

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Request for Emergency Temporary)
Relief Enjoining AT&T Corp. from) CC Docket No. 96-262
Discontinuing Service Pending)
Final Decision)

REPLY COMMENTS OF AT&T CORP.

Pursuant to the Public Notice issued by the Commission on May 15, 2000,¹ AT&T hereby submits its reply comments in opposition to the Requests for Emergency Relief (“the Requests”) filed by the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance (collectively “movants”).²

The comments filed in this proceeding vividly confirm that the Commission should deny the movants’ self-styled requests for emergency relief. To begin with, movants “have improperly sought a preliminary injunction pending completion of a rulemaking” and their petitions are thus procedurally inappropriate. WorldCom, p. 2. The Commission should not undermine its rulemaking processes by encouraging parties to file requests for injunctive relief that would in fact require the Commission to prejudge the very issues pending before it in the rulemaking.

¹ Public Notice, DA 00-1067, CC Docket No. 96-262 (May 15, 2000) (“Notice”).

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In any event, the relief movants seek is fundamentally irreconcilable with the Commission's adoption of a market-based approach to access charge reform. "[I]f the Commission refuses to regulate wireline CLEC access charges directly, it cannot force IXCs" to purchase CLECs' services "on whatever terms the CLECs attempt to dictate unilaterally through the filing of a tariff." *Sprint*, p. 2. "So long as the Commission wishes to leave the matter of CLEC access charges to the 'marketplace,' it must allow IXCs to take 'marketplace' responses to protect themselves and their customers against the grossly excessive access charges imposed by many CLECs." *Id.* Indeed, there is every reason to expect that a "hands-off" approach by the Commission would result in a marketplace solution. Because the long distance market is highly competitive, "[m]arket forces should . . . ultimately provide sufficient motivation for both AT&T and the CLECs represented by RICA and Minnesota to negotiate an amicable solution to the problem identified by the Requests without Commission intervention." *U S WEST*, p. 8.

Not surprisingly, a number of CLECs nevertheless urge the Commission to intervene in the marketplace by granting the movants' requests to compel AT&T to purchase movants' services. With very few exceptions, AT&T anticipated and addressed each of the arguments advanced by these CLECs in its comments, and will not burden the Commission by repeating them here. Instead, AT&T will limit itself to responding briefly to two new arguments raised by the movants' supporters.

First, a number of CLECs suggests that AT&T's argument "that it never requested services from these carriers" "fails because AT&T has used these carriers services"

² See Request for Emergency Temporary Relief of Minnesota CLEC Consortium (May 5, 2000) ("Minn. Pet."); Request for Emergency Relief of Rural Independent Competitive Alliance *et al.* (Feb. 18, 2000) ("RICA Pet.").

and “has billed” its customers. *See, e.g.,* Haxtun, p. 3. In other words, these CLECs suggest that AT&T has in fact ordered services from the movants by billing its end users for calls that the movants have insisted – despite AT&T’s unequivocal instructions – on routing to AT&T’s network. This claim lacks merit.

To begin with, it is hardly surprising that neither set of movants itself makes this claim. AT&T sent each of the movants letters expressly and unambiguously stating that “AT&T has not ordered switched access services” from the CLEC, that the CLEC “should immediately cease routing all traffic to AT&T’s network,” and that the CLEC “should not presubscribe its local exchange customers to AT&T’s interexchange services.” *See, e.g.* Letter from Brian W. Moore (AT&T) to Sylvia Lesse (attorney for FCTI) (Feb. 4, 2000) (attached to RICA Pet.). If the movants honor AT&T’s request, these CLECs will not route traffic to AT&T in the first place and no issue regarding the billing of end users for such traffic will arise. The movants’ recognition that AT&T does not want and has not ordered their services explains why the movants seek an order requiring AT&T to order their services and pay their exorbitant rates, and did not choose instead to file a complaint claiming that AT&T “constructively” ordered their services and seeking collection of their tariffed rates.

