DOCKET FILE COPY ORIGINAL ORIGINAL

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

RECEIVED
OCT 29 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	

INITIAL COMMENTS OF

RCN TELECOM SERVICES, INC.

William L. Fishman
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (202) 424-7645

Counsel for RCN Telecom Services, Inc.

October 29, 1999

No. of Copies rec'd 0+4
List ABCDE

SUMMARY

RCN Telecom Services, Inc. ("RCN") which provides originating and terminating access services as well as local exchange and interexchange services, does not believe it is necessary or prudent for the Commission to further pursue the alleged problem of excessive CLEC access charges. RCN's rates, to the best of its knowledge, are more or less in line with those of the ILECs with which it competes. It is unlikely that major IXCs such as AT&T are being abused by excessive access charges because AT&T has vastly more market power than all but (at most) a very few CLECs. Where CLEC access charges are higher than those of comparable ILECs, the great likelihood is that the CLEC faces significantly higher costs because of its relative newness to the market and the smaller scale and scope of its operations. ILECs frequently impose charges for access service other than the per minute charges and if these charges are not included in a comparison of access charges the results are misleading. For both reasons, comparisons must be made with great care to avoid an apples and oranges problem.

IXCs cannot lawfully refuse to carry traffic presented to them on the ground that the originating or terminating access charges are too high. Under sections 201 to 208 of the Communications Act, their only statutory remedy is to file a civil complaint under § 207 of the Act, or an FCC complaint under § 208. If the CLEC's rates are found to be excessive or otherwise unlawful, they will be lowered or restructured for the future. If the rates are found to have been unlawfully collected, damages may also be assessed. Nor can an IXC refuse to pay a CLEC the duly filed tariffed rate for originating or terminating access service. The filed rate doctrine compels an IXC to carry such traffic at the posted rate. IXCs, of course, are also free to try to negotiate lower rates with CLECs, either with the carrot of additional traffic, or the stick of formal action, pressure on customers, advertising, or some other market-based remedy.

Given the limited resources of the Commission and the continuing abuses of the ILECs with respect to the availability and pricing of unbundled local loops, UNEs, and collocation, the Commission should concentrate on these major regulatory problems created by the transition to a competitive market, not on one whose existence is in doubt and which, even if it does exist, necessarily has a narrow and limited scope.

If, however, the Commission concludes that some regulatory intervention in respect to access charges is justified, it should give careful consideration to the development of CLEC access charges benchmarked by reference to ILEC charges, with an allowance for the fact that relevant CLEC costs are likely to be higher. RCN could support a regime in which CLEC access charges not more than a percentage above the level of a locally competing ILEC's access charges are presumed to be lawful, with the burden of proof on the complainant, while those exceeding such a benchmark would not enjoy a strong presumption of legality. RCN, however, does not support mandatory detariffing of CLEC access charges. Mandatory detariffing would be unwise as a policy matter and would exceed the Commission's statutory power as presently construed by the courts. Mandatory detariffing would put into the already powerful IXCs' hands another tool to seek special or sweetheart deals from CLECs. It would burden CLECs with the need to negotiate individual contracts. Start-up entities like RCN typically seek to operate with minimal administrative staff and would be severely burdened by the inability to offer service under a limited number of broadly-applicable tariffs. A regime of "calling party pays" is impractical and should not be further considered. The record currently before the Commission does not justify linking terminating access charges to originating charges for assessing their lawfulness.

TABLE OF CONTENTS

Page

SUMMARY i

I. BACKGROUND 1

II. THE NOI 3

. A. IXCs Are Required By The Communications Act To Accept All Traffic Offered To Them By, And To Terminate Such Traffic On, The Facilities Of Any Carrier With Which A Course of Dealing Exists 6

B. CLECs Are Required By The Filed Rate Doctrine To Charge IXCs The Tariffed Rates. 10

C. Benchmarking CLEC Access Charges On The Basis Of ILEC Access Charges May Be A Useful Regulatory Approach 13

D. "Calling Party Pays" Is Not Practical 15

III. IXCS MAY NOT DECLINE A CLEC'S ACCESS SERVICE WITHOUT THE CONCURRENCE OF THE END-USER(S) 17

IV. CONCLUSION 18

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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	

INITIAL COMMENTS OF
RCN TELECOM SERVICES, INC.

