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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

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

PATHFINDER COMMUNICATIONS, INC.'S PETITION FOR RECONSIDERATION OF THE FEDERAL COMMUNICATIONS COMMISSION'S SIXTH REPORT AND ORDER IN CC DOCKET NOS. 96-262 AND 94-1, REPORT AND ORDER IN CC DOCKET NO. 99-249, AND ELEVENTH REPORT AND ORDER IN CC DOCKET NO. 96-45

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SUMMARY OF FILING

Pathfinder Communications hereby petitions the Federal Communications Commission ("the Commission") to reconsider its Report and Order in the above titled matter due to the fundamentally defective process by which the Report and Order were promulgated. The numerous and egregious violations of the Regulatory Flexibility Act, Negotiated Rulemaking Act, and the Commission's own Rulemaking Procedures that were inherent in the process whereby the subject Report and Order were promulgated mandate that the Commission remand and/or vacate the subject Report and Order and engage in open, honest, and meaningful rulemaking that includes the participation and input of affected small entities and the general public.

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Pathfinder Communications, Inc. ("Pathfinder"), by and through undersigned counsel, and pursuant to 47 C.F.R. §1.429, hereby petitions the Federal Communications Commission (the "Commission') to reconsider and provide clarification in its May 31, 2000 Report and Order regarding 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, and in support thereof, states the following:

INTRODUCTION

1. Since the enactment of the Commission's *Access Charge Reform Report and Order* it has been subjected to a one-sided misinformation campaign conducted by the members of the so-called Coalition for Affordable Local and Long Distance Services (the

"Coalition", or "CALLS"), and the inability of the Commission to properly execute its duties under the Regulatory Flexibility Act, and other Federal laws.

2. As detailed below, the Commission chose to take input from, and to negotiate exclusively with, The Coalition when promulgating the subject rule. It did not consider, in any meaningful or proper manner, either the impact The Coalition's scheme would have on consumers or the small business community entities, or the valid substantive comments submitted by some of the latter, including Pathfinder.

3. The members of The Coalition are among the largest companies in America (and the world), and include AT&T, Bell Atlantic, GTE, Southwestern Bell, BellSouth, and Sprint. Curiously, the CALLS Coalition is made up of all major US IXCs and LECs - with the exception of one large LEC (US West) and one large IXC (MCI). Furthermore, we find grossly inadequate representation of smaller, competitive telecommunications carriers, like Pathfinder.

4. As a result of its decision to exclude and/or ignore smaller, competitive telecommunications carriers from the Rulemaking Process, and to only consider information submitted or agreed to by The Coalition, the Commission has received and considered only a slanted, one-sided view of the CALLS Proposal. This result would not have been possible had the Commission properly fulfilled its legally required obligations as set forth in their Rulemaking Procedures, as well as The Negotiated Rulemaking Act.

5. To compound matters, the Commission failed to correctly interpret or fulfill its mandate under the Regulatory Flexibility Act. Among other things, the Commission failed to identify and explore alternatives with regard to the impact of the subject Order and Report on (1) smaller, competitive telecommunication providers, and (2) millions upon millions

of American small businesses dependent upon the continued, uninterrupted provision of telecommunication services. Instead, the Commission issued a deficient Final Regulatory Flexibility Analysis that failed to take into account even a single small entity in contrast to the thousands of small business telephone entities and the millions of small business entity consumers.

6. As a result, the subject Order and Report are fundamentally flawed and the Commission has let down the millions of small business-users and small business-providers of telecommunication services in spite of the warnings issued by the Commissioners that voted for Access Charge Reform.[1]

FACTUAL AND PROCEDURAL BACKGROUND

7. In the 1970's, Interexchange Carriers ("IXC's") began to provide switched long-distance in competition with AT&T. Because AT&T's local subsidiaries, the Bell Operating Companies ("BOC's"), owned and operated the telephone wires that connected the customers in their local markets, the IXC's were dependent on the BOC's to complete the long distance calls to the end-user. As the IXC's were using the BOC's local networks, disputes arose over access charges that the IXC's should pay the BOC's for originating and terminating interstate calls placed by or to end-users on the BOC's local networks.

