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FEDERAL COMMUNICATIONS COMMISSION
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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
	)	
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 WINSTAR COMMUNICATIONS, INC.

I. INTRODUCTION

Winstar Communications, Inc. and its operating subsidiaries (collectively "Winstar"), by its attorneys, hereby submit the following Comments in response to the Commission's Further Notice of Proposed Rulemaking ("Notice") in the proceeding captioned above.[1] In this proceeding, the Commission is considering various amendments to its rules governing access charges. Winstar offers local exchange service using fixed wireless technology in more than 30 major U.S. markets. As such, Winstar has a direct and vital interest in the outcome of this proceeding.

In these Comments, Winstar addresses the Commission's proposals regarding CLEC access charges. As discussed below, Winstar recommends that the Commission adopt a "benchmark" rate approach to assure the reasonableness of CLEC terminating access charges. In

[1] FCC 99-206, rel. August 27, 1999.

addition, the Commission should explicitly affirm that IXCs are required by the Communications Act ("the Act") to interconnect with CLECs and cannot use self-help to resolve rate disputes.

II. ESTABLISHING A "BENCHMARK RATE" STANDARD FOR CLEC TERMINATING ACCESS CHARGES WILL ASSURE ALL PARTIES OF THE CONTINUING REASONABLENESS OF THESE RATES WITHOUT SUBJECTING CLECS TO UNDULY BURDENSOME REGULATORY REQUIREMENTS.

In the Notice, the Commission seeks comment on the possible regulation of CLEC access charges. The FCC states that its inquiry was prompted by the allegations of several IXCs that "a substantial number of CLECs impose switched access charges that are significantly higher than those charged by the incumbent LECs with which they compete."[2] In response to this "problem," the Commission proposes and solicits comment on several regulatory and market-based solutions.

As an initial matter, Winstar notes that there are legitimate reasons for the disparities in the terminating rates charged by CLECs and ILECs. The access charge rates of ILECs and CLECs are not readily comparable, as ILECs and CLECs do not necessarily employ the same rate structure. For example, some CLECs do not assess PICC and other flat-rate charges that price cap ILECs are required by the Commission's Rules to collect from the IXCs. Furthermore, a CLEC often has higher access costs because of the substantial up-front investment in facilities and network infrastructure that is required to compete with the ILEC. These costs are typically spread over a lower traffic volume than that of an ILEC, since CLECs usually serve smaller geographic regions and fewer customers. Finally, while the ILECs have operated for decades under an effectively guaranteed rate of return with a captive ratepayer base, the CLECs must

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[2] Notice at ¶ 238.

compete for customers, are capitalized by debt and the stock market, and operate under pressure from the market to ramp up revenues and show a return on investment. Under the circumstances, a difference in the access rates charged by CLECs and ILECs is not necessarily unreasonable.

Regardless of the reasonableness of CLEC access charges, subjecting CLECs to a full panoply of regulatory requirements in their provision of terminating access would not serve the interests of the public, most notably the interests of U.S. consumers. Imposing burdensome regulations on CLECs would only further increase their costs, which would ultimately be borne by end users in the form of higher rates. This increase in costs would discourage carriers from entering the market and thus would discourage competition. Development of a complete regulatory scheme applicable only to CLECs would also be unduly burdensome for the Commission. Such action would require considerable time and effort, and thus would divert scarce Commission resources from other more important matters, such as implementation of the Commission's UNE ruling.

At the same time, however, Winstar acknowledges the benefits of establishing a standard for CLEC terminating access rates. As recognized in the Notice, some IXCs are refusing to pay selected CLECs for terminating access services they have received because the tariffed rates for these services are alleged to be unreasonable.[3] Indeed, it is Winstar's understanding that at least two major interexchange carriers have publicly declared "war" on smaller CLECs' access charges.[4] A standard for terminating access rates that is approved by the Commission would

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[3] Notice at ¶ 32, n.68.

[4] Sprint, for example, has sent letters to several CLECs in which it advises that it is (or will be) withholding payment for charges in excess of the ILEC access rates. AT&T goes one step further, and has threatened to terminate the CLECs' originating and terminating access service unless the CLECs yield to AT&T's edict that they lower their presumptively lawful, tariffed access rates. For the reasons discussed herein, this

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provide proof to the IXCs that the rates they are being charged are reasonable. Thus, this approach should facilitate a rapid resolution of these matters without litigation and provide greater assurance to CLECs that they will get paid for services rendered.