RCN Telecom Services, Inc. ("RCN"), a facilities-based competitive local exchange carrier, by its undersigned counsel, herein comments on the Notice of Inquiry ("NOI") in the above-captioned matter.[1/] RCN believes there is no justification for the Commission to devote further resources at this time to the subject of CLEC access charges, and urges the Commission to terminate this proceeding and to devote its limited resources to the oversight of the incumbent local exchange industry whose continued abuse of monopoly power is materially delaying the introduction and growth of competitive local exchange telecommunications. Indeed, given the disparity between ILECs and CLECs in market power and dominance of essential facilities it would be little less than tragic for the Commission to divert resources from continuing oversight of ILEC activities in order to undertake active regulation of CLEC access charges.

I. BACKGROUND

RCN is developing an integrated offering of local exchange and interexchange telephony, high-speed Internet access, and video distribution, largely to residential subscribers located in the

---

[1/] *Fifth Report and Order and Further Notice of Proposed Rulemaking*, FCC 99-206, *rel.* Aug. 27, 1999.

Northeast corridor and in the San-Francisco to San Diego corridor relying principally upon construction of its own state-of-the-art broadband fiber optic network. RCN is certificated as a CLEC in 15 states and is offering CLEC services in Massachusetts, New York, New Jersey, Pennsylvania, Maryland, the District of Columbia, and Virginia. It is fair to say that RCN is a child of the Telecommunications Act of 1996 (the "1996 Act"), having come into existence to implement the pro-competitive vision of that legislation. Although RCN initiated its telephony offerings on a resale basis, it is phasing out such offerings in favor of using its own state-of-the-art fiber optic plant.

As a CLEC RCN is therefore vitally interested in, and deeply troubled by, the Access Charge NOI. While RCN offers originating and terminating access services in numerous markets in the northeast corridor, including the metropolitan areas of Boston, New York, and Washington, D.C., it is not aware of any instances in which its access charges are significantly different from those charged by the ILEC, Bell Atlantic, when account is taken of all relevant charge components.[2/] RCN sees no need at this time or on the basis of this record for the Commission to further explore the subject of CLEC access charges. Indeed, doing so would divert limited and invaluable Commission resources from regulatory tasks whose continuing pursuit is vital if RCN and the many similar CLECs fostered by the 1996 Act are to survive.

[2/] *See, e.g., Access Reform*, First Report and Order, 12 FCC Rcd 15982 (1997), converting certain ILEC per minute to flat rate charges.

II. THE NOI

In paragraph 237 of the *Fifth Report and Order and FNPRM*, the Commission initiates an NOI. In the NOI it notes that, while it has previously determined that CLECs lack market power in setting terminating access charges,[3] it has now received "indications" that the marketplace may not be constraining CLEC access rates, including not only terminating, but originating and open-end originating charges.[4] The Commission is at pains to say, and reiterates numerous times, that it would prefer to allow the competitive marketplace to constrain CLEC terminating and originating minutes, but that it is no longer certain that the marketplace can be relied upon to discipline CLECs. It notes, for example, that in respect to terminating minutes, the originator of the call may have little control over the identity of, or prices set by, the terminating carrier, and asks how, in such circumstances, the marketplace can be expected to function.

The "indications" to which the NOI points are derived from IXC submissions in response to a petition filed by AT&T seeking a declaratory ruling that it was not obligated to pay CLEC access charges which it regarded as excessive.[5] In one instance AT&T claims that it is paying CLEC terminating charges which are 20 times higher than those of a competing ILEC.[6] Based on this anecdotal premise, the NOI poses a series of questions concerning CLEC market power,

---

[3] *Access Reform First Report and Order*, 12 FCC Rcd 15982 at 16140 (1997).

