pass through access charge reductions to their customers).

forces work. I do not believe that eliminating regulatory barriers to competition can ever be the impetus for further regulatory action by this agency. We must not intervene in a competitive market whether it be for the "protection" of consumers or for any other reason.

The majority maintains that its inquiry is designed to ensure that low-volume residential and single-line business consumers share in the benefits of universal service and access charge reform. Three members of this same majority, however, weeks ago raised the e-rate tax on these same customers' bills by $1 billion -- roughly $10 per household per year -- to pay for an excessive schools and libraries program. Where was their concern for consumers then?

IV. The Commission's True Motivation

This overly-broad inquiry leads me to question the motives of the Commission in adopting this item. First, I believe that the timing of this Notice is designed to coincide, at least approximately, with the decrease in access charges and the exorbitant increase in funding of the schools and libraries program. Moreover, I am deeply concerned that, yet again, the Commission has taken regulatory action for the purpose of distancing itself from the taxes that they established, and because they are angry with carriers who have informed consumers about the tax. I am concerned about the use of limited Commission resources on an exercise driven by questionable motives.

Timing of the Notice of Inquiry

The Commission has engaged in a public relations campaign to convince the Washington political establishment that massive increases in the e-rate tax could be offset by access charge reductions and that the American consumer need not ever know about either the access charge reduction or the increased e-rate tax. In this way, the Commission can claim that its new tax is not responsible for increased rates. The Commission's campaign, however, does not ring true for at least one set of consumers: low-volume users. I have repeatedly pointed out the fallacy in the connection between access charge reductions and increased universal service fund contributions; namely, there is no assurance that the consumers who benefit from access charge reductions will be the same consumers who will bear the new universal service burden. The issue should not be whether, despite massive tax increases that may offset decreases in federal access fees and charges, IXCs have no net differences in costs. The issue is whether, absent massive tax increases, consumers would be better off. Today's inquiry seeks to assuage those consumers from whom the Commission is unable to hide its e-rate tax increase.

Another Attempt to Conceal the E-rate Tax

From its inception, the Commission has attempted to conceal the e-rate tax from consumers. It has done so through a series of actions, both formal and informal, to coerce long distance companies into hiding the tax. First, it employed behind-the-scenes threats and pressure. When that was unsuccessful, the Commission made its threats public by adopting unconstitutional "truth-in-billing" rules ostensibly designed to penalize "deceptive" billing practices that, in fact, limit how long distance carriers may identify e-rate tax line items on their bills. Now, the Commission is unholstering its biggest threat of all: the power to re-regulate the long distance industry.

This story begins with the Commission's development of the schools and libraries program. In a May 1997 Order, the Commission "requir[ed] phone companies [to] make . . .[a universal service] 'contribution' for the social good of wiring schools and libraries to the internet. . . . [T]he companies will have to hand over $2.25 billion in extra charges for the wiring cause." *New Phone Tax*, Wall Street Journal, December 9, 1997.

In December of 1997, I first noted my concern that the Commission was pressuring carriers not to place line-items for these charges on their consumers' bills.[12] At the time, it was widely reported that the "Commission prefers that [universal service costs] be rolled into rates,"[13] and that the FCC was irate with companies that planned to pass this tax through to consumers:

> The FCC is angry at companies that plan to disclose those costs to customers as a line item on the monthly bill. "They don't want us to call it a tax," [said one industry representative]. "But that's what it is."

A New Tax for the New Year, The Washington Post, December 2, 1997.

I objected to the Commission's efforts to hide this tax from consumers, making clear that "I do not share such a preference or endorse such efforts. . . . No carrier should have its billing information restricted or limited by the Commission."[14] Indeed, I believe that consumers have a right to know when they are paying federal charges; the Commission should not discourage companies from placing federal universal service charges on their bills. Line items for new taxes are a means of letting customers understand why rates are not lower than they would have been absent the new taxes. These line items are not a means of promoting "hidden rate increases," as some have called it. To the contrary, the only "hidden rate increases" here are those that result from obscured and unexplained taxes.

