DOCKET FILE COPY ORIGINAL

ORIGINAL

RECEIVED
OCT 29 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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
	)	
Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

COMMENTS OF FOCAL COMMUNICATIONS CORPORATION AND HYPERION TELECOMMUNICATIONS, INC. d/b/a ADELPHIA BUSINESS SOLUTIONS

Russell M. Blau
Kemal M. Hawa
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007-5116
(202) 424-7500

Counsel for Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions

October 29, 1999

No. of Copies rec'd 0+12
List ABCDE

Table of Contents

Summary iii

I. Local Switching 2

II. CLEC Access Charges 5

A. The Market Power Concept is Not Appropriately Applied to CLEC Switched Access Services 6

B. CLEC Originating and Terminating Access Rates Should Be Afforded a Safe Harbor from a Section 208 Complaint if They are at or Below the ILEC Level, and Should Be Presumed Just and Reasonable if Within 25% of the ILEC Rate 9

1. CLEC Access Rates Should Be Afforded a Safe Harbor Against a Section 208 Complaint if they are at or Below the ILEC Rate 9

2. CLEC Access Rates Should Be Presumed Just and Reasonable if they are Within 25% of the ILEC Level 12

3. If CLEC Access Rates Exceed the Incumbent LEC's Rate By More Than 25% and an IXC Files a Complaint Challenging Those Rates, the CLEC Should Be Permitted to File Cost Support to Justify Its Rates 14

C. Both Statutory and Regulatory Constraints Prevent an IXC From Declining a CLEC's Access Service 15

D. CLEC Access Rates May at Times Be Higher Due to High Start Up Costs, Their Small Geographic Service Areas, and the Limited Number of Subscribers Over Whom CLECs Can Distribute Costs 17

E. Access Rates of CLECs Serving Rural and High Cost Areas Will Decrease as CLECs Become Eligible for Universal Service Subsidies 18

F. Mandatory Detariffing of CLEC Interstate Access Charges Will Competitively Disadvantage CLECs 19

1. IXCs Could Exercise Bargaining Power Over CLECs in Contract Negotiations for Access Service Arrangements 20

2. Mandatory Detariffing Would Cause CLECs to Incur Significant Unnecessary Transaction Costs 21

3. Providing the Legal Benefits of Tariffs Only to ILECs Would Place CLECs at a Distinct Competitive Disadvantage 22

Conclusion 23

Summary

Adelphia and Focal submit these comments to advocate two main points. First, there is no cost justification for the Commission to now abandon the existing per-minute local switching rate structure in favor of a capacity-based rate structure. Second, the Commission should not regulate CLEC switched access rates in great detail, but instead should establish a system of benchmarks through which CLEC access rates will be evaluated.

The Commission has been investigating the cost structure of access charges for over two decades, and has fine-tuned the traffic-sensitive local switching charges as recently as its last *Access Charge Reform Order*. Since that order was issued, nothing has changed in the physical provisioning of local switching or in cost causation principles that would justify any further changes in the current characterization of local switching as traffic-sensitive. Implementing a new local switching rate structure for access that is not demanded by cost causation also unfairly harm competition if it were applied to reciprocal compensation, and would create uncertainty where none need exist, thereby frustrating the legitimate expectations of competitors.

With respect to CLEC access charges, the Commission should disregard IXC attempts to frame CLECs as having market power in the provision of access services, and reject the notion that CLEC access rates should be regulated in great detail. Rather, the Commission should seek to promulgate rules that will ensure that CLEC access rates are just and reasonable, while still providing CLECs with flexibility in their access pricing. Focal and Adelphia believe that this can

be achieved in a manner that is consistent with Congress' and the Commission's deregulatory objectives.

To accomplish this, the Commission should establish a series of benchmark rates through which CLEC access rates can be evaluated. Under Focal and Adelphia's proposal, if a CLEC's access rates are at or below the level of the incumbent LEC, taking into account both the incumbent LEC's traffic-sensitive and flat rates, the CLEC rate will have a safe harbor against a Section 208 complaint. If a CLEC's rate is within 25% of the incumbent LEC adjusted rate, the rate should be presumed just and reasonable, and IXCs should bear a heavy burden to overcome this presumption. If a CLEC's access rates exceed either of these benchmarks, and the rate is challenged in a formal complaint, the CLEC should be permitted to file cost support to justify the reasonableness of its rates. This proposal is consistent with the Act and the Commission's rules, and is far more equitable than other proposals being considered, such as allowing IXCs to refuse a CLEC's access service, or mandatorily detariffing CLEC access services.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

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
	)	
Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

COMMENTS OF
FOCAL COMMUNICATIONS CORPORATION AND
HYPERION TELECOMMUNICATIONS, INC. d/b/a
ADELPHIA BUSINESS SOLUTIONS

Focal Communications Corporation ("Focal") and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions ("Adelphia"), by their counsel, and pursuant to the Commission's August 27, 1999, Notice of Proposed Rulemaking ("NPRM"), hereby submit their comments in the above-captioned proceeding. Adelphia and Focal submit these comments to advocate two main points. First, there is no cost justification for the Commission to now abandon the existing per-minute local switching rate structure in favor of a capacity-based rate structure. Second, the Commission should not regulate CLEC switched access rates in great detail, but instead should establish a system of benchmarks through which CLEC access rates will be evaluated.