[4] *NOI*, at ¶ 238.

[5] AT&T Declaratory Ruling Petition.

[6] *NOI* at n. 579.

the obligations of IXCs and CLECs to each other under the law, and possible remedies for any market failures which may be occurring, if any. In the remainder of these Comments RCN offers its views on the legal and factual questions posed by the NOI.

Before doing so in detail, however, RCN notes the heavy irony of a Commission proposal to substantially reregulate one of the most competitive portions of the telecommunications industry– the portion in which nondominant carriers have entered in droves and are beginning to implement the policy objectives of the deregulatory Telecommunications Act of 1996. Such reregulation would not only have pernicious effects on the still-struggling CLECs, but would send the wrong message to future potential entrants or investors. RCN knows from its own first-hand experience that the CLEC portion of the telecommunications industry is fiercely competitive. In each of its markets RCN competes against both a massive ILEC and against a growing army of CLECs, each of which offers services, facilities, or arrangements which are slightly different from others. In New York, for example, there are approximately 49 competitive LECs.[7] When RCN solicits new business it must persuade the customer that its offering is superior to that of all these competitors as well as that of the ILEC. The notion that the marketplace does not, or cannot, exert downward pressure on CLEC pricing is not consistent with RCN's experience. If there are instances in which AT&T or other IXCs are paying access

---

[7] They have deployed almost 6,000 route-miles of fiber and at least 47 local voice switches. Over a billion dollars, it is estimated, has been invested. *See Application of Bell Atlantic - New York for Authorization To Provide In-Region Interlata Services In New York*, filed September 29, 1999, at 64.

charges which are excessive, they must be few and far between, and hardly merit the massive, expensive, and disruptive regulatory intervention threatened in the NOI. RCN knows of no instance in which its own access charges deviate more than insignificantly from those of other CLECs and if it were aware of such instances, it would feel constrained by the ever-present threat of customer churn to match the lower rates of a competitor.[8/]

If there is any market failure in the IXC/CLEC relationships, it arises from the massive, virtually monopsonistic economic strength of the IXCs, with their enormous traffic volumes and ubiquity, which allows them to leverage below-cost rates from CLECs. As noted above, the Commission may be assured that the competitive market is alive and well. Of course, it is not yet fully mature, in large part because the ILECs continue to obstruct and delay implementation of Commission policy favoring unbundling of local loops, the availability of UNEs, and collocation. The Commission would be well advised to devote its resources to these fundamental systemic issues so that a fully competitive market becomes a reality. Such full competition will more appropriately constrain occasional excessive pricing -- if there is any -- than heavy-handed and unnecessary regulatory intervention at the CLEC level.

[8/] To be sure there may be individual instances in which RCN's access charges are higher than those of its local ILEC competitor. In such cases the higher prices are due to higher costs. Over time these charges will be reduced or RCN will lose its customer base.

A. IXCs Are Required By The Communications Act To Accept All Traffic Offered To Them By, And To Terminate Such Traffic On, The Facilities Of Any Carrier With Which A Course of Dealing Exists

It is passing strange for AT&T – of all carriers – to contend that a carrier subject to Title II of the Communications Act of 1934, as amended (the "Act"),[9] is free to pick and choose whether or not it will exchange traffic with other carriers subject to the same regulatory regime. Notwithstanding the dramatic changes introduced by the 1996 Act, the common carrier contents and structure of the heart of Title II of the Act have remained unchanged since 1934. Those provisions, for all their generality, govern the present matter.

Section 201 requires common carriers to "furnish ... communication service upon reasonable request therefor" and mandates that their "charges, practices, classifications, and regulations" be "just and reasonable."[10] Section 202 forbids carriers to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services ... or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality."[11] Upon complaint or on its own initiative, the Commission may hold hearings and declare unlawful proposed rate increases under section 204, and upon a finding that a common carrier's actual or proposed charges are in violation of these provisions, may

---

[9] 47 U.S.C. § 151 *et seq.*

[10] 47 U.S.C. §§ 201(a), (b).

