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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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In the Matters 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 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

Opposition of the Association for Local Telecommunications Services to the Petitions for Reconsideration by Bell Atlantic and GTE Service Corporation

The Association for Local Telecommunications Services ("ALTS"), pursuant to Report Number 2370, released November 4, 1999, and Section 1.106 of the Commission's rules hereby files its opposition to the petitions for reconsideration of the Commission's *Fifth Report and Order* in the above-captioned proceeding[1] filed by Bell Atlantic and GTE.

[1] Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206 (rel. August 27, 1999) (herein referred to as the *Fifth Report and Order*).

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Bell Atlantic and GTE generally seek reconsideration of the Commission's decision to eliminate the low-end adjustment mechanism for those price cap local exchange carriers that qualify for and choose the pricing flexibility offered in the *Fifth Report and Order*. The petitions for reconsideration argue that the Commission may not condition the availability of pricing flexibility on the elimination of a mechanism that is designed to ensure that price-cap rates do not become confiscatory. Petitioners argue that the Commission has placed the price cap local exchange carriers in the untenable position of having to choose between foregoing the pricing flexibility offered by the *Fifth Report and Order*, which the petitioners assert is necessary for them to compete with competitive local exchange carriers, and the guarantee of a constitutionally sufficient rate of return. This choice, petitioners argue, is unconstitutional because the Commission may not require a person to give up a constitutional right in exchange for a discretionary benefit conferred by the government where the benefit sought has little relationship to the condition imposed. Finally, petitioners assert that the elimination of the low-end adjustment on a company-wide basis is not necessary to prevent anti-competitive behavior because the Commission's rules would prevent such cross-subsidization between the regulated markets and markets where pricing flexibility has been chosen.[2]

Petitioners have raised no new arguments that would require the Commission to reconsider its decision to eliminate the low-end adjustment mechanism for price cap LECs that elect Phase I or Phase II pricing flexibility. As the Commission found in the *Fifth Report and Order*:

> [Because] price cap LECs must remove the costs of non-price cap services in

[2] GTE cites to the Commission's price cap rules themselves and the rules that generally require costs and earnings figures to be measured separately by study area. GTE Petition at 8-9.

> order to calculate interstate earnings . . . they have the incentive to underallocate those costs in order to minimize measured earnings. Currently, this underallocation incentive is not a serious concern, because non-price cap services represent a very small fraction of the price cap LECs' federally tariffed activities, and so the effects of any underallocation are minimal. Once a LEC has removed a significant amount of demand associated with contract tariff offerings from price cap regulation, however, its incentive to underallocate the costs of non-price cap services and the effects of such underallocation will be greater.[3]

Petitioners have not shown that the Commission's analysis as to the greater incentives that ILECs will have when granted pricing flexibility for additional services to overallocate costs to the price cap services is incorrect. And, with respect to GTE's argument that the Commission's own rules make it more difficult to misallocate costs, the Commission surely is aware of its own rules, but also is aware that the rules do not affect the incentives of any carrier subject to those rules. The Commission recognizes the limitations in its own rules to limit certain incentives and behaviors.The local access markets are in a transition period from monopoly markets to competitive markets. That is why ILECs are seeking increased pricing flexibility. But they should not be heard to complain when one of the protections granted to them under one regulatory treatment of their prices is removed when they have sought to be deregulated. Some have argued that the low-end adjustment was not necessary under price cap regulation since the ILECs are permitted unlimited profits.[4] Whether or not one accepts that argument, it is clear that at some point in the transition from regulation to deregulation the "protections" associated with regulation should be lifted as the regulations are lifted. The Commission has chosen a reasonable

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[3] Fifth Report and Order at para. 163.

[4] Certainly the financial records of the price cap ILECs since the adoption of the price cap scheme indicate no need to worry about confiscatory rates.

time.

With respect to petitioners assertions that the Commission should have eliminated the low-end adjustment, if at all, only, for those services and in those areas where the ILEC has qualified for and chosen either Phase I or Phase II pricing flexibility, we note that the Commission considered that option and rejected it for very sound reasons. In order to eliminate the low-end adjustment mechanism only for services for which Phase I or Phase II pricing flexibility has been elected, the Commission rightfully observed that it would have to adopt cost allocation rules to segregate the price cap costs and revenues from those outside the price cap. The Commission found that such rules would be burdensome for carriers and inconsistent with the deregulatory framework envisioned by Congress in adopting the 1996 Act.

Furthermore, with respect to the constitutional arguments raised by petitioners, there is no question that the Commission's action is constitutionally sound.[5] The petitioners argue that the availability of an above cap tariff filing is not sufficient to satisfy the requirements of the fifth amendment because the Commission has indicated that it will not look upon such filings with favor. The fact that the Commission has indicated that it will not be easy to convince it that an above cap filing is necessary does not negate the fact that the Commission noted, in the very decision about which petitioners complain, that such filings will be available in the unlikely case that a carrier will need to file it to ensure that rates are not confiscatory.

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[5] In addition, the question of whether the repeal of the low-end adjustment mechanism could result in a taking is clearly not ripe. No ILEC has filed for Phase I or Phase II pricing flexibility nor has any price cap ILEC had a rate of return anywhere near the 10.25 trigger of the low end adjustment.

CONCLUSION

For the foregoing reasons the Commission should deny the petitions for reconsideration filed by Bell Atlantic and GTE.

Respectfully submitted

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December 1, 1999

CERTIFICATE OF SERVICE

I, Jonathan Askin, do hereby certify that on this 1st day of December, copies of the foregoing Opposition of the Association for Local Telecommunications Services filed today with the following persons.

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