I. Local Switching

In its NPRM, the Commission solicits comment on whether the existing per-minute local switching rate structure rules should be replaced with a capacity-based rate structure. As a threshold matter, the Commission should be cautious in its local switching inquiry in this proceeding, since the issues raised by the Commission could easily become embroiled with the issues being considered by the Commission in its *Reciprocal Compensation Proceeding*.[1] For this reason Focal and Adelphia urge the Commission to issue an order in that proceeding quickly so as to avoid confusing the two issues, which should properly be considered separately. With respect to the merits of the Commission's current inquiry, there is no basis or need at this time to disturb the existing local switching rate structure.

The Commission has been investigating the cost structure of access charges for over two decades, and has fine-tuned the traffic-sensitive local switching charges as recently as its last *Access Charge Reform Order*,[2] where it removed the line and dedicated trunk ports from traffic-sensitive charges. *Access Charge Reform Order* at ¶¶ 125-127.

In its NPRM in this proceeding, the Commission acknowledges that any change in current traffic-sensitive local switching charges would have to be justified by cost causation. *NPRM* at ¶¶

---

[1] *Inter-Carrier Compensation for ISP-Bound Traffic*, CC Docket Nos. 96-98, 99-68, Declaratory Ruling in CC Docket No. 96-98 and Notice of Proposed Rulemaking in Docket No. 99-68 (rel. Feb. 26, 1999) ("*Reciprocal Compensation Proceeding*").

[2] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, ¶ 363 (1997), *aff'd, Southwestern Bell Telephone Company v. FCC*, 153 F.3d 520 (8th Cir. 1998).

208-210. In the two years since the last *Access Charge Reform Order*, nothing has changed in the physical provisioning of local switching or in cost causation principles that would justify any further changes in the current characterization of local switching as traffic-sensitive. The legitimacy of the current structure is also underscored by the fact that the Commission and states (with the exception of the Washington State PUC), have treated local switching as traffic-sensitive (including the California PSC and the New York PSC, which just completed an exhaustive inquiry into reciprocal compensation). The traffic-sensitive nature of the current local switching access charge is also underscored by the *Access Charge Reform Order*, where the Commission reaffirmed that the "cost of modern digital switches is actually predominantly [traffic-sensitive]." *Access Charge Reform Order* at n. 167.

Implementing a new local switching rate structure for access that is not demanded by cost causation would also unfairly harm competition if it were applied to reciprocal compensation. First, it would create uncertainty where none need exist, thereby frustrating the legitimate expectations of competitors. CLECs have fought in virtually every state and at the Commission to be fairly compensated for the switching services they provide. To abandon traffic sensitive charges now in the absence of compelling cost-causation justification would needlessly destroy those expectations. Second, abandoning traffic-sensitive charging without justification would also make incumbent LEC access charges look unjustifiably attractive to traffic-intensive end users, who form the initial target market for access competitors.

To the extent there are "first best" theoretical arguments favoring a capacity charge over a traffic-sensitive charge for local switching, those arguments existed three years ago when the Commission decided to retain the current structure, and move only line ports and dedicated trunk ports out of local switching. Nothing in the NPRM suggests why the Commission should now reverse its field and adopt a proposal based on theoretical virtues that were inadequate just a few short months ago. Furthermore, the pragmatic arguments against a capacity-based charge remain equally compelling. There are tremendous ambiguities about how such a charge would be calculated and applied – indeed, precisely the same ambiguities that the NPRM relies upon in rejecting the concept of time-of-day access pricing. These uncertainties totally outweigh any theoretical virtues any capacity charge might have. In short, implementation of a capacity charge for the purposes of reciprocal compensation or access would create greater uncertainty and debate than currently exist as to the proper level of traffic-sensitive charges.

II. CLEC Access Charges

In the past year, IXCs, led by AT&T, have launched an assault against CLEC switched access charges. Large IXCs have used their market power to engage in a form of "self help" that has been condemned by this Commission in the past. In many instances, IXCs have simply refused to pay for access services provided by CLECs. At other times, IXCs have attempted to dictate unilaterally the rate that they, in their sole discretion, believe is reasonable for CLEC access services. IXCs attempt to justify their behavior by claiming that CLECs possess market power, despite the fact that CLECs have an extremely small share of the local exchange market and few customers. In view of these claims, the Commission has initiated this NPRM to investigate, among other things, whether CLEC access charges should be subject to any degree of regulatory oversight.