Despite the benefits of fully informing consumers about government-mandated charges, "[t]he administration, which has touted the [schools and libraries] program as the centerpiece of President Clinton's education goals, would rather that customers not know." *Itemized list of phone fees hotly debated*, USA Today December 15, 1997 at B-12. So, it was reported, "the FCC . . . had been pushing hard to get major long-distance carriers to agree not to put line-item charges on residential phone bills at least until July." *FCC Postpones Ruling on Internet Connections*, Washington Post, December 13, 1997 at F-9. These efforts were designed to "mask [the tax] for a while, to take some pressure off from the Hill." *Id.* For the first few months of the program, the Commission even "decided to reduce the [initial universal service] charges after the carriers said the fee could lead to higher rates and after AT&T and MCI threatened to specify the charge on the bills they send to customers." *Fund to Aid Technology in Schools Facing Big FCC Cuts*, New York Times, December 15, 1997 at D-1. Apparently, "the agency worried that if millions of Americans began seeing such fees on their bills, popular support for

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12 Federal-State Joint Board on Universal Service, Third Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 22801, 22814 (1997) (Dissenting Statement of Commissioner Furchtgott-Roth).

13 Monday December 8, *Communications Daily.*

14 Federal-State Joint Board on Universal Service, Third Order on Reconsideration, CC Docket No. 96-45, 12 FCC Rcd. 22801, 22814 (1997) (Dissenting Statement of Commissioner Furchtgott-Roth).

deregulating the telecommunications industry could begin to erode." *Id.* At this point, most large carriers began to place the line items only on bills for commercial customers, declining to specify the charges on bills for residential customers.

Last spring, the general issue of line items for schools and libraries "contributions" arose again when the Commission began to consider raising the funding level for the schools and libraries program. By then, many carriers had announced that they would recover these costs through separate line items on individual consumers, such as residential customers. Again, these announcements angered some at the Commission. *See, e.g., Statement of Chairman William E. Kennard on AT&T Long Distance Announcement*, May 28, 1998 ("AT&T's announcement is premature, unwarranted and inconsistent with their own public proposals to the FCC. This announcement suggests that AT&T will raise rates to pay for universal service."); "*AT&T adding surcharges; FCC Furious*," USA Today, May 29, 1998 at 2 ("The FCC is livid.").[15]

Immediately after carriers announced their intent to place line items on residential bills, the Commission announced its plan to initiate a so-called "truth-in-billing" proceeding. *Schools, Libraries, Health Care Discounts Program Faces More Scrutiny*, Washington Report, June 15, 1998 (Commissioners "said they plan to adopt a notice of proposed rulemaking to help clear up consumer confusion about new rates and fees attributed to the discount programs").

Even worse, in the view of some at the Commission, opponents of the tax were blaming not just the Commission for the imposition new consumer charges, but also the current Administration, which strongly supported the schools and libraries program. As one news magazine reported:

> [The Vice President's] biggest high-tech achievement to date is a program to wire every classroom and library in the country. . . . But right now the program is under assault from congress as an out of control entitlement engineered by an out-of-control bureaucracy. Which does not do much for Gore's reputation as the architect of reinventing government. Even more ominous is another threat: starting this summer phone companies that were ordered to pay for the program are threatening to add a new charge to the long distance bills of residential consumers. Critics are already calling it the Gore Tax.

TIME, Karen Tumulty & John Dickerson, *Gore's Costly High Wire Act*, at 52, May, 25 1998.[16] Others

[15] *See also FCC Caught in Middle on Rate Rise*, June 11, 1998 at C-3 ("The FCC had hoped that long distance carriers would absorb the costs of the program, . . . But AT&T Corp., MCI Communications Corp. and other carriers plan to levy new charges, . . . "). *See generally, Some MCI Customers Seeing Surge in Phone Bills*, Washington Post, January 31, 1998 at page H-3 ("FCC officials are upset about being blamed by MCI for the new charges. The agency maintains that the universal service fees are technically charged to local phone companies, . . . which are authorized to seek compensation from long distance carriers. It's up to MCI and other long-distance companies to decide how to pay, the FCC contends.").

[16] *See also, id.* ("The blame inevitably finds its way to Gore, whose hands many see in virtually everything the FCC does."); *A New Tax for the New Year*, The Washington Post, December 2, 1997, ("The Internet in-the-schools idea was hatched by Vice President Gore and his friend Reed Hundt, the recently departed FCC chairman.

even claimed the schools and libraries program had been initiated in order to enhance the chances of possible presidential candidates, arguing that it was

> nothing less than a stealth campaign to enhance Gore's presidential prospects. "This was not to be a political cash-grant program so that Al Gore can run for President, [one Congressman] complain[ed]."

Id. at 55.

Toward the end of 1998, an investigation by the United States House of Representatives confirmed the Commission's attempt to prevent carriers from associating the federal government with these charges:

> It is clear that the FCC pressured and threatened long distance carriers in an inappropriate manner from taking action regarding how long distance carriers would recover their contributions to universal service from their telephone subscribers. The FCC was apparently motivated to exert such pressure to fulfill the Administration's political agenda to connect every classroom in the United States to the Internet by the Year 2000, and to do so while hiding the costs of their agenda from the American public.