8. In December 1978, AT&T and other long-distance competitors entered into a comprehensive interim agreement known as Exchange Network Facilities For Interstate

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[1] The one major concern I have about this approach is the impact that these increased flat rate charges will have on small business, ... because we seek to protect single line customers, the new flat rate charges fall disproportionately upon the shoulders of multiline customers and may have a disparate impact on small business and people who have a second line at home." Commissioner Rachelle B. Chong, CC Docket Nos. 96-262; 94-1; 91-213; 95-72.

Access ("ENFIA") that established access rates that AT&T would charge long-distance competitors for originating and terminating interstate traffic over the facilities of its local exchange affiliates.

9. After the breakup of AT&T in 1983, the Commission adopted uniform access charge rules in lieu of the ENFIA.

10. Based on these new access charge rules, access revenues were governed by "rate-of-return" regulation. Under this framework, incumbent LEC's calculate the specific access charge rates using projected costs and projected demand for access services.

11. Thereafter, in 1991, the Commission implemented its system of price cap regulation that altered the manner in which the largest incumbent LECs established their interstate access charges. The largest incumbent LECs were then subject to price cap regulations while the rural and small LECs remained subject to rate-of-return rules.

12. In May 1997, under the guise of "Access Charge Reform," the Commission substantially revised its access charge rules, changing the manner in which price cap LECs recover access costs by alleging to align the rate structure more closely with the manner in which costs were incurred. The Commission also created the Primary Interexchange Carrier Charge ("PICC"), a flat per-line charge imposed by a price cap LEC on an end user's IXC. The IXCs typically are allowed to, and do, pass this charge on to end consumers.

13. On July 11, 1997, one of the CALLS members, Sprint filed with the Commission a Petition for Expedited Reconsideration and Clarification in which it requested that the Commission reconsider certain implementation issues related to the PICC adopted in the First Report and Order. In Sprint's Petition, the Commission was asked to, among other things, require that the LECs provide IXCs with customer-by-customer billing information that

specified the number and type(s) of PICCs LECs would be assessing for each of the IXCs presubscribed customers.

14. On October 8, 1997, the Commission responded to Sprint's Petition for Reconsideration of certain implementation issues. Among other things, Sprint's Petition indicated that, "Sprint is concerned that some IXCs may try to persuade their high-volume customers to presubscribe their local business lines that are not used for long distance traffic to another IXCs so as to shift the PICC cost to their competition. Sprint argues that in order to respond adequately to such practices, IXCs need access to customer-by-customer PICC data so that they have the ability to pass through the PICCs directly to their customers if they so choose." See FCC 97-368, October 8, 1997, ¶10.

15. In the Commission's October 8, 1997 Second Order on Reconsideration and Memorandum Opinion and Order, the Commission drew attention to the following comments the Commission received from MCI and CompTel, (See FCC 97-368 at ¶12.) "MCI and CompTel agree with 'Sprint that LECs should be required to provide information to IXCs about PICCs for each presubscribed customer. CompTel argued that without this information, IXCs will not be able to verify the access bills they receive from LECs and will not be able to determine accurately the amount that will be passed through to their customers." See FCC 97-368, Comments.

16. The Commission also received Replies opposing Sprint's July 11, 1997 Petition and Request for a Requirement that the LECs must provide PICC billing information on a customer-by-customer basis. In the case of CALLS member GTE's comments opposing Sprint's Petition. GTE stated that it "opposes any proposal that LECs provide customer-by-customer PICC data. GTE states that IXCs can obtain this information from its own customers

and that when discrepancies arise, IXCs can resolve problems through normal billing reconciliation process."[2] See FCC 97-368 ¶14.

17. Finally, the Commission in its Second Order on Reconsideration agreed with Sprint [3] and apparently took notice of Sprint's arguments, which included "that the fact that USTA opposes a request for PICC information supports Sprint's position that the Commission needs to issue a directive to avoid lengthy and burdensome disputes between hundreds of IXCs and LECs."[4]

18. On December 30, 1997, just a few days before the IXCs were to become responsible for the payment of PICC to the LECs, all of the CALLS members, with the exception of AT&T, became the focus of the Commission's "ACCESS CHARGE REFORM TARIFFS SUSPENSION ORDER. . . ACCOUNTING ORDER. . . and initiated an investigation into the lawfulness of a number of issues raised by these tariff filings." These tariffs included the initial implementation of PICC.[5]

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[2] This is in sharp contrast to the treatment Pathfinder received from GTE when PICC billing discrepancies arose in the fall of 1999, and, without notice, GTE terminated its billing and collection responsibilities on 30,000 Pathfinder accounts. Pathfinder was thus forced to provide, and continues to provide, long distance service to these 30,000 GTE customers and foregoes approximately $1 million per month in revenues.

