EXHIBIT A

2325 Northwood Dr.
Santa Rosa, CA 95404
April 7, 1999

CALIFORNIA PUBLIC UTILITY COMMISSION
CONSUMERS AFFAIRS BRANCH
505 VAN NESS AVE.
SAN FRANCISCO, CA 94102

Gentlemen:

Please find enclosed a check for 26.71 enclosed. This is the amount of my Pacific Bell statement for Mar. 25, 1999. I would like to continue to pay my bill to the CPUC until my telephone service can be straightened out.

Here is my complaint. The January Pacific Bell statement got my attention due to the amount. Sure enough the calls listed were calls my wife and I had made; although we were surprised at the rate of the long distance calls. We then realized that we were being billed by a company called USBI, a company that we had not heard of nor with which we had signed up.

After spending 1 to 2 hours altogether on the phone with Pacific Bell, Sprint and USBI, I was given a credit from USBI and supposedly switched back to SPRINT which I was told was my long distance carrier; although, SPRINT claimed that had not billed my account for years.

The Pacific Bell February statement had more charges from USBI but no charges from SPRINT, supposedly my carrier. I spent another 1 to 2 hours on the phone with Pacific Bell trying to resolve the issue. I asked for a supervisor, and I talked to Ray at ext. 36305. He assured me that the maintenance people once again at disconnected my line and reconnected to SPRINT and that I should not get a bill from USBI again.

The Pacific Bell March statement again had more charges from USBI plus a monthly fee, but again no charges from SPRINT.

I do not want to continue to be billed the exorbitant fees from USBI nor Do I wish to pay USBI a monthly fee. I would like to be reconnected to SPRINT if this was my previous long distance carrier. We have not programmed our telephones to dial anything but the numbers we are calling.

Please resolve this problem with Pacific Bell for me. I don't think any money should be paid to Pacific Bell that is not performing their local carrier function until this problem is resolved nor should I have to pay any fees to HSBI with which I have never contracted any services. I will continue to pay the CPUC for the phone services.

My home phone number is (707) 546 9049. I can be reached by phone through the day at (707) 573 0882 if you have any questions.

Sincerely,

Wayne H. Brigden

Wayne H. Brigden

APPROVED JAN 1 2 2000 a

Account Number
707 546-9049 382 N 7160

Statement Date
Dec 25, 1998

Page [illegible]

Questions about your bill? 1-8[illegible]3-478-872[illegible]

Total Current Charges (See detail below) $5[illegible]

Monthly Charges

#	Description	Amount
1.	CA High Cost Fund Surcharge - A: B: .80	.80
2.	California Teleconnect Fund Surcharge	.07
3.	Universal Lifeline Telephone Service Surcharge	.6[illegible]
4.	CA Relay Service and Communications Devices Fund	.07
5.	State Regulatory Fee	.03
6.	Tax: Fed: 1.52 911: .[illegible] Local: 1.93	3.[illegible]

Total Monthly Charges $5.[illegible]

Calls

•**Billed on Behalf of** LONG DIST BILLING

•**Domestic**

	Date	Time	Place and Number Called		Type	Rate	Minutes	Amount
7.	Nov26		UNIV SERV FD					.10
8.	Nov27	11:57am	SACRAMENTOCA	916 7[illegible]5-3122	Direct	Day	[illegible]	1.50
9.	Nov27	12:27pm	LOSANGELESCA	323 464-5917	Direct	Day	1.0	.25
10.	Dec 2	4:18pm	ELK GROVE CA	916 682-7475	Direct	Day	1.0	.25
11.	Dec 3	9:01am	ELK GROVE CA	916 682-7475	Direct	Day	1.0	.25
12.	Dec 3	4:56pm	ELK GROVE CA	916 682-7475	Direct	Day	1.0	.25
13.	Dec 5	10:16pm	SACRAMENTOCA	916 485-3122	Direct	Night	1.0	.25
14.	Dec 9		LD LINE CHG					5.[illegible]
15.	Dec10	5:54pm	WASHINGTONDC	202 337-3313	Direct	Eve	3.0	.75
16.	Dec14	6:51pm	WASHINGTONDC	202 337-3313	Direct	Eve	1.0	.25
17.	Dec17		MONTHLY FEE					3.50
18.	Dec20	11:45am	WASHINGTONDC	202 337-3313	Direct	Night	45.0	11.25
19.	Dec20	12:33pm	PLACRVL CA	530 626-[illegible]678	Direct	Night	28.0	7.00
20.	Dec20	1:33pm	NORTHRIDGECA	818 349 5357	Direct	Night	73.0	18.25
								49.10

Total Calls $49.10

48.00

Ray
x 36305

APPROVED JAN 1 2 2000

File

May 17, 1999

California Public Utilities Commission
505 Van Ness Ave., Room 2003
San Francisco, CA 94102

RE: Bridgen, Wayne
Contact No. 99-01-1720

We are in receipt of the above referenced customer complaint and have reviewed our records and conducted an investigation in accordance with your request.

According to our records, on August 2, 1996 a marketing representative contacted the above referenced company about the long distance service offered by Long Distance Billing. The marketing representative subsequently transferred the carrier change order to Capital Verification, a third party verification company. That company's records indicate Mrs. Sylvia Bridgen confirmed telephone number 707-546-9049 and verified the switch in long distance service for that line. Attached is a letter from Capital Verification relative to this matter.

Based upon the above information, it is our company's position that Mrs. Bridgen authorized the change in the long distance service at issue in this complaint nearly three years ago. Our records further reflect the account is in an "active" status with no change in long distance service or cancellation of such through May 2, 1999.

It is our recommendation that the consumer immediately contact his local exchange carrier, Pacific Bell, and initiate a carrier change to his preferred long distance provider. I apologize for any inconvenience this matter may have caused. If the consumer has additional questions, we encourage him to contact our customer service department directly at 800-318-1501during regular business hours. Thank you for your assistance in resolving this complaint.

Sincerely,

Carla Lindell
Regulatory Advisor

enclosure

APPROVED JAN 1 2 2000

ALFIE'S AUTOGRAPHS, INC.
1110 Hacienda Place, #406
West Hollywood, CA 90069

PACIFIC BELL CHRONOLOGY

1/14/99 Rec'd call from Carl who represented himself as from our local phone company. Stated he would place PICC Freeze on phone if we wanted and he was going to lower our local long-distance rate from $0.32 to $0.25/minute. He also stated he was going to waive our monthly fee because we have more than $25 on long distance calls. He then put his supervisor on the phone to verify call. **NEITHER ONE OF THEM MENTIONED THAT I WAS SWITCHING LONG DISTANCE SERVICES.**

1/28/99 Received call from AT & T asking if our recent switch in long distance service was an authorized one. Asked what company we switched to and she didn't have that info. Informed her it was not, that it was a SLAM. Also told her we were not interested in their long distance service, we had a preferred carrier, EXCEL COMMUNICATIONS.

Phoned Pacific Bell to advise them we had been SLAMMED and asked for a PICC freeze be placed on all 4 phone numbers. She advised me that any time someone represents themselves as from Pac. Bell, to get their phone number and call Pac. Bell to verify it. Most likely, they would not give me their phone number. Also that Pac. Bell employees are not allowed to call customers to offer more services. They can only do that when a customer calls them. Also advised me to phone EXCEL to reinstate.
Pac. Bell stated they showed our new long distance carrier as SPRINT.

Phoned EXCEL to reinstate service.

Phoned SPRINT to ask about switch. They do not have us listed as one of their customers. After further checking, she advised me that they rent phone lines out to several small companies and one of them (USBI) was our actual carrier. Got a phone number for USBI.

Phoned USBI and discovered they are the billing agent for Long Distance QAI. Cancelled service this day, advised them we had been SLAMMED and got Corporate Headquarters' address.

