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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63

COMMENTS OF CTSI, INC.

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October 29, 1999

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Executive Summary

In these Comments, CTSI contends that the Commission should permit market forces, rather than regulatory intervention, to govern CLEC interstate access charges. To date, the Commission has received only unsubstantiated, anecdotal evidence that CLEC interstate access rates are excessive. CTSI doubts that any party will produce such evidence in this proceeding. In those rare instances where CLEC access rates are not just and reasonable, the Section 208 complaint process provides a means of relief.

CLECs do not control monopoly bottleneck facilities. There will always be at least one alternative to the CLEC (the ILEC), and IXCs, especially those with large market shares and established customer relationships, have numerous lawful alternative means to avoid paying access charges to CLECs with whom they do not wish to do business. However, refusing to accept or deliver traffic from or to CLECs is not a lawful alternative. The Commission has no legal basis for granting IXCs the right to decline to interconnect with CLECs.

The Commission's task in evaluating CLEC access charges is complicated by the fact that ILEC access charges have always varied from ILEC to ILEC (especially between rural and non-rural ILECs), CLECs face start-up and additional costs that ILECs do not face, and there is no single access rate structure common to all LECs. These differences make many of the Commission's proposals difficult if not impossible to administer in a nondiscriminatory manner. For instance, if the Commission were to adopt a benchmark for CLEC access rates and permit IXCs to charge end users directly for CLEC access rates that exceed the benchmark, but prohibit IXCs from charging

end users directly for any difference between a rural ILEC's access rate and the benchmark, the Commission would create a strong disincentive for CLECs to enter rural markets. The interdependence of the elements in the competition trilogy (access, universal service, and local competition) makes it imperative that the Commission adhere to the principle of competitive neutrality when reviewing the options presented in the *Notice*.

If the Commission determines that there is a market failure and regulatory intervention is necessary to correct it, CTSI urges the Commission to adopt the least intrusive corrective measure. Of all the proposals made in the *Notice*, the proposal to establish a presumption that CLEC rates are reasonable so long as they do not exceed the National Exchange Carrier Association ("NECA") rate is the least intrusive. So long as a CLEC's rate falls at or below the NECA rate, the IXC should be required either to pay the CLEC for access service or to file a Section 208 complaint and request an accounting order. Absent overwhelming, conclusive evidence of systemic CLEC price gouging,[1] which CTSI submits no party will be able to present, the Commission should not begin to regulate CLEC access rates and reverse its twenty-year-old policy of deregulating nondominant carriers.

[1] An IXC always has the option of bringing a Section 208 complaint against a CLEC if its rates are unjust or discriminatory.

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COMMENTS OF CTSI, INC.

CTSI, Inc. ("CTSI"),[2] by its counsel, hereby submits its Comments on the Notice of Proposed Rulemaking ("*Notice*") issued by the Commission in the above-captioned proceeding.[3]

I. Introduction and Summary

CTSI is a competitive local exchange carrier ("CLEC") currently operating in eastern Pennsylvania and in the Binghamton, New York area. CTSI provides competitive local exchange services to both residential and business customers in its operating territory and provides exchange access services to interexchange carriers ("IXCs") that provide long distance service to CTSI's local service customers. CTSI has filed a tariff with the Commission (Tariff F.C.C. No. 6) that contains rates, terms and conditions for its interstate switched access service.

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[2] CTSI was formerly known as Commonwealth Telecom Services, Inc.

[3] *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262, 94-1, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206 (rel. Aug. 27, 1999) ("*Fifth Access Charge Order*" or "*Notice*").

In these Comments, CTSI contends that the Commission should permit market forces, rather than regulatory intervention, to govern CLEC interstate access charges. To date, the Commission has received only unsubstantiated, anecdotal evidence that CLEC interstate access rates are excessive. CTSI doubts that any party will produce such evidence in this proceeding. In those rare instances where CLEC access rates are not just and reasonable, the Section 208 complaint process provides a means of relief.

CLECs do not control monopoly bottleneck facilities. There will always be at least one alternative to the CLEC (the ILEC), and IXCs, especially those with large market shares and established customer relationships, have numerous lawful alternative means to avoid paying access charges to CLECs with whom they do not wish to do business. For instance, IXCs may negotiate individual case basis contracts with CLECs or enter teaming arrangements with preferred LECs to encourage their long distance customers to select a particular LEC as the customer's local service provider. However, refusing to accept or deliver traffic from or to CLECs is not a lawful alternative. The Commission has no legal basis for granting IXCs the right to decline to interconnect with CLECs.

