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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
)	
Complete Detariffing for Competitive)	
Access Providers and Competitive)	CC Docket No. 97-146
Local Exchange Carriers)	
)	

AT&T SUPPLEMENTAL COMMENTS

Pursuant to the Commission's June 16, 2000 Public Notice in the above-captioned proceedings,¹ AT&T Corp. ("AT&T") submits these supplemental comments on the Commission's proposals in these pending dockets to completely detariff exchange access services provided by competitive local exchange carriers ("CLECs").²

As AT&T has previously shown, a small but rapidly growing segment of the CLEC industry is attempting to capitalize on market failures by tariffing and seeking to enforce against interexchange carriers ("IXCs") supracompetitive rates for both originating and terminating switched access. Those CLECs have then claimed

¹ Public Notice, "Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services," DA 00-1268, released June 6, 2000 ("Public Notice").

² See Hyperion Telecommunications, Inc. and Time Warner Petitions for Forbearance; Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers, 12 FCC Rcd 8596, 8613 (1997) ("Hyperion Order" and "Hyperion NPRM"); Access Charge Reform, 14 FCC Rcd 14421, 14344 (1999)(¶246)("Fifth Report" or "Further Notice").

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that, despite the fact it has not ordered service from them, AT&T is obligated under the "filed tariff" doctrine to pay these carriers' filed rates that are often many times higher than the corresponding rates of incumbent local exchange carriers ("ILECs") in the same service areas.

Mandatory detariffing of all CLEC switched access rates, however, is unnecessary to allow competitive market forces to control these CLECs' abuses of their bottleneck monopolies and their deliberate misconstruction of the "filed tariff" doctrine. Instead, the Commission should retain its current "permissive detariffing" policy for those CLECs whose switched access rates do not exceed those of the ILECs in their service territories, and detariff only the rates of those CLECs whose charges exceed those levels. Moreover, the Commission should make explicit that IXCs such as AT&T have no legal obligation to order or otherwise accept a CLEC's access services -- either under tariff or an intercarrier contract -- and should require CLECs that avail themselves of permissive tariffing to specify clearly the process for affirmatively ordering and subsequently canceling service under those rates, terms and conditions.

Consistent with its general pro-competitive policies, from the inception of its Access Charge Reform docket the Commission has expressed its strong preference for reliance on marketplace forces, as opposed to regulation, as the mechanism for disciplining CLECs' access rates. For this reason, based on the record then before it, in the First Report in that proceeding the Commission classified CLECs as nondominant carriers, even though it acknowledged that those carriers still retained locational monopolies that significantly insulated their switched access rates

from the full scope of any competitive forces.³ However, the Commission expressly stated that, if subsequent events demonstrated that CLECs had adopted unreasonably high access rates, those circumstances would “suggest the need to revisit our regulatory approach.”⁴

The Commission’s Fifth Report has in fact undertaken just such a reexamination of those initial conclusions in response to AT&T’s petition for a declaratory ruling confirming that IXCs are not obligated to order such CLEC access services.⁵ The Commission there underscored again its reliance on market forces as the primary method for regulating CLECs’ access charges.⁶

³ See Access Charge Reform, 12 FCC Rcd 15982, 16138-16141 (1997)(¶¶ 358-365)(“First Report”). In particular, the Commission expressed its concern that CLECs’ terminating access rates might not be subject to effective marketplace constraints because IXCs must rely on those carriers to complete calls to customers who subscribe to their local service. However, the Commission concluded there was insufficient evidence at that time that CLECs would seek to charge terminating rates in excess of the ILECs’ levels. Id. at 16140-16141 (¶¶ 360-364).

As shown below and in AT&T’s prior filings, subsequent evidence has shown that many CLECs have adopted terminating rates far in excess of ILEC charges. Moreover, the market failures that have allowed CLECs to establish supracompetitive rates have not been limited to terminating access, but extend to the CLEC’s originating access services as well. See infra, p. 6 & n.12.

⁴ First Report, 12 FCC Rcd at 16141-42 (¶ 364).

⁵ Fifth Report, 14 FCC Rcd at 14237, 14319, 14340 (¶¶ 33, 189, 238), citing AT&T Petition for Declaratory Ruling, CCB/CPD No. 98-63 (October 23, 1998)(“AT&T Petition”).

