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July 24, 2000

VIA ELECTRONIC COMMENT FILING SYSTEM

Ms. Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A324
445 Twelfth Street, SW
Washington, D.C. 20554

Re: *Access Charge Reform*, CC Docket No. 96-262, *Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, CC Docket No. 97-146

Dear Ms. Salas:

Pursuant to the Public Notice in the above captioned matter, enclosed please find an original of the Reply Comments of the Ad Hoc Telecommunications Users Committee. These Reply Comments are being filed via the Federal Communications Commission's Electronic Comment Filing System ("ECFS").

If you have any questions regarding this filing, please do not hesitate to call at (202) 857-2550.

Sincerely,

Stephen J. Rosen

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

In the Matter of	)	
Access Charge Reform	)	CC Docket No. 96-262
Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers	)	CC Docket No. 97-146

REPLY COMMENTS OF THE
AD HOC TELECOMMUNICATIONS USERS COMMITTEE

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Reply Comments of the
Ad Hoc Telecommunications Users Committee

The Ad Hoc Telecommunications Users Committee ("the Committee" or "Ad Hoc") hereby submits its reply to the comments filed in response to the Commission's June 16, 2000 *Public Notice* seeking to refresh the record on the detariffing of CLEC interstate access services.[1] As described below, CLEC access services should be subject to mandatory detariffing, and the Commission should enact measures to protect end users from the impact of unreasonably high terminating access charges.

I. Introduction and Summary

In its opening round comments, Ad Hoc, as the representative of some of the nation's largest users of telecommunications services, expressed its support for the mandatory detariffing of interstate access services. Ad Hoc argued that such mandatory detariffing will create a more competitive marketplace by

[1] *Public Notice,* "Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services," DA 00-1268, CC Docket Nos. 96-262 and 97-146 (June 16, 2000) ("*Public Notice*").

encouraging the introduction of new services, stimulating competitive entry, and preventing carriers from using the filed rate doctrine to deprive their customers of the benefit of the bargain by unilaterally modifying contracts.

Ad Hoc was, however, concerned that the absence of: (1) effective competition with respect to terminating switched access service; and (2) Commission regulation of CLEC terminating switched access charges creates the potential for noncompetitive pricing of such access service. In particular, because the subscriber to a terminating access provider does not pay that provider's terminating access charges, market forces are unlikely to constrain these rates. Based on this potential market failure, Ad Hoc stated that it would review the record and determine whether FCC intervention is necessary or whether the marketplace can forge a solution that will guard against CLECs charging excessive rates for terminating switched access service.

The comments filed in this proceeding indicate that the mandatory detariffing of CLEC access services will ultimately benefit consumers. In this regard, none of the objections to mandatory detariffing posited by the CLECs—commercial impracticability, violation of the anti-discrimination provisions of Section 202(a), CLEC vulnerability to the superior bargaining power of the IXCs, CLECs being disadvantaged *vis-à-vis* the tariffed ILECs, overwhelming administrative burdens on the Commission, and the limiting of a customer's choice of IXC—survive reasoned analysis. Therefore, the Commission should order the mandatory detariffing of CLEC access services.

The record does, however, reflect that market forces will not constrain the price of terminating access. In order to compensate for this market failure, while still ensuring that all telephone calls are completed and allowing consumers to reap the benefits of detariffing, the Commission should impose the following requirements on the buyers and sellers of terminating access. IXCs should be required to hand off, and CLECs should be required to deliver, all interexchange traffic sent through the public switched network. If a negotiated agreement is in place between the CLEC and the IXC, then the CLEC will be compensated under the terms of that agreement. If no agreement is in place, the IXC will be required to pay the CLEC's standard terminating access fee. The IXC will then be permitted to challenge the CLEC's rate in an accelerated docket complaint proceeding in which the CLEC will have the burden of demonstrating the reasonableness of any terminating access fee that exceeds the ILEC's tariffed rate for that study area.