Hill Report Finds FCC Threats, political Acts Against AT&T and MCI, Communications Daily, November 30, 1998.

In the "Truth-in-Billing" proceeding, the Commission adopted "standardized labeling" requirements that, when fully implemented, will prohibit any line items that indicate that the universal service charge is federally-mandated or federally-imposed. As I explained at the time the rules were adopted, I believe they raise serious concerns under the First Amendment.[17]

In initiating this Notice of Inquiry, the majority has sent another message to the long distance industry. In paragraph 18, the Commission asks: "Are there measures we can take that do not require direct regulation of IXCs, but *that would give this Commission greater control over the manner in which access charges and universal service assessments are passed on to consumers*?" I am troubled by what appears to be another attempt to control the long distance companies' attempts to inform consumers about the e-rate tax.

They consistently tout the benefits of the program, but not its costs."); *Senators tell FCC "Gore tax" too costly*, The Washington Times, June 11, 1998 at B-9 ("Lawmakers said the FCC overreached its mandate by setting up a $2.25 billion fund to wire schools and libraries, which critics have dubbed the "Gore tax" because of Vice President Al Gore's vigorous support of the program. The issue came to a head this week after long-distance companies said they would start adding about $1 a month to consumers' bills to fund the program."); *Phone Wars leave FCC in a Political Combat Zone*, The New York Times, August 13, 1998 at D-1 ("When a dispute arose over the commission's plan to raise money to subsidize internet connections for schools and libraries, the fees were immediately labeled the "Gore tax" on Capital Hill.").

[17] *See* Truth-in-Billing and Billing Format, CC Docket 98-170, First Report and Order and Further Notice of Proposed Rulemaking (Dissenting Statement of Commissioner Harold Furchtgott-Roth).

At bottom, I fear that this agency has only opened this inquiry because many carriers went "against the FCC's wishes and itemiz[ed] the phone tax." *New Phone Tax*, Wall Street Journal, December 9, 1997. That is not a legitimate reason for regulation.

Separate Statement
of
Commissioner Michael K. Powell, Concurring

Re: Notice of Inquiry, Low-Volume Long-Distance Users (CC Docket No. 99-249).

I write separately, both to express the degree to which I support this *Notice* and to highlight some important concerns I believe we should always bear in mind as we study this and similar issues related to the consumer impact of our pro-competitive reforms.

To the extent this *Notice* stands for the proposition that we should be conscious of the impact of our reforms on consumers, I vigorously support it. The 1996 Act reflects Congress' fundamental judgment that markets are more likely than traditional regulation to enhance consumer welfare. To effect this transition to competitive markets, we must impose requirements designed to eliminate the vestiges of the old monopoly system and its tangled web of implicit subsidies. Yet, try as we might, we regulators can never impose these requirements in a way that leads to fully predictable results for consumers. Thus, it is prudent that we monitor the impact of our reforms on consumers in an effort to ensure that such impacts are not inconsistent with the goals of the reforms or the Act more generally.

As we monitor these impacts, however, we must continue to resist the temptation to substitute politics for policy. That is, we must remain aware that some of our pro-competitive reforms may arouse passions in the public not so much because they "harm" consumers in any legitimate sense, but simply because these reforms involve change. One way that we can stay vigilant in this regard is to keep always in the backs of our minds two critical questions: (1) are these reforms necessary to promote competition; and (2) are these reforms fair? I look forward to examining these and related questions in the context of this proceeding. Even at this early stage, however, I firmly believe in the possibility that we can answer both of these questions resoundingly in the affirmative, while remaining true to our core mission of delivering on the Act's promise of competition for all consumers. I begin to explore the bases for this strong belief below.

I. Access Charge and Universal Service Reforms Are Necessary to Promote Competition

So, are our access charge and universal service reforms necessary to promote competition? This question has been asked, answered and affirmed repeatedly by this Commission and our predecessors, and I see no evidence on the horizon that would undermine that fundamental judgment. This is not a subjective or ideological preference but a conclusion borne of economics.

I applaud the Commission's stated commitment to reforming universal service to make those subsidies more explicit and portable. This reform will encourage new entrants to compete more vigorously for many consumers by undermining the advantage incumbent LECs have traditionally enjoyed by virtue of their exclusive access to implicit universal service subsidies.