[3] See FCC 97-368 at ¶2], "In response to Sprint's July 11, 1997 petition, we implement the following changes in this Order: (1) incumbent LECs must inform interexchange carriers (IXC's), on a customer-by-customer basis, how many PICCs, and what kind of PICCs are being assessed on each of their presubscribed customers."

[4] In spite of the Commission's agreement with Sprint and subsequent adoption of Sprint's recommendations, Pathfinder has been subjected to lengthy and burdensome disputes by each of its facilities-based suppliers, including Sprint, who have over charged and refused to provide Pathfinder with the LEC-supplied CARE record, "customer-by-customer line-type billing information" as required by the Commission.

[5] See FCC ACCESS CHARGE REFORM TARIFF SUSPENSION ORDER AND INVESTIGATION adopted on December 30, 1997. Also see FCC ORDER DESIGNATING ISSUES FOR INVESTIGATION AND ORDER ON RECONSIDERATION adopted on January 28, 1998, which included testimony of LEC

19. Within a few months of the January 1, 1998 implementation of the PICC access fees, consumer confusion exploded nationwide. The unprecidented scale and scope of the consumer confusion primarily revolved and continues to revolve around the consumers' long distance charges.. Three factors that were in the control of the Commission and one factor that was associated with most of the CALLS members account for virtually all of the consumer confusion and dissatisfaction that our industry has experienced from January 1998 to the current time. These three Commission factors include, (I) the Commission's inadequate assessment of the impact that the new monthly PICC fees would have on the consumer, especially the hard hit small business and multi-line residential consumers, and (ii) the Commission misguided efforts, apparently directed at forcing long distance rates down by misinforming the consumers to expect lower long distance rates and no monthly fees, presumably with the hope that the consumer's expectations alone would somehow influence or force IXCs long distance rate down, and (iii) the ongoing and indefensible position of the Commission that precludes IXCs from being allowed to fully and truthfully and describe the monthly PICC on the consumer's phone bill. The fourth factor can be attributed to the customer treatment that was deployed by the majority of the CALLS members, subsequent to the January 1, 1998 PICC implementation. The consumer inquiry treatment, deployed by most of these CALLS members who collectively engaged in misleading billing and customer service inquiry methods that in hundreds of thousands of cases were inconsistent, untruthful, and remarkably abusive to consumers when in many of the confused consumer inquiry cases the LECs facilitated the consumer expectation that a simple phone call to their IXC requesting a cancellation should be all that is needed to remove

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overcharges of access charges totaling hundreds of millions of dollars.

the PICC charges from the long distance bill.[6]

20. Thus, on July 29, 1999, the so-called Coalition for Affordable Local and Long Distance Services ("CALLS") submitted a proposal ("CALLS Proposal") to the Commission that advocated an Integrated Interstate Access Reform and Universal Service Plan. This proposal was allegedly designed to lower rates, halt consumer confusion, and create a more rational interstate rate structure.

21. In reviewing the CALLS Proposal and pursuant to its rulemaking procedures, the Commission twice solicited and received Comments. *Access Charge Report,* CC Docket No. 96-262, Notice of Proposed Rulemaking, 14 FCC Rcd 16872 (1999); *CALLS Modified Proposal,* CC Docket No. 96-262. Public Notice, DA-00-533.

22. Petitioner Pathfinder, through subsidiaries and affiliates, provides long distance telephone services to the general public on a resale basis.

23. Concerned over numerous aspects of the CALLS Proposal, Pathfinder filed a formal Comment with the Commission on or about November 12, 1999, urging the Commission to reject it, noting that the CALLS Proposal would increase the complexity of an already complex system through its phased-in and multifaceted nature. Pathfinder also pointed out that the CALLS Proposal will create additional customer confusion, and do little, if anything, to remedy the competitive imbalance inherent in the current system. (A true and correct copy of Pathfinder's Comment is attached hereto as Exhibit "B.")

