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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

REPLY COMMENTS OF THE RURAL INDEPENDENT COMPETITIVE ALLIANCE

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SUMMARY

In their Comments, AT&T and Sprint boldly assert that IXCs have a right to refuse service to CLEC customers. However, RICA and many other Commenters refute this assertion by citing statutory requirements to interconnect, by referencing the anti-competitive consequences that would result if large IXCs were able to refuse service to CLEC customers and by demonstrating that IXCs "order" service, whether explicitly or constructively, from CLECs, thus obligating them to carry the CLECs' traffic and to pay the access charges associated with the service. Additionally, AT&T and Sprint claim that they provide substantial "evidence" that demonstrate that CLEC switched access rates are unreasonable . However, this "evidence" is based upon the false premise that CLEC rates must be deemed unreasonable if they exceed the rates of the ILEC serving the same territory, utilizes over-simplistic methods of comparing CLEC and ILEC rates and contains incorrect data. The Commission must disregard this false and misleading "evidence" and act quickly to declare the obligation of IXCs to provide service to customers of rural CLECs.

RICA and a large number of Commenters support a benchmark approach to establish presumably reasonable access rates for CLECs. However, such an approach must be representative of the revenue requirements of the smaller number of rural CLECs, must not be based upon an average with urban areas, and must have a "safety valve" which permits CLECs with higher costs to justify their rates. Additionally, proposals must be rejected that place burdensome tariff requirements for so-called "supracompetitive CLECs" or require end users to

pay for rate differentials. Instead, the Commission should adopt a benchmark for rural CLECs such that CLEC rates equal or below the benchmark would be presumed reasonable.

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REPLY COMMENTS OF THE
RURAL INDEPENDENT COMPETITIVE ALLIANCE

The Rural Independent Competitive Alliance (RICA), by counsel, hereby files these reply comments in response to comments filed pursuant to the Fifth Report and Order and Notice of Proposed Rulemaking in CC Docket No. 96-262, FCC 99-206, released August 27, 1999.

I. THE COMMENTS OF AT&T AND SPRINT DO NOT ESTABLISH A RIGHT TO REFUSE SERVICE TO CLEC CUSTOMERS NOR THAT CLEC RATES ARE UNREASONABLE

The RICA Comments demonstrated that IXCs have a legal obligation as common carriers to provide service to customers of rural CLECs and that the access rates of the rural CLECs may reasonably reflect the higher costs of serving rural areas and the inability to average with urban areas. The only comments opposing these positions were those of AT&T and Sprint.

A. AT&T AND SPRINT WRONGLY ASSERT THAT IXCS HAVE NO OBLIGATION TO SERVE CLECS

1. The Comments demonstrate that IXCs refusal to provide long distance service to CLECs is anti-competitive

AT&T and Sprint both assert that IXCs can refuse to interconnect with a CLEC's switched access service. See AT&T's Comments at 29 n. 51; Sprint's Comments at 24-25. In contrast, a large majority of Commenters cite the statutory requirements to interconnect and strongly argue that IXCs cannot unilaterally refuse to serve CLEC subscribers. See RICA's Comments at 7-8; Telecommunications Resellers Association's Comments at 5-8; RCN Telecom Services' Comments at 17-18. In addition to the statutory requirements, Commenters reference the anti-competitive consequences that result if IXCs, especially those with such large market share as AT&T and Sprint, are allowed to selectively refuse customers of certain carriers. For example, CTSI hypothesizes that an IXC with a large market share, such as AT&T, has the power to take several anti-competitive actions such as forcing long distance customers to choose between AT&T and their preferred CLEC or refusing to serve customers of any CLEC that is not affiliated with AT&T. See CTSI's Comments at 9-10. This power becomes even greater in the context of CLECs that serve rural areas since fewer long distance carriers choose to serve rural areas. Another Commenter, Competitive Communications Group, argues that a CLEC would be severely disadvantaged if the IXC chooses to compete with it. In expressing its concern regarding AT&T, Sprint and MCI/Worldcom entering the local CLEC market, Competitive Communications Group states,

> If these large carriers are allowed to keep their long distance customers from choosing other CLECs, then the ability of other CLECs to gain customers will be incredibly diminished. Those few carriers comprise a clear long distance oligopoly, and discrimination by these few carriers against CLECs would be clear abuse of oligopoly power. At a minimum, IXCs who are also CLECs, either directly or through another subsidiary, should not be able to block their subscribers from choosing other CLECs.[1]

2. The Comments Demonstrate That IXCs "Order" Service From CLECs Even Though a Written Service Agreement May Not Exist and That IXCs are Obligated to Pay for the Services.