As explained more fully below, the concept of market power cannot be meaningfully applied to CLEC switched access services. Thus, the Commission should disregard IXC attempts to frame CLECs as having market power in the provision of access services, and reject the notion that CLEC access rates should be regulated in great detail. Rather, the Commission should seek to promulgate rules that will ensure that CLEC access rates are just and reasonable, while still providing CLECs with flexibility in their access pricing. Focal and Adelphia believe that this can be achieved in a manner that is consistent with Congress' and the Commission's deregulatory objectives.

To accomplish this, the Commission should establish a series of benchmark rates through which CLEC access rates can be evaluated. Under Focal and Adelphia's proposal, if a CLEC's access rates are at or below the level of the incumbent LEC, taking into account both the incumbent

LEC's traffic-sensitive and flat rates, the CLEC rate will have a safe harbor against a Section 208 complaint. If a CLEC's rate is within 25% of the adjusted incumbent LEC rate, the rate should be presumed just and reasonable, and IXCs should bear a heavy burden to overcome this presumption. If a CLEC's access rates exceed either of these benchmarks, and the rate is challenged in a formal complaint, the CLEC should be permitted to file cost support to justify the reasonableness of its rates. This proposal is consistent with the Act and the Commission's rules, and is far more equitable than other proposals being considered, such as allowing IXCs to refuse a CLEC's access service, or mandatorily detariffing CLEC access services.

A. The Market Power Concept is Not Appropriately Applied to CLEC Switched Access Services

The concept of market power cannot readily be applied to CLEC switched access services. Access charges are the charges paid by interexchange carriers ("IXCs") to local exchange carriers ("LECs") for the use of a LEC's network to originate and terminate long distance calls to the LEC's customers. As such, access services are merely interconnection services designed to facilitate end users' ability to place and receive long distance calls. For the most part, end users utilize only a single local service provider, thus that carrier necessarily must provide access to IXCs for such end user. Although end users select their local carrier (and thus their access service provider), IXCs are considered to be the access customer. This paradigm does not lend itself to the traditional market power analysis employed by the Commission.

The Commission has historically considered several factors in assessing market power, including: the nature of barriers to market entry; the ability to influence market price; supply capabilities of competing participants, including the availability of reasonably substitutable services; the number and financial strength of competing participants; the relative power of purchasers; whether a firm controls bottleneck facilities; and the movement of market share over time.[3/] Each of these factors views the marketplace as a whole in an attempt to determine whether viable competitive alternatives exist in a given market for similar services. From this standpoint, CLECs cannot plausibly be considered to have market power since the incumbent LEC (as well as other CLECs) is always a potential competitive alternative for end users. Moreover, CLECs have no significant market share, and rely in large part on incumbent LECs for the loops and transport facilities necessary to provision local exchange telecommunications services.

Switched access services are unique, however, since the carrier providing local exchange services to an end user necessarily is the carrier that will provide switched access to IXCs for that end user. Based on this fact, AT&T has alleged that CLECs have market power over IXCs, especially in the case of terminating access. According to AT&T, since the called party is not paying for the call, terminating access charges are shielded from downward market pressures. *NPRM* at ¶ 240. As a result, AT&T asserts that CLEC access services should be regulated as a dominant service. AT&T's position is untenable, as it is tantamount to an assertion that although CLECs have

---

[3/] *See e.g., In the Matter of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, CC Docket No. 79-252, Order, 11 FCC Red. 3271 (1995).

no cognizable market share and have few customers, CLECs are dominant providers with respect to each of their customers. Carried out to its logical extreme, AT&T is claiming that when a CLEC gets its first customer, such a CLEC suddenly becomes a carrier with market power over AT&T, a proposition that does not comport with any market power definition utilized by this Commission in the past.[4] Moreover, if the Commission were to accept AT&T's position that CLECs have market power over terminating access, then it would be difficult to imagine the point at which CLECs would cease to have such market power. It thus appears that AT&T proposes that the Commission regulate CLEC switched access services for the indefinite future, a position that cannot be reconciled with Congress' and the Commission's pronounced goal of establishing "a pro-competitive, deregulatory national policy framework for the United States telecommunications industry."[5]

The requirements of the Act and the Section 208 complaint process should be adequate to ensure that CLEC switched access rates are just and reasonable. However, if CLEC switched access rates are to be subjected to some form of regulation, it should be the least intrusive regulation possible. *See NPRM* at ¶ 256. The Commission has already articulated its reluctance "to regulate the rates charged by competitive entrants to the local exchange and exchange access markets and

---

[4] Translating AT&T's position to the commercial real estate market is perhaps instructive. It is certainly true that the owner of an office building could attempt to increase rents by 25% upon the expiration of existing leases, and perhaps some tenants might be forced to renew even under such conditions. But this would not prove that commercial real estate requires regulation, inasmuch as such a landlord would soon have an empty building. The same market discipline applies to the competitive access market.