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[6] See customer complaint letters describing the customers' month-after-month inability to remove these monthly charges from their bill. True and correct copies of the customer letters are attached hereto as Exhibit "A." By refusing to PIC change the customers as requested , the LECs subjected the customer to the ongoing assessment of the monthly fee.

24. Pathfinder also filed a Reply Comment to the Notice of Inquiry in the matter of Low-Volume Long-Distance Users, CC Docket No. 99-249. Pathfinder's Reply Comment noted concerns similar to those addressed in its November 12, 1999 Comment. (A true and correct copy of Pathfinder's Reply Comment is attached hereto as Exhibit "C.")

25. Under the Regulatory Flexibility Act, the Commission had an obligation to affirmatively seek dialogue with small business entities like Pathfinder before it rendered a decision. However, due to the well-heeled influence of the largest telecommunication companies in America, such was not the case with the subject Rule. Instead, the Commission completely ignored the comments submitted by Pathfinder and other small businesses in favor of the self-interested misinformation fed to it by The Coalition.

26. On May 31, 2000, the Commission released its Report and Order on 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, and 96-45.

27. On that same day, Commissioner Furchtgott-Roth issued a public statement concurring in part and dissenting in part to the Commission's Reports and Orders set forth above. (A true and correct copy of Commissioner Furchtgott-Roth's statement is attached hereto as Exhibit "D.")

THE PROCESS BY WHICH THE COMMISSION ADOPTED THE ORDER WAS FUNDAMENTALLY DEFECTIVE

The Secret Deal With The Coalition

28. Upon reviewing the statement of Commissioner Furchtgott-Roth, Pathfinder learned, for the first time, of the deceptive and secret negotiations that occurred

between the CALLS members and the Commission. Such action totally deprived Pathfinder (and all other non-CALLS members) and the general public of their rights to participate in the Rule Making Process. More importantly, the Commission was deprived of its opportunity to consider critical information regarding the detrimental impact the CALLS Proposal will have on small businesses. In fact, the Commission did not even attempt to consider viewpoints of affected entities other than the large and deep- pocketed membership of The Coalition. In sum, it is clear that the Commission sidestepped its own administrative process and, apparently, illegally and secretly amended the CALLS Proposal to satisfy the particular desires of CALLS members to the detriment of the public and interested and affected small, competitive carriers like Pathfinder.

29. Specifically, Commissioner Furchtgott-Roth observed that "in the early part of this year, apparently prompted by objections to the original CALLS Proposal raised by groups purporting to represent the consumer interest, 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 interest in this proceeding. The substance of what was discussed at these meetings was not publicly disclosed. And a number of parties with interest in the outcome of this proceeding . . . were not allowed to participate." (Exhibit "D," page 1.)

30. Commissioner Furchtgott-Roth also disclosed that "the Commission evidently refereed the negotiations at these meetings, and a 'modified proposal' was put forth by members of The Coalition, 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 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." (Exhibit "D," pages 1-2.)

31. Commissioner Furchtgott-Roth detailed further Commission wrongdoing, noting that during "the course of the CALLS negotiations, proceedings that were unrelated to the issue of access charge reform became part of the negotiations. Incumbent [LEC] 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 matter--a depreciation waiver item and the pending special access proceeding, would be resolved favorably to them." (Exhibit "D," page 2.)

32. The resulting order, therefore, is a product of a classic "backroom deal" deliberately hidden from public scrutiny and manipulated by the few parties allowed to participate so as to improperly benefit themselves – to the detriment of consumers and small businesses such as Pathfinder's. [That the Commission has failed to make the substance and scope of the negotiations public, and failed to compile a complete public record of such activity is testament to the impropriety of the Commission's rulemaking procedure in this matter.]

33. As Commissioner Furchtgott-Roth accurately observed, "the final CALLS deal does not reflect the views of parties that were not included in the CALLS negotiations," (Exhibit "D," page 3) and "the process by which the original CALLS Proposal was modified is fundamentally inconsistent with principles of neutrality and transparency that must govern agency decision making." (Exhibit "D," page 2.)

The Commission Violated the Negotiated Rulemaking Act

34. As further reported by Commissioner Furchtgott-Roth, the Commission could have lawfully attempted to narrow the differences between the various parties to the CALLS Proposal as set forth in the Negotiated Rulemaking Act, 5 U.S.C. § 561 *et. seq. See* Exhibit "D", p.3.