2/4/99 Wrote letter to Corp. Headquarters of Long Distance QAI. (attached)

3/8/99 Discovered more calls from USBI (Long Distance QAI) on our February bill. Phoned and spoke with April. She said she would CREDIT $33.65 on our phone bill. Phoned Pac. Bell and they will remove charge from our bill.

4/1/99 Discovered service charges of $27.50 from USBI still on our March bill. Phoned Pac. Bell and they will remove charges from our bill. Found out Long Distance QAI last month only credited Pac. Bell with $28.11, not $33.65.

Filed on-line complain with Federal Communications Commission.

APPROVED JAN 1 2 2000

ALFIE'S AUTOGRAPHS, INC.

4/5/99 Phoned USBI; asked again for cancellation of this service. Matt (Customer Svc.) had to go thru whole process of cancelling service. After service was cancelled on our primary line (650-7506), he told me I had to call EXCEL to open an acocount with them. Advised him we had an account open with EXCEL 18 months ago and it was current, as evidenced on my phone bill. He kept insisting the only way to prevent more charges from Long Distance QAI was to open an account with EXCEL. After arguing for 5 minutes I just asked him to cancel the service on our other 3 lines. He did (hopefully) He said a CREDIT of $23 + taxes will appear on our next bill.

4/8/99 Filed complaint with California Public Utilities Company.

APPROVED JAN 1 2 2000

EXHIBIT B

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
	)	
Low-Volume Long Distance Users	)	CC Docket No. 99-249
	)	
Federal-State Joint Board on Universal Service	)	CC Docket No. 96-45

COMMENTS OF PATHFINDER COMMUNICATIONS, INC.

Pathfinder Communications, Inc. ("Pathfinder"), hereby comments on the Notice of Proposed Rulemaking ("NPRM"), released September 15, 1999, in the above-referenced proceedings. Pathfinder, through subsidiaries and affiliates, provides long-distance services on a resale basis.

The NPRM is based on a proposal offered by an *ad hoc* group of local and long-distance carriers (known as "CALLS") designed to remedy the problems associated with the current access charge regime. Although the CALLS proposal has some qualities to recommend it, at bottom it dodges the fundamental problem with the current system: The PICC is not working for low-volume long-distance users and their carriers. Yet, if the CALLS proposal is adopted as it currently is framed, there will be little chance for any further access reform in the near term that could address this problem. For that reason, Pathfinder urges rejection of the CALLS proposal.

DISCUSSION

However well-intentioned, the Commission's first shot at access reform has misfired. Rather than eliminate implicit subsidies, encourage competition, and reduce the cost of long-distance services for all consumers, the current access charge system has engendered customer confusion and complaints, placed an inordinate burden on low-volume long-distance users, and put a squeeze on certain providers of long-distance services.

The CALLS proposal would not immediately remedy these defects. Instead, the CALLS proposal would increase complexity through its phased-in and multifaceted reform of a system that already is too complex, create additional customer confusion, and do little to remedy the competitive imbalance inherent in the current system.

I. The Current Access Charge Regime Unfairly Burdens Low-Volume Long-Distance Users And Their Carriers.

At least one point should be clear • the current access charge system is not working. It is not working for consumers, it is not working for IXCs (both large and small), and it is not working for policy-makers who had hoped that it would facilitate competitive entry in the local telecommunications markets and more closely relate access charges to access costs.

In practice, as CALLS noted, the "[t]housands of calls and letters to carriers, Congress, and the Commission confirm that ratepayers are confused by [multiple access] charges, particularly PICC-related charges, and do not understand their basis."[1] Customer confusion, in turn, is disrupting the natural balance of competition in the long-distance market and providing ILECs with opportunities to damage their future competitors in the long-distance markets. Indeed, many of the current conflicts involving consumers, IXCs, third-party billing companies, ILECs, and sometimes the FCC, have their basis in the new access charge system and the PICC implementation.

The current common line rate structure was intended to match cost recovery with cost causation. Rather than assess IXCs for their portion of the common line costs through a traffic-sensitive carrier common line charge, the FCC implemented a flat-rate PICC, which it, perhaps naively, assumed would not be passed through directly to subscribers.[2] In fact, these costs, just as the traffic-sensitive costs for which they were a substitute, often are passed through to customers as a recurring monthly charge. The difference is that customers now see that charge on their monthly bill whereas it once was hidden in the traffic-sensitive rates for long-distance service.

As a result, the PICC charge has, from the beginning, been a cause of customer complaints and Commission consternation. Indeed, while the Commission and ILECs have given consumers the impression that their long-distance rates should be plummeting across the board, actual access costs for many long-distance carriers,

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[1] CALLS Proposal Memorandum at 15.

[2] See In the Matter of Low-Volume Long Distance Users, Notice of Inquiry, CC Docket No. 99-249 (rel. July 20, 1999) ¶ 10.

measured on a per-customer basis, have been relatively static or are *increasing*, foreclosing the possibility of dramatic reductions in long-distance rates for some customers. In that environment, customer dissatisfaction is inevitable. Pathfinder, for example, has experienced a doubling of the number of customer complaints and refusals to pay for services since the implementation of the PICC.

In fact, although it may appear to consumers (and the Commission) that the pass-through of PICC charges is unfair, the real victims of the PICC have been niche providers of long-distance services such as Pathfinder. Pathfinder has completed a study of the impact of access charge reform on its cost structure. Although access charge reform was intended to reduce the overall cost of long-distance service by reducing or eliminating the implicit subsidy of local service that had been built into the prior access cost recovery system, the reality for companies such as Pathfinder has been quite different: According to Pathfinder's analysis, implementation of the PICC has actually *increased* the cost of access for Pathfinder by almost $8 million dollars since January of 1998.

This increase results from two facts. First, while per-minute line charges have been reduced, PICC charges have *more than* off-set that reduction for carriers that provide service to low-volume users. In Pathfinder's case, the implementation of the PICC has resulted in almost a *doubling* of access charges that it incurs. Second, the reductions in per-minute access charges that facilities-based carriers are realizing as a result of access reform are *not immediately* being passed-through to long-distance resale carriers.

Thus, for the period of January 1998 through September of 1999, Pathfinder was assessed $8,889,688 for PICC costs, while it was *entitled to receive* a benefit in access reform reductions of only $2,358,962. Further, however, because one of the major facilities-based carriers does not pass through to resellers access charge reductions for six-months, Pathfinder actually only realized a savings of $1,240,313 on per-minute access costs. Net, therefore, the implementation of the PICC *cost* Pathfinder over $7 million during that period.

Access charge reform has had such a disparate and negative impact on Pathfinder, in part, because many of Pathfinder's customers are small multi-line businesses that have relatively low call volumes. As the Commission itself has recognized, these are the class of customers upon whom much of the burden of access reform has fallen.[3] For the same reasons, the carriers that serve this segment of the market realize a relatively small benefit in terms of per-minute access reductions, while incurring significant new PICC costs.

Naturally, just as the large facilities-based carriers do, Pathfinder passes its PICC costs through to subscribers as a PICC charge and, as a result, a caller who makes few calls in any given month still may be billed for a PICC of several dollars. The low-volume user thus pays "per-minute" long-distance rates that far exceed the rates advertised on television every night. Not surprisingly, it is these same low-volume customers who are most likely to complain about such charges and, when they do so, ILECs providing billing services for long-distance carriers frequently issue a credit for the PICC charge.

