BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Hyperion Telecommunications, Inc. and Time Warner Petitions for Forbearance, Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)	CC Docket No. 97-146

COMMENTS OF TIME WARNER TELECOM

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TABLE OF CONTENTS

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Time Warner Telecom ("TWTC")[1], by its attorneys, hereby files these comments in response to the Public Notice released on June 16, 2000 by the Commission in the above-captioned proceedings. In the Public Notice, the Commission asked parties to refresh the record on the merits of mandatory detariffing of CLEC interstate access.

I. INTRODUCTION AND SUMMARY

The Commission should not implement mandatory detariffing for CLEC switched access. The Commission's request for comments regarding mandatory detariffing has apparently been prompted by a concern that CLEC access rates are not adequately disciplined by competitive forces. As explained below, this is at most a

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1 Time Warner Telecom is a leading optical network, facilities-based provider of integrated telecommunications solutions for businesses. The company currently serves business customers with last-mile broadband connections for data, Internet, and voice in 21 U.S. markets.

temporary problem, which could disappear without the need for regulatory intervention. But in no case is mandatory detariffing an appropriate mechanism for addressing the issue. A mandatory detariffing regime would likely harm consumers, create opportunities for large IXCs to leverage their market power to extract confiscatory rates from CLECs, and impose substantial and needless transaction costs on CLECs. To the extent that regulatory intervention is warranted, there are far simpler and more effective means of addressing CLEC access charges. The appropriate approach would be (at most) to allow IXCs to pass through to customers the amount by which a CLEC's originating access exceeds the ILEC's originating access rates and to prohibit CLECs from charging terminating access above originating levels. In this way, the Commission could adequately address any temporary market failure in CLEC access with minimal regulation and without creating the many serious new problems that mandatory detariffing would introduce.

II. DISCUSSION

As TWTC has explained in the past, it is likely that any perceived market failure in CLEC access services will disappear over time with the introduction of competition for bundled local and long distance service. See Comments of TWTC in CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63 (Oct. 29, 1999) at 7-15. On the originating side, CLEC access charges will be increasingly constrained by bundled service offerings, which will soon dominate the telecommunications marketplace. In the near future, competition will likely force CLECs to offer most of their customers bundled services, eliminating the divide between local and long distance. Once bundled service offerings become standard in the industry, the opportunity for CLECs to serve customers for local service alone and then overcharge the IXC for switched access will disappear.

Perhaps the strongest force driving the market toward bundled offerings is the increased level of Section 271 checklist compliance by the BOCs. BOCs that have gained authority to offer in-region interLATA services will be formidable competitors, offering a bundle of local and long distance. Moreover once a BOC has complied with the Section 271 competitive checklist in a state, IXCs will be able to compete more effectively in the local market, giving them an opportunity to offer bundled services much more efficiently. The threat of BOC competition is already moving IXCs toward bundled offerings. In this competitive environment, CLECs will not be able to maintain stand-alone local service offerings. Therefore, the Commission should not take any action to correct a perceived failure in the originating access market just when the market is beginning to discipline rates itself.

On the terminating side, once the industry completes the process of eliminating the distinction between local and long distance, all carriers will terminate long distance traffic for all other carriers. When this is the case, unless a carrier's customers either originate or terminate a disproportionate percentage of traffic, carriers will have the incentive to set the termination rate at or close to zero. Regulatory intervention will be unnecessary.

If, before the transformation into a market dominated by bundled local/long distance offerings takes hold, the Commission determines that there is a need for regulatory intervention to address market failure in CLEC access, it should tailor regulations for CLEC access as narrowly as possible. On the originating side, the Commission should at most allow long distance carriers to deaverage their interstate offerings to permit them to pass through to a customer the amount by which the customer's CLEC's access charges exceed the ILEC's. See Reply Comments of TWTC in CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63 (Nov. 29, 1999) at 9-13. On the terminating side, the Commission should simply prohibit CLECs from charging terminating access rates above rates they charge for originating switched access rates. Implementing these mechanisms in the current permissive detariffing context will provide a sufficient response to any perceived temporary market failure. Permitting a pass-through by IXCs on the originating side will exert pressure on originating access without extensive regulation. Tying terminating to originating will simply extend that pressure to terminating access.

In no event should the Commission mandatorily detariff CLEC interstate switched terminating access charges. In order to forbear from applying any regulation or any provision of the Act, the Commission must find that (1) enforcement is not necessary to ensure that rates and terms are just and reasonable and are not unjustly and unreasonably discriminatory; (2) enforcement is not necessary to protect consumers; and (3) forbearance is in the public interest. 47 U.S.C. § 160. Mandatory detariffing of CLEC access rates does not satisfy the test for forbearance.