35. As demonstrated by the record in this matter, or, rather, the glaring *lack* of a record, it is clear that the Commission's closed-door negotiations with The Coalition's members violated all of the foregoing provisions of the Negotiated Rulemaking Act. This fact, along with its violations of its own rulemaking procedures per 47 C.F.R. 1.400 *et. Seq.*, reveals that the Commission has failed to properly consider or promulgate the subject rule, and mandates that it vacate the Report and Order issued in this matter and begin anew the Rulemaking process on the CALLS Proposal.

THE COMMISSION VIOLATED THE REGULATORY FLEXIBILITY ACT

5 U.S.C. § 601 ET. SEQ.

36. Aside from its violations of its own Rulemaking Procedures and the Negotiated Rulemaking Act, the Commission also failed to comply with the requirements of the Regulatory Flexibility Act, 5 U.S.C. § 601 *et. seq.*

37. This Act requires that an agency conduct and publish an Initial Regulatory Flexibility Analysis ("IRFA") prior to its promulgation of a final rule in order to determine its impact on small entities. Upon completion, and as part of the final rule, a Final Regulatory Flexibility Analysis ("FRFA") must be conducted. 5 U.S.C. §§ 603(a) and 604(a).

38. The IRFA and FRFA must, at a minimum, provide the following information: A description and an estimate of the type and number of small entities

(independently owned and operated, not dominant in its field of operations, and having less than 1,500 employees – 5 U.S.C. § 601(6)) to which the Rule will apply, and the specific steps the agency has taken in order to minimize any significant economic impacts of the Rule on them. 5 U.S.C. §§ 603(a) and 604(a).

Deficient FRFA

39. Incredibly, in its *Access Charge Reform Order*, the Commission pretends to have fulfilled its obligations under the Regulatory Flexibility Act, all the while alleging the fact that it does not have sufficient data to determine the number of small businesses that would be adversely affected by its order of May 31, 2000. (See, *Access Charge Reform Order*, ¶ 257.) Because of the Commission's alleged lack of relevant data, caused by its failure to consider anything other than information fed to it by the Coalition, it erroneously concluded that only thirteen (!) LECs could be negatively affected by both the original May, 1997 Access Charge Reform Order and the May, 2000 Order. This resulted in the Commission's conclusion that only thirteen companies nationwide were protected under the Regulatory Flexibility Act. Consequently, the Commission only considered the impact of the PICC and the other Access Charge Reform Rule on a total of thirteen companies nationwide. Because it failed to consider the information required by The Regulatory Flexibility Act, the Commission did not consider the effects of this Rule on the millions of small business users and providers – such as Pathfinder – who have and will continue to suffer as a result of its enactment. The Commission therefore failed to fulfill (or even adequately *attempt* to fulfill) its mandate under the Regulatory Flexibility Act.

40. It is also noteworthy that the Commission failed to detail, with any specificity, why it has allegedly has such deficient information regarding the number of small

entities. [This is particularly vexing to Pathfinder who submitted a Comment to the Rule and could have provided such information to the Commission had it not completely ignored the Comment it received from Pathfinder and other similarly situated small entities.]

41. However, other recent findings of the Commission belie its assertion that it is unaware of how many small businesses might be impacted by its Rule, and offer a plausible explanation of its failure to offer adequate explanations of its lack of information regarding small entities.

42. The Final Regulatory Flexibility Analysis performed in other matters including the *Truth-In-Billing and Billing Format,* CC Docket No. 98-170 ("Truth In Billing"), released on May 11, 1999, and the Notice of Proposed Rulemaking in the July, 1998 *Elimination of Part 41 Telephone and Telegraphic Franks,* CC Docket No. 98-119, sets forth specific data that the Commission *must* have been aware of when it promulgated the subject Rule and Order.

43. For example, in the Truth In Billing Report and Order, the Commission went to great lengths to ascertain the total number of "small business" telephone companies that would be affected by the Rule. As part of this analysis, the Commission concluded that there were "3,497 firms providing telephone services at the end of 1992." (Truth In Billing Report and Order, ¶ 82.)

