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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
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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	CC Docket No. 98-63
Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	CC Docket No. 98-157

COMMENTS OF THE STATE OF HAWAII

The State of Hawaii (the "State"),[1] by its attorneys, hereby responds to the portion of the Commission's *Notice of Proposed Rulemaking* requesting comment on the deaveraging of interstate access rate elements.[2] As explained below, the Commission should ensure that its efforts to reform the access charge mechanisms used to fund universal service do not undermine

[1] These comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs.

[2] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizone MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, CC Docket Nos. 96-262, 94-1, 98-63, 98-157 (rel. Aug. 27, 1999) ("*Notice*"). The State also plans to respond to the Commission's request for comment on the access charge proposal submitted by the Coalition for Affordable Local and Long Distance Services.

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the important universal service goals served by Section 254(g) of the Communications Act. More specifically, the Commission should make clear that Section 254(g) prohibits interexchange carriers from using disparities in access charges – either between geographic regions or between LECs – as a pretext for deaveraging interexchange rates imposed on end-users. Moreover, the Commission should ensure that, as required by Section 254(b)(3) of the Communications Act, any interstate access rate elements (*i.e.,* Subscriber Line Charges) imposed on end-users in urban areas are "reasonably comparable" to those imposed on end-users in rural, high-cost, and insular areas.

I. THE COMMISSION SHOULD NOT PERMIT CARRIERS TO USE THE DEAVERAGING OF INTERSTATE ACCESS RATE ELEMENTS AS A PRETEXT TO DEAVERAGE END-USER INTEREXCHANGE RATES

In the *Notice*, the Commission requests comment on the deaveraging of interstate access rate elements.[3] The Commission also observes that, as a result of such deaveraging, interexchange carriers could face "differing access costs within LEC study areas."[4] While this may be true, the Commission must not permit carriers to use differing access costs as a pretext for deaveraging rates charged to end-users for interexchange services.

Section 254(g) of the Communications Act states that providers of interexchange telecommunications services must charge "subscribers in rural and high cost areas" rates that are "no higher than the rates charged by each such provider to its subscribers in urban areas."[5] By its terms, this provision clearly requires the geographic averaging of interexchange rates charged to

[3] *See id.* ¶ 194.

[4] *Id.* ¶ 191 n.493.

[5] 47 U.S.C. § 254(g).

end-users.[6] The fact that access rate elements may be further deaveraged simply does not provide a justification for ignoring this congressional mandate. As the Commission has recognized, Congress was "fully aware of geographic differences in access charges when it adopted Section 254(g), and intended us to require geographic rate averaging even under these conditions."[7] Further, like other costs of providing interexchange services – such as labor and infrastructure costs – access rates have long varied from region to region and interexchange carriers have been able to achieve compliance with the geographic averaging requirement. The Commission should require interexchange carriers to continue to do so.

Section 254(g)'s geographic rate averaging requirements are vital to the overall commitment to universal service made by Congress in the Telecommunications Act of 1996. To be sure, Congress intended the universal service fund to play a significant role in fulfilling this commitment. However, as evidenced by the codification and expansion of the Commission's geographic averaging policies, Congress plainly did not intend to rely solely on the fund to achieve its universal service goals. In this regard, the legislative history makes clear that Section 254(g)'s *affirmative* universal service mandate is intended to "ensure that subscribers in rural and high cost areas throughout the Nation are able to continue to receive both intrastate and interstate interexchange services at rates no higher than those paid by urban subscribers."[8] The Commission must ensure that its efforts to reform the mechanisms used to support the universal service fund do not interfere with the Communications Act's express universal service mandates.

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[6] The legislative history accompanying Section 254(g) states: "The conferees intend the Commission's rules to *require* geographic rate averaging . . . ." *See* H.R. Conf. Rep. No. 458, 104th Cong., 2d Sess., at 132 (1996) (emphasis added) (*"House Conference Report"*).

[7] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace – Implementation of Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 9564, 9583 (1996).

To the extent that any carriers invite the Commission to forbear from Section 254(g)'s geographic averaging requirements with respect to the pass through of deaveraged interstate access rate elements, the Commission must decline to do so. Congress has made clear with respect to geographic averaging that the Commission's forbearance authority under Section 10 of the Communications Act can be used only sparingly and for "limited exceptions."[9] The wholesale deaveraging of end-user rates for interexchange services plainly would not constitute a "limited exception."