[5] *See Access Charge Reform Order* at ¶ 1.

prefer[s] instead to seek a marketplace solution that might constrain CLEC access rates." *NPRM* at 238. Adelphia and Focal support this aim.

B. CLEC Originating and Terminating Access Rates Should Be Afforded a Safe Harbor from a Section 208 Complaint if They are at or Below the ILEC Level, and Should Be Presumed Just and Reasonable if Within 25% of the ILEC Rate

The Commission should refrain from actively regulating CLEC switched access rates. However, an appropriate benchmark scheme would play a useful role in evaluating CLEC access rates. It bears mention that as a general matter, Adelphia and Focal charge rates that are comparable to the rates of the incumbent LEC serving the same geographic service territory.

1. CLEC Access Rates Should Be Afforded a Safe Harbor Against a Section 208 Complaint if they are at or Below the ILEC Rate

The Commission regulates incumbent LEC access charges to ensure that those charges fall within the Commission's mandates. *NPRM* at ¶ 243. Focal and Hyperion fully expect that these rates will continue to be scrutinized by the Commission, and will continue to be adjusted as a result of further cost studies, universal service considerations, and other factors. Since incumbent LEC rates are the most heavily examined, their rates are the most obvious choice to serve as a benchmark.[6] If CLEC access charges are at or below the level of the incumbent LEC for the same geographic area, they should be afforded a safe harbor against a Section 208 complaint by an IXC.

---

[6] Focal and Adelphia recognize that this approach is one that would be advocated by typical CLECs. CLECs with unique circumstances may believe that different rates, such as the NECA rates, would serve as a more appropriate benchmark. Those CLECs should be permitted to make a factual showing in support of those rates.

To hold otherwise would indicate to CLECs as well as IXCs that even if CLEC access rates were subjected to the strictest rate regulation, *i.e.* the level of regulation imposed on incumbent LECs, their rates still may be unreasonable and subject to challenge by IXCs. Not only would this result be inequitable and place CLECs at a competitive disadvantage vis-a-vis the incumbent LECs, but it would also potentially subject CLECs to severe anticompetitive conduct on the part of IXCs.

IXCs have painted a highly misleading picture of the disparity that exists between incumbent LEC and CLEC access rates. As an initial matter, the rates cited by AT&T in its petition for a declaratory ruling that initiated this proceeding were largely inaccurate.[7] This problem is compounded by the fact that, for purposes of simplicity, most CLECs do not utilize the complex access charge rate structure to which price cap incumbent LECs must adhere. Specifically, many CLECs to do not assess subscriber line charges ("SLCs"), primary interexchange carrier charges ("PICCs"), and other flat non-traffic sensitive fees imposed by incumbent LECs. Thus, it is inappropriate for AT&T and other IXCs to compare the per minute access charges assessed by CLECs (which may comprise the entire access charge), solely against the per minute charges assessed by incumbent LECs, thereby excluding the non-usage- sensitive charges imposed by incumbent LECs. It is Focal and Adelphia's understanding that the Association for Local Telecommunications Services ("ALTS") has commissioned a study to determine what the per-minute rate of incumbent LEC access charges would be if flat-rate charges were accounted for, and believe

[7] *In the Matter of Interexchange Carrier Purchase of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD 98-63 (filed Oct. 23, 1998).

that the results of that study will more appropriately reflect incumbent LEC access rates. In any event, if the Commission decides to employ incumbent LEC rates in setting a benchmark rate for CLECs, the Commission must take into account both the flat and per-minute charges imposed by incumbent LECs when determining what the incumbent LEC rate actually is. The Commission can do this either by utilizing the results of the ALTS study, or by factoring in some reasonable percentage above the incumbent LEC rate that represents the flat rate charges assessed by incumbent LECs.

Establishing a safe harbor for CLECs whose access charges are at or below the level of the incumbent LEC has the added advantage of protecting CLECs from insular attacks by large IXCs. Any challenge to such a CLEC's rate would in effect be a challenge to the incumbent LEC's rate. Incumbent LEC switched access services currently enjoy the protection of the filed rate doctrine. The effective rate for switched access services contained in incumbent LEC tariffs is the lawful rate that IXCs must pay. If an IXC is aggrieved over any incumbent LEC rate, then such IXC is free to file a Section 208 complaint and demonstrate, by submitting its own cost studies, that the rate is unjust or unreasonable. Any changes in the incumbent LEC's access charge levels resulting from such a challenge would, of course, affect the benchmark rates.