44. In the *Telephone and Telegraphic Franks Report,* CC Docket No. 98-119, the Commission provided an extensive RFA analysis which accounted for paragraphs 22 through 53 – of 61 total paragraphs of that July, 1998 report. Among other things, the Report states: "We expect that...the privileges regulated therein - - have only been utilized by ...the Bell operating companies and certain other providers... Nevertheless...we analyze a wide range

of categories to identify the greatest number of small entities possible that could be affected by the proposals in this NPRM."

45. While the Commission did not conclude that all 3,497 businesses qualified as small entities, the Commission went on to break them down, in detail, in order to determine the various types of telephones services and the numbers of potentially affected small entities within each class. By way of example, the Commission concluded that the following categories of telephone service firms nationwide were made up of the following number of entities, which most, if not all, would be properly defined as a small entity based on the definition used by the Commission in this proceeding:

• Wireless Carriers and Providers	Fewer than 2,295 small entities
• Local Exchange Carriers	Fewer than 1,371 providers
• Interexchange Carriers	Fewer than 143 small entities
• Competitive Access Providers	Fewer than 109 small entities
• Resellers (including debit card)	Fewer than 339 small entities
• Rural Radio-Telephone Service	1,000 small entities

46. Interestingly, in many of the Commission's rulings, such as the Truth In Billing Report and Order, the Commission stated that it obtained the above data from the Telecommunications Relay Service ("TRS"). TRS is the same source that the Commission claims it supposedly examined in order to arrive at its universe of small businesses in its *Access Charge Reform Order*. (See Truth In Billing Report and Order, ¶ 258.)

47. Thus, it is clear and beyond question that, based on the data and analysis in reports such as the *Truth In Billing Report and Order*, and the *Telephone and Telegraph Franks NPRM*, on May 31, 2000, the Commission was well aware of both the potential numbers

of small telecommunications-based entities, and that many (if not all) would be dramatically affected by the *Access Charge Reform Report and Order*. Yet, the Commission ignored this information and the provisions of the Regulatory Flexibility Act to placate the CALLS Coalition members and make good on its backroom deal.

Failure To Consider Alternatives

48. 5 U.S.C. § 603(c)(1)-(4) enumerates four alternatives, ranging from instituting different compliance guidelines to outright exemption for small entities, that an agency must substantively consider and specifically address in its FRFA when considering the impact of a rule on small entities. In the instant matter, the Commission failed to do so. Nowhere in the Commission's Order and Report are all of these required alternatives examined in any meaningful way, and the Commission fails to offer any justification for this serious omission.

Commission Fails To Ensure Participation Of Small Entities Or Address Comments

49. 5 U.S.C. § 609 mandates that an agency must ensure the reasonable participation of small entities in the rulemaking process. 5 U.S.C. § 604(a)(2) requires an agency's FRFA to summarize the comments it receives from small entities that raise significant issues. In the instant matter, the Commission did neither.

50. As noted above, the Commission excluded affected small entities such as Pathfinder from the secret negotiations it conducted with the CALLS members, and failed to respond to, summarize, or address the formal Comments to the CALLS Proposal submitted by Pathfinder. In sum, the Commission not only failed in its duty to ensure small entity participation, it effectively prevented such participation. As a result, the information the

Commission relied upon in promulgating the subject Report and Order, as well as the conclusions it draws in those documents, are fundamentally flawed and grossly one-sided in favor of the powerful CALLS members.

51. For example, in the instant matter the Commission relies on the claims of CALLS members in their "side letter" that a benefit of the rule is that consumers will save "3.2 billion dollars" over the next five years due to the withdrawal of the "monthly minimum charge fee" with respect to low volume users. Had the Commission included small entities such as Pathfinder in the process, it would surely have learned that the notion of a $3.2 billion "savings" to consumers is inaccurate, if not misleading. The monthly minimum fee referred to by the CALLS members was first instituted after implementation of the PICC fee and was in *addition* to the PICC recovery charges. Thus, by "withdrawing" this recent add-on charge, there is in reality no "savings" to consumers, rather, the system just returns to consumers a fee that was added by the IXC CALLS members after the implementation of the PICC fee, and in an environment where consumers were already extremely confused. The providers at issue will still be allowed to assess and recover 100% (or more!) of the access charges without violating the side-letter agreement to the Commission which *apparently* had a significant influence over the final decision to adopt the CALLS Proposal. The Commission does not point this out, and the result is completely misleading. If the Commission had engaged in meaningful analysis of the data provided it by CALLS, and had the Commission had the benefit of input from adversely affected small entities such as Pathfinder, this misleading information would have been debunked and a more accurate and well-rounded picture of the Rule's impact might have emerged.