The long-distance carrier in this scenario is in a double-bind. On one hand, the carrier is left without recovery of its PICC costs. As set forth above, these costs become substantial in very short order for a company like Pathfinder. On the other hand, the carrier's relationship with its customer is at risk. The long-distance carrier, therefore, either must alienate a customer (who by this time is well-disposed toward the ILEC which so generously agreed to credit back the IXC's PICC charge) or suffer crippling financial losses. It should come as no surprise that Pathfinder, in this situation, normally elects to forego collection of the PICC in order to keep its customer and forestall customer complaints. Nonetheless, it also should come as no surprise that it cannot continue to do so indefinitely.

In the meantime, the customer dissatisfaction engendered by the PICC is hurting niche providers in the long-distance market, allowing ILECs to impose unreasonable costs on their soon-to-be-competitors, and undermining the purported goals of the Commission's 1996 Act implementation. This is not a recipe for promoting competition. Competitive markets are not created by establishing a system that requires non-dominant suppliers to collect service subsidies that are then remitted to incumbent monopolists • particularly when the incumbent monopolists often have nearly unfettered control over the billing and collections process.

[3] See id.

II. The CALLS Proposal Fails To Remedy The Fundamental Defect In The Current Access Charge System.

The CALLS proposal, at least implicitly, recognizes that the PICC is the most important defect in the current system in that it would eliminate the confusing and anti-competitive PICC over time through a phased-in approach. In its place, CALLS would establish a single subscriber line charge that would be billed by ILECs directly to customers for the recovery of all fixed common line costs. As a matter of pure economic theory, of course, this model is superior to the current system in which common line charges still are, in many cases, divorced from the costs they purportedly recover.

Further, the CALLS proposal would address some of the practical problems confronted by long-distance carriers in general and long-distance resale carriers in particular. By allowing LECs to bill subscribers directly for common line costs, the middle-man would be eliminated and customers could deal directly with the billing carrier, which also would be the carrier imposing the SLC. In essence, the billing and service functions would be unified at the LEC level.

At bottom, however, the CALLS proposal is deficient in that it would not immediately eliminate the PICC for multi-line businesses. This is one area in which the problems created by the current system are most pronounced. Low-volume users are subsidizing high-volume users, and multi-line businesses are subsidizing residential and single-line businesses. For those that are *both* low-volume users and multi-line businesses, the burden of the current system falls especially hard. And, as explained above, the burdens fall also on the carriers that service this segment of the market.

Thus, the PICC should be eliminated immediately for multi-line businesses as well as others. To the extent that the CALLS proposal does not do so, Pathfinder cannot support it. Indeed, the CALLS proposal, by affording different PICC costs different treatment based on the line type of the customer, would increase customer confusion and provide the ILECs (which control the CPNI that dictates the line-treatment of the PICC) greater control of IXC charges and their ability to recover common line costs.

Simple methods of assessing common line costs, on the other hand, will reduce customer confusion and promote competition. The single step to most needed to achieve this end is the immediate and complete elimination of the PICC. If, however, the PICC cannot be eliminated immediately for all customers, the FCC should at least establish a single, blended PICC rate and eliminate the disparate treatment of customers with respect to the PICC based on line types.

Respectfully submitted,

PATHFINDER COMMUNICATIONS, INC.

/s/ W. Kenneth Ferree
W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900

Its Attorneys

November 12, 1999

EXHIBIT C

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

In the Matter of	)	
	)	
Low Volume Long Distance Users	)	CC Docket No. 99-249

REPLY OF PATHFINDER COMMUNICATIONS, INC.

Pathfinder Communications, Inc. ("Pathfinder"), hereby replies to the above-referenced Notice of Inquiry ("NOI"). Pathfinder, through subsidiaries and affiliates, provides long distance services, often to small-business customers. With over 400,000 ANIs, twenty to thirty percent of which have no usage in any given month, Pathfinder is at "ground zero" regarding the effects of PICC charges on low volume users.

Pathfinder is encouraged that the Commission has begun a serious examination of the issues raised in the NOI. At this time, Pathfinder is developing data on these issues, and on how certain aspects of access charge reform actually may be harming long distance providers and their customers. When this information has been gathered and assembled in a form that can be made publicly available, Pathfinder will use it to supplement the record in this proceeding.

Respectfully submitted,

PATHFINDER COMMUNICATIONS, INC.

/s/ W. Kenneth Ferree
W. Kenneth Ferree

GOLDBERG, GODLES, WIENER & WRIGHT
1229 Nineteenth Street, NW
Washington, DC 20036
(202) 429-4900

Its Attorneys

October 20, 1999

EXHIBIT D

VII. STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH, CONCURRING IN PART AND DISSENTING IN PART

Re: Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service, Report and Order, CC Docket Nos. 96-262, 94-1, 99-249, 96-45.

The current structure of interstate access charges is irrational, and substantial revision of the Commission's access charge rules is needed. At present, the price of access to the local exchange carriers' networks bears very little relation to the way in which the costs of access are actually incurred – per-minute charges for access are far higher than they should be, whereas fixed charges are artificially low. As substitutes for traditional circuit-switched long-distance services, such as packet-switched Internet-based telephony, become more widely available, the regulatory distortions created by the Commission's rules are increasingly untenable.

Today's restructure of the access charge regime takes some steps in the right direction, and I concur in those aspects of this decision that permit price-cap local exchange carriers more fully to recover the fixed costs of the local loop through flat-rated charges. Indeed, I would have moved even more aggressively in this regard. I write separately, however, to express my profound disagreement with three aspects of this order.

The Process Through Which this Order Was Adopted Was Fundamentally Defective. This order is a product of a proposal that was originally submitted last summer by the Coalition for Affordable Local and Long Distance Service ("CALLS"). The Commission sought comment on this proposal last fall. *See* Notice of Proposed Rulemaking, *Access Charge Reform, Low-Volume Long Distance Users, Federal-State Joint Board on Universal Service*, CC Docket Nos. 92-262, 94-1, 99-249, 96-45 (Sept. 15, 1999).

In ordinary circumstances, the Commission would simply have rendered a decision on the CALLS proposal based on comments submitted by interested parties. The course the Commission took here, however, was very different. In the early part of this year, apparently prompted by objections to the original CALLS proposal raised by groups purporting to represent consumer interests, the Commission, acting chiefly through the Common Carrier Bureau, held a series of meetings with a select group of some – but by no means all – of the parties with interests in this proceeding. The substance of what was discussed at these meetings was not publicly disclosed. And a number of parties with interests in the outcome of this proceeding, including the Ad Hoc Telecommunications Users Committee, Time Warner Telecom, and the Association for Local Telecommunications Services, were not allowed to participate.

The Commission evidently refereed the negotiations at these meetings, and a "modified" CALLS proposal was reached near the end of February. Although this order announces that this "modified proposal" was put forth by members of the Coalition, *see* Order ¶ 1, it is undeniable that the proposal was a product of the negotiations that took place between the Commission and those parties that were allowed to participate in the negotiations – that is, members of the Coalition and some groups that purport to represent the interests of residential and small-business consumers. The Coalition's "modified proposal" simply memorialized aspects of the agreement that was reached between these parties and the Commission in the course of the meetings held in January and February of this year.

Even more dismaying, however, is what the "modified proposal" does not disclose. At some point in the course of the CALLS negotiations, proceedings that were unrelated to the issue of access charge reform became part of the negotiations. Incumbent local exchange carrier members of the Coalition apparently contended that they could not commit to certain modifications of the CALLS proposal unless they had confidence that two separate matters – a depreciation waiver item[1] and the pending special access proceeding, which concerns the circumstances in which carriers may purchase combinations of unbundled loops and transport network elements[2] – would be resolved favorably to them. As a consequence, part of the final agreement reached by the participants to the CALLS negotiations concerned these two separate matters. With respect to this depreciation item, the Bureau agreed to recommend to the Commission that it approve the waiver that is the subject of this Notice and terminate the CPR audits. Additionally, the Bureau agreed to recommend to the Commission that it "clarify" the existing rules regarding special access and defer further rulemaking until 2001. The linkage between these unrelated items and the CALLS docket was very clear – at least internally. To brief the Commissioners and their staff regarding the outcome of the CALLS negotiations, the Bureau distributed briefing sheets outlining the incumbent carriers' concerns and making plain that the depreciation and special access matters had become a key part of the CALLS package. Nothing in this order, however, tells the public of this connection between this order and these other dockets.