⁶ Further Notice, 14 FCC Rcd at 14340 (¶ 238)(the Commission “prefer[s] to seek a marketplace solution that might constrain CLEC access rates”); see also id. at 14348 (¶ 256)(the Commission “strongly prefer[s] not to intervene in the marketplace . . . If market forces are not operating to constrain CLEC

Concurrently with these initiatives, the Commission has reexamined the applicability of traditional tariffing practices to CLEC switched access services. In the Hyperion Order, the Commission exercised its forbearance authority under Section 10 of the Communications Act (47 U.S.C. § 10), adopting a “permissive detariffing” policy that allowed those carriers the option to cease filing tariffs, and to operate instead through intercarrier arrangements negotiated directly with their access customers.⁷ The Commission there also requested comment on the desirability of adopting mandatory detariffing for CLEC access services, both to reduce administrative and transaction costs for carriers and the Commission, and to preclude CLECs from abusing the filed rate doctrine to the detriment of their access customers.⁸ Last year, in the Further Notice, the Commission renewed its

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access charges, we seek the least intrusive means possible to correct any market failures”).

⁷ Hyperion Order, 12 FCC Rcd. at 8607-8612 (¶¶ 21-32). The Commission found that the benefits of permissive detariffing included a reduction in the costs of market entry, avoidance of disclosing new entrants’ prices to competitors, and the elimination of burdens on a CLEC’s ability promptly to introduce new services. Id. at 8610 (¶ 27). As in the First Report, the Commission’s conclusions were based on the premise (now shown to be erroneous) that, with these changes in the tariff regime, marketplace forces would be sufficient to constrain the CLECs’ pricing behavior. Id. at 8608-09 (¶ 24).

⁸ Hyperion NPRM, 12 FCC Rcd at 8613 (¶ 34).

examination of the efficacy of mandatory detariffing as a constraint on LEC access pricing.⁹

The Commission's decision in the Public Notice to revisit the need for fundamental changes in CLEC tariffing requirements is both timely and necessary. As AT&T has repeatedly demonstrated,¹⁰ the CLECs' provision of access services is characterized by serious market failures that render ineffective the competitive forces upon which the Commission has relied to constrain those carriers' rates. The market failure with respect to terminating access charges results from the fact that the recipient of a typical long distance call does not pay for the cost of that call. Because local exchange customers that have selected a CLEC as their service provider are indifferent to the CLEC's terminating access rates, CLECs can raise those charges without impairing the demand for their local exchange services.¹¹ The market failure

⁹ Further Notice, 14 FCC Rcd at 14343 (¶ 246).

¹⁰ See AT&T Petition, pp. 2-4 and Appendix A; AT&T Reply in id., filed December 22, 1998 ("AT&T Reply"), p. 2 and Attachment B; AT&T Comments in Further Notice filed October 29, 1999 ("AT&T FNPRM Comments"), pp. 27-28; AT&T Reply Comments in Further Notice filed November 29, 1999 ("AT&T FRPRM Reply"), pp. 28-29; id., Attachment D (Expert Statement of Frederick P. Warren-Boulton in MGC Communications, Inc. v. AT&T Corp., File No. EAD-99-002 (June 7, 1999))("Warren-Boulton Expert Statement"), p. 2; id., Attachment E (Expert Testimony of Frederick P. Warren-Boulton in MGC Communications, Inc. v. AT&T Corp., File No. EAD-99-002 (June 28, 1999))("Warren-Boulton Expert Testimony").

¹¹ See Warren-Boulton Expert Statement, p. 2. This market failure also creates perverse economic incentives for CLECs to offer below-cost local services to end users, which they may then cross-subsidize from their supracompetitive charges to access customers. Such economically inefficient pricing thus also produces distortions in the local service market. See Warren-Boulton Expert Testimony, pp. 160-163; AT&T FNPRM Reply, pp. 28-29.

as to originating access results from geographic rate averaging by IXCs, which insulates the CLECs' local customers from the supracompetitive access rates charged by their selected exchange carrier.¹² As a result, a disturbingly large number of CLECs have tariffed switched access rates at levels far in excess of the charges by the ILECs in the same service areas.¹³

Compounding these market failures, these CLECs have adopted insupportable interpretations of the "filed rate doctrine" and have relentlessly asserted that IXCs such as AT&T are obligated to purchase their access services and to pay the exorbitant rates tariffed by these CLECs, despite the fact that the IXC has not affirmatively ordered such services (and even where the IXC has affirmatively disclaimed any intention to so order). CLECs are currently pressing these meritless claims against AT&T in numerous court actions and Commission formal complaint proceedings,¹⁴ as well as requests for "emergency relief" in the pending Access Charge Reform docket.¹⁵

¹² See, e.g., AT&T FNPRM Comments, p. 30 n.53; AT&T FNPRM Reply, p. 28 n.40; Warren-Boulton Expert Statement, p. 3; Warren-Boulton Expert Testimony, pp. 127-141.