52. Furthermore, by excluding small entities from the process, and by ignoring their Comments and concerns, the Commission deprived itself of learning about many

of the specific adverse impacts Access Charge Reform has had on them.

53. For example, Pathfinder's wholesale cost has risen dramatically since 1996. In 1997, Pathfinder's wholesale cost was 10 cents. It rose in 1998 to 14 cents. Today it stands at 16 cents. The adverse impact Access Charge Reform has had, and will continue to have (should the Commission's trend continue) on small businesses is a matter of indisputable fact. Yet, according to the Commission's findings in this matter, Access Charge Reform is said to have little if any impact on small entities! How could the Commission arrive at such a grossly inaccurate conclusion? Because, it actively excluded small entities from the process, failed to seek their participation or address their concerns, and blindly accepted the self interested assertions of the CALLS members. As a result, important relevant facts such as the increase in wholesale cost to small entities such as Pathfinder was never even addressed, let alone investigated by the Commission. The resulting Report and Order are therefore both factually inaccurate and incomplete.

Commission's Actions Violate Clear Intent of Congress

54. Further, read in conjunction with the secret and illegal negotiations that lead to the promulgation of the final Rule (see ¶¶ 16-21, supra), the Commission's failure to fulfill its duties under the Regulatory Flexibility Act smacks of both shameless favoritism, and unbridled indifference to the will of Congress.

55. It is crystal clear (both in terms of the plain text of the statute as well as the attendant legislative history) that the drafters of this statute intended it to serve as a backstop to agency action that might – purposely or innocently – ignore or trample the concerns and rights of small who do not have the power, wealth and personnel (like, for example, The CALLS Coalition) to aggressively and consistently lobby and influence an agency. It is therefore bitterly

ironic that the Commission both failed to address the impact on small business as required by the Regulatory Flexibility Act, and did so as a result of being co-opted and mislead by the largest and most powerful members of this industry. By doing so, the Commission violated not only the terms of this statute, but its clear purpose as well. That small entities such as Pathfinder have suffered, and will continue to suffer as a result of the Commission's failure to properly utilize this statute enacted for their protection, is axiomatic.

56. In conclusion, because the Commission failed to comply with the Regulatory Flexibility Act, and because its *Access Charge Reform Rule* was willfully deficient (if not misleading) in terms of small entity data, the Commission must rescind the Rule and remand this matter back to the rule making stage for meaningful, accurate and open decision making.

THE COMMISSION HAS ENGAGED IN

DISCRIMINATORY CONDUCT TOWARD SMALL BUSINESSES

57. Since the passage of the 1996 Telecommunications Act, the Commission's rules and orders have consistently favored big business interests while ignoring the valid needs and concerns of small entities – often to their great harm and competitive disadvantage. The Commission has not – as yet – correctly or completely applied the Regulatory Flexibility Act with respect to its rules and orders and, as a result, the impacts on small entities have been ignored. The process leading to the instant Report and Order is illustrative of the Commission's treatment of small entities.[7]

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[7] Pathfinder's experience is not unique, and it is not alone in its frustration over the Commission's inability or unwillingness to fulfill the mandate created by the Regulatory Flexibility Act. Attached at Exhibit "E" is one example of the many letters written to the Commission by The Small Business Administration attesting to the fact that the FCC has a history of failing to fulfill its statutory duties with regard to small entities.

58. Through its closed-door, back room negotiations with AT&T, Bell Atlantic, BellSouth, GTE, SBC and Sprint (CALLS Coalition members), and by excluding small businesses such as Pathfinder from the Rulemaking Process, the Commission has demonstrated both its unbridled favoritism of large entities, and its wholesale contempt for small telecommunications-based businesses.