[11] *Id.* § 202(a).

prescribe the "just and reasonable charge" or a range of charges pursuant to section 205.[12] Sections 206 and 207 give persons damaged by a common carrier's violation of the statute a right to damages.[13] Section 208 gives such persons the right to file a complaint with the Commission.[14] Section 209 bestows authority on the Commission to award damages.[15]

Section 203(a), which addresses the filing of rates, is the provision on which these other provisions depend. Compliance with section 203(a) is crucial to the effective enforcement of the reasonable and nondiscriminatory rate provisions. Simply put, carriers are obligated to provide service indiscriminately to all customers, subject to the constraints of the reasonableness of the demand and the presence of adequate capacity to carry the traffic. These fundamental notions of common carrier regulation have not been altered by the Commission, the courts, or the Congress.[16] As succinctly put by the D.C. Circuit Court of Appeals: "[A] carrier will not be a common carrier where its practice is to make individualized decisions in particular cases whether and on what terms to serve."[17] It is accordingly one of the core obligations of a common carrier to interconnect upon reasonable demand with other common carriers, and AT&T can no more

---

[12] *Id.* §§ 204-205.

[13] *Id.* §§ 206-207.

[14] *Id.* § 208.

[15] *Id.* § 209.

[16] *See, e.g. Federal-State Joint Board on Universal Service*, 14 FCC Rcd 3040 (1999); *NARUC v. FCC*, 525 F. 2d 630, n. 58 (D.C. Cir.), *cert. den.* 425 U.S. 992 (1976).

[17] *NARUC v. FCC* ("*NARUC II*"), 533 F.2d 601, 609 (1976) (footnote omitted).

obviate or ignore that obligation than it could discriminate among customers on the basis of their personal characteristics. Sections 254 and 251(a)(1) of the Act, added in 1996, reinforce these underlying principles by emphasizing that carriers must interconnect with each other to assure that consumers in all regions of the country have access to telecommunications services. RCN recognizes that a relationship must be established between, *e.g.*, an IXC and a CLEC before the statutory framework imposes legal obligations, but such relationships are compelled by § 251(a)(1) in particular and by the overall scheme of Title II. Moreover the relationship can arise from a wide variety of circumstances, including the ordering of service under tariff or contract, the exchange of customer billing records, or the voluntary initiation of an interconnected relationship by carrying traffic. If an IXC is carrying CLEC traffic on either end of a transmission, the requisite relationship exists.

It is equally true, of course, that a CLEC carrier originating or terminating traffic for an IXC is also a common carrier, and is also subject to sections 201 to 208 of the Act. As such the CLEC must charge only just and reasonable and nondiscriminatory rates. If an IXC believes that it is being charged an access charge which exceeds, or otherwise deviates from, a lawful level or structure, its remedy is to file a complaint under § 208 of the Act [18/] or to file suit in U.S. District Court as provided for in § 207 of the Act. It is most assuredly not to become a free-wheeling

---

[18/] *See, e.g., Investigation of Interstate Access Tariff Non-Recurring Charges*, 2 FCC Rcd 3498 (1987) (If a customer believes that the cost support for a particular NRC is unreliable, it may file a complaint under § 208 of the Act); *Annual 1985 Access Tariff Filings*, 2 FCC Rcd 1416 (1987) (Rather than impose additional requirements on the LECS, IXC may file a complaint if it is damaged by the manner in which service is provided).

cowboy, declining on its own whims or sense of appropriateness, to interconnect with this or that carrier. That way leads to chaos and to the breakdown of the entire common carrier scheme set forth in Title II of the Act.

Apart from these elementary, and one would have thought, indisputable propositions, there is no practical need to permit the IXCs to decline traffic from those CLECs they disfavor. The bargaining power between CLECs and IXCs in the present state of the industry is disproportionately in favor of the IXCs in most instances. With customer bases in the tens of thousands to tens of millions and financial resources in the millions or billions of dollars, it is a little difficult to perceive that AT&T or other major IXCs, or even the many smaller IXCs, can be unfairly whipped about by CLECs, most of which are orders of magnitude smaller in scope and scale.