Similarly, I applaud the Commission's ongoing recognition that in order to create incentives for economically efficient entry by competing exchange access providers, we will need to allow access charges to more properly reflect the manner in which access costs are incurred. Thus, costs that increase the longer one is on the phone might properly be recovered through per minute pricing. Moreover, costs that remain about the same, regardless of how many calls one makes, or how long any one call is, should be recovered by flat charges. As the *Notice* indicates, however, the artificially high per minute long distance rates resulting from traditional subsidies of low volume consumers distorted competitive entry. Competitors realized that high volume consumers and businesses were paying rates well above cost and thus seized on the opportunity to serve them and thereby maximize profits. Conversely, competitors have been slow to embrace low volume residential customers under the old system, because these firms are less likely to be able to recoup the costs of serving those customers, relative to serving high volume customers. High per minute long distance rates also have discouraged all consumers from using this valuable service. Our access charge reforms sought to correct these problems by ensuring that flat costs are recovered through flat fees and per minute costs through per minute fees.

Thus, both our access charge and universal service reforms are necessary to promote competition because they remove policies that tend to make some customers, particularly low volume customers, unattractive prospects for new entrants. Without these reforms, all consumers, including low volume consumers, would be much less likely to receive the benefits of competition.

II. Access Charge and Universal Service Reforms Do Not Appear to Be Unfair to Consumers

A. Low Volume Consumers as a Protected Class

Next we must ask whether our access charge and universal service reforms are fair to consumers. But what does it mean to be "fair" with respect to these reforms?

Of course, some suggest (as, regrettably, the focus of this item appears to) that because of some impediment or dysfunction suffered by low volume consumers, it is unfair to deny those consumers the benefit of being subsidized by their higher volume friends and neighbors. This notion is both untested and analytically weak.

Although I support watching to see if there are unanticipated impacts of our reforms, I worry that this *Notice* almost prejudges the issue whether "low volume consumers" constitute some type of protected class. As a threshold matter, a bit of caution is in order about whom such consumers may be. One might be misled to believe that low volume consumers are poor, elderly or rural individuals. In some cases yes, but by no means does low volume necessarily correlate with these groupings for which the government often accepts some social responsibility. Low volume simply means less long distance calling. Thus, wealthy parents whose kids and family live locally may be low volume consumers. Similarly, businesses that operate only locally are low volume with respect to long distance calling, as are high tech-types who use e-mail and Internet communications (via their local internet service provider, or ISP) instead of the phone. Conversely, there may be sympathetic high volume consumers who may seem equally deserving of special consideration (*e.g.*, poor immigrant families who make numerous long distance calls home to their families, rural customers isolated by distance and geography, working class families who are struggling to pay for their kids' college and stay in touch with them at the same time).

But even if we later determine that low volume consumers include constituencies for which government sometimes expresses sympathy, there is little evidence to suggest that low volume consumers are trapped in that status. To the contrary, the long distance industry constantly bombards all consumers with competitive pricing options through the mass media. Some of these options may ameliorate the impact of flat charges on consumers. In light of such competitive choices, it would seem over-regulatory – and, indeed, paternalistic – to take steps to minimize impacts on consumers before at least attempting to educate them on how they may protect *themselves* in the marketplace. For example, customers can make use of dial around services that allow the customer to by pass the costs charged by a presubscribed carrier. In addition, customers can switch to rate plans that offer greater value through lower long distance rates. In sum, I am not yet persuaded that the competitive choices available to consumers are insufficient to afford them adequate opportunity to protect themselves against the potential harms described in the *Notice*.[1]

I believe we must continue to resist the temptation to favor certain consumers over others unless there is a well-documented and compelling reason to do so. Rather, we must look beyond poorly defined groups of consumers to assess the impact of our reforms on *all* consumers. We also must recognize that, in the competitive paradigm, our primary role as regulators is to ensure that anti-competitive behavior, fraud and other competitive abuses do not hinder consumers' freedom to obtain services in the marketplace. At this early stage of the proceeding, I would note only that many of the potential impacts on consumers addressed in the *Notice* do not implicate this primary role.

B. The Fairness of Cost-Causative Rates and Removing Implicit Subsidies Among Consumers

I also question whether our reforms have resulted in low volume consumers paying more than their fair share of network costs as part of their long distance service. Some significant portion of the cost of serving a customer is the cost of having a telephone line to one's home—one that is always available and highly reliable. This cost generally does not vary no matter how much the customer uses his line. Both a customer's local company and its long distance company use that "common line" to provide that customer service. Consequently, some portion of the common line's cost is attributable to each carrier and will be reflected in the customer's bill. We traditionally have allowed carriers to recover these flat costs through per minute charges, which had the effect of inflating the rates of consumers who make many long distance calls. By ensuring that flat costs are recovered through flat fees and that per minute costs are recovered through per minute fees, however, our access charge reforms arguably have made the rate structure more fair by making consumers more responsible for the costs they cause, including the flat cost of having a common line.