59. The Commission's behavior can be fairly characterized as discriminatory because it did not merely omit small businesses from the process, it did so intentionally and explicitly. Based on the record, it is clear that the Commission was determined to let the CALLS Coalition members have their way unopposed, and to conduct the proceedings in such a way as to guarantee that the valid concerns of small entities such as Pathfinder were never brought to light. That the Commission did so despite the clear rights of participation granted to small entities in the statutes discussed above is illustrative of its indifferent attitude toward the least powerful members of this industry.

60. Moreover, the Commission's conduct casts it as a co-conspirator (unwitting or otherwise) with the CALLS Coalition members in their rapacious quest to regain the monopoly once enjoyed by AT&T and its minions. Whatever the duties of the Commission in promulgating rules and regulations, it is certainly *not* to choose up sides and zealously advocate for one particular (and powerful) segment of an industry.

61. For example, the subject Report and Order works a *sub silencio* reversal of the Commission's position regarding how PICC is portrayed and reported to the general public. In the original rule promulgated by the Commission, the Commission would not allow providers to describe the PICC as an FCC mandated charge on customer bills. As the Commission is no doubt aware, this created a nightmare for providers and generated a

significant number of consumer complaints. Small entities such as Pathfinder weathered an enormous amount of both public criticism and resource expenditures as a result of the Commission's rule – a rule adopted without input from small businesses or adequate analysis under the Regulatory Flexibility Act. This policy has now apparently been reversed for the LECs who will now consolidate the PICC into their existing SLC billing charge which is identified on the consumer's bill as an FCC mandated interexchange access charge.

62. Thanks to this "reform," ILECS, like CALLS member Southwestern Bell, are permitted to charge the *exact same* PICC fee but are free to label it as FCC mandated. Consumers who don't automatically assume that the FCC mandated access charge on the LEC's bill is merely an increase to an existing fee will undoubtedly receive - at best - a confusing explanation upon inquiry of their LEC, resulting in an inability to associate the LEC-billed PICC with the IXC-billed PICC. On the other hand, small IXCs, like Pathfinder, who are required to continually subsidize the LECs through the multiline business PICC (and without adequate customer-by-customer billing detail to audit their PICC assessments) are left to struggle for an adequate explanation to the consumer for the millions of multi-line PICCs that will still be billed by the IXCs.

63. This unacceptable condition creates an anti-competitive atmosphere between large LECs (like Southwestern Bell) and small IXCs (like Pathfinder). The LECs may now advertise and promote their long-distance "without monthly fees." On the other hand, small IXCs are left with the unsavory legacy of having charged the consumer these fees for the past two and half years. Further, in the case of multi-line business consumers, the IXCs are left no alternative but to continue to market their long-distance services with a monthly fee - to recover the *same* PICC dollars for submission to the LEC that the LEC is collecting under the guise of

the "FCC mandated fee." In addition, the consumer has been "educated" by the Commission for the past three years to expect the IXCs to absorb the PICC monthly access recovery assessments. Now, however, such expectation has been eliminated with regard to the LECs billing of the access fees – irrationally and without explanation. There can be little valid explanation for this gross disparity in treatment between small entities and the large businesses symbolized by the Coalition.

CONCLUSION

The "process" the Commission used to promulgate the subject Rule was a sham. It never fully examined the implications of this Rule on small businesses which are far more substantial than this Petition or any single set of comments, like Pathfinder's could describe. From the very beginning, the Commission elected to favor the large entities that comprise the CALLS Coalition and to do so without thought or regard for the interests and concerns of small entities such as Pathfinder. Further, the Commission's complete dismissal of its duties under the Regulatory Flexibility Act, its own Rulemaking Procedures, and the Negotiated Rulemaking Act render the subject Report and Order of May 31, 2000 utterly untenable in both fact and law. As such, the Rule must be remanded back to the Commission for genuine, open examination with full participation by affected small entities.

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WHEREFORE, Pathfinder respectfully requests clarification on the status of the Commission's original competitive safeguard requirement that directed the LECs to file a TSLRIC study not later than February 8, 2001. In addition, Pathfinder requests a clarification on the Commission's commitment in the original Order to review "historical cost recovery issues." Pathfinder respectfully requests the Commission vacate, remand, or suspend the effective date of its May 31, 2000 Report and Order (captioned above) and reconsider it in light of the matters set forth above so that the Commission will have an opportunity to fully and openly consider relevant information from small entities and the general public as required by law.

Respectfully submitted,

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