In the NOI, for example, the Commission worries a good deal about the IXCs being forced to pay high or excessively high terminating charges when neither the IXC nor the originating customer has any leverage on the terminating CLEC.[19] The IXC, however, can always resort to advising its own customers that it is being forced to pay terminating access charges which it regards as unreasonable and that such circumstances will lead to an increase in its rates. Advertising directed to the relevant group of end-users can be employed to pressure the CLEC whose access charges are deemed unreasonable. As suggested above, administrative proceedings, or the threat of such proceedings, can also be employed to try to force rates down.

---

[19] *See, e.g.*, ¶ 239.

Given the scale of the major IXCs, the notion that they are helpless in the face of intransigent CLECs is more than a little silly. In its recent merger with TCI, AT&T claimed that its acquisition of the largest cable company in the country was crucial to the growth of competition in the telephone industry because it would permit AT&T to originate or terminate much of its own traffic without having to rely on local exchange carriers. The Commission accepted this rationale, as it should have, as one of the public interest benefits of the merger.[20] There are two significant aspects of this: (1) AT&T has or shortly will have the capability to bypass, at least to some degree, CLECs whose access rates are deemed unacceptably high, and (2) CLECs must be aware that this kind of bypass is an ever-present threat. This kind of market pressure is what the 1996 Act is all about; it is real world competition, and it will redound to the benefit of the public and the industry, by driving inefficient vendors out of the market.

B. CLECs Are Required By The Filed Rate Doctrine To Charge IXCs The Tariffed Rates.

The NOI notes the contention of CLECs that, once a tariff is filed containing access charges, the CLEC has no choice but to charge an IXC the tariffed rate.[21] This is indeed what the filed rate doctrine requires. Under the filed rate doctrine a rate is lawful and must be charged and collected if it appears in an effective tariff. The doctrine, a judicially developed adjunct to a

---

[20] *See Applications for Consent to the Transfer of Control of Licenses and Section 214 Authorizations from Tele-Communications, Inc., Transferor, to AT&T Corp., Transferee*, 14 FCC Rcd 3160 (1999) ¶¶ 47-50; 145-150 (ATT will use cable infrastructure to deploy local exchange and exchange access services following the merger).

[21] *NOI*, ¶ 246.

variety of federal regulatory statutes, simply forbids a regulated entity from charging rates "for its services other than those properly filed with the appropriate federal regulatory authority." *Arkansas Louisiana Gas Co. v. Hall,* 453 US 571, 577(1981). As the Supreme Court noted in the often-quoted bankruptcy proceeding involving transactions carried out at prices below those set in governing ICC tariffs, the doctrine creates "strict filed rates requirements and... forbid[s] equitable defenses to collection of the filed tariff." *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 US 116, 127 (1990) (invalidating an ICC policy relieving a shipper of the obligation to pay the filed rate when the shipper and carrier had privately negotiated a lower rate). Simply put, a tariff filed with the FCC supersedes all other agreements between the parties. *MCI Telecom Corp. v. Best Tel. Co.*, 898 F. Supp. 868, 872 (D.S.D. Fla. 1994). Indeed, "filed tariffs are the law, not mere contracts." *MCI Telecommunications Corp. v. Garden State Inv. Corp.*, 981 F.2d 385, 387 (8th Cir. 1992). Nondiscriminatory rate setting is one of the basic rationales for the doctrine. *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 21 (2d Cir. 1994).