The Commission's task in evaluating CLEC access charges is complicated by the fact that ILEC access charges have always varied from ILEC to ILEC (especially between rural and non-rural ILECs), CLECs face start-up and additional costs that ILECs do not face, and there is no single access rate structure common to all LECs. These differences make many of the Commission's proposals difficult if not impossible to administer in a nondiscriminatory manner. For instance, if the Commission were to adopt a benchmark for CLEC access rates and permit IXCs to charge end users directly for CLEC access rates that exceed the benchmark, but prohibit IXCs from charging end users directly for any difference between a rural ILEC's access rate and the benchmark, the Commission would create a strong disincentive for CLECs to enter rural markets. The interdependence of the elements in the competition trilogy (access, universal service, and local competition) makes it imperative that the Commission adhere to the principle of competitive neutrality when reviewing the options presented in the *Notice*.

As CTSI argues below, competitive alternatives to CLEC service, and the availability of the Section 208 complaint process, act as a real constraint on CLEC access rates. If, however, the Commission determines that there is a market failure and regulatory intervention is necessary to correct it, CTSI urges the Commission to adopt the least intrusive corrective measure. Of all the proposals made in the *Notice*, the proposal to establish a presumption that CLEC rates are reasonable so long as they do not exceed the National Exchange Carrier Association ("NECA") rate is the least intrusive. So long as a CLEC's rate falls at or below the NECA rate, the IXC should be required either to pay the CLEC for access service or to file a Section 208 complaint and request an accounting order. Absent overwhelming, conclusive evidence of systemic CLEC price gouging,[4] which CTSI submits no party will be able to present, the Commission should not begin to regulate CLEC access rates and reverse its twenty-year-old policy of deregulating nondominant carriers.

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[4] An IXC always has the option of bringing a Section 208 complaint against a CLEC if its rates are unjust or discriminatory.

II. An Analysis of CLEC Market Power Shows Competitive Alternatives Restrain CLEC Access Rates

To date, the Commission has implicitly recognized, through asymmetric regulation, the wide difference between a CLEC's ability to exercise market power and an ILEC's ability to exercise market power in both the local exchange and exchange access markets. Although the Commission recently adopted pricing flexibility reforms that apply to ILECs' switched access service, ILECs' switched access rates remain subject to the Commission's Part 61 tariffing and Part 69 rate structure rules. As nondominant carriers, CLECs are not required to file interstate access tariffs with the Commission, nor are they required to adhere to Part 69.

The recognition that firms in a competitive market may be subject to asymmetric regulation is a fundamental tenet of antitrust policy. For example, because the competitive pressures facing small and large firms differ, small firms in a concentrated market may merge without raising antitrust concerns while mergers of larger firms are often challenged, and sometimes stopped, on antitrust grounds. Underlying this competition policy is the basic tenet that firms with a larger market share have greater ability to exercise market power. To date, CLECs clearly have not increased their market share to the point of being able to exercise market power.

Nevertheless, the Commission now asks whether its prior decisions to rely on market forces to constrain CLEC access rates should be reversed. As the Commission has recognized in the context of access pricing flexibility for ILECs, the presence of competitive alternatives acts as a constraint on a carrier's ability to exercise market power.[5] Measurement of a carrier's market power must include an evaluation of, among other factors, whether or not the customer has competitive alternatives. CTSI fears that in the *Notice*, by focusing on the so-called "captured customer," the Commission has lost sight of the fact that CLECs still control a very small percent of the local exchange and exchange access market.[6]

Ironically, in the same document in which it solicits comments regarding "captive" customers of CLECs, the Commission found that a certain level of competitor presence in the market would justify pricing flexibility for *incumbent LECs'* traffic-sensitive, common line, and the traffic-sensitive portions of tandem-switched transport access rates even though, with respect to an individual customer and the IXC that serves that customer, the ILEC retains a monopoly on origination and termination services provided to that customer.[7] A CLEC end user customer, and the IXC that must purchase access service from the CLEC to reach that customer, are not "captive," nor does the CLEC control a "bottleneck" network facility. At a minimum, new entrants face competition from ILECs for the provision of both local exchange and exchange access service. The incumbents' ubiquitous loop facilities will remain in place, ready to serve any customer of a new

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[5] *Fifth Access Charge Order* at ¶¶ 67-69.