To that end, Winstar supports establishment of a "benchmark rate" for CLEC terminating access charges, along the lines proposed by the Association for Local Telecommunications Services ("ALTS") in its comments in this proceeding. Under the ALTS approach, as long as the CLEC terminating access rate is at or below the relevant benchmark, the rate would be presumed reasonable under Section 201 of the Act. This presumption would be rebuttable by a *prima facie* showing in a complaint filed under Section 208 that the rate in question is unreasonable. If such a showing is made, the CLEC would then bear the burden of proving that its rates are in fact reasonable. Winstar suggests using the terminating access rates that appear in the NECA tariff as the benchmark rates. However, other measures may also be acceptable, such as the ILEC rates for the serving area, or the proxy rates that are being developed by ALTS (as discussed in ALTS' comments). Since CLECs upon entering a market are likely to face higher costs for some network elements than ILECs, benchmark rates that are based on ILEC charges in some fashion should be conservative relative to cost-based CLEC access rates.

There is precedent for use of a benchmark standard as proposed. The Commission has a long history of using benchmark rates as a means of regulation,[5] and of relying on the Section

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position is untenable, and the Commission should quickly and unequivocally reject this blatant attempt by two of the largest IXCs to impose their dictates upon the CLEC community.

[5] *See, e.g., International Settlement Rates*, 12 FCC Rcd 19,806 (1997), *aff'd sub. nom., Cable & Wireless et al. v. FCC*, No. 97-1612 (D.C. Cir., Jan. 12, 1999); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* Report and Order, 8 FCC Rcd 5631, *recon.*, 9 FCC Rcd 1164, 1171-79 (1993).

208 complaint process to ensure the reasonableness of charges.[6] Furthermore, there are definite benefits to this approach. Simply put, the establishment and use of benchmark rates for CLEC terminating access is a reasonable compromise – it would provide reasonable assurance to IXCs that the rates they are being charged are appropriate, without unduly burdening the CLECs. Importantly, a benchmark approach would not be burdensome for the FCC to implement and administer. Benchmark rates are either being developed (by ALTS) or can be readily ascertained by reference to the appropriate NECA or ILEC tariffs. Once benchmarks are established, Commission involvement in the process would be minimal until a complaint is filed.

In addition, Winstar notes that other solutions proposed in the Notice are problematic in other respects. Any solution that involves IXCs refusing to terminate calls to CLECs[7] is not only illegal (as discussed below), but also would result in chaos for consumers, and would fundamentally disrupt the workings of the public switched telephone network. Requiring CLECs to negotiate all terminating access rates with IXCs is unrealistic – it ignores the practical market power of the larger IXCs. Furthermore, it would be an administrative nightmare for the CLECs, who as a general matter do not have the resources to negotiate access rates with hundreds of long distance carriers. The "called-party-pays" and "end-user-pays" solutions suggested by the Commission[8] are also confusing for end user customers, and as they are expensive to implement and administer, would result in higher rates for consumers.

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6 *See, e.g., Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Prescription and Enforcement Processes*, Report and Order, 10 FCC Rcd 6788 ¶ 137 (1995); *ACC Long Distance Corp. v. Yankee Microwave, Inc.*, Memorandum Opinion and Order, 8 FCC Rcd 85, ¶ 6 (1993); *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 36 (1990).

7 Notice at ¶ 242.

8 Notice at ¶¶ 249-252.

In light of these facts, Winstar recommends that the Commission establish benchmark rates for CLEC terminating access charges along the lines proposed by ALTS in its comments in this proceeding.

III. ALL CARRIERS ARE REQUIRED TO INTERCONNECT WITH OTHER CARRIERS BY THE COMMUNICATIONS ACT AND IN THE PUBLIC INTEREST.

The Commission solicits comment on the issue left open by the Common Carrier Bureau (the "Bureau") in *MGC v. AT&T*[9]: whether any statutory or regulatory constraints prevent an IXC from declining a CLEC's access service.[10] As Winstar explains below, the Bureau was correct that an IXC's ability to refuse to provide long distance service—and, concomitantly, its ability to refuse a CLEC's switched access service—is narrowly circumscribed, if not completely foreclosed, by various provisions of the Act.

Sections 201(a) and 251(a)(1) require telecommunications carriers to interconnect with one another.[11] This mandate has been confirmed time and again by the Commission in cases dealing with local competition.[12] As such, an IXC's refusal to interconnect with a CLEC in order to make possible the exchange of toll traffic directly violates these provisions of the Act.

Furthermore, an IXC's practice of interconnecting with *some*, but not all, CLECs places the IXC in violation of its nondiscrimination obligations under Section 202(a) of the Act. It has come to Winstar's attention that AT&T is violating Section 202(a), as it is interconnecting with

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9 *MGC Communications, Inc. v. AT&T Corp.*, File No. EAD-99-002, DA 99-1395, Memorandum Opinion and Order (rel. July 16, 1999) ("*MGC v. AT&T*"). AT&T has filed an application for review of the Bureau's decision.

10 Notice at ¶ 122.

11 *See* 47 U.S.C. §§ 201(a) & 251(a)(1).