¹³ See AT&T Petition, Appendix A; AT&T Reply in *id.*, Attachment B. The fact that these CLECs' originating and terminating access rates are generally set at the same levels further confirms that both of these services are affected by market failures.

¹⁴ See, e.g., Advantel, LLC d/b/a Plan B Communications, et al. v. AT&T Corp., Civ No. 00-643-A (E.D. Va., filed April 17, 2000)(civil actions brought by 16 unaffiliated CLECs to collect unpaid charges from AT&T for unordered switched access services); Allegiance Telecom of the District of Columbia, et al. v. AT&T Corp., Civil Action No. 00-679 (D.D.C. filed March 29, 2000)(similar civil action by 12 affiliated CLECs); U S TelePacific Corp. v.

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The Commission has correctly recognized that mandatory detariffing of all CLEC access rates would substantially alleviate the serious problems described above by precluding those carriers from relying on the filed rate doctrine to coerce unwilling IXCs to pay their exorbitant access charges.¹⁶ However, as AT&T has previously demonstrated, such a sweeping application of the Commission's forbearance authority would also be squarely inconsistent with the Commission's expressed objective of applying "the least intrusive means possible to correct any market failures" that affect CLEC access.¹⁷

Despite the abuses committed by an appreciable number of CLECs, AT&T expects that the majority of current and future local market entrants will seek to compete with established local carriers (both ILECs and CLECs) on the basis of service quality and, in particular, price of their access services. Precluding such carriers, and their IXC access customers, from availing themselves of the

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AT&T, File No. EB-00-MD-010, filed June 16, 2000 (similar claim brought by a single CLEC as formal complaint).

¹⁵ See Rural Independent Competitive Alliance Request for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision, filed February 18, 2000 in CC Docket No. 96-262 ("RICA Petition"); Minnesota CLEC Consortium Request for Emergency Temporary Relief Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision, filed May 5, 2000 in CC Docket No. 96-262 ("Minnesota Petition").

¹⁶ See Hyperion NPRM, 12 FCC Rcd at 8613 (¶ 38); Further Notice, 14 FCC Rcd at 14343 (¶ 346).

¹⁷ Further Notice, 14 FCC Rcd 14348 (¶ 256).

convenience and administrative efficiency of the tariff filing mechanism to establish the rates, terms and conditions governing their supplier-customer relationship would not serve the public interest.¹⁸ Instead, any such action would impose significant (and unwarranted) burdens both on access customers and CLECs to negotiate mutually satisfactory contractual access arrangements in every single case (even where the CLECs' tariffed rates were otherwise acceptable to the IXCs). Stated simply, the use of tariffs provides significant efficiencies and economies to legitimate access carriers. Providing entrenched incumbents with a further cost advantage over new competitive entrants cannot be squared with the Commission's objectives in these proceedings.¹⁹

Moreover, tariffing offers similar efficiencies to access customers, who can benefit from the relative ease and speed of taking advantage of lower costs or higher quality from CLECs without the need to engage in potentially-protracted contract negotiations that neither party may desire. In this regard, AT&T is one of the largest, if not the largest, CLEC access customers. Unlike in the Commission's recent consideration of mandatory detariffing of nondominant carriers' interstate interLATA services, there is thus no "customer interest" basis here to impose mandatory detariffing on all CLEC access services.

¹⁸ To the extent that the Commission may continue to entertain any concerns that the filed rate doctrine may be abused even by CLECs that price their access services at rates equal to (or below) the ILEC levels, the Commission can more efficiently address that issue by publicly reaffirming that under existing law IXCs have no obligation to order access from any CLEC. *See infra*, pp. 10-11.

¹⁹ *See* AT&T Reply in Hyperion NPRM, filed September 17, 1997, pp. 6-7.