[6] According to the Commission's most recent report on local competition, local competitors' revenues from per minute access charges amounted to only 2% of total industry revenues, with ILECs reporting 96.9% of total industry per minute access revenues. *Local Competition: August, 1999*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, Table 2.3. In the same report, the Commission found that local competitors serve fewer than 5% of local access lines in most areas. *Id.* at 2.

[7] *See, e.g., Fifth Access Charge Order* at ¶ 24.

entrant who wishes to switch back to the ILEC's service. Similarly, the incumbents' transport facilities remain in place, ready to serve any IXC customer. In many markets, a CLEC also faces competition from other CLECs who may either deploy their own facilities or rely on the ILEC's unbundled local loop to reach the end user.

Thus even if the local exchange market is not competitive (which it likely will not be for some time to come), new entrants will always be constrained by at least one alternative: the ILEC. It would be ironic and counterintuitive for the Commission to find that ILECs, who control approximately 97% of the exchange access market, place no market pressure on CLEC access rates, but CLECs, upon gaining a mere 15% exchange access market share, place sufficient market pressure on ILEC rates to justify partial deregulation of those rates.

If a CLEC consistently "overcharges" an IXC for terminating access, the IXC will have an incentive to enter into marketing alliances with other LECs in the same market or in other markets where the CLEC seeks to expand.[8] Furthermore, excessive terminating access charges could encourage IXCs to enter the local exchange and exchange access markets in an effort to win local customers and avoid paying access charges to other carriers. This is precisely what AT&T has

[8] The Commission recently reiterated that it would consider several factors before making a determination whether or not a marketing arrangement between a Bell Operating Company and an unaffiliated long distance carrier complied with the restrictions set forth in Section 271(a). *Implementation of Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, Third Order on Reconsideration, FCC 99-242 (rel. Oct. 1, 1999).

attempted to do through its acquisitions of ACC, TCG and TCI. Numerous other IXCs, including MCI WorldCom and Sprint, have also entered the local exchange market.

In its *Fifth Access Charge Order*, the Commission found that a competitive erosion of 15% of the local exchange market would place sufficient market pressure on ILEC access rates to justify partial deregulation. It follows that ILECs, who retain over 95% of the local exchange market share, must place pressure on CLEC access rates. The Commission should reaffirm its prior findings that market forces are adequate to constrain CLEC access rates.

III. Statutory and Regulatory Constraints Require that IXCs Accept Long Distance Traffic from and Deliver Long Distance Traffic to All LECs

The Commission has proposed various alternative methods of correcting a perceived market failure with respect to CLEC terminating access rates. One of the proposed alternatives would permit IXCs to refuse to deliver long distance traffic to, or accept long distance traffic from, CLECs. As set forth in more detail below, Sections 201(a), 202(a), 251(a)(1), 251(b)(3), and 254(b)(3) of the Communications Act of 1934, as amended by the Telecommunications Act of 1996 ("Act"), and Section 54.101 of the Commission's rules all require that IXCs deliver and accept traffic to and from all LECs on a nondiscriminatory basis. Today, IXCs are using CLEC switched access services to originate and terminate long-distance calls to hundreds of thousands of CLEC customers nationwide. If the Commission granted IXCs the right to decide not to purchase CLEC access services any more, only two outcomes are logically possible. Either an IXC would continue to use a CLEC's switched access service without paying for it, or IXCs and/or CLECs would have to block millions of long-distance calls every day. Either outcome is manifestly contrary to the law and to the public interest.

There are serious unlawful and anticompetitive consequences that would result from permitting an IXC to determine unilaterally not to purchase access service from a CLEC. First, Section 201(a) imposes a duty on "every common carrier engaged in interstate or foreign communication . . . to establish physical connections with other carriers." 47 U.S.C. § 201(a).[9] Similarly, Section 251(a) states that "each telecommunications carrier has the duty to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. § 251(a). Under Section 251(a)(1) of the Act, every telecommunications carrier (including an IXC) is required to interconnect directly or indirectly (*i.e.*, through the ILEC's tandem) with all other telecommunications carriers (including CLECs). Congress' clear purpose in requiring that all carriers interconnect with each other on a nondiscriminatory basis was to ensure that the customers of all telecommunications carriers will have access to the customers of all other carriers. An IXC's refusal to accept traffic that originates or terminates on a CLEC's network would violate these statutory principles.