In any event, AT&T cannot be deemed to have ordered the movants’ services by billing end users for traffic that the movants insisted on delivering to AT&T. To begin with, AT&T is legally compelled to charge its full tariffed rate for any services that its end users order and that AT&T provides. If AT&T were to provide interexchange service to end users at a charge different from the tariffed rate, it would violate section 203 of the Act, since services to end users must be provided today under tariff. Once the movants insist on delivering traffic to an unwilling AT&T, AT&T has no choice but to bill for the call. Any requirement that AT&T

refrain from billing end users in order to avoid ordering a CLEC's access services would arbitrarily place AT&T in an impossible catch-22: either refrain from billing its end users for the calls, and thereby violate section 203, or comply with section 203, and thereby lose its right to cancel service.³

Moreover, AT&T is entitled to bill its end users for calls routed against AT&T's wishes to the AT&T network in order to mitigate AT&T's damages and deter potentially fraudulent use of the AT&T network. When calls are routed to AT&T's network, there is no dispute that AT&T incurs costs in completing such traffic, both its internal costs and the access charges it pays to terminate the call. Unless AT&T were entitled to bill end users for such calls it would have no way to recover these costs.

Finally, and perhaps most fundamentally, the CLECs' claim that AT&T must either order the CLECs' services or refrain from billing the CLECs' end users amounts to the claim that AT&T cannot avoid being compelled to subsidize the CLECs' local services. As these CLECs would have it, AT&T has only two "choices": AT&T can either pay the CLECs in cash by ordering their access services and paying their excessive rates, or AT&T can pay the CLECs in kind by providing unlimited free long distance services to the CLECs' end users. It goes without saying that any CLEC whose customers could obtain free AT&T long distance service would enjoy a significant competitive advantage over its rivals in attracting customers, and would generate more, not less, traffic to the AT&T network as customers learn that they can

³ Indeed, had AT&T refrained (contrary to law) from billing originating end users, that action would only have encouraged more traffic from those end users as well as others attracted to the movants by the prospect of free AT&T service, thereby increasing movants' access bills.

place such calls without ever receiving a bill.⁴ It would be patently arbitrary to reward the CLECs' deliberate refusal to honor AT&T's request that they cease delivering calls to the AT&T network by requiring AT&T to subsidize the CLECs' offerings in these ways.

Second, a number of CLECs argue that the Commission should grant the movants' requests for emergency relief on the asserted ground that "AT&T's treatment of the Petitioners is substantially similar to its treatment of MGC," and that the Commission's decision in *MGC Communications v. AT&T* effectively disposes of the legal issues raised by the movants' requests. Haxtun, p. 7; Allegiance, p.5. This claim is frivolous. As described more fully in AT&T's comments, and as expressly noted by the Commission in affirming the Bureau's decision in the *MGC* decision, *MGC* involved cancellation of a service that AT&T had initially "voluntarily" ordered. *MGC Communications v. AT&T*, 15 FCC Rcd. 308 (1999) (¶ 7). Although the *MGC* decision recognized that AT&T had a right to cancel service, the Commission concluded that AT&T's cancellation letter was ambiguous.

By contrast, AT&T has not ordered the access services provided by each of the movants in the first place, and no claim could possibly be made here that AT&T's communications with the movants were ambiguous. The movants' requests thus raise an issue entirely different from the theory on which *MGC* was decided: whether an IXC that has declined to order a CLEC's access services, and that has in fact expressly and unambiguously rejected such services, may nevertheless be compelled to purchase the CLECs' offering. To the extent that the *MGC* decision addresses *this* issue, it supports *AT&T's* position: by deciding that AT&T

⁴ Indeed, if AT&T were to provide its services to these CLECs' customers for free, while charging its tariffed rates to customers of other LECs, that favorable treatment would constitute unlawful discrimination under section 202(a) of the Act.

was liable to MGC for failing to state its intent to cancel service in unambiguous terms, the *MGC* decision implicitly recognizes that AT&T has the option not to order service in the first place.

CONCLUSION

For the reasons stated above, as well as those set forth in AT&T's Comments, the Requests should be denied.

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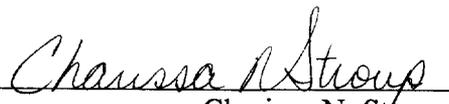
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