A more narrowly focused application of the Commission's forbearance authority with respect to CLEC tariff filings is therefore appropriate. Specifically, the Commission should prohibit those CLECs whose switched access rates exceed the rate levels of the ILECs that serve the same service territories from continuing to use publicly filed interstate tariffs to create a supplier relationship with IXC access customers.²⁰ CLECs that insist on charging supracompetitive rates should instead be required to negotiate intercarrier contractual arrangements with any IXCs that may wish to make use of those access services notwithstanding their excessive prices.

The Commission should, however, retain its current "permissive detariffing" regime for CLECs whose switched access rates do not exceed the levels of the corresponding ILECs' charges. This will assure that CLECs that genuinely attempt to compete with established access carriers will be able to rely upon the relative ease and convenience of tariffs to provide access services to IXCs that request them. CLECs subject to "permissive detariffing" will also continue to have the flexibility they now enjoy to enter into non-tariffed, mutually agreeable contractual arrangements with their access customers.

²⁰ This standard does not require that CLECs mirror exactly the access rate structure applicable to ILECs under Part 69 of the Commission's rules (47 C.F.R. Pt. 69), nor that a CLEC's rate for a given rate element may not exceed the corresponding ILEC's charge for the same rate element. However, the Commission should require that under this standard the CLEC's total charge per switched access minute (based on verifiable assumptions for allocating any fixed charges to usage elements) may not exceed the corresponding ILEC's combined access rate for the same switched access service(s).

These modifications to the Commission's mandatory detariffing proposals will assure that the Commission's regulatory regime provides correct signals -- and appropriate rewards -- to pro-competitive marketplace behavior by CLECs. Under these revisions, any CLEC may continue to offer access services pursuant to tariff, so long as it does so at prices, terms and conditions no greater than those offered by the corresponding ILEC. These revisions thus will eliminate the competitive unfairness of a complete detariffing approach to CLEC access services by maximizing efficiency in administering transactions between access providers and purchasers, while reducing unnecessary burdens on the Commission's resources.²¹

The full competitive benefits of these revisions will not be achieved, however, unless the Commission takes two further, related steps. First, the Commission should conclude its pending rulemaking in the Further Notice and expressly confirm that IXCs have no legal obligation to purchase switched access

²¹ Last year, AT&T proposed in the Further Notice that CLECs with supracompetitive rates should be subject to traditional, non-streamlined tariff review and to comply with the full panoply of tariff support rules (including compliance with USOA, separations and Part 69 rate structure requirements), based on their own individual cost characteristics. See AT&T FNPRM Comments, pp. 30-32. At the time AT&T made that proposal, the Commission's forbearance authority to require mandatory detariffing was still in question.

However, as the Public Notice points out, that issue has now been resolved by the Court of Appeals. See MCI WorldCom v. FCC, 209 F.3d 760 (D.C. Cir. 2000). In light of this development, the need for such detailed cost support and tariff review can be eliminated by detariffing the affected CLECs' switched access rates. If, however, mandatory detariffing of supracompetitive CLEC access rates is not achieved, those rates should be subject to traditional non-streamlined tariff review.

services from CLECs under tariff or otherwise, and regardless of the CLECs' proposed rates.²² AT&T has repeatedly demonstrated, both in the Access Charge Reform docket and other proceedings, that none of the grounds that CLECs and their supporters have identified (including, but not limited to, Sections 201(a), 202, 203, 214 and 251 of the Communications Act) provides any legal basis for obligating an IXC to purchase access services from a CLEC.²³ Unless the Commission conclusively rejects the CLECs' claims in this rulemaking, it is predictable that despite detariffing many of these carriers will continue to insist that IXCs are obligated to enter into contractual service arrangements with those carriers at the same exorbitant rates those carriers now offer under tariff.²⁴ The Commission should foreclose the CLECs' ability to continue harassing IXCs and their customers in this manner. An explicit Commission ruling on this issue will also avoid the diversion of scarce resources by regulators and courts that will otherwise have to address such CLEC claims.

²² See Further Notice, 14 FCC Rcd at 14342 (¶¶ 242-243). Because ILECs' ratesetting practices remain subject to Commission oversight under price cap or rate-of-return regulation, there is no similar need for the Commission to examine the IXCs' obligations to purchase ILEC access.