Second, under Section 202(a) of the Act, both IXCs and CLECs are required to provide their common carrier services on nondiscriminatory terms. An IXC's refusal to deal with a CLEC would discriminate against CLEC customers seeking to purchase that IXC's long-distance services. It also

[9] Although the Commission has previously interpreted this Section to require a Commission hearing and/or order before a refusal to interconnect violates this section, *see, e.g.*, *Applications of South Central Bell Telephone Company*, Order on Review, 2 FCC Rcd 196, ¶ 4 (1987), there is clearly no such prerequisite to the duty to interconnect established by Section 251(a).

would discriminate against the IXC's customers who wish to place long distance calls to customers of CLECs with whom the IXC refuses to deal.

Third, Section 254(b)(3) requires that all consumers have access to interexchange services and Section 251(b)(3) imposes a duty on all LECs to provide equal access to IXCs so that end users may access their preferred IXC. Furthermore, in order to be designated as an eligible telecommunications carrier ("ETC") under the FCC's Rules, and become eligible for rural and high cost universal service support, a carrier must provide access to interexchange services throughout its service area.[10] Although it is unlikely that all IXCs would decline to purchase access service from a CLEC, it is possible, and such an outcome would deny that consumer access to interexchange service. It is much more likely that granting IXCs a right to refuse to purchase CLEC access service would prevent the affected LEC from meeting its statutory equal access obligation or its regulatory ETC obligations.

Allowing an IXC unilaterally to cut off CLEC customers from its long-distance network would also have severe anti-competitive consequences. For example, as an IXC with more than 40% of the U.S. long distance market,[11] AT&T could force its long distance customers to choose between AT&T and their preferred CLEC. An IXC could refuse to serve customers of any CLEC that is not

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[10] 47 C.F.R. § 54.101(a).

[11] The Commission's most recent report on the long distance market shows that AT&T controlled 41.8% of the market (based on its percentage of all long distance carriers' fourth quarter 1998 toll revenues) or 63% of presubscribed access lines (based on December, 1996 line counts). *Long Distance Market Shares Fourth Quarter 1998*, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, 9, 20 (March 1999).

affiliated with the IXC. Allowing an IXC to pick and choose which of its competitors to interconnect with would seriously thwart the pro-competitive measures Congress enacted in the 1996 Act to open local telephone markets to competition. If a CLEC is not able to provide its local customers with the same choice of long distance carriers that an ILEC provides, the CLEC will be severely disadvantaged in competing for local customers.

Permitting IXCs to decline to purchase CLEC access service could begin to unravel the seamless public switched telephone network ("PSTN"). Just as all consumers in the nation have a right to have access to telecommunications under Section 254 of the Act, they also have the right to communicate with other users on the PSTN. The obligation to interconnect with other carriers is fundamental to the interoperability of the PSTN. Interconnection between carriers allows any end user to communicate with any other end user. Competitive carriers have fought for over 100 years to reform the Bell network into a ***public*** network accessible to all competitors. By granting IXCs the right to pick and choose which LECs to interconnect with, the Commission would, in one fell swoop, grant IXCs the ability to undermine the very openness and accessibility of the network that the Commission, Congress, and competitive providers have worked so hard to achieve virtually since the PSTN was created.

If, rather than blocking traffic to and from a CLEC, an IXC continues to route traffic but simply "chooses" not to pay tariffed switched access rates, it would put CLECs in an untenable position. CLECs would be forced either to block the IXC's traffic themselves (in violation of a CLEC's Section 251(b)(3) duty to provide equal access) or provide the IXC access service free of charge. Such rate preferences (free service) would violate the nondiscrimination requirement of Section 202(a).[12] Thus the end result of an IXC's refusal to purchase CLEC access service would be an exercise of its monopsony power to force CLEC access rates to the rate the IXC is willing to pay. As the courts have recognized:

> Regardless of whether or not the FCC has ordered interconnection with Bell facilities, and regardless of how AT&T appraises the public interest under the Communications Act, AT&T has a continuing obligation under the antitrust laws to permit interconnection, if failure to interconnect is inconsistent with Sherman Act requirements. Compliance with the standards of the Communications Act does not in any way relieve defendants (or anyone else) of the obligation to comply with the antitrust laws.[13]

Today, of course (unlike in 1976), a refusal to interconnect with CLECs would *not* comply with Communications Act standards because of the adoption of Section 251(a)(1) in 1996.