First, continued permissive detariffing is necessary to ensure that CLEC access rates are not set unreasonably low, and that IXCs are not able to unreasonably discriminate among sellers of access. Mandatory detariffing would potentially offer large IXCs the opportunity to impose onerous terms of access arrangements on CLECs but not ILECs. As the Department of Justice has concluded in the recent complaint it filed to block the Sprint-WorldCom merger, the domestic mass market and large business long distance markets are characterized by high levels of concentration and high entry barriers (both in terms of brand identity and reputation and the ubiquity of the required facilities investment).[2] Moreover, Chairman Kennard's support of the Justice Department's complaint indicates that he too views the long distance market as highly concentrated.[3]

Notwithstanding the fact that the Commission has classified all IXCs as nondominant, the level of concentration and high entry barriers in the long distance market creates a significant

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2 See Complaint filed in United States v. WorldCom, Inc. and Sprint Corp., Case No. 1:00CV01526 (D.D.C.) at 26-31 (mass market), 56-58 (large business).

3 See FCC News Release, "Statement of FCC Chairman William E. Kennard Regarding U.S. Department of Justice Action in Proposed Worldcom-Sprint Merger" June 27, 2000 (applauding the Department of Justice decision to file a complaint to block the merger).

risk that large IXCs would attempt to leverage their market power in the long distance market to extract extraordinary concessions from CLECs in access negotiations. A large IXC could, for example, insist that a CLEC charge the IXC access rates that are substantially below the ILEC rates as a condition of the IXC agreeing to deliver traffic from its customers to the CLEC. The CLEC would then be placed in an intractable position. On the one hand, it is implausible that a CLEC would ever attempt to market service to customers subject to the caveat that the customers could neither receive traffic from a large IXC's customers nor presubscribe to the IXC. The CLEC's service would be so degraded as to be worthless under such conditions. Yet if the CLEC accepted the terms of the IXC ultimatum, the CLEC would be seriously disadvantaged vis-à-vis the ILECs, whose tariffed rates are protected by the filed rate doctrine and whose market power would prevent the large IXC from attempting to cut off service to its customers. Thus, the industry would be in the absurd situation in which CLECs are forced to charge access rates below the ILEC rates and yet the ILECs would be under no pressure or obligation to lower prices to meet the CLEC rates.[4] This kind of practice should clearly be prevented.

Second, allowing CLECs to continue to file tariffs is necessary to protect consumers. Under mandatory detariffing, CLECs would be required to negotiate with each IXC to determine

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4 Moreover, if, as is often the case, negotiations between the CLEC and the large IXC were confidential, such tactics would never come to light.

the access rates the IXC would pay. If, as part of those negotiations, IXCs can refuse to purchase access from certain CLECs whose rates they deem too high, customers will be harmed. On the originating side, customer choice of service providers will be limited if CLECs may only permit customers to choose IXCs, either as the primary interexchange carrier ("PIC") or for dial-around, with whom the CLEC has an established agreement. On the terminating side, the customer impact of an IXC declining a CLEC's access service is even more acute. If IXCs are allowed to decline a CLEC's access service, an IXC might choose to limit service to consumers on a permanent basis when it is unable to reach agreement with a CLEC.[5] This would mean that the IXC would have to block calls from its customers to end users that have chosen the CLEC for local service. As a result, customers would not be able to receive calls from certain other users on the network, diminishing the value of their telephone service. In addition, this practice would result in widespread consumer confusion and frustration. Customers would be blocked from calling CLEC customers whom they have called without difficulty in the past, and the calling consumers would have no indication

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5 AT&T has already done so with certain rural CLECs. See Requests for Emergency Temporary Relief of the Minnesota CLEC Consortium and Rural Independent Competitive Alliance Enjoining AT&T from Discontinuing Service Pending Final Decision, CC Docket No. 26-262 (describing AT&T's refusal to exchange traffic with certain CLECs). This demonstrates that IXC refusals to deal are not just theoretical. Moreover, TWTC suspects that AT&T's actions thus far are designed to send a signal to larger CLECs that AT&T will refuse to deal with them as well if the FCC holds that it is permissible to do so.

as to why their calling options have suddenly been limited.[6] This spillorer effect would diminish the value of the entire domestic telecommunications network.