In my view, the process by which the original CALLS proposal was modified is fundamentally inconsistent with principles of neutrality and transparency that must govern agency decisionmaking. By participating in the CALLS negotiations, the Commission plainly reached a view as to how the CALLS proceeding should be

1 *See* Further Notice of Proposed Rulemaking,1998 Biennial Regulatory Review -- Review Of Depreciation Requirements For Incumbent Local Exchange Carriers, Ameritech Corporation Telephone Operating Companies' Continuing Property Records Audit, et al., CC Docket Nos. 98-137, 99-117 (Rel. Apr. 3, 2000).

2 *See, e.g.*, Supplemental Order, *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket 96-98 (rel. Nov. 24, 1999).

resolved, and its review of the comments it subsequently received regarding the "modified proposal" could not have been uninfluenced by the role it had played earlier. In addition, it was entirely improper for the Commission to have permitted the unrelated matters of depreciation and special access become part of the negotiations.

If the Bureau thought it would be helpful to narrow the differences between the various parties with interests in this docket in advance of a formal rulemaking proceeding, it could legally have done so by following the framework set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et seq*. This statute provides for the formation of a committee that will, with the assistance of the relevant agency, negotiate to reach a consensus on a given issue. 5 U.S.C. § 563. An agency that undertakes a negotiated rulemaking must publish in the Federal Register a notice that, among other things, (1) announces the establishment of the committee; (2) describes the issues and scope of the rule to be developed; and (3) proposes a list of persons that will participate on the committee. 5 U.S.C. § 564(a). In addition, the agency must give persons with interests that will be affected by the new rule an opportunity to apply to participate in the negotiated rulemaking process. *Id.* § 564(b). If the committee reaches a consensus, the statute requires it to transmit to the agency that established the committee a report on a proposed rule. *Id.* § 566(f). Significantly, although the agency may nominate a federal employee to facilitate the committee's negotiations, "[a] person designated to represent the agency in substantive issues *may not* serve as facilitator or otherwise chair the committee." *Id.* § 566(c) (emphasis added).

None of those procedures was followed here. The public generally was not notified that the CALLS negotiations were taking place, nor were a number of parties that wished to be included in these negotiations permitted to participate. Not surprisingly, the final CALLS deal does not reflect the views of parties that were not included in the CALLS negotiations, such as the Ad Hoc Telecommunications Users Committee. For example, Ad Hoc has pointed out, in its comments and in a series of *ex parte* presentations to the Commission, that the retention of the multi-line business presubscribed interexchange carrier charge (or "PICC") imposes substantial costs on multi-line business consumers. *See, e.g.*, Letter from James S. Blasak to Harold Furchtgott-Roth (May 23, 2000). Ad Hoc contended that the multi-line business PICC is often marked up by long-distance carriers, with the result that business subscribers pay more than they otherwise would. It therefore proposed that the multi-line business PICC be consolidated with the multi-line business subscriber line charge (or "SLC") and billed directly from the price-cap LEC to the end-user, to avoid a mark-up by the interexchange carrier. *See* Order ¶¶ 105-110. Elimination of the multi-line business PICC would have been consistent with the approach the Commission took with respect to the residential and single-line PICC. (Notably, groups purporting to represent the interests of residential and small-business consumers *were* at the table when the CALLS negotiations were held.) But the order declines to take Ad Hoc's approach. Had this party been permitted to present its views in the context of a negotiated rulemaking, I think the treatment of the multi-line business PICC might well have been different. And other aspects of this order would have been different as well.

Not only were interested parties excluded from the CALLS negotiations, but also the substance and scope of the CALLS negotiations was not made public, and there is no public record describing whatever consensus was finally reached. And, inconsistent with the policy set forth in 5 U.S.C. § 566(c), the Bureau participated in these negotiations both substantively *and* as a facilitator. Had the Commission adhered to the statutory requirements set forth in the Negotiated Rulemaking Act, I believe it could have accomplished its goal of reforming the current access charge regime in a way that preserved its neutrality, allowed representatives of *all* interested parties to participate, and kept the public informed about the process taking place.[3]

To be clear, I do not believe that any employee of this agency acted in bad faith, nor do I call into question the propriety of public participation in the Commission's decisionmaking process by making *ex parte* presentations. In addition, I believe that the inefficiencies of the current access charge regime should be eliminated. But I cannot escape the conclusion that the process by which this Notice has been promulgated falls short of certain fundamental principles that govern the behavior of administrative agencies.

The Universal Service Subsidy Created in this Order Is Illegitimate. This order establishes a new $650 million fund universal service subsidy mechanism, which will be paid from contributions made by *all* interstate carriers almost exclusively to price-cap local exchange carriers. The Commission claims that this new subsidy is needed to replace the implicit "universal service" support mechanism currently present in interstate access charges.

It is important to understand what is occurring with the creation of this new subsidy. Until now, it has been interexchange carriers that have paid to local exchange carriers whatever "implicit subsidy" exists in access charges, and local exchange carriers have used this money to subsidize the cost of providing certain types of services within a limited geographical area (typically within a state). Thus, money might flow from a business end-user to a residential user, both within the incumbent's territory. Under this new mechanism, however, *all* carriers that provide interstate services will fund the access subsidy, and the costs of the subsidy will be spread nationwide. Thus, a wireless carrier in California (which is not eligible to receive any support from the $650 million

[3] Even under the Negotiated Rulemaking Act, however, the Bureau could not have promised that this Commission would abide by the negotiated rulemaking committee's consensus. *See USA Group Loan Servs. Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996).

fund) will now find itself footing the bill to subsidize local exchange carriers nationwide.

I do not think that the creation of this new fund is consistent with the statute's directive that the Commission "preserve and advance" universal service support mechanisms. *See* 47 U.S.C. §254. In my view, the subsidies present in the existing access charge regime do not come within the scope of section 254, and the Commission's reliance on section 254 as a basis for creating this new fund is inconsistent with the statute. Moreover, the only economically rational way for local exchange carriers to recover whatever subsidies are currently included in access charges is to increase the flat fees that subscribers pay for access. Paradoxically, this order decreases those charges. Although consumers may pay less in flat charges in the short term, I believe that this order does them a great disservice, since they will ultimately wind up paying far more to fund the subsidies that this Commission continues to manufacture in the name of "universal service."

The Commission's Requirement that Sprint and AT&T Comply with the Commitments these Companies Made in Letters to the Commission Is Unenforceable. In various letters to Commission, Sprint and AT&T have made "commitments" regarding the CALLS proposal. Among other things, these companies have said they will "pass through" to consumers the savings that they realize in access charge reductions and that they will make various rate plans available to different types of consumers. The Commission orders Sprint and AT&T to comply with all the supposedly "voluntary" commitments they have made in these letters. *See* Order ¶ 247.

In my view, the Commission lacks the power to regulate AT&T's and Sprint's rates in this manner. As the Commission recognized in 1996, the long-distance market is a competitive one, and the Commission therefore no longer regulates the rates of any long-distance carrier. Order, *Motion of AT&T To Be Classified as a Non-Dominant Carrier*, 11 FCC Rcd 3271 (1996). In a competitive market, it is consumers – through their buying power – who tell carriers whether their rates are reasonable or not. Government regulation is no longer warranted. I therefore do not see how, even if these carriers fail to live up to their "commitment" letters, the Commission could possibly find these carriers' rates "unjust" or "unreasonable."