IV. Differences Between CLECs' and ILECs' Access Costs and Means of Recovering Such Costs Justify Divergent Access Rates

CTSI currently provides competitive local exchange telecommunications services to residential and business customers in smaller markets in Pennsylvania and New York such as Wilkes-Barre, Scranton, Harrisburg, and Binghamton. CTSI does not serve Philadelphia, New York City, or other major metropolitan areas. Bell Atlantic charges unitary switched access rates in Pennsylvania and New York, based on the average cost it incurs within each state for provisioning

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12 *AT&T v. Central Office Telephone, Inc.*, 118 S.Ct. 1956, 1963 (1998) ("the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services").

13 *United States v. AT&T*, 524 F. Supp. 1336, 1359 (D.D.C. 1981).

such services. CTSI is unable to subsidize the costs it incurs in providing switched access services in its small markets with revenues derived from large urban areas, as Bell Atlantic does.

As a nondominant carrier, CTSI is not required to comply with the Commission's Part 69 access rate structure rules. CTSI may choose to mirror the ILEC access rate elements, or it may choose to establish its own access rate elements depending on its unique cost structure. For example, CTSI deaverages its per minute switched access rates and does not charge the same rate in all density zones. This flexibility permits CTSI to distinguish its service from Bell Atlantic while recovering its costs in the manner in which they are incurred, subject to market constraints.

Like other new entrants, CTSI is making enormous investments in plant and equipment and still has a small customer base, at least as compared to the ILEC, over which to spread the costs of these investments. As a new market entrant, CTSI also incurs additional costs not borne by ILECs. These additional costs include obtaining certification, franchising and rights-of-way costs, and building access contracts and fees.

Like other carriers serving third tier markets, CTSI also typically makes a larger investment per customer to deploy its services in markets that are less dense than concentrated tier one and two urban markets. The larger investments necessary to enter third tier markets, together with the subsidized ILEC local service rates that effectively cap a CLEC's ability to recover its investment in these markets, have already discouraged many CLECs from aggressively targeting third tier and rural local exchange markets.[14] In considering the proposals made in the *Notice*, the Commission must be careful not to erect further barriers to CLEC entry in rural, high cost markets. For instance, if the Commission were to adopt a price cap ILEC benchmark for CLEC access rates and permit IXCs to charge end users directly for CLEC access rates that exceed the benchmark, but prohibit IXCs from charging end users directly for any difference between a rural ILEC's access rate and the price cap ILEC benchmark, the Commission would create a strong disincentive for CLECs to enter rural markets. The disincentive would be even greater if the CLEC itself was required to pass the difference through to end users.

Taken together, the differences between the costs CLECs and ILECs incur to provide exchange access, and the different means by which CLECs and ILECs may recover such costs, justify CLEC access rates elements and rates that do not mirror, and are higher than, ILEC access rates elements and rates. The divergent rate structures make any comparison between ILEC and CLEC access rates difficult, and efforts to directly compare any two sets of rates may effectively require CLECs to mirror the ILEC rate structure. It is not yet clear whether the recently adopted pricing flexibility rules for ILECs will facilitate such comparisons or merely proliferate the myriad rate structures that would have to be reconciled if the Commission adopted a benchmark test based

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[14] Although CTSI is an ETC and is eligible to receive universal support for serving customers in rural and high cost areas, the Commission has not yet fully implemented the explicit universal service fund that will permit CTSI to receive support for serving these customers. Even when the new fund is implemented in 2000, new entrants such as CTSI will remain at a distinct competitive disadvantage because ILECs will still enjoy the universal service support implicit in the access charges they receive for serving the majority of customers located in rural areas.

on an ILEC rate. If the Commission determines it must adopt a benchmark approach notwithstanding these factors, it must be careful not to restrain CLEC pricing flexibility at the same time it grants pricing flexibility to ILECs and it must carefully consider the impact of any benchmark on CLEC entry into third tier and rural markets.