CLECs should also enjoy the protections of the filed rate doctrine. However, IXCs have ignored CLEC tariffs, and have unilaterally decided to withhold payment of lawfully billed switched access charges, without invoking the Section 208 complaint process. Creating a safe harbor for CLEC access rates when they are at or below the adjusted level of the incumbent LEC will prevent

IXCs from abusing their market power to force CLECs to accept whatever payment, if any, that IXCs are willing to submit for switched access services provided. IXCs, of course, can always challenge the reasonableness of the underlying incumbent LEC rate, but would be prevented from deciding, in their sole discretion, that a rate is reasonable for certain LECs, but unreasonable for others.

2. CLEC Access Rates Should Be Presumed Just and Reasonable if they are Within 25% of the ILEC Level

CLEC switched access rates should be presumed to be just and reasonable if they are fairly proximate to the rate charged by the incumbent LEC in the same geographic area. The Commission has recognized in past decisions the inequity of attempting to force a disparate group of carriers, with varying costs and circumstances, to charge uniform rates. It has instead used statistical measures of rate variation, such as the mean and standard deviation, to identify "outlier" carriers and establish benchmarks for identifying potentially unreasonable rates.[8] Adelphia and Focal believe that an equitable benchmark for CLEC access rates would be within 25% of the incumbent LEC rate, factoring in both the flat and per-minute charges assessed by incumbent LECs. Based on recent IXC

[8] *See, e.g., Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection through Physical Collocation for Special Access and Switched Transport*, 12 FCC Rcd 18730, paras. 144-149 (1997), *aff'd, Southwestern Bell v. FCC*, 168 F.3d 1344 (1999); *Simplification of the Depreciation Prescription Process*, 8 FCC Rcd 8025, 8050 (1993); *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, Appendix C (1990); *Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers*, 5 FCC Rcd. 7507, 7507-08 (1990), on recon., 6 FCC Rcd 7193 (1991), *aff'd, Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993).

behavior, it is reasonable to assume that if a safe harbor were established for CLEC rates at or below the ILEC level, IXCs would automatically deem any rate that exceeds the incumbent LEC rate to be unjust and unreasonable, and would thus refuse to pay CLECs such a rate.

Although Adelphia and Focal advocate the use of a benchmark, it is not their intention that the benchmark be used by IXCs as a sword to attack any CLEC rate that varies from the incumbent LEC rate, even slightly. As explained more fully below, CLECs have many costs that incumbent LECs do not have, thus CLEC access rates may vary from those of the incumbent LEC serving the same geographic area. CLECs who charge slightly higher rates than the incumbent LEC should not lose the protections afforded other LECs falling within the benchmark, especially in the case of marginal increases in charges. In any event, AT&T and other IXCs have previously complained (in large part based on erroneous information) about CLEC access rates that are ten or twenty times the rates being charged by the corresponding incumbent LEC. It would be absurd for IXCs to argue that scrutiny of CLEC access rates that are within 0.25 of the incumbent LEC rates should be equated with rates that are twenty times greater.

Under this proposed benchmark, Focal and Adelphia believe that the burden should be on the IXC to demonstrate, by filing a Section 208 complaint, that the CLEC rate is unjust or unreasonable. This proposal will allow CLECs the flexibility to charge rates that vary from the incumbent LEC rate – though within the realm of reasonableness – while still providing IXCs with a procedure to challenge such rates with the Commission.

3. If CLEC Access Rates Exceed the Incumbent LEC's Rate By More Than 25% and an IXC Files a Complaint Challenging Those Rates, the CLEC Should Be Permitted to File Cost Support to Justify Its Rates

Adelphia and Focal submit that the use of benchmarks does not mean that rates falling outside the scope of those benchmarks should automatically be deemed unjust or unreasonable. In many instances, CLEC access rates could significantly exceed the ILEC rates, and still be lawful. For example, certain CLECs have targeted only residential customers or customers in smaller markets within states in which they seek to provide service. Because of the lack of population density in these markets, the cost of providing access lines is significantly greater than it would be in large urban markets within the same state. Incumbent LECs are for the most part required to average their rates, thus they are able to offset the costs they incur in higher cost markets with the revenue they derive from larger urban markets. CLECs that do not provide service in such larger urban markets are unable to offset their costs in this manner, thus they must charge higher rates for access service.