AT&T claims that absent "an affirmative access order from an IXC for a specific switched access service" it should not be obligated to carry traffic from a CLEC or be required to pay for switched access charges. AT&T's Comments at pg 32 n. 55. Sprint receives services from CLECs, yet contends that it is only obligated to pay for charges equal to or below the rates of the ILECs serving the same territory. See Sprint's Comments at 15-16. However, as Commenters point out, IXCs "order" service from CLECs in many ways. See ALTS' Comments at 19-21 (explanation of how the exchange of information establishes a relationship between a CLEC and an IXC pursuant to which the IXC accepts originating toll traffic from the CLEC and thus accepts the CLEC's originating switched access service even though no written order, service request or agreement between the CLEC and IXC exists); Competitive Communications Group's Comments at 3-4 (arguing that when an IXC places an access order at an RBOC or other LEC tandem, it is agreeing to serve end users at end offices in that area); McLeod USA's Comments at 5 (arguing that when an IXC routes CLEC access traffic through an ILEC tandem,

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[1]Competitive Communications Group's Comments at 4.

it must analyze the traffic volumes and thereby becomes aware of the CLEC's operations prior to providing service). When service is "ordered," IXCs are obliged to pay for the services rendered. See ALTS' Comments at 20; MGC Communications' Comments at 2-3.

B. AT&T AND SPRINT INCORRECTLY ASSUME THAT CLEC CHARGES ARE UNREASONABLE

AT&T and Sprint claim to provide "evidence" to the Commission that a substantial number of CLECs are charging unreasonable switched access charges. However, as shown below, this "evidence" is based upon wrong assumptions and therefore must be discarded.

AT&T boldly claims that in its October 23, 1998 petition for a declaratory ruling, it provided evidence that "a substantial number of CLECs have sought to tariff switched access rates at supracompetitive levels." AT&T's Comments at 28. In making this assertion, AT&T defines "supracompetitive" as "in excess – and often far in excess – of the ILEC levels in the same service territories served by those CLECs" and states that the Commission has "previously recognized" that CLEC access rates that exceed those charged by ILECS serving the same territory are unreasonable. However, the citations provided by AT&T only reveal the Commission's inclination that "terminating rates that exceed those charged by the incumbent LEC serving the same market <u>may</u> <u>suggest</u> that a CLEC's terminating access rates are excessive." [2] Additionally, AT&T fails to provide any documentation as to how it determined that CLEC access charges are in excess of ILEC access charges, *i.e.* whether it took into

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[2]<u>In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Transport Rate Structure and Pricing, End User Common Line Charges: First Report and Order</u>, 12 FCC Rcd 15982, 16142 (1997) (emphasis supplied).

consideration the differences in access rate structures between price cap ILECs and rate of return ILECs, the non-usage-based charges that the ILECs impose on some IXCs, the monthly per-line subscriber interexchange carrier charges ("PICCs") that ILECs can require IXCs to pay, or flat rate port charges for switching that ILECs assess, but many CLECs do not. See Alltel's Comments at 2-3; ALTS' Comments at 1-2, 4.

Not only is AT&T wrong in blatantly assuming that CLEC access rates are unreasonable if they exceed the rates of the ILEC serving the same territory, but AT&T provides incorrect data when it claims that the amount of CLECs charging access rates in excess of ILECs is "substantial." Several Commenters show the inaccuracy in AT&T's data by stating that one of the CLECs cited in AT&T's petition is actually an ILEC and that many of the rates cited in the petition were incorrect. See ALTS' Comments at 4, Allegiance's Comments at 20-21, GTE's Comments at 50, Focal Communications' Comments at 10.

Similarly, Sprint claims that CLEC charges are unreasonable, yet fails to show whether it included the variables referenced above in its calculations. Declaring itself to be the supreme equalizer of access rates, Sprint receives service from a CLEC and then makes a determination as to whether that CLEC's charges exceed that of the ILEC serving the same territory. If it concludes that the CLEC's rates exceed the ILEC's, it disputes the amount that it considers to be in excess. See Sprint's Comments at 15-16. Based on this subjective determination, as of September 1999, Sprint has disputed $15.5 million and projected that the amount is growing at $2.3 million per month ($3 million by the end of the year). Id. Although Sprint indicates that it has these disputes with "more than two dozen CLECs" and that this amount has been growing by

"2 or 3 CLECs every month," it does not reveal the total number of CLECs that provide service to it. As a result, no determination can be made as to the percentage of CLECs that charge "unreasonable" access fees verses ones that charge "reasonable" fees.