II. Despite CLEC Claims to the Contrary, Mandatory Detariffing of CLEC Access Services Will Result in a More Competitive Marketplace That Will Ultimately Benefit Consumers

Ad Hoc was joined by WorldCom in calling for the mandatory detariffing of CLEC access services as a pro-competitive action that would benefit consumers of telecommunications services. As described by Ad Hoc in its opening round comments, detariffing encourages providers to offer new types of access services, encourages new providers to enter the access market, and eliminates the pernicious effects of the filed rate doctrine. As such, the increased access competition produced by detariffing will ultimately provide end users with better and cheaper access services.[2]

In its comments, WorldCom added that as a matter of policy, the Commission should favor the application of marketplace solutions, such as negotiations, rather than regulatory solutions, such as tariffs, to solve the problem of unreasonable rates, terms, and conditions for CLEC access services.[3] WorldCom added that there is no reason to apply the full panoply of dominant carrier regulation to a marketplace where the buyers and sellers are both non-dominant carriers.[4] Finally, WorldCom pointed out that tariffs are intended to protect the buyers of telecommunications services from the market power abuses of the sellers of such services. Therefore, the CLECs, as sellers of access services, are turning this scheme on its head by seeking the continued use of tariffs.[5]

A number of CLECs attempted to provide a basis for the Commission to continue to apply a permissive detariffing regime to CLEC access services. As described below, because none of these arguments withstands close scrutiny, they should be rejected.

First, the CLECs argue that it is commercially impractical to negotiate access charge agreements with every IXC to which they hand off or receive

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2 Ad Hoc Comments at 3-5.

3 WorldCom Comments at 3-4.

4 *Id.*

5 *Id.* at 4.

traffic.[6] This argument is no different from that made by the interexchange carriers ("IXCs") in CC Docket No. 96-61, which was properly rejected by the Commission. In particular, when faced with a Commission proposal to mandate the detariffing of interexchange services offered by non-dominant carriers, the IXCs claimed that such Commission action would "significantly increase transaction costs by forcing nondominant interexchange carriers to conclude literally millions of written agreements with customers in order to establish legally enforceable contractual relationships."[7] The Commission did not accept this "economic impossibility" argument, noting that, "requiring nondominant interexchange carriers to withdraw their tariffs and conduct their business as other enterprises do will not impose undue burdens on such carriers, substantially increase their costs, or … force such carriers to abandon segments of the market …."[8]

Similarly, the Commission should not accept the allegations made by the CLECs in this proceeding that the only economically feasible way to exchange traffic with IXCs is through tariffs. Other than their mere allegation, the CLECs have not provided any support for this proposition. Further, given that CLECs only need to negotiate agreements with the facilities-based IXCs with which they actually exchange traffic, it is not clear that such negotiations will consume the quantity of resources alleged by the CLECs. And, as the Commission noted in CC

[6] *See, e.g.,* Association for Local Telecommunications Services ("ALTS") Comments at 5-9; Focal Communications Corp. Comments at 4; Allegiance Telecom, Inc. Comments at 4-6.

[7] *Policy and Rules Concerning the Interstate, Interexchange Marketplace* (Second Report and Order), 11 FCC Rcd 20730, ¶ 46 (1996), *recon., Policy and Rules Concerning the Interstate, Interexchange Marketplace* (Order on Reconsideration), 12 FCC Rcd 15014 (1997), *recon., Policy and Rules Concerning the Interstate, Interexchange Marketplace* (Second Order on Reconsideration and Erratum), 14 FCC Rcd 6004 (1999), *affirmed, MCI WorldCom, Inc. v. FCC,* 209 F.3d 760 (D.C. Cir. 2000).