12 *See, e.g., Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996).

some CLECs (including its affiliates, Teleport and ACC) while refusing to interconnect with other competitive carriers. AT&T improperly justifies this preferential treatment on its unilateral determination that it will only interconnect with those CLECs whose access rates are at or lower than the ILECs' rates. Yet it is Winstar's understanding that in some cases the rates charged by AT&T's own affiliates exceed the ILEC charges for comparable service in the same territory. In any event, the Commission has not made a determination that the rates of those CLECs with which AT&T will not interconnect are unreasonable; nor has the Commission concluded that the ILECs' rates should be the benchmark rates. Consequently, AT&T has no basis for discriminating among CLECs on the basis of their access charges.

In addition, an IXC that refuses to interconnect also violates Section 254 of the Act. Section 254 provides that "[c]onsumers in all regions of the Nation . . . should have access to telecommunications services, including interexchange services."[13] An IXC that refuses to interconnect with a CLEC will not provide long distance service to the CLEC's customers, or permit its own subscribers to place calls to the CLEC's customers. Thus, an IXC that denies long distance service to a customer on impermissible grounds[14] effectively limits that customer's access to telecommunications services.[15]

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13 47 U.S.C. § 254.

14 Winstar does not believe that an IXC may lawfully condition the availability of its long distance service on the customer's choice of telephone exchange provider.

15 An IXC's refusal to interconnect arguably implicates Section 214 of the Act as well. Section 214 requires an IXC that intends to discontinue or terminate service to a community to obtain approval from the Commission and notify its customers prior to service termination. Thus, assuming that an IXC may lawfully terminate long distance service to a CLEC's customers based on those customers' relationship with the CLEC—and Winstar does not believe that this is permissible—the IXC is arguably required to comply with the Commission's discontinuance requirements under Section 214 before terminating service. Similarly, an IXC's termination of service to its existing customers (and denial of service to potential customers) on the basis of the customers' choice of local service provider also may implicate the IXC's compliance with Section 203 of the Act. Section 203 states that a carrier may provide service only in accordance with the

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Winstar strongly believes that it would be difficult, if not impossible, to legally justify an IXC's refusal to interconnect with a CLEC. However, if the Commission should find that an IXC may lawfully refuse to interconnect with a CLEC, the Commission should at the same time impose certain requirements on the IXCs to ensure that the rights of the public are protected when the IXC takes such action. Specifically, the Commission should require any IXC that refuses to interconnect to work cooperatively with the CLEC to migrate any existing customers to a new interexchange provider or local carrier. As the Bureau found in *MGC v. AT&T*, the IXC must, at a minimum, initiate talks with the CLEC on how customers are to be contacted and notified.[16] The burden and costs of notification and migration appropriately should be borne by the IXC. Furthermore, if the IXC is unable to block traffic, or simply wants the CLEC to perform the necessary blocking, the Commission should require the IXC to compensate the CLEC for all reasonable costs incurred. In addition, the Commission should require the IXC to demonstrate that it has satisfied all relevant requirements of the Act and the Commission's rules and decisions in refusing to interconnect.

As a final matter, the Commission should take this opportunity to reaffirm, in the strongest possible terms, its policy that carriers may not use self-help to resolve rate disputes. Under applicable Commission precedent, carriers who challenge tariff rates as unreasonable may file a Section 208 complaint with the Commission; they may *not*, however, withhold payments.[17] Yet as Winstar discussed above, at least two IXCs have refused to compensate some CLECs for

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terms of its tariff. As such, to the extent the IXC's tariff does not condition the availability of long distance service on the customer's choice of telephone exchange provider, denial of service on that basis violates the IXC's tariff and Section 203.

16 *See MGC v. AT&T* at ¶ 10.

17 *See, e.g., MCI Telecommunications Corp.*, 62 FCC 2d 703 (1976).

switched access service at their presumptively lawful tariffed rates. Indeed, it is Winstar's understanding that AT&T is *still* withholding payment for the services at issue in *MGC v. AT&T*, despite the Bureau's express finding that AT&T must pay MGC's charges for the services rendered.[18] To the extent that carriers such as AT&T are engaging in self-help despite Commission orders and precedent to the contrary, it is time for the Commission to take stronger measures to enforce its requirements – *e.g.*, the imposition of forfeitures and other penalties. Such action would do more to assure the continued availability of CLEC access services priced at reasonable rates than any regulation of CLEC access charges.

IV. CONCLUSION

For these reasons, the Commission should adopt a "benchmark rate" standard for CLEC terminating access charges, and should confirm that IXCs cannot refuse to interconnect with CLECs, as discussed herein.

Respectfully Submitted,

WINSTAR COMMUNICATIONS, INC.

By: _____

Danny E. Adams
Joan M. Griffin
Enrico Soriano
KELLEY DRYE & WARREN LLP
1200-19th Street N.W., Suite 500
Washington, D.C. 20036
(202) 955-9600

Its Attorneys

Russell C. Merbeth
Lawrence A. Walke
WINSTAR COMMUNICATIONS, INC.
1615 L Street N.W., Suite 1260
Washington, D.C. 20036

October 29, 1999

[18] *See MGC v. AT&T* at ¶ 29.