In contrast to the false and misleading "evidence" provided by AT&T and Sprint, the majority of Commenters state that CLEC access rates are not unreasonable and that if CLEC rates exceed those of the ILEC serving the same territory, justifiable reasons exist as to why that is so. See *e.g.*, CTSI's Comments at 11-14. Also, many Commenters recognize that there may be a few "bad apples" that can be addressed on a case-by-case basis, but that the problem is not as widespread as AT&T and Sprint claim. *See* Competitive Communications Group's Comments at 2; Telecommunications Resellers Association's Comments at 4-5; MCI Worldcom's Comments at 18-19; RCN Telecom Services' Comments at 2-5; Corecomm Limited's Comments at 3-6; McLeodUSA's Comments at 6.

II. A BENCHMARK SHOULD BE ADOPTED FOR RURAL CLECS SUCH THAT CLEC RATES EQUAL OR BELOW THE BENCHMARK WOULD BE PRESUMED REASONABLE

The RICA Comments supported the use of a benchmark methodology to establish presumptively reasonable access rates, provided provision is made for carriers with costs above the benchmark to justify rates based on those costs.

A. COMMENTERS OVERWHELMINGLY SUPPORT A BENCHMARK APPROACH

Most Commenters favor some form of benchmark with many rejecting the idea that the benchmark should be the rate of the ILEC serving the same territory. See, e.g., Allegiance Telecom's Comments at 12-13. Some Commenters proposed benchmarks that took

into account small or rural CLECs (*see, e.g.*, Minnesota CLEC Consortium's Comments at 14-16) or suggested use of the NECA rate (*see, e.g.*, CTSI's Comments at 18-19; Telecommunications Resellers Association's Comments at 9-13; McLeodUSA Telecommunications Services' Comments at 3). Many suggested that the benchmark rate would be presumed lawful, with a process to justify rates above that level. See, *e.g.*, Allegiance Telecom's Comments at 12; CTSI's Comments at 18-19.

B. BENCHMARK RATES SHOULD NOT BE BASED ON AVERAGE WITH URBAN AREAS

A few Commenters recommended that the Commission adopt benchmarks that are an average of CLEC rates in both urban and rural areas. *See* ALTS' Comments at 9-15; MGC Communications' Comments at 26-28; Winstar's Comments at 2-6. RICA urges the Commission to reject such an approach for the following reasons:

1. Commission Precedent Shows that Adopting a Benchmark Approach Based Upon Averages Is Extremely Complicated and Burdensome

As noted in Allegiance's Comments, the Commission's most extensive experience with benchmark regulation was the regulation of rates for cable service under the 1992 Cable Act. See Allegiance's Comments at 11. In this proceeding, the Commission examined an approach that would base the benchmark for cable rates on an average of rates. See In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation: Report and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 5631, 5764-67 (1993). In reviewing the Comments in this proceeding, it noted that this approach was opposed by municipalities, state governmental organizations, telephone

companies and cable operators for a variety of reasons. Id. at 5764-65. In rendering its decision, the Commission stated that it "[did] not believe that average industry rates by themselves can form the basis for defining reasonable rate levels because, by definition, average industry rates merely reflect current rates." Id. at 5766. Instead, it chose to adopt a benchmark formula based upon its analysis of the average rates of systems subject to effective competition. Id. at 5767. As Allegiance aptly points out, the Commission's adoption of this type of benchmark approach "turned about to be extremely complicated and burdensome."[3]

2. A Benchmark Approach Based on Averages Fails to Account For Size Differentials Between Urban and Rural Markets

If the Commission adopts benchmarks that are an average of CLEC rates in both urban and rural areas, RICA members will not be fairly represented in the average. As Sprint observes, "[n]early all CLECs offer their services not in the rural areas served by these ILECs, but rather in high-density metropolitan areas." Sprint's Comments at 20. Additionally, as CTSI's Comments illustrate, many "smaller" markets served by CLECs are urban markets and thus not reflective of the "really small" rural markets. CTSI states that its "smaller" markets include areas such as Wilkes-Barre, Scranton, Harrisburg and Binghamton. CTSI's Comments at 11. Although these markets are certainly smaller than New York or Philadelphia, they are not the really small, rural areas that RICA members serve. Thus, a benchmark approach must be

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[3]See also, In the Matter of Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992; Rate Regulation: First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking, 9 FCC Rcd 1164, 1173-74 (1993) (Petitioners argued that the Commission failed to take into account "such cost variables as system size, geographic location, and franchise and programming costs").

adopted that does not average the rates of CLECs since such an approach will not fairly take into account the truly rural markets.