However, as RCN contends above, the filed rate doctrine does not deprive an IXC which believes the rates are too high, or otherwise unlawful, of a remedy. Nothing prevents a customer taking service under such a tariff from seeking a determination about the lawfulness of the rate. In such a proceeding, brought as a civil complaint under § 207 of the Act, or as an administrative

complaint under § 208 of the Act, the CLEC would, in principle, be obliged to justify the rate, based on costs, benchmark criteria, or other criteria of reasonableness.[22]

Given the vast disparity in the bargaining power of AT&T and other large IXCs, on the one hand, and CLECs on the other, RCN is concerned that the adoption by the Commission of mandatory detarrifing for access charges would only provide more opportunity for IXCs to abuse their greater economic resources.[23] Indeed, with or without detariffing based on regulatory forbearance, the carriers who participate in an end-to-end transmission are always free to negotiate with each other and to agree upon rates or other terms to be filed in tariffs. Such arrangements may even be protected against subsequent unilateral alteration by the CLEC's

---

[22] *See, e.g., Allnet Communication Services, Inc. v. Bell Atlantic Telephone Companies, et al.*, 8 FCC Rcd 1347 (1993) (Damages ordered where carriers' filed rates exceeded valid prescription-limited levels).

[23] *See Policy and Rules concerning the Interstate, Interexchange Markeplace*, CC Docket NO. 96-61, *Second Report and Order*, 11 FCC Rcd 20730, 20741-43 (1996) (*Tariff Forbearance Order*), *stay granted*, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. filed Feb. 13, 1997). RCN notes that the Commission's proposed mandatory detariffing of the IXCs was based on the finding that the IXC industry was competitive and that users did not need the protection of tariffs and indeed were disadvantaged by the price-matching encouraged by tariffing IXC services. *See id.* at 20744. If the Commission were to detariff CLEC access services based on a finding that CLEC access charges were not sufficiently controlled by the market, a certain dissonance between the two situations would appear to arise.

filing of an inconsistent tariff change.[24] But the presence of a tariff protects the CLEC and its customers against abusive pressures from the monopsonistic IXCs.

C. Benchmarking CLEC Access Charges On The Basis Of ILEC Access Charges May Be A Useful Regulatory Approach

Paragraph 247 of the NOI asks whether benchmarking CLEC access charges on the basis of ILEC access charges is a useful regulatory device. As noted above, RCN believes no further regulatory intervention is required for CLEC access charges at this time. But if the Commission concludes otherwise, a benchmarking approach may be useful, provided, however, that all relevant ILEC charges are properly attributed to the access service. Viewed in the abstract the idea appears to be a good one, particularly if, as the NOI suggests, the ILEC rate is used only as a guide to assigning presumptions and the burden of proof with respect to a contested CLEC rate. RCN would not object to establishing a comparable ILEC terminating rate as a presumptive test

---

[24] *See* the so-called "Sierra-Mobile Doctrine" set forth in *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 US 332, 76 S. Ct. 373, 378 (1956*);and Fed. Power Comm'n. v. Sierra Pac. Power Co.*, 350 U.S. 348, 76 S Ct. 368 (1956) (utility may not unilaterally alter a material term of a contract arrangement simply by filing a new tariff). *See also Bell System Tariff Offerings*, 46 FCC 2d 413,432 (1974); *Bell Telephone Co of Pa. v. FCC*, 503 F.2d 1250, 1275-1282 (3d Cir. 1974); *MCI Telecomm. Corp. v. FCC*, 822 F.2d 80 (DC Cir. 1987). The fact is that at the FCC, and in other public utility environments, contracts and tariffs are not disconnected means of establishing relationships, but part of an organic whole. As the D.C. circuit has noted: "Contracts and tariffs are not always mutually exclusive, but may be used in concert to define the relationship of the parties. In such circumstances, the contract governs the legality of subsequent tariff filings. Rate filings consistent with subsequent obligations are valid; rate filings inconsistent with contractual obligations are invalid." *MCI Telecomm. Corp. v. FCC,* 665 F.2d 1300, 1302 (DC Cir. 1981).

of reasonableness if the CLEC rate is not significantly higher than the ILEC rate.[25] But RCN suggests the Commission go further and specify that if a CLEC rate is less than, equal to, or not more than some percentage in excess of an ILEC rate it would be strongly presumed to be lawful and a very high burden would have to be met by a complainant to demonstrate its unlawfulness. This would minimize resort to abusive litigation and ease the administrative and financial burden on a CLEC if its rates are challenged in good faith.