V. The Commission Should Apply the Principle of Competitive Neutrality Equally to Both Universal Service and Interstate Access

The Commission has repeatedly recognized the link between access charges, universal service, and local competition, calling the three reforms part of an interdependent "competition trilogy." Because inflated access rates have historically provided implicit subsidies to keep ILEC local exchange rates low,[15] the Commission has committed itself to the task of identifying and removing universal service support implicit in interstate access rates. To date, however, the Commission has neither quantified the implicit support amounts, nor removed them from ILEC access rates.[16] As such, ILECs continue to reap the implicit subsidies access charges contain.

The Commission's interstate access rules have historically forced IXCs to subsidize local exchange service by requiring ILECs to charge above-cost access rates. Although the amount of subsidy and the access rate itself has varied from LEC to LEC, IXCs have been required to average their long distance rates. Today, Section 254(g) requires that an IXC must "provide services to its

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15 *See, e.g., Federal-State* Joint Board on Universal Service, Access Charge Reform, CC Docket Nos. 96-45, 96-262, Seventh Report and Order and Thirteenth Order on Reconsideration in CC Docket No. 96-45, Fourth Report and Order in CC Docket No. 96-262, and Further Notice of Proposed Rulemaking, FCC 99-119, ¶ 6 (rel. May 28, 1999) ("*Seventh Report and Order*").

16 *See, e.g., Seventh Report and Order* at ¶¶ 7, 43.

subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." When the Commission's rate averaging requirement was codified in Section 254(g) of the Act, Congress was aware that IXCs' access costs vary by LEC. Historically, because there was no competition in local exchange markets, this difference was manifested between rural and urban LECs. However, Congress clearly anticipated that with the advent of local competition, IXCs access costs may vary by LEC within a single area (rural or urban). To address this concern, the Congress directed the Commission to "continue to require that geographically averaged and rate integrated [interexchange] services . . . be generally available in the areas served by a particular [interexchange] provider."[17] This statement, made by the conferees in the Conference Report accompanying the 1996 Act, clearly expresses Congress' intent that IXC rates be averaged not only between rural and urban areas, but also within a particular rural or urban area that an IXC chooses to serve.

In revising its universal service policies and rules to comply with the 1996 Act, the Commission adopted the principle of competitive neutrality. The Commission emphasized that this principle was necessary to "ensure that no entity receives an unfair competitive advantage that may skew the marketplace or inhibit competition by limiting the available quantity of services or restricting the entry of potential service providers."[18] Because of the link between access subsidies and universal service, the Commission may not apply the principle of competitive neutrality to the

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[17] H. Rep. No. 104–458 at 132 (1996).

[18] *Federal-State Joint Board on Universal Service,* Report and Order, 12 FCC Rcd 8876, ¶ 48 (1997), *aff'd. in part, rev'd in part, remanded in part sub nom* Texas Office of Public Utility Council v. FCC, 1999 WL 556461 (5th Cir. 1999).

explicit universal service fund and fail to apply the same principle to implicit universal service support in access rates. So long as ILECs are permitted to charge above-cost access rates, shifting costs properly attributed to local service from end users to IXCs, CLECs must be permitted the flexibility to recover costs in the same manner. Permitting IXCs to recover from end users any difference between CLEC and non-rural ILEC access rates, while prohibiting IXCs from recovering from end users the difference between rural ILEC and non-rural ILEC access rates violates the principle of competitive neutrality. Similarly, requiring CLECs to recover from end users any difference between their access rate and the non-rural ILEC rate, but permitting rural ILECs to continue recovering the difference directly from IXCs, also violates the principle of competitive neutrality. The Commission should not rely on Sections 254(g)'s distinction between rural and urban customers to justify discrimination between CLEC and ILEC customers located in the same area (whether rural or urban).

VI. The Commission Should Not Adopt Mandatory Detariffing for CLEC Exchange Access Services

Tariffs are an efficient and effective means by which CTSI and other new entrants can establish terms of service with hundreds of business and IXC customers for exchange access service. As previously mentioned, CTSI has filed an interstate access tariff with the Commission. If the Commission were to order mandatory detariffing by CLECs, CTSI would be required to withdraw this tariff and develop its access relationships on a contract-by-contract basis. Very few CLECs can afford to establish individual service contracts with hundreds of customers in a few months or even a year's time. Negotiating individual contracts requires the expenditure of precious resources from

CLEC employees that could be devoted to other important tasks. The need to individually negotiate hundreds of access contracts would create an obvious operational barrier to a CLEC's ability to begin providing service, including access to interexchange service, quickly to a large number of customers. Unlike negotiations between carriers and end user customers, where the end user has numerous alternatives to choose from, the CLEC's obligation to provide equal access leaves the CLEC with no alternative – it must negotiate a contract with each IXC in order to meet its equal access obligation. CLECs would be further disadvantaged in such negotiations where the IXC holds a large share of the interexchange market. Such IXCs could wield considerable negotiating power by threatening to withholding access to their large customer base unless the CLEC agreed to the IXC's terms.