C. AT&T'S "PERMISSIVE" TARIFF MECHANISM AND NON-STREAMLINED TARIFF REVIEW MUST BE REJECTED

In its Comments, AT&T suggests that instead of using a benchmark approach, the FCC should adopt the use of a "permissive" tariff mechanism in which the Commission would permit CLECs that file tariffs offering "competitive" access rates to continue filing tariffs under the streamlined review standards, but would require CLECS that file tariffed switched access rates that are "supracompetitive" to justify the rates in a traditional, non-streamlined tariff review proceeding with full cost support. AT&T's Comments at 30-31.

In making its proposal, AT&T appears to have crafted a procedure to prevent CLECs that it considers to have "supracompetitive" rates from utilizing the filed tariff doctrine (see AT&T's Comments at 31), but it is defective in several ways. First, instead of clearly defining the difference between "competitive" and "supracompetitive" CLEC access rates, AT&T states only that "supracompetitive" rates are rates that are in excess of the ILEC serving the same service territory. Id. As noted above in Section I(A), this falls far short of a workable definition in that it fails to explain whether the rate comparisons take into account non-usage-based charges that ILECs impose on IXCs, PICCs or flat rate port charges. See ALTS' Comments at 4. Second, even if the Commission were to arrive at some bright line test to determine what constitutes "competitive" and "supracompetitive" rates, AT&T 's proposal would be extremely burdensome to CLECs and the Commission in that it would require CLECs to submit, and the FCC to review, historical and projected service cost studies and estimates of the tariff's effects on traffic and revenues as specified

in Section 61.38 and other showings required in Parts 32, 36, 64 and 69. See AT&T's Comments at 31 n.54. Such extreme measures are unnecessary given the preferred alternative of a benchmark approach. Finally, AT&T fails to demonstrate how its complex "permissive" tariff mechanism would resolve many of the issues raised in the Commission's Notice of Proposed Rulemaking. If CLECs filed tariffs containing "supracompetitive" rates and the Commission determines, after a lengthy tariff proceeding that the rates are justified, then the IXC and CLEC are at the same place where they started yet with no procedures to resolve the situation.

D. PROPOSALS THAT END USERS MUST PAY RATE DIFFERENTIAL MUST BE REJECTED

The majority of Commenters did not recommend the "escape valve" proposal in which CLECs that desire to charge more than the benchmark may collect those charges from end users. As recognized by Commenters, many CLECs, especially rural CLECs, justifiably have high costs in seeking to compete with the incumbent LEC. See e.g., Allegiance Telecom's Comments at 12-17. In order to compete profitably, rural CLECs must have a benchmark, such as that proposed by RICA, that allows it to recoup its costs without the need for an "escape valve."

III. CONCLUSION: PROMPT ACTION MUST BE TAKEN

In conclusion, RICA strongly urges the Commission to reject AT&T and Sprint's spurious assertions regarding the supposed unreasonableness of CLEC rates and their attempts to avoid their obligations to serve CLECs and to adopt a benchmark approach that suits the needs of rural CLECs. RICA recommends that such a benchmark would initially be set at either the individual rate of the ILEC parent or the NECA rate increased or decreased by net settlement. After three to five years, the benchmark would move to the NECA rate. A CLEC access rate at

or below the benchmark would be presumed reasonable. Rates above that level would be subject to case by case determinations.

It is very important that the Commission act quickly in this matter, particularly with respect to declaring the obligation of IXCs to provide service to customers of rural CLECs. The current refusals of AT&T and Sprint to pay validly tariffed interstate access charges creates a substantial risk for the continuation of local competition in rural areas by entities unaffiliated with the major IXCs.

Respectfully Submitted,

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I, Shelley Davis, of Kraskin, Lesse & Cosson, LLP, 2120 L Street, NW, Suite 520, Washington, DC 20037, do hereby certify that a copy of the foregoing "Reply Comments of Rural Independent Competitive Alliance" was served on this 29th day of November 1999, by first class, U.S. mail, postage prepaid to the following parties:

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