An IXC may recognize this fact and decide not to challenge the reasonableness of CLEC rates, in which case the IXC would be required to pay the CLEC's tariffed rate. In the event that an IXC decides to challenge such rates, the IXC should be required to file a Section 208 complaint, and the CLEC should be permitted to file cost support to justify its rates. This procedure is largely the same as the Section 208 complaint process works currently. There are several advantages to this procedure. First, it allows CLECs to charge rates that are outside the scope of the established benchmarks without being automatically invalidated. Second, if a CLEC's access rates are

challenged, CLECs would have a mechanism through which to demonstrate through cost data, and in a formal rate proceeding, that its rates are in fact just and reasonable. Third, it establishes the Commission as the ultimate arbiter of disputes – as it properly should be – thereby preventing large IXCs from unilaterally deeming CLEC access rates unreasonable and withholding payment.

C. Both Statutory and Regulatory Constraints Prevent an IXC From Declining a CLEC's Access Service

The Act and the Commission's rules prevent IXCs from declining a CLEC's access service. Sections 201 and 251(a) of the Act impose an unequivocal duty on all common carriers to interconnect with each other. Specifically, Section 201 imposes a duty on "every common carrier engaged in interstate or foreign communication . . . to establish physical connections with other carriers."[9] *47 U.S.C. § 201.* Similarly, Section 251(a) of the Act 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).* A determination that IXCs may decline a CLEC's access service would stand in direct opposition to the plain dictates of these provisions of the Act.

Under Section 202(a) of the Act, both IXCs and CLECs are required to provide their common carrier services on a nondiscriminatory basis. If an IXC were able to decline a CLEC's

[9] Although the Commission has at times in the past interpreted Section 201 to require a hearing in the event that an interconnection request was denied, the continued validity of this procedure is questionable in view of passage of the Act. In any event, the interconnection duty imposed on all carriers in Section 251(a) of the Act is unambiguous.

access service, this nondiscrimination duty would be violated. CLEC customers seeking to purchase that IXC's long distance service would be discriminated against since they would be unable to presubscribe to that IXC. Moreover, IXC customers who wish to place calls to customers of the CLEC with whom the IXC refuses to deal would be discriminated against since their calls would be blocked.

As new entrants into the telecommunications market, CLECs are in no position to inconvenience their customers either by limiting the number of IXCs to whom they can presubscribe, or by blocking their long distance calls. If an IXC were to refuse to purchase a CLEC's access service, however, CLECs would have little choice but to block calls originated to that IXC. The only other alternative would be for the CLEC to provide access service to the IXC without charge. Neither of these alternatives is consistent with the Act. If a CLEC were to deny its customers access to an IXC's long distance services, it would be in violation of its duty to provide equal access to IXCs, contained in Section 251(b)(3). Further, providing access services to an IXC without charge would force a CLEC to violate its own nondiscrimination duty with respect to other IXCs purchasing its switched access services and paying for those services. The inevitable result would be that CLECs would be forced to capitulate to an IXC's demands and assess a switched access rate that the IXC, in its sole discretion, deems reasonable.

D. CLEC Access Rates May at Times Be Higher Due to High Start Up Costs, Their Small Geographic Service Areas, and the Limited Number of Subscribers Over Whom CLECs Can Distribute Costs

CLECs incur enormous up-front capital expenditures in connection with the construction of their telecommunications infrastructure which they must finance themselves. Incumbent LECs, however, benefit from their historical monopolies and decades of rate of return regulation, and thus already have ubiquitous telecommunications networks in place. In view of this, it should be understandable that CLECs may have to charge more for their access services in some instances, since access charges have traditionally been an integral mechanism through which local carriers recoup the costs associated with constructing and operating their local networks. Moreover, when constructing their networks, CLECs install enough equipment and capacity to accommodate both their current and future needs. Thus, when a CLEC network initially becomes operational, it typically is not being utilized to its full capacity due to the limited number of customers that a new entrant possesses. Since CLECs have both large start-up expenditures associated with installing their equipment, and few customers over whom to distribute those costs, they must at times charge higher access rates.

When constructing their networks, CLECs are also faced with exorbitant franchise fees and fees for access to public rights-of-way frequently imposed by municipal franchising authorities. In addition, building owners often try to impose building access fees on CLECs for access to commercial and residential property. These fees are not paid by incumbent LECs since incumbent LECs gained access many years ago when they were monopolies, thus giving them a decisive

advantage over CLECs. Since incumbent LECs do not pay franchise fees or fees associated with building access or access to rights-of-way, in many instances CLECs cannot sustain effective competition against the incumbent due to the recurring cost disadvantage.

Focal and Adelphia readily agree that CLEC access charges should be just and reasonable, but raise the points above to emphasize that CLEC access rates should not be deemed unreasonable merely because they are higher than the incumbent LEC rate. There are numerous cost and other factors that come into play when determining whether CLEC access charges are just and reasonable. In any event, if a CLEC's access rates are challenged by an IXC, it should be the Commission that evaluates the reasonableness of those rates in a Section 208 proceeding, not large IXCs who have only their own self interest mind, and who can use their dominant market power to force CLECs to capitulate into charging whatever rates the IXCs deem appropriate.