EXHIBIT E

SBA

Return to Chronology

Office of Advocacy

November 21, 1997

The Honorable William E. Kennard
Chairman
Federal Communications Commission
1919 M Street, NW Suite 814
Washington, DC 20554

RE: *Ex parte*.. Comments and Petition for Reconsideration for Access Charge Reform, ..*et al*.,.. CC Docket. No. 96-262 .

Dear Chairman Kennard:

The Office of Advocacy of the United States Small Business Administration (SBA) submits this *ex parte* comment and petition for reconsideration in the Federal Communications Commission's (FCC or Commission) above-captioned proceeding. In May, the FCC issued new rules for access charge reform..(1). There have been two subsequent *Orders on Reconsideration*, the first on the Commission's own motion and the second after review of the petitions for reconsideration..(2). The Commission's effort to reform access charges is a laudatory goal. However, this process should not be done at the expense of small businesses while subsidizing the rates of residential and large business users of telecommunications services.

The Office of Advocacy was established by Congress in 1976 by Pub. L. No. 94-305 (codified as amended at 15 U.S.C. §§ 634 a-g, 637) to represent the views and interests of small business within the federal government. Its statutory duties include serving as a focal point for concerns regarding the government's policies as they affect small business, and developing proposals for changes in federal agencies' policies and communicating these proposals to the agencies. 15 U.S.C. § 634c(1)-(4). The Office of Advocacy also has statutory authority to monitor and report on the FCC's compliance with the Regulatory Flexibility Act (RFA), as amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA). 5 U.S.C. § 612

The Office of Advocacy has three primary concerns with the FCC's actions in this proceeding. The FCC has violated, and continues to violate the Regulatory Flexibility Act, as amended, by 1) its failure to implement the RFA properly so that the economic impact on all affected small entities would be sufficiently addressed in the public record and thus, provide the necessary foundation for the final regulatory flexibility analysis; 2) its failure to identify properly, describe, and reasonably estimate the number of <u>all</u> small entities to which these rules will apply; and 3) to analyze the impact of its rules on small interexchange carriers (IXC), and small business end users - including an examination of less burdensome alternatives. 5 U.S.C. § 601 *et seq.* A proper regulatory flexibility analysis, in the *First Report and Order* and in subsequent orders, would have uncovered, *inter alia*, the disproportionate impact of the elimination of the unitary rate structure option for tandem-switched transport on small IXCs, as well as the tremendous increase in telephone service costs due to FCC-imposed flat rate charges for certain small business end users.

Advocacy had hoped that the Commission would have corrected the deficiencies from the *First Report and Order* in its recently released *Second Order on Reconsideration*, as requested in a timely manner by many commenters.<u>(3)</u>.. In fact, expedited review was requested, *inter alia*, to help eliminate the disproportionate burden on small entities that a January 1, 1998, effective date of the Presubscriber Interexchange Carrier Charge (PICC) assessment would impose.<u>(4).</u> Regrettably, the Commission did not act on this request and noted that it would address additional petitions for reconsideration at a later date. *Second Order on Reconsideration*, para. 1. Therefore, the Office of Advocacy is compelled to document its concerns on the record given the urgent need to have these important issues reviewed and altered by the Commission before 1/1/98.

The RFA, as amended, does not seek preferential treatment for small businesses, nor does it require agencies to adopt regulations that impose the least burden on small entities or mandate exemptions for small entities. Rather, it establishes an analytical process for determining how public issues can best be resolved <u>without</u> erecting barriers to competition. The law seeks a level playing field for small business, not an unfair advantage. To this end, the RFA requires the FCC to analyze the economic impact of proposed regulations on different-sized entities, estimate each rule's effectiveness in addressing the agency's purpose for the rule, and consider alternatives that will achieve the rule's objectives while minimizing the burden on small entities. 5 U.S.C. § 604. This analysis, as a matter of law, is required when there is a "significant economic impact on a substantial number of small entities." *See* 5 U.S.C. § 605.

By its nature, changes in access charge rules apply to incumbent local exchange carriers (ILEC) <u>and</u> interexchange carriers (IXC). Both parties are affected by a regulatory adjustment in compensation for the cost of using the local loop or "common line" - one group as payee and the other as payor. While we appreciate the Commission's analysis of small ILECs (payee), the Commission failed, among other things, to analyze fully the impact of the final rule on small IXCs (payor).

The third party in this regulatory scheme is the customer of both ILECs and IXCs - "end user" using the FCC's vernacular. Changes in the access charge compensation scheme influence the cost of local telephone and toll service, a cost ultimately borne by the end user. However, in the instant proceeding, the end user is also the payor through the direct assessment of increased Subscriber Line

Charges (SLC) on all multi-line businesses and the new PICC on non-presubscribed small businesses. Therefore, the rules set forth in the *First Report and Order* have a direct significant economic impact on a substantial number of small business end users and yet small business end users were virtually ignored in the rulemaking process and RFA analysis. This significant economic impact on small IXCs and small business end users will be discussed separately below.

I. The FCC's Overall Implementation of the Regulatory Flexibility Act in this Proceeding Was Deficient in Creating an Adequate Public Record for a Proper Final Regulatory Flexibility Analysis and Equitable Rules for Small Businesses.

Congress recognized that "small businesses bear a disproportionate share of regulatory costs and burdens." SBREFA, § 202(2), codified at 5 U.S.C. § 601 Note. Therefore, the first stage of a sufficient regulatory flexibility analysis of a final rule is the Initial Regulatory Flexibility Analysis (IRFA) in which the FCC "shall describe the impact of the proposed rule on small entities." 5 U.S.C. § 603. Done properly, the IRFA provides the foundation for an adequate Final Regulatory Flexibility Analysis (FRFA) because it will have informed small entities of the detrimental or beneficial impact of the proposed rule.(5).. It is also incumbent on the agency to identify significant alternatives to the proposed rule that would minimize the burden on small entities, at the NPRM stage, so that such alternatives will have the opportunity for public notice and comment. 5 U.S.C. § 603.(6).

The IRFA in the first NPRM for this proceeding was deficient in providing any analysis of the rule's impact on small IXCs or on small business end users. In fact, the FCC abrogated its responsibility of including a discussion of small business impact by stating that it was "unable to ascertain, at this time, what the significant economic impact would be on small entities as defined by the SBA." NPRM, para. 337. There was no mention, much less than an analysis, of the Federal-State Joint Board on Universal Service's recommendation that end users be assessed an increase in rates if they were not presubscribed to an IXC, nor the potential elimination of the unitary rate structure and its impact on small IXCs, nor the economic affect of increased SLCs on all multiple-line business end users.(7).. The economic impact of these recommendations are obvious and did not need to be first identified by public comment. Therefore, the IRFA fell far short of the statutory requirements of the IRFA, making the need for the Commission's execution of a proper FRFA even more important. Given the FCC's lack of full disclosure of the impact on small IXCs and small business end users in the IRFA, it is not surprising that only one comment was filed in direct response to the IRFA, and that comment was from the Rural Telephone Coalition representing its ILEC members. *First Report and Order*, para. 421.

The Commission also released a *Further Notice of Proposed Rulemaking* (FNPRM) with the *First Report and Order* and pursuant to 5 U.S.C. § 603, issued an IRFA. *First Report and Order*, paras. 444-453. The IRFA is also flawed for similar reasons. We recognize that the FNPRM's scope is limited to proposals for incumbent price cap LECS, however small IXCs are still affected. To be in compliance with the Administrative Procedures Act (APA) and the RFA, the Office of Advocacy encourages the Commission to include small IXCs and end users, where appropriate, in its FRFA for this final rule.