The dissymmetry of these recommendations is not accidental: in almost all cases CLECs will experience access costs which exceed those of ILECs because the latter have every conceivable economic advantage: those of scale and scope economies, those of wholly or partially depreciated plant, those of existing back office and other administrative machinery, and those of a large and not readily dislodged customer base.[26] It is therefore overwhelmingly likely that CLEC costs are higher than ILEC costs. To keep the rates within reason, CLECs must either accept a lower return on investment, or even offer services at a loss in the interest of building market share. In any formal dispute about its access charges, however, in which those charges

---

[25] Comparability in this sense would encompass both local market conditions and the proper calculation of ILEC access rates taking account of non per-minute-based charges.

[26] Other factors include higher costs of capital, higher fees for public rights of way, and collocation fees. In every instance of ILEC and CLEC competition known to RCN, the ILEC has a far wider variety of service areas and is therefore able to average costs over a greater and more diverse customer base and service configurations.

exceed the comparable charges of a local ILEC by perhaps 20-30%, RCN would accept the obligation to demonstrate that its rate is just and reasonable.[27]

D. "Calling Party Pays" Is Not Practical

As to the suggestion that a calling party could separately pay CLEC access charges,[28] the confusion and uncertainty such a regime would introduce would be a serious detriment to the growth of competitive services. IXCs are, in the main, large and sophisticated companies, with specially designed computer systems and staffs who are trained to deal with rate and charging issues. Customers may or may not have such capability and even if they have it, will not wish to deploy such resources in the fashion suggested. Even for sophisticated entities the calculation of a CLEC's or ILEC's access charges on a comparable basis requires difficult and debatable judgment calls. For an ordinary residential subscriber such analysis would be virtually impossible.

---

[27] To the extent the burden of proof will depend on the relative levels of ILEC and CLEC charges, the defendant, of course, must have full access to discovery on the ILEC with respect to its cost functions and rate-setting philosophy.

[28] NOI,¶¶ 251-252. The NOI also suggests that CLECs might charge the difference between their rates and the benchmarks to originating or terminating end-users. Any such scheme, however, introduces enormous complexity and uncertainty into a CLECs rates and billing. Its charges would vary, depending on changes in the benchmarks; ILECs would have an incentive to lower their own charges, perhaps below their own costs, to force CLECs to bill the difference between their CLEC costs and the ILECs' benchmarked rates to end-users.

Nor does the present record justify adoption of Bell Atlantic's suggestion to link terminating access charges to originating access charges.[29] The underlying assumption that originating access charges are better disciplined by market forces than are terminating charges, is little more than speculation. Even if it were true, the cost functions of the two services can easily be significantly different depending on a wide variety of differences in circumstances. Linking the two without further hard data is far too mechanistic and broad-brush to be adopted at this point as a rate-setting principle. The Commission must keep in mind that the CLEC industry is still in its infancy. It continues to battle anticompetitive ILEC interconnection, collocation, and UNE practices on a daily basis. Even if originating access charges are better disciplined by customer relationships than terminating access charges, it is premature for the Commission to develop a hard and fast rule linking the two. Only after the Commission has had further opportunity to explore the facts of such a linkage should such potentially intrusive regulatory requirements be addressed.

The NOI also seeks comment on the appropriate treatment of originating open-end minutes, as in 1-800 and 1-888 services.[30] RCN suggests that this is a relatively minor aspect of the issue presented and is conceptually less of a problem because such services are generally very high-volume arrangements or ones in which the paying party should be able to negotiate rates

[29] NOI, ¶ 253.

[30] NOI, ¶ 255.

with all participating carriers or, if it cannot do so, switch carriers, at least on the terminating end.