²³ See AT&T FNPRM Comments, p. 32 n. 55; AT&T FNPRM Reply Comments, pp. 29-31. See also AT&T Petition, pp. 6-8; AT&T Petition Reply, pp. 5-8; AT&T Comments in RICA and Minnesota Petitions, filed June 14, 2000, pp. 9-26; AT&T Reply Comments, filed June 29, 2000 in id., pp. 3-5.

²⁴ Alternatively, CLECs may claim that an IXC such as AT&T is required to accept and pay for unordered, unwanted traffic that those CLECs unilaterally route to AT&T's network.

Second, the Commission should confirm that, even to the extent that their access services remain permissively tariffed, the CLECs' tariffs must expressly state the affirmative steps that an IXC must follow in order to become a customer under those tariffs.²⁵ Increasingly, AT&T has found that CLECs have adopted tariff provisions that purport to force IXCs passively to become their access customers. For example, many CLECs' tariffs state that access is deemed ordered thereunder by an IXC's "use" of the CLEC's services, even absent the submission of an ASR or any other affirmative request for service. Other CLECs have implemented tariffs that deem an access order to be placed by an IXC whenever an end user purports to presubscribe to that carrier or dials the IXC's "1010XXX" access code (despite the absence of any express request from the IXC for Feature Group D access service), or where an end user dials an "8YY" or "900 NXX" number for which the IXC provides transport services. The CLECs that have adopted and attempted to enforce such tariff provisions simply ignore the fact that no one acting in the capacity of an end user has either actual or apparent authority to order switched access services on AT&T's behalf.

²⁵ Well-established standard industry practices already provide for submission of an Access Service Request ("ASR") in written or electronic form by an IXC to a local carrier, pursuant to guidelines promulgated by the Ordering and Billing Forum ("OBF"), specifying the access services (e.g., by end office, by CIC code) ordered by the IXC.

As AT&T has already shown,²⁶ these and similar tariff provisions are transparent attempts to evade the Commission's well-established holding, affirmed on appeal, that an access customer cannot be required to pay for an access service unless it has affirmatively and expressly ordered or intended to receive such service.²⁷

Rather than allow CLECs to continue to abuse the tariff filing mechanism in this fashion, the Commission should expressly require (a) that CLEC access tariffs must describe with specificity the affirmative steps IXCs must take to order service thereunder, and (b) that, absent compliance with those provisions by both parties to the service arrangement, the IXC is not obligated to pay the CLECs' tariffed service charges. Additionally, the CLECs' tariffs should be required to specify that access customers have the right to cancel their orders for those services, and to set forth specifically the steps that customers must take to implement such cancellation.²⁸

²⁶ See AT&T Petition, pp. 5-6; AT&T Petition Reply, pp. 8-12; AT&T FNPRM Reply, p. 31.

²⁷ Capital Network System, Inc., 6 FCC Rcd 5609 (Com.Car.Bur. 1991), application for review denied, 7 FCC Rcd 8092 (1992), aff'd Capital Network System, Inc. v. FCC, 28 F.3d 201 (D.C. Cir. 1994). See also AT&T Communications Tariff FCC Nos. 9 & 11, 10 FCC Rcd 4288, 4297-99 (1995)(finding "it would be an unreasonable practice under Section 201(b) of the Act for AT&T to bill and end user for Feature Group A and B Connection Service, unless the end user has requested such service").

²⁸ The Commission has recognized that, even where it has affirmatively ordered access from a CLEC, an IXC such as AT&T is entitled to cancel that service order. See MGC Communications, Inc. v. AT&T Corp., 14 FCC Rcd 11647, 11655 n.32 (1999).

CONCLUSION

For the reasons shown above and in AT&T's prior submissions in these and related proceedings, the Commission should retain permissive detariffing of exchange access services offered by CLECs to the extent that those carriers' tariffed rates do not exceed the corresponding rates of ILECs in the same service territory. The Commission should, however, impose mandatory detariffing of CLEC access rates that exceed the ILECs' rates in those same locales, and should require that carriers seeking to charge such rates must rely solely upon mutually agreed contractual arrangements with IXCs for the provision of exchange access services. Finally, even for permissively tariffed CLEC access services, the Commission should require that tariffs for such services specify the affirmative steps an IXC must take both to order and cancel service under those arrangements, and should prohibit terms and conditions that purport to make an IXC a customer merely because it has received traffic from, or terminated traffic to, the CLEC.

Respectfully submitted,

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