II. The FCC Was Obligated By The RFA And The Administrative Procedures Act To Discuss The Obvious And Asserted Impact On Small Entities As Documented By Public Comment.

The FCC was obligated by the RFA and the APA, 5 U.S.C. § 706, to discuss this obvious and asserted impact on small IXCs and small business end-users, whether or not these issues were raised as separate IRFA comments. The Commission is required to "includ[e] a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect the impact on small entities was rejected." 5 U.S.C. § 604(a)(5) (emphasis added). The statute does not stipulate in this section that only alternatives raised in response to the IRFA must be considered. *See id.*

Although only one comment was filed specifically on the IRFA, the general comments were replete with small business issues that should have been addressed in the FRFA. Several commenters recommended significant alternatives to the proposed rules that would have minimized the burden on small entities that should have been discussed in the "Significant Alternatives" section of the FRFA. *See e.g., First Report and Order*, Comment Summary, Appendix B at paras. 7 (Illinois Commission, US West and the Pennsylvania Internet Service Providers proposed that SLC increases be phased in over time to reduce the economic burden on end users), 13 (instead of imposition of additional flat rate charges on end users, NARUC recommended that "a per line charge could be divided among all carriers using the common line on the basis of relative use by the carrier").

The Commission's failure to examine less burdensome alternatives on the "whole record" and to follow the necessary procedural FRFA requirements is also a violation of the APA. *Citizens To Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 419 (1971). Pursuant to the APA, the FCC is required to issue rational rules. *Motor Vehicle Manufacturers Association*, 463 U.S. 29, 43 (1983); *see also Bowen v. American Hospital Association*, 476 U.S. 610, 643-45 (1986). To determine whether the results of informal rulemaking meet that standard, the rulemaking record must support the factual conclusions underlying the rule, the policy determinations undergirding the rule must be rational, and the agency must adequately explain its conclusions. *McGregor Printing Corp. v. Kemp*, 20 F.3d 1188, 1194 (D.C. Cir. 1994). Failure to undertake a proper regulatory flexibility analysis as part of the rulemaking could result in arbitrary and capricious rulemaking. *Thompson v. Clark*, 741 F.2d 401, 405 (D.C. Cir. 1984); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 538 (D.C. Cir. 1983). The Office of Advocacy asserts that the Commission has failed to explain its final rules adequately in light of the significant economic impact on small IXCs and small end-users that is documented on the record.

A. The Holding of *Mid-Tex Electric Cooperative* Is Not Applicable in This Proceeding.

In its Access Charge Reform FRFA, the FCC should have included an analysis on the direct and indirect significant economic impact on all small business entities. *A Guide to the Regulatory Flexibility Act*, Office of Advocacy, U.S. Small Business Administration, May 1996, at 11. This analysis should have included the impact on the ultimate small business consumer (end user), particularly those small businesses with multiple lines, of the increased SLC, the PICC charged to IXCs (potentially passed through to the end-user), the direct assessment of the PICC on non-presubscribers, and the elimination of the unitary transport rate's affect on rates in rural areas.

Conversely, the U.S. Court of Appeals of the District of Columbia in *Mid-Tex Electric Cooperative, Inc. v. Federal Energy Regulatory Commission*, 773 F.2d 327 (D.C. Cir. 1985), held that an analysis of secondary impact is not required by the agency. *Id.* at 343. The D.C. Circuit ruled that FERC did not need to prepare a regulatory flexibility analysis on the economic affect of the agency's decision on "ultimate" wholesale and retail customers to allow electric utilities to recover their investments in construction work in progress (CWIP) in their rate bases. *Id.* at 343.

The Office of Advocacy disagrees with the court's interpretation but no court case has presented itself in which the issue can be reexamined. We assert that this decision is contradictory to congressional intent in that an agency must analyze both the direct and indirect affect of a rule. 126 Cong. Rec. 21,558-59 (1980) (statement of Sen. Culver); *but see Mid-Tex*, at 342-43 (characterizing the congressional intent as ambiguous).

Nonetheless, *Mid-Tex* is distinguishable from the instant proceeding based on the facts and the interpretation of "regulated entities," as well as the Commission's statutory obligations of the Communications Act of 1934, as amended. 47 U.S.C. § 151 *et seq.* In *Mid-Tex*, the increase of rates of the wholesale/retail customer would have been due to the electric utilities' "passing on some of the cost impact attributable to consumers throughout the construction period." *Id.* at 334. The electric utilities were clearly the regulated entities in *Mid-Tex* given FERC's decision to allow them to include CWIP in their rate base. FERC successfully argued that the wholesale customers were "non-jurisdictional entities whose rates are not subject to the rule." *Id.* at 341. Thus, a "regulated entity" is an entity who is subject to the agency's rule or regulations and is not limited to an entity in a field that is traditionally controlled by a pervasive regulatory scheme, such as railroads, telephone companies, or broadcasters. *See also* 5 U.S.C. §§ 603(b)(3), 604(a)(3) (defining small entities to be identified in an IRFA and FRFA as those "to which the rule will apply").

However, in the FCC's *First Report and Order,* the SLC and the PICC for non-presubscribed lines is not a "pass-through" but a direct assessment on end users. Therefore, end users become regulated entities because the end user's rates are "subject to the rules." Unlike FERC, end users in this instance are with-in the FCC's jurisdiction. ILEC would not, on their own, have the authority to assess the SLC on end users nor impose a PICC. It is only by direct Commission action, a federal regulatory body, that an end user must pay the SLC and PICC. ILEC involvement is necessary as a means to collect the fees from the end users. Therefore, the direct assessment of the SLC and PICC by the ILEC on its small business end users pursuant to Commission mandate brings end users within the scope of the RFA as small entities to "which the rule will apply." 5 U.S.C. §§ 603, 604. Thus, the holding of *Mid-Tex* is not applicable in this instance.

The Office of Advocacy also asserts that the statutory mandate pursuant to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 (1996 Act), to serve the public interest, *see* 47 U.S.C. § 151, and "[t]o promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies," Pub. L. No. 104-104, 110 Stat. 56 (1996), also renders *Mid Tex's* prohibition on an analysis of the indirect impact of the Commission's action on small entities irrelevant in this context.

Unlike *Mid-Tex*, the rules in the Access Charge Reform proceeding and related proceedings are not just rate setting or cost recovery rules - they are rules changing the entire telecommunications landscape and have a cumulative effect on competition. Predicting the outcome of such extensive deregulation on competition is difficult to do with any certainty, even among the best and brightest economists and regulators. This is why it is in the public interest, as well as part of reasoned decision-making, to address the economic impact, direct and indirect, on all affected entities: incumbents, new entrants, residential and small business consumers, as well as collateral industries such as tower construction, equipment manufacturers and suppliers, when appropriate. The Commission's implementation of the 1996 Act cannot be in a vacuum. There must be an expansive look at the practical effects of rules and regulations if the 1996 Act is to live up to its promise of true competition and the public interest is to be served.

III. The Significant Economic Impact on Small Interexchange Carriers.

Congress recognized that "the failure to recognize differences in the scale and resources of regulated entities has in numerous instances adversely affected competition in the marketplace, discouraged innovation and restricted improvements in productivity." 5 U.S.C. § 601(4) (emphasis added). This is particularly true in the access charge reform proceeding. Small IXCs are the predominant users of tandem-switching.(8).. Therefore, the FCC's elimination of the unitary pricing option for tandem-switched users is patently discriminatory and disproportionately burdens small IXCs and their customers. The record clearly supports these differences in economic structure and operations between large and small IXCs.(9). Even if such data were not on the record, the FCC's extensive knowledge of the industry should have been sufficient to conduct a proper analysis of the rules' impact on small IXCs.