Moreover, the Commission has previously rejected the notion that the deaveraging of interstate access rate elements provides a basis for forbearing from Section 254(g)'s geographic averaging requirements. In this regard, the Commission has explained:

> We find that establishing a broad exception to permit IXCs to pass through flat-rated charges on a deaveraged basis may create a substantial risk that many subscribers in rural and high-cost areas may be charged significantly more than subscribers in other areas. Accordingly, we cannot conclude that enforcing our rate averaging requirement is unnecessary to ensure that charges are just and reasonable.[10]

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[8] *House Conference Report* at 132.

[9] More specifically, the Conference Report states: "The conferees are aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services *in limited circumstances* (such as services offered under Tariff 12 contracts), and intend that the Commission, where appropriate, could continue to authorize *limited exceptions* to the general geographic rate averaging policy using the authority provided by new Section 10 of the Communications Act." *See id.* (emphasis added).

[10] *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges,* 12 FCC Rcd 19582, 16022 (1997) *see also Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 11 FCC Rcd at 9583 ("With respect to the first prong of the forbearance test, we believe that establishing a broad exception to Section 254(g) for low-cost regions entails a substantial risk that many subscribers in rural and high cost areas may be charged more than subscribers in other areas. Accordingly, we cannot conclude that enforcing our rate averaging requirements is unnecessary to ensure just and reasonable and nondiscriminatory charges for subscribers. We also see no basis in the record to conclude that it is unnecessary to enforce Section 254(g) to ensure protection of consumers. We are concerned that widespread deaveraged rates for interexchange services could produce unreasonably high rates for some subscribers.").

Because forbearance from Section 254(g)'s geographic rate averaging requirement would hurt those the statute is intended to protect (*i.e.*, end-users living in rural and high-cost areas), the Commission should reject any attempts to use the deaveraging of interstate access elements as a pretext for seeking the deaveraging of rates for interstate, interexchange services.

II. THE COMMISSION SHOULD NOT PERMIT INTEREXCHANGE CARRIERS TO DEAVERAGE INTEREXCHANGE RATES ON A LEC-BY-LEC BASIS

In the *Notice*, the Commission observes that some CLECs may charge interexchange carriers higher access rates than some ILECs.[11] In light of this situation, the Commission requests comment on whether interexchange carriers should be permitted to "charge different rates to end-users within the same geographic area" in order to target the pass through of higher CLEC access rates to CLEC subscribers.[12] Under no circumstances should the Commission permit interexchange carriers to do so.

As explained in the House Conference Report, Section 254(g) is intended to ensure that "subscribers in rural and high cost areas *throughout the Nation*" receive interexchange service at rates no higher than those paid by urban subscribers.[13] Consistent with this statutory goal, the Commission has determined that Section 254(g) requires providers of interexchange services to average rates for end-users on a *national* basis.[14] According to the

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[11] *See Notice* at ¶ 244.

[12] *Id.* at ¶ 245.

[13] *House Conference Report* at 132 (emphasis added).

[14] *See, e.g., Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended,* 11 FCC Rcd 9564, 9567 (1996) ("geographic averaging ensures that ratepayers share in the benefits of *nationwide* interexchange competition").

Commission, this means that "interexchange telecommunications service offerings will be *available on the same terms throughout a carrier's service area.*"[15] As a matter of law, interexchange carriers may not offer their services to CLEC customers and to ILEC customers within their service area at different rates.

Moreover, permitting interexchange carriers to deaverage end-user rates in certain geographic areas on a LEC-by-LEC basis would be unsound as a matter of policy. As the Commission has previously recognized, the universal service benefits of the "national policy" of geographic averaging "outweigh" the speculative benefits of selective deaveraging.[16] First, the policy ensures that interexchange rates for rual and high cost areas "will not reflect the disproportionate burdens that may be associated with common line recovery costs in those areas" and thus "furthers" the Commission's goal of "providing a universal nationwide telecommunications network."[17] Second, "geographic rate averaging ensures that ratepayers share in the benefits of nationwide interexchange competition."[18] Because many rural LECs have higher access costs, the deaveraging of interexchange rates on a LEC-by-LEC basis would inevitably lead to higher interexchange rates for end-users in rural and high-cost areas and thus undermine the universal service goals of Section 254(g).[19]

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[15] *Id.* at 9576.

[16] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended, AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration*, 12 FCC Rcd 934, 939 (1997).