E. Access Rates of CLECs Serving Rural and High Cost Areas Will Decrease as CLECs Become Eligible for Universal Service Subsidies

There will invariably be instances where an individual CLEC's access charges exceed any Commission established benchmark, but are still just and reasonable taking into consideration the significant costs CLECs incur and the geographic area which is being served. This should come as no surprise to IXCs, as independent telephone companies in rural and high cost areas have always levied higher access charges than their urban counterparts. These higher access rates have not had a detrimental effect on IXCs, as they are able to disperse their costs across all of their customers. Thus, IXCs have absorbed the higher access charges assessed by independent telephone companies,

while still complying with their obligation, under Section 254(g) of the Act, to charge subscribers in rural and high cost areas rates that are no higher than the rates charged by the IXC in urban areas. IXCs could defray higher CLEC access charges in a similar manner.

There is no evidence, at this time, to support a finding that IXCs would have to charge customers in rural and high cost areas any more than they would charge urban customers due to higher CLEC access rates. In any event, Adelphia and Focal believe that any Section 254(g) concerns that presently exist will be obviated in the near future, as the implicit subsidies currently built into access charges are replaced by explicit universal service subsidies. As more CLECs begin to provide service in rural and high cost areas, they will increasingly become eligible for universal service subsidies, and thus be able to offset many of their costs through this mechanism, as opposed to building their costs into their access rates. It is notable that incumbent LECs, whose access rates may ultimately become the benchmark, currently receive virtually all universal service contributions.

F. Mandatory Detariffing of CLEC Interstate Access Charges Will Competitively Disadvantage CLECs

IXCs have already demonstrated their enormous market power by refusing to pay CLECs for access services provided, even though CLECs have effective access tariffs on file with the Commission. IXCs have ignored the Section 208 complaint process that should properly have been invoked in the case of a rate dispute, and instead have attempted to dictate unilaterally the rates they deem acceptable. Mandatory detariffing of CLEC access charges would harm CLECs by increasing IXC bargaining power.

1. IXCs Could Exercise Bargaining Power Over CLECs in Contract Negotiations for Access Service Arrangements

Large IXCs have already demonstrated the tremendous bargaining power they possess over CLECs by refusing to pay CLECs for access services provided or by paying CLECs whatever amount they, in their sole discretion, deem appropriate. Mandatory detariffing of CLEC access services would further enhance IXCs' ability to exercise this bargaining power, and leave CLECs with little recourse.

Switched local service would not be a viable business for CLECs in the absence of an arrangement with IXCs to provide long distance service to the CLEC's customers. Tariffs are an efficient and effective means by which CLECs can establish terms of service with all IXCs for exchange access services. If the Commission were to order mandatory detariffing, CLECs would then be required to negotiate individual contracts with numerous IXCs. The major IXCs, in particular, are well aware that CLECs, as new entrants into the telecommunications marketplace, are under pressure to accede to their demands. CLECs would be unable to attract new or retain existing customers if their customers were unable to presubscribe to their long distance carrier of choice. IXCs, on the other hand, would be virtually unaffected if they were unable to secure an access contract with a CLEC due to the small market share and few number of customers served by the CLEC.

Major IXCs possess tremendous resources, and thus already have superior bargaining power over CLECs, as they have the money and personnel to enter into protracted contract negotiations.

Knowing that the CLEC would be in critical need of establishing an access service arrangement, IXCs would have a decisive negotiation advantage. Since speed to market is critical for a new entrant, CLECs, especially smaller CLECs, would be forced to accept whatever rates and terms large IXCs wish to impose. Moreover, once an IXC establishes an access service contract with one CLEC, it would have no incentive to pay any other CLEC any more, regardless of the CLEC's costs. Unlike the interconnection negotiation process established by the Act between CLECs and incumbent LECs, there are no formal procedures or time lines in place for CLECs to arbitrate the rates or terms of an access contract. Thus, CLECs would be left with a dilemma – either accept the terms imposed by the IXC, or file a formal complaint with the appropriate regulatory agency in the hopes of obtaining better rates and terms, thereby delaying their market entry until the dispute is resolved.

2. Mandatory Detariffing Would Cause CLECs to Incur Significant Unnecessary Transaction Costs

Few CLECs can afford to establish individual access service contracts with all of the IXCs, then renegotiate them periodically. CLECs currently struggle to devote adequate resources to their negotiations with incumbent LECs for the interconnection agreements that are most critical for their operations. Negotiating individual contracts with IXCs for access services will require the expenditure of additional precious resources that, if avoided, could make CLECs more competitive and ultimately result in lower prices for consumers. These resource limitations would create an obvious entry barrier to the ability of a CLEC to begin providing service quickly.