III. IXCS MAY NOT DECLINE A CLEC'S ACCESS SERVICE WITHOUT THE CONCURRENCE OF THE END-USER(S)

The NOI seeks views on the question whether an IXC is constrained by statutory or regulatory requirements from declining a CLEC's access service.[31] In doing so the NOI cites §§ 201 to 203 and 214 of the Act, and § 63.71 of the Rules.[32] These provisions are indeed governing as set forth above in part II.A, and, taken in the aggregate, require that an IXC must accept originating traffic from the carrier chosen by the IXC's customer provided a carrier-to-carrier relationship exists between them. In this connection it should be noted that § 251(a)(1), and indeed, the entire scheme of Title II, requires that such a relationship be established where necessary or appropriate to assure the availability of service. Whether pursuant to the filing of IXC tariffs, or in the absence of such tariffs, an interstate IXC is subject to the common carrier obligations of Title II of the Act and the Commission's implementing regulations. Indeed, it is the very persistence of these fundamental regulatory obligations which, the Commission argues, permits it to forebear from the requirement of tariff filings for non-dominant carriers.[33]

The same is true in regard to terminating access. If an IXC holds itself out to a caller to transport traffic to a local access carrier for delivery, it is initially bound to accept the terminating

---

[31] NOI at ¶ 242.

[32] Respectively, 47 U.S.C. §§ 201-203 and 47 C.F.R. § 63.71.

[33] *See Policy and Rules concerning the Interstate, Interexchange Markeplace*, CC Docket NO. 96-61, Second Report and Order, 11 FCC Rcd 20730, 20741-43 (1996) (*Tariff Forbearance Order*), *stay granted*, *MCI Telecommunications Corp. v. FCC*, No. 96-1459 (D.C. Cir. filed Feb. 13, 1997).

carrier chosen by the called party. In either case, however, and as noted above, the IXC is free either to try to negotiate carriage rates with the access carrier(s), or to bring an action complaining about the rates, to seek higher rates from the calling or called party if the access rates are excessive, or to try to persuade the calling or called party to shift to another access carrier for reasons of economy.[34/] What it may not do, however, is become the arbiter of whose service it will use for originating or terminating traffic, unless the calling or called parties have previously devolved discretion on it to act as an agent for the customer.

IV. CONCLUSION

RCN believes that all its originating and terminating access charges are based on relevant costs and can be justified, if necessary. If IXCs believe that RCN's or any other CLEC's access charges are excessive and cannot persuade the CLEC to reduce its charges, its formal remedy is to file a complaint under the provisions of §§ 207 or 208 of the Act, and challenge the CLEC to justify its rates based on its costs of doing business. Nothing more complicated is required or should be imposed. Certainly the diversion of the Commission's limited staff resources to alleged overcharging by the most fragile and vulnerable element of the competitive

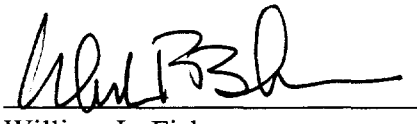
---

[34/] *See* 47 U.S.C. sec 258(a); *Implementation of the Subscriber Carrier Selection Changes Provisions of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, Second Report and Order and FNPRM, 14 FCC Rcd 1508, 1510 (1998); 47 C.F.R. § 64.1150.

telecommunications industry would be very unwise. By drawing staff away from supervision of the continuing abuse of monopoly power by the ILECs, such a policy would not only fail to advance the public interest but would actually disserve it to a significant degree.

Respectfully submitted,

RCN TELECOM SERVICES, INC.

By: 

William L. Fishman
SWIDLER BERLIN SHEREFF FRIEDMAN, LLP
3000 K Street, N.W., Suite 300
Washington, D.C. 20007-5116
Telephone: (202) 945-6986
Facsimile: (202) 424-7645

Counsel for RCN Telecom Services, Inc.

October 29, 1999

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Comments of RCN Telecom Services, Inc. was hand delivered this 29th day of October 1999, to the following:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Sharon Ann Gantt

303278.1