[17] *See Policy and Rules Concerning the Interstate, Interexchange Marketplace -- Implementation of Section 254(g) of the Communications Act of 1934, as Amended*, 11 FCC Rcd 9564, 9567 (1996).

[18] *See id.*

[19] The Commission also must reconcile the deaveraging proposal with the rate integration requirements of Section 254(g), which require an interexchange carrier to "provide service to its subscribers in each State at rates no higher

In addition to being unsound as a matter of law and policy, deaveraging interexchange rates would not provide a "market-based solution" to the perceived problem with the level of CLEC access charges. The *Notice* suggests that, in theory, permitting interexchange carriers to deaverage rates on a LEC-by-LEC basis would cause end-users to switch to the LEC with the lowest "access charges in order to reduce their long distance bills."[20] As a matter of practice, however, it is unlikely that deaveraging would impose such market discipline on CLEC acess charges. Indeed, given the increasing number of interexchange service plans and rates, and given the number of charges and rates that now appear on many end-user bills, and given the fact that consumers will increasingly purchase "bundles" of services in the future, it is unlikely that end-users would attribute differences in interexchange rates to differences in the underlying access rates charged by their LEC or make purchasing decisions on that basis. From a consumer perspective, the relationship is too tenuous.

If the Commission perceives that there is a problem with the level of access rates charge by CLECs to interexchange carriers, then it should exercise it regulatory authority over such charges. Under no circumstances, however, should the Commission seek to address this perceived problem through the deaveraging of interexchange rates charged to end-users. To do so would undermine the universal service goals of the Telecommunications Act of 1996 and contravene Section 254(g)'s clear geographic rate averaging mandate.

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than the rates charged to its subscribers in any other State." 47 U.S.C. § 254(g). The pass through of higher CLEC access charges would inevitably lead to higher interexchange rates in some States than others in violation of the plain language of Section 254(g).

[20] *Notice* ¶ 244. The State believes that the Commission should give serious consideration to whether it should seek to promote policies intended to facilitate the migration of end-users from CLECs back to ILECs.

III. THE COMMISSION SHOULD GIVE CAREFUL CONSIDERATION TO THE DEAVERAGING OF SLCs

In the *Notice*, the Commission also requests comment on the deaveraging of subscriber line charges ("SLCs"). SLCs are imposed on end-users to recover a portion of the common line costs assigned to the interstate jurisdiction in connection with the provision of interexchange services. Before permitting LECs to deaverage such end-user charges, the State believes that the Commission should give careful consideration to the universal service requirements of Section 254 of the Communications Act.

Section 254 clearly expresses Congress' preference for minimizing disparities in rates charged to end-users in rural and high-cost areas, on the one hand, and urban areas, on the other hand. First, as discussed above, Section 254(g) requires interexchange rates to average rates across urban, rural, and high-cost areas.[21] Second, Section 254(b)(3) mandates that "consumers in rural, insular, and high cost areas, should have access to telecommunications and information services" at rates that are "reasonably comparably" to those charged to consumers in rural areas.[22] These provisions, taken together, place clear limits on the ability of the Commission to permit the deaveraging of interexchange rates charged to end-users.

The Commission must adhere to the limitations imposed by Section 254(g) in its efforts to reform the access charge system. *It would be ironic if the Commission's efforts to create greater transparency in the mechanisms used to fund universal service were to create the very rate disparities that the universal service provisions of the Telecommunications Act, whether Section 254(g), Section 254(b) or otherwise, were intended to eliminate.* To avoid this

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[21] *See* 47 U.S.C. § 254(g).

[22] *Id.* § 254(b)(3).

result, the Commission should ensure that the deaveraging of any access rate elements imposed on end-users (*i.e.,* Subscriber Line Charges) do not lead to statutorily prohibited disparities in the rates charged to end-users in urban areas and those charged to end-users in rural, insular, and high cost areas.

CONCLUSION

The Commission should make clear that Section 254(g) prohibits interexchange carriers from using disparities in access charges – either between geographic regions or between LECs – as a pretext for deaveraging interexchange rates imposed on end-users. Moreover, the Commission should also ensure that, as required by Section 254(b)(3) of the Communications Act, any interstate access rate elements (*i.e.,* Subscriber Line Charges) imposed on end-users in urban areas are "reasonably comparable" to those in rural, high-cost, and insular areas.

Respectfully submitted,

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