In addition to reducing contract negotiation costs for carriers, tariffs offer telecommunications carriers the legal benefits of the "filed rate doctrine." Under this doctrine, CLECs will have some assurance that they can collect legitimately-owed accounts receivable. The filed rate doctrine, which applies at both the federal and state level,[19] bars the use of breach of contract claims and traditional common law and equitable contract defenses to avoid payment of the tariffed rate.

Providing the legal benefits of the filed rate doctrine to ILECs, but not to CLECs, would offer a significant competitive advantage to ILECs. Quite simply, under mandatory detariffing, CLECs

[19] The United States Supreme Court has ruled that "the filed rate doctrine applies not only to federal court review . . . but also to decisions of state courts." *Nantahala Power and Light Co. v. Thornburg*, 476 U.S. 953, 963 (1986).

could be forced to incur substantial litigation costs to collect from customers for services rendered, whereas ILECs would be able to collect from their access customers in a simpler and less costly manner under the filed rate doctrine. Moreover, many CLECs have limited legal and financial resources to litigate the collection of invoice amounts. This alone should prompt the Commission to reject a mandatory detariffing system because of the burden it will inevitably place on competitive entrants. However, the mere fact that ILECs will not be forced to bear the same costs of collection necessitates the rejection of the mandatory detariffing proposal as anticompetitive.

If the Commission is interested in promoting competition in the local exchange and exchange access marketplace, it should not now institute a policy that in fact caps the growth of CLECs. In a competitive market, the merits of a CLEC's service offerings, rather than the scope of its negotiating resources, should determine whether that CLEC successfully attracts customers.

VII. In the Event the Commission Determines Market Forces Are Failing to Constrain CLEC Access Rates, It Should Adopt the Least Intrusive Corrective Measure

The Commission proposed numerous alternative regulatory measures to correct perceived market failures and backstops to constrain CLEC access rates. As argued above, CTSI believes that CLECs do not exercise market power in the exchange access market and therefore the Commission need not regulate CLEC access rates. However, in the event the Commission determines that it must intervene in the market, CTSI urges the Commission to adopt the least intrusive measure possible.

In these Comments, CTSI has shown that most of the Commission's proposals would violate the Act and/or Commission regulations and place CLECs at a distinct competitive disadvantage *vis-a-vis* ILECs. Permitting IXCs to refuse to deliver or accept traffic to or from a CLEC would violate

Sections 201(a), 202(a), 251(a)(1), 251(b)(3), and 254(b)(3) of the Act and Section 54.101 of the Commission's rules. Requiring CLECs or IXCs to pass through to end users the difference between a CLEC access rate and a Commission-determined benchmark would violate the universal service principle of competitive neutrality and/or Section 254(g)'s rate averaging requirements. Mandatory detariffing would place CLECs at a competitive disadvantage as their equal access obligations and an IXC's large customer base would provide IXCs with a distinct bargaining advantage. If the Commission determines that it must take action to intervene in the market, CTSI submits that the least intrusive means of intervention is to establish a presumption that CLEC rates are reasonable so long as they do not exceed the NECA rate. Together with this presumption, the Commission must also direct IXCs to pay CLECs if their rate falls at or below the NECA rate or file a Section 208 complaint and request an accounting order. This cap, together with the Commission's Section 208 complaint process, would ensure that CLECs continue to enjoy access pricing flexibility to compete with ILECs. Establishing the benchmark at the NECA rate would also ensure that the Commission does not erect further barriers to CLEC entry in rural markets.

VIII. Conclusion

For the foregoing reasons, CTSI urges the Commission to either affirm its prior finding that market forces are sufficient to constrain CLEC access rates or adopt a rule that a CLEC's access rates are presumed reasonable so long as they do not exceed the NECA rate.

Respectfully submitted,

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I hereby certify that the foregoing Comments of CTSI, Inc. have been served by hand delivery to the persons on the attached list.

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