The effect of mandatory detariffing would be to have an extra weight applied to each CLEC that would limit its ability to expand its customer base, thereby protecting the considerable market share held by incumbent LECs. Given the Commission's pronounced pro-competitive objectives, it should not now institute a policy that in hinders 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 is successful.

3. Providing the Legal Benefits of Tariffs Only to ILECs Would Place CLECs at a Distinct Competitive Disadvantage

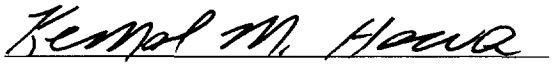
In addition to reducing the costs of contract negotiations for carriers, tariffs offer telecommunications carriers the legal benefits of the "filed rate doctrine." Under this doctrine, CLECs will have some assurance that customers will receive service under the rates, terms and conditions in their tariffs. Providing the legal benefits of the filed rate doctrine to incumbent LECs, but not to CLECs, would offer a significant competitive advantage to incumbent LECs. Such a result would be unfairly discriminatory since CLECs would be forced to incur substantial transaction costs and potential litigation costs in establishing and enforcing access service arrangements with IXCs, while incumbent LECs would be shielded from such costs through the filed rate doctrine. As stated previously, given their limited legal and financial resources, CLECs may be inclined to forego their rights in an effort to enter the market quickly, and accept whatever rates and terms the IXC imposes. This Commission should reject a mandatory detariffing system because of the burden it will inevitably place on competitive entrants. However, the mere fact that incumbent LECs will not

be forced to bear the same costs as CLECs necessitates the rejection of the mandatory detariffing proposal as anticompetitive and discriminatory.

Conclusion

For the foregoing reasons, Adelphia and Focal urge the Commission to reject the notion that CLECs possess meaningful market power in the access services market, and refrain from regulating CLEC switched access charges in detail. Rather, the Commission should establish a series of benchmarks that will be used to evaluate the reasonableness of CLEC switched access rates, as recommended above. Such an approach would be far more equitable than allowing IXCs to refuse to purchase CLEC access services or mandatorily detariffing those services. This approach would ensure that CLEC access rates are just and reasonable and still be consistent with the deregulatory objectives embodied in the Act.

Respectfully submitted,



Russell M. Blau
Kemal M. Hawa
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W. Suite 300
Washington, D.C. 20007-5116
(202) 424-7500 (phone)
(202) 424-7645 (fax)

Counsel for Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions

303486.2

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Comments of Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions have been served by hand delivery to the persons on the attached list.

Alma R. Myers

Date: October 29, 1999

VIA HAND DELIVERY

Magalie Roman Salas, Secretary
Federal Communications Commissions
The Portals - TW-A325
445 Twelfth Street, S.W.
Washington, DC 20554

VIA HAND DELIVERY

Chairman William E. Kennard
Federal Communications Commission
445 12th Street, S.W. - Suite B201
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Dorothy Atwood
Chief, Enforcement Division
Federal Communications Commission
Common Carrier Bureau
445 12th Street, S.W. - Suite 5A848
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Susan Ness, Commissioner
Federal Communications Commission
445 12th Street, S.W.
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Linda Kinney
Federal Communications Commission
445 12th Street, S.W. Suite 8-B115
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Harold Furchtgott-Roth, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

William Bailey
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Michael K. Powell, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Kyle D. Dixon
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Gloria Tristani, Commissioner
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Sarah Whitesell
Federal Communications Commission
445 12th Street, S.W. - 8TH Floor
The Portals
Washington, DC 20554

VIA HAND DELIVERY

Tamara Preiss
Federal Communications Commission
445 12th Street, S.W. - 5th Floor
The Portals
Washington DC 20554

VIA HAND DELIVERY

Jane Jackson
Federal Communications Commission
445 12th Street, S.W. - 5th Floor
The Portals
Washington DC 20554

VIA HAND DELIVERY

Yog Varma
Federal Communications Commission
445 12th Street, S.W. - 5th Floor
The Portals
Washington DC 20554

VIA HAND DELIVERY

Rich Lerner
Federal Communications Commission
445 12th Street, S.W. - 5th Floor
The Portals
Washington DC 20554

VIA HAND DELIVERY

International Transcription Service
1231 20th Street, N.W.
Washington, DC 20036

VIA HAND DELIVERY

Larry Strickling
Federal Communications Commission
445 12th Street, S.W. - 5th Floor
The Portals
Washington DC 20554

VIA HAND DELIVERY

Kathryn Brown
Federal Communications Commission
445 12th Street, S.W. - 8th Floor
The Portals
Washington DC 20554