There are several material flaws in the FRFA. First, *Section C. Description and Size of Entities To Which the Rule Will Apply* does not include a reasonable estimate of small IXCs. Only a cursory mention of IXCs is buried in paras. 426 and 427 which are generic listings of Telephone Companies (SIC 4813), and interstate carriers, respectively. The RFA requires that the FCC provide a description of and an estimate of the number of small entities in which the rule will apply. 5 U.S.C. § 604. Although only an estimate is required, proper completion of this section is guided by a good faith effort to use available data with some specificity. Specific data on IXCs was not only available to the Commission, but has been included in previous FRFAs..(10).. Furthermore, the Commission traditionally collects data on the number of presubscribed lines by carrier..(11).. Therefore, the data required to ascertain the number of small IXCs impacted by the assessment of PICCs was available. .(12).

Second, the Commission neglected to include small IXCs in *Section D. Summary Analysis of the Projected Reporting, Recordkeeping, and Other Compliance Requirements*. The Commission only discusses the requirements that ILECs will have to undertake. *First Report and Order*, paras. 431-32. There is no discussion regarding IXC compliance requirements, such as payment to the ILECs for the newly created PICC. *Id.* para. 91. The entire access charge scheme has also changed, certainly creating internal processing or reporting requirements on small IXCs. These IXC administrative matters due to regulatory changes should have been discussed in both the FRFA for *the First Report and Order* and the *Second Order on Reconsideration*. For example, the *Second Order on Reconsideration, inter alia*, mandated that the interstate interLATA carrier shall be assessed a PICC and thus, shall pay for both interLATA and intraLATA presubscribed lines even if the intraLATA line is through another carrier. *Second Order on Reconsideration*, para. 18.

Finally, *Section E. Burdens on Small Entities and Significant Alternatives Considered and Rejected* is woefully absent of any analysis of the significant economic impact on small IXCs, either quantifiable, numerical, or general descriptive statements. 5 U.S.C. § 607. "Ascertaining the impact on small entities is the heart of the regulatory flexibility analysis." 126 Cong. Rec. H 8468 (Sept. 8, 1980) emphasis added. The Commission was obligated to analyze the FCC's elimination of the unitary rate structure, the new tandem-switched transport rate, and the imposition of the PICCs on small IXCs. Again, the Commission focuses primarily on ILECs when the impact of these changes are also significant on all small IXCs and their customers. For example, CompTel, who represents more than two hundred competitive long distance carriers, argues that the abolition of the unitary pricing option for tandem-switched transport users "will make it more expensive for long distance carriers to serve rural areas by forcing them to pay (i) two sets of fixed charges for transport routing; and (ii) additional mileage rates." CompTel Expedited Petition, at Summary, iii; *see also* CompTel Ex parte Notice, Apr. 29, 1997 (Attachment). It is also asserted that the abolition of the unitary rate structure for small IXCs, in effect, will cause a 400% net increase in tandem switching charges. *See e.g.*, CompTel Expedited Petition, at 1; ACTA Reply

Comments, at 5 n.9 (a trade organization representing 215 members). By any standard, a 400% increase is a "significant economic impact" that deserved to be addressed by the Commission.

We recognize that the unitary rate structure was an interim measure and reliance on its preservation may not be reasonable. Nonetheless, the absence of justification for its demise and a discussion on its impact on small IXCs in the regulatory flexibility analysis is more troubling given, by the Commission's own admission, "[e]xcept for AT&T, IXC commenters addressing the issue <u>generally support the unitary rate structure</u> and argue that the Commission <u>should retain the pricing option</u>." *First Report and Order*, Appendix B Comment Summary, para. 54 (emphasis added) (summary also lists the benefits of the unitary rate structure).

The Commission admits that the unitary rate structure "has facilitated the growth of small IXCs to compete with larger carriers." *Id.* para. 180. However, if the assertions of 400% increases in tandem switch charges and the inability of small IXCs to compete fairly have some validity, the Commission has not reconciled with the record its claim that "that such protective rules [unitary rate structure] are no longer necessary." *Id.* para. 180. Moreover, the Commission's justification for the elimination of the unitary rate structure in that "its rules should promote competition, not protect certain competitors" is confusing. *Id.* para. 180. Advocacy finds it difficult to understand why a potential wholesale loss of active competitors would <u>not</u> affect competition. At the end of 1996, the top four (4) long distance carriers, AT&T, MCI, Sprint, and WorldCom served 88% of the nation's presubscribed lines, with over 600 smaller carriers serving the remaining 12%. FCC Long Distance Market Shares Report, at 4. The mere presence of the smaller carriers promotes competition and surely had some influence on the Commission's ruling on non-dominant status for the world's largest IXC. *See In re* Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier, *Order*, 11 FCC Rcd 3271 (1996).

Several commenters also assert that small IXCs, if they attempt to absorb the costs of the PICC "they place in jeopardy their already perilously thin profit margins, and, as a result, many will be forced to go out of business." *See e.g.*, ACTA Petition for Expedited Reconsideration, July 11, 1997, at 7; CompTel *Ex parte* Communication, April 29, 1997 (illustrating a 68.7% increase in operating expenses, creating a negative operating margin of $117,577). The practical impact of the FCC's decision is that rural areas, most likely served by small IXCs that use tandem switches (due to lack of traffic), will see increases in long distance rates. The Commission has not demonstrated in the FRFA how this alternative is "consistent with the stated objectives of applicable statutes," 5 U.S.C. § 604, namely, the Telecommunications Act of 1996's mandate to promote competition, and ensure comparable rates and services for <u>all</u> consumers, especially those in rural and insular areas. 47 U.S.C. § 254(b)(3).

<u>IV. The Significant Economic Impact on Small Business End Users.</u>

The majority of businesses in the country are small businesses with annual gross revenues under $5.0 million dollars, 94.9% of 4, 677,075 firms.(13). Significantly, these firms only garner 17.1% of total business receipts,.(14). yet they pay a disproportionate share of the cost of the local loop due to implicit business/residential subsidies. Although exact numbers on the number of small businesses located in rural, insular, high cost areas are not available, we are confident that mostly all the businesses in such areas are small, numbering in the tens of thousands. Small business end users are indeed a "substantial number of small entities" under the RFA. 5 U.S.C. § 601 *et seq*.

The Commission has acknowledged that the average small business has four telephone lines.(15). Several studies also report that small businesses use multiple telephone lines.(16). As previously addressed in the Office of Advocacy's filing in this docket and the companion Universal Service proceeding, the cumulative impact of regulations on small business multi-line end users is a great concern.(17). In her separate statement on Access Charge Reform, former Commissioner Rachelle B. Chong, also expressed some concern that "the new flat charges fall disproportionately upon the shoulders of multi-line customers and may have a disparate impact on small businesses . . . .".(18).

Today, these concerns are magnified because of the cumulative impact of increased SLCs, new PICCs, increased long distance rates, non-documentable pass through of access charge savings to customers, and now - the severe repercussions of transport rate charge increases incurred by small IXCs that will most likely be passed on to their small business customers.(19).