Docket No. 96-61, there is no reason why telephone companies should not be required to negotiate individual contracts with the other commercial entities with which they do business. The Commission's earlier conclusion that "pro-competitive effects" of detariffing "outweigh any potential increase in transactional or administrative costs resulting from the shift to a detariffed environment," should also apply to CLEC access services.[9]

Second, the CLECs argue that individually negotiated access arrangements will run afoul of the anti-discrimination provisions contained in Section 202(a) of the Communications Act if the individual arrangements do not provide exchange access on the same terms to all customers.[10] This argument misapprehends the meaning of Section 202(a) by presuming that all discrimination is unreasonable, and therefore prohibited by this section. In fact, it is well settled that common carriers are permitted to provide customers with term and volume discounts, provided they make these same discounts available to other customers that are "willing and able to meet the contractual terms."[11] Thus, Section 202(a) does not prohibit a CLEC from offering cheaper access services to an IXC that commits to buy more access for a longer term, for example, from the CLEC, *provided*, the CLEC makes the same discount available to other IXCs that are willing to make the same volume commitment.

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8 *Id.*, ¶ 57.

9 *Id.*, ¶ 57.

10 *See, e.g.,* Focal Communications Corp. Comments at 4-5; Joint Comments of e.spire Communications, Inc., Fairpoint Communications Solutions Corp., Intermedia Communications, Inc., Newsouth Communications Corp., Nextlink Communications, Inc., and Talk.com, Inc. at 16-17.

Third, the CLECs claim that because IXCs have superior bargaining power, any negotiated access arrangements will inevitably favor the IXCs.[12] While it is true that AT&T and WorldCom are larger corporations than many of the CLECs, corporate size is not the criteria by which the Commission has weighed the need for regulatory intervention. Rather, the Commission has generally used a market power standard for determining whether rate regulation in the form of tariffs is necessary.[13] Because the FCC has already held that neither IXCs[14] nor CLECs providing access services[15] have market power, there is no reason why these entities cannot engage in an arms-length negotiation over the rates, terms, and conditions on which access is to be provided.

Fourth, the CLECs claim that mandatory detariffing of CLEC services will favor the ILECs, which would continue to operate under a tariffed regime.[16] This argument misapprehends the purpose of tariffs, and incorrectly presupposes that such tariffs are necessary to engage in commercial relationships with a large number of customers. The purpose of tariffs is to protect customers from abusive

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11 *MCI v. FCC*, 917 F.2d 30, 38 (D.C. Cir. 1990) (citing *Sea-Land Service, Inc. v. ICC*, 738 F.2d 1311, 1316-19 (D.C. Cir. 1984)).

12 *See, e.g.,* ALTS Comments at 11-12; Focal Communications Corp. Comments at 5-7; Allegiance Telecom, Inc. Comments at 6-8.

13 *Complete Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers* (Memorandum Opinion and Order and Notice Of Proposed Rulemaking), 12 FCC Rcd 8596, ¶¶ 6-7 (1997) ("*Complete Detariffing MO&O and NPRM*").

14 *Motion of AT&T Corp. to be Classified as a Non-Dominant Carrier* (Order), 11 FCC Rcd 3271, ¶ 1 (1995).

15 *Complete Detariffing MO&O and NPRM*, ¶ 23.

16 *See, e.g.,* ALTS Comments at 9-10; Focal Communications Corp. Comments at 7-8; Allegiance Telecom, Inc. Comments at 8-9.

behavior by carriers that possess market power.[17] The ILECs, because they are dominant carriers in the access market, must file tariffs. Without such tariffs, ILECs could use their market power to overcharge the IXCs, which are their access customers, and such overcharges would ineluctably be passed on to consumers in the form of higher rates. As pointed out by WorldCom, however, there is no reason to apply a tariffing regime to a marketplace where the non-customer carrier—in this case the CLEC—is non-dominant.[18] Further, as described above, the Commission has already determined that carriers can conduct business with multiple customers without the use of tariffs. Therefore, there is no reason to conclude that because ILEC's are subject to access charge tariffs so too must be CLECs. In fact, as soon as ILECs lose their market power in the interstate access market, they too should be freed from tariffing requirements.