Further, as indicated, our access charge reforms were designed to correct implicit subsidy flows from high volume to low volume users that artificially made the price of long distance service more expensive and impeded the development of competitive choices for *all* consumers. In that sense, flat charges on consumers' long distance bills may represent the price consumers should pay for adoption of a more pro-competitive rate structure. This is an especially important and ironic point for low volume consumers, as the very implicit subsidies that were designed to favor them under the old system also made them less attractive to competitors and thus doomed them to fewer opportunities for competitive choice. Thus, to the extent that access charge and similar reforms help promote competition for all consumers,

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[1] And even if we must resort to additional regulation, I would submit that we should first attempt measures that do not amount to direct regulation of a competitive industry, such as requiring LECs to bill the PICC directly to end users. In any event, I feel strongly that we should be cautious about imposing new regulation on long distance or other carriers, recognizing that any such requirements may weaken the vigor of competition in the telecommunications industry.

including low volume consumers, it is difficult to conclude that these reforms are somehow unfair. It also does not seem unfair to free high volume consumers from the burden of subsidizing low volume consumers.

C. The Difference Between Consumer "Value" and "Harm"

This is not to say that high and low volume customers facing similar common line costs obtain the same *value* in exchange for paying those costs. Flat rates have one inherent characteristic. If the rate is flat, you will get more value from your service if you use it a lot. For example, Internet service is now almost universally priced as a flat rate—*e.g.*, $19.95 per month for unlimited use is common. If I subscribe to this service and only "surf the Net" 2 hours a week, I will get less value out of the service than my retired neighbor who spends 100 hours a week on the Net planning his next trip to some exotic destination. It would be a mistake, however, to say that I am "harmed" because I am a "low volume" user. I have the same potential to get as much value from my service as my neighbor if I chose or needed to do so. Moreover, I assure you that my ISP is making up for my relative lack of use through my neighbor's extensive use. Thus, we should not confuse consumer "value" with "harm."

D. Managing Consumer Expectations Developed Under Monopoly

One final note on fairness: some will urge us to define fairness based on what consumers came to expect under the old monopoly system of implicit subsidies. Consumers have been conditioned to believe that they should only have to pay long distance carriers for the time they are on the phone, *i.e.*, solely through per minute charges. Indeed, the government bears much responsibility for that expectation, given the manner and method by which it regulated cost recovery. Some will urge us to find the effects of our reforms fair only to the extent that these expectations remain satisfied. But consumers' expectations that they would not be charged flat rates developed *not* because the traditional pricing structure was inherently fair or reflective of the underlying cost of service, but simply by virtue of rules developed in a largely monopolistic environment. Thus, in assessing whether the impact of our pro-competitive reforms on consumers is fair, we must look beyond consumers' own expectations regarding how they obtained service under the old monopoly regime. It takes some courage to do so, but such a transition is clearly required if there is to be any hope of effecting Congress' vision of competition and its recognition that implicit subsidies are anathema to that vision.

III. Conclusion: A Plea for Avoiding Re-Regulation of Competitive Markets

Thus, there may be many reasons to conclude that our access charge and universal service reforms are both necessary to promote competition and fair to consumers. In particular, we must recognize that it may be impossible to achieve any economically efficient price structure (or free high volume consumers from the burden of subsidizing low volume consumers) if we step in and regulate to "protect" low volume consumers from the impact of flat charges. This looming impossibility makes it especially disturbing to suggest, as some of the questions in the *Notice* do, that regulation of rates is the solution.[2]

[2] Specifically, I am uncomfortable with the extent to which the *Notice* seeks comment on whether the Commission should mandate certain retail rate structures or constrain the manner in which long distance carriers recover universal service and access charge contributions. At the very least, requests for such comment seem

The long distance industry is highly competitive and has created greater choice and value for all consumers. Further, overall long distance rates have continued to decline, as the *Notice* properly indicates. This increasingly competitive environment has been spurred on, in recent years, by the previous Commission's wise decision to declare these companies non-dominant, thereby freeing them from some of our more burdensome, demand-stifling, innovation-sapping regulations.

I remain open to analyzing and addressing any significant and inequitable consumer effects of our reforms through regulatory means in the event (which, at present, I find unlikely) that these impacts cannot be addressed through market-based approaches. I would urge only, in evaluating the options before us, that we be hesitant to sacrifice the very pro-competitive reforms that I continue to believe will result in greater consumer welfare than our regulations ever could.

premature.