The goal of competition and increased services to consumers as promised in the Telecommunications Act of 1996 is lost on certain small businesses whose telephone expenses will increase at least $209 in 1998 - without making one additional phone call.(20). The fact is that many small businesses, even those with multiple lines, do not reach the volume of toll calls that will offset the flat rate charges imposed by the Commission. Granted, the data reported by the California Small Business Association is that an average small business spends $300 per month on long distance calls. CSBA Telephone Poll at 6. However, the Commission ignores the reality behind these numbers. "There are substantial and sometimes significant differences depending on the location of the company and the type of small business." *Id.* The $300 figure can be reached by averaging small businesses with the same number of telephone lines - but with a widely varying use of long distance. For example, the dry cleaners, whose customers are inherently local, may make $150 in toll calls per month and the kitchen supplies wholesaler, whose customers may be all over the country, may make $450 in toll calls per month. The combined total of $600 still averages to be $300 per month, but the full benefit of lower long distance rates due to the lowering of access charges (due to the supposed pass through of these savings to the end user) is only received by the high volume caller. Also, as detailed in Advocacy's Universal Service comments, certain industries have different local and long distance calling patterns.(21). Therefore, small businesses with a local client base or in certain industries, will not save money, but may pay even higher rates than they do now. This scenario is neither consistent with the Telecommunications Act's mandate under Section 254(b)(3) to ensure comparable rates for all consumers nor the Regulatory Flexibility Act in which the differences in small businesses subject to the regulations should be considered. 5 U.S.C.§ 601 note.

The Office of Advocacy recognizes that there are often countervailing interests between small telecommunications providers and their small business customers that requires a balancing of benefits and burdens for all. However, the Commission has not even acknowledged that small IXCs or small business customers are specific classes of small entities affected by this rulemaking in addition to ILECs, and thus, are impacted disproportionately compared to their larger counterparts, much less than attempted to balance the interests between IXCs, ILECs, and their customers.

V. Conclusion.

The Commission's overall objective and Telecommunications Act of 1996's mandate to promote competition will be undermined by the Access Charge rule changes imposed in the *First Report and Order* because it imposes substantial economic harm on small IXCs, making it difficult for these entities to compete in the fiercely competitive long distance marketplace. There is also significant economic impact on small business end users, due to the direct action of the Commission, that is also disproportionately burdensome. The regulatory impact of access charge reform on these classes of small entities deserves to be addressed prior to the January 1, 1998 implementation deadline.

The Office of Advocacy appreciates the difficult task and time constraints faced by the FCC in implementing an extremely complex regulatory scheme as a companion piece to the Universal Service proceeding which was under the May 8 statutory deadline. Nevertheless, the Commission cannot simply disregard the analytical and procedural requirements imposed on it by the APA and the RFA. There are fundamental problems with the FCC's decision, substantively and procedurally, that should have been addressed in the *First Report and Order*. Alternatively, these issues should have been resolved in its *Second Order on Reconsideration* in which the FCC was not on a deadline.

Given the flawed, if not absent, analysis of the complete impact of these rules, we respectfully request that this Commission 1) undertake a regulatory flexibility analysis on small IXCs and small business end users, and 2) act expeditiously on the petitions for reconsideration of the unitary rate structure, and if appropriate, revise the access charge rules to minimize the significant economic burden on small entities.

Respectfully submitted,

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The Honorable Harold W. Furchtgott-Roth
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The Honorable Michael K. Powell
The Honorable Gloria Tristani

ENDNOTES

1. *In re* Access Charge Reform (CC Dkt. No. 96-262), Price Cap Performance Review for Local Exchange Carriers (CC Dkt. No. 94-1), Transport Rate Structure and Pricing (CC Dkt. No. 91-213), End User Common Line Charges (CC Dkt. No. 95-72), *First Report and Order*, FCC 97-158, (rel. May 16, 1997) (*First Report and Order).*

2. *In re* Access Charge Reform (CC Dkt. No. 96-262) *et al., Order on Reconsideration,* 12 FCC Rcd. 10119 (1997); *In re* Access Charge Reform (CC Dkt. No. 96-262) *et al., Second Order and Memorandum Opinion and Order*, FCC 97-368 (rel. Oct. 9, 1997) (*Second Order on Reconsideration*).

3. *See e.g.*, America's Carriers Telecommunication Association (ACTA) Petition for Expedited Reconsideration, July 11, 1997 (ACTA Expedited Petition); ACTA Petition for Expedited Reconsideration, Reply Comments, Sept. 3, 1997 (ACTA Reply Comments); Competitive Telecommunications Association (CompTel) Expedited Petition for Reconsideration, July 11, 1997, at 3 (citing to comments of Telecommunications Resellers Association, U.S. Long Distance, Inc., WorldCom, Inc., and Frontier Corporation that assert that the FCC failed to conduct a proper analysis of the effect of the *First Report and Order* on small businesses) (CompTel Expedited Petition).

4. ACTA Expedited Petition, at 2; ACTA Reply Comments, at 2; CompTel Expedited Petition, at 2.

5. 126 Cong. Rec. 24,588 (Sept. 8, 1990) ("the term 'significant economic impact' is neutral with respect to whether such impact is beneficial or adverse").

6. It is important to note that these requirements of the IRFA are not new under the SBREFA amendments, but have been staples of the RFA since 1980. Pub. L. No. 96-354, § 2(b), 94 Stat. 1164 (1980).

7. *In re* Access Charge Reform (CC Dkt. No. 96-262), *Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry*, 11 FCC Rcd 21354 (1996) (NPRM).

8. This circumstance is due to long-standing Commission policy. ACTA Petition for Expedited Reconsideration, Reply Comments, Sept. 3, 1997, at 3.

9. *See e.g.*, ACTA Reply Comments, at 3-4; Competitive Telecommunications Association *Ex Parte* Letter to Reed E. Hundt, Chairman, Federal Communications Commission, Apr. 28, 1997.

10. *See e.g., In re* Federal-State Joint Board on Universal Service, *Report and Order*, 12 FCC Rcd. 8776, para. 897 (1997) (citing TRS Worksheet data).

11. *Long Distance Market Shares*, Industry Analysis Division, Common Carrier Bureau, FCC, July 1997 (reporting number of long distance providers and NECA collected data on the number of lines presubscribed to each long distance carrier from each local telephone company) (Long Distance Report).

12. The Long Distance Report states that "more than 600 companies were providing long distance service to their own presubscribed customers. If all resellers were included, the number of long distance providers would exceed 800." *Id.* at 4. We acknowledge that the release of this report was two months post the *First Report and Order* however, the data was available internally given NECA's collection timetable. Moreover, this is an annual report and the Commission could have referred to the 1996 report if the new data was not yet available for public release.

13. *Ex parte* Comments of the Office of Advocacy *In re* Universal Service (CC Dkt. No. 96-45), Apr. 4, 1997, at 11 (citing U.S. Census Bureau Data).

14. *Id.*

15. FCC Press Release, *Commission Reforms Interstate Access Charge System*, CC Dkt. No. 96-262, Rpt. No. 97-23 (*The Average Small Business is A Winner* chart citing results from PNR Associates study) (FCC Access Charge Press Release).

16. Office of Advocacy *Ex parte* Comments, at 4 (citing CSBA 1997 Telephone Use Poll); *see also* National Federation of Independent Business Foundation, *Who Will Connect Small Businesses To The Information Superhighway* 7 (December 1994).

17. Letter from Jere W. Glover, Chief Counsel, Office of Advocacy, SBA, to Reed E. Hundt, Chairman, FCC 2 (April 29, 1997) (CC Dkt. Nos. 96-94, 96-262, 94-1, 91-213 and 96-263).

18. Press Statement of Commissioner Rachelle B. Chong, Re: Access Charge Reform, May 7, 1997.

19. ACTA Expedited Petition, at 7.

20. Effective January 1, 1998, the PICC will be $2.75 per line/per month for end-users that are not presubscribed to an IXC. *First Report and Order*, para. 99. In 1998, the SLC is expected to increase $1.61 per line/per month for multi-line businesses served by price cap ILECs. FCC Access Charge Press Release, Attachment, at 1. For an average small business with 4 lines, these combined charges would be an increase of $209.28 annually. For small businesses that are presubscribed to an IXC, the pass through of the PICC by its IXC would have the same economic impact.

21. April 29 Letter from Jere W. Glover to Chairman Hundt, at 5.

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