Third, mandatory detariffing would not be in the public interest more generally because it would significantly and unnecessarily increase transaction costs between sellers and purchasers of access. To begin with, it is not even clear how CLECs would identify the long distance carriers with whom to negotiate access rates. In the case of originating access, the CLEC might not have a negotiated access agreement with all carriers that their customers might select as their PIC or for dial-around calls. In that situation, the CLEC would have to either limit the customers' choices to IXCs with access agreements in place or accept the risk that the IXC might not accept the obligation to pay for the traffic routed to it. For terminating access, CLECs do not even know which carriers will terminate traffic at CLEC customers until the CLEC actually receives the traffic. Moreover, there are apparently hundreds of IXCs that purchase terminating access. Thus, the transaction costs imposed by the need to identify and negotiate with IXCs for terminating access would be extraordinary.

The Commission would need to address these problems if it were to implement mandatory detariffing. But any possible

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6 It is for this reason, among others, that TWTC has argued that the Commission should rule, as a matter of law, that IXCs are not permitted to refuse to purchase access from certain CLECs. See Comments of TWTC in CC Docket No. 96-262 (June 14, 2000).

solutions would cause the Commission to engage in just the sort of regulation of CLEC terminating access charges that the negotiation-based mandatory detariffing approach is intended to avoid. The result would be the reduction or elimination of any purported public interest benefits from mandatory detariffing that the Commission has identified, such as freeing up market forces and the reduction in administrative burdens. See Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, Second Report and Order, 11 FCC Rcd 20730, ¶¶ 53, 62 (1996).

For example, the Commission must not permit IXCs and CLECs to block traffic. The resulting customer confusion and general degradation of service would be simply intolerable. But it is hard to see how CLEC-IXC negotiations could work if the Commission were to prohibit the carriers from refusing to serve each other's customers. Such a prohibition would make it difficult for one party to force the other to the bargaining table. Disputes would go unresolved and would likely be brought back to the Commission for resolution in the form of Section 208 complaints, thereby transforming a negotiation-based approach into one reliant on complex and administratively burdensome proceedings leading to regulatory mandates.

Similarly, any mandatory detariffing regime would need to include a mechanism to prevent IXCs from extracting confiscatory terminating rates from CLECs. One solution to this imbalance in bargaining power suggested by the 1996 Act would be to establish a federal arbitration scheme similar to the one administered by the States under Section 252 for local interconnection. But, again, this would transform intercarrier negotiations into regulatory mandates and would consume significant administrative resources in the process.

Furthermore, the Commission would need to prevent carriers from exchanging traffic in the absence of contract terms and conditions that are binding on the carriers. But this is no easy task. For example, the Commission could establish a transition period before mandatory detariffing goes into effect to allow CLECs to identify and enter into agreements with all long distance carriers that could conceivably originate or terminate traffic at CLEC customers. But, as mentioned, such negotiations would needlessly increase costs and entry barriers into the local market (which is already characterized by extremely high entry barriers). It would also not address the situations in which a new IXC enters the market after the transition period ends or in which existing CLEC-IXC agreements expire and the carriers are unable to reach a new agreement. To address these situations, the Commission could establish a mechanism (probably a tariff) for setting a binding terminating access price during CLEC-IXC negotiations. But this would once again remove pricing decisions from market pressures and land the Commission back in the position of expending the time and resources to set CLEC terminating access rates.

Finally, the factors described above make mandatory detariffing of CLEC access markedly different from the long distance market in which the Commission determined that mandatory detariffing is appropriate. The long distance market does not pose the threat of third party customers being adversely affected by the buyer-seller negotiations. If the long distance customer decides not to subscribe to a particular long distance carrier, only that customer is affected. Nor does mandatory detariffing increase the threat in the long distance market that IXCs will exploit their market power. In fact, the FCC found that mandatory detariffing would improve the market's response to customer needs. See id. at ¶ 54. Moreover, except for the temporary problem of identifying dial-around 1+ long distance customers, see Policy and Rules Concerning the Interstate, Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as amended, Order on Reconsideration, 12 FCC Rcd 15014, ¶¶ 32-36 (1997), mandatory detariffing in long distance does not create the risk that traffic will be exchanged in the absence of binding contractual terms and conditions.

All of this demonstrates that mandatory detariffing for CLEC access does not meet the standard for forbearance under Section 10 and in all events is an inappropriate means of addressing the issue of CLEC access charges. It would be far more efficient and effective for the Commission, if any regulatory intervention is deemed necessary, to impose market discipline by allowing an IXC pass through of CLEC access charges on the originating side and by tying terminating rates to originating access as TWTC has explained.

III. CONCLUSION

For the reasons described herein, the Commission should not impose mandatory detariffing on CLEC access charges.

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