Fifth, the CLECs posit that resolving the inter-carrier complaints that would arise out of negotiated arrangements, and the failure of carriers to reach agreement, will create an intolerable administrative burden on the Commission.[19] This argument is ill-founded. Preliminarily, the Commission will save the resources that are currently dedicated to maintaining a repository of CLEC access tariffs. Further, carriers are as likely to complain about unreasonable rates, terms, and conditions contained in tariffs as they are to complain about the unreasonableness of a carrier's failure to negotiate, or the unreasonableness of a

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[17] WorldCom Comments at 4 (citing *AT&T v. Central Office Tel. Inc.*, 524 U.S. 214, 222 (1998)).

[18] WorldCom Comments at 3-4.

[19] *See, e.g.,* ALTS Comments at 11; Focal Communications Corp. Comments at 11; Allegiance Telecom, Inc. Comments at 11.

negotiated agreement. Therefore, there should be no greater volume of complaints if mandatory detariffing is implemented. Finally, even if the number of inter-carrier complaints does increase, the Commission is well equipped to address them, having created both a Market Disputes Resolution Division of the Enforcement Bureau[20] and an accelerated complaint docket[21] in the last two years. As described below, inter-carrier complaints regarding IXC-CLEC disputes over access charges would be well suited to accelerated resolution by the Market Disputes Resolution Division.

Finally, the CLECs argue that because not all IXCs will have access arrangements in place with all CLECs, consumers will be limited in their choice of IXCs.[22] The CLECs are correct in their assertion that under a detariffed regime, if a particular CLEC is unable to negotiate an originating access agreement (terminating access is addressed below) with a particular IXC, then that CLEC's customers will not be able to presubscribe to the IXC in question. This possibility is not, however, a reason to forego the pro-competitive benefits of mandatory detariffing. Rather, the possibility that an IXC will not be able to serve a particular CLEC's customers should give both the CLEC and the IXC ample economic incentive to negotiate a reasonable access agreement. It is these types of mutually beneficial commercial arrangements that underlie the provision of virtually

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20 *See* 47 C.F.R. § 0.111 (1999); *News Release*, "FCC Reshapes For The Future—Establishes New Enforcement And Consumer Information Bureaus To Be Effective November 8, 1999" (Oct. 26, 1999).

21 *See* 47 C.F.R. § 1.730 (1999); *Implementation of the Telecommunications Act of 1996; Amendment of Rules Governing Procedures to Be Followed When Formal Complaints are Filed Against Common Carriers* (Second Report and Order), 13 FCC Rcd 17018 (1998).

22 *See, e.g.,* ALTS Comments at 13-14; Focal Communications Corp. Comments at 11-12; Allegiance Telecom, Inc. Comments at 11-12.

every type of consumer service in the United States, and there is no reason why non-dominant telecommunications carriers should operate under a different paradigm.

Thus, while the CLECs have described a litany of alleged economic ills that would result from mandatory detariffing, none of their allegations withstand close scrutiny. In reaching its decision, the Commission should therefore appropriately discount the putatively negative consequences of detariffing CLEC access services, and focus on the pro-consumer benefits of requiring the detariffing of the CLECs' interstate offerings.

III. CLEC Rates for Terminating Access Should Be Constrained Through FCC-Defined Presumptively Reasonable Rates and an Expedited Complaint Process

The record in this proceeding indicates that because terminating access is a service for which market forces will not constrain rates,[23] some degree of regulatory intervention is necessary to protect consumers. In particular, the party choosing the terminating access provider does not pay the cost of terminating access, which is ultimately borne by the originating caller, (or in the case of toll-free service, by the toll free service subscriber), through charges levied by the presubscribed IXC. Under such circumstances terminating access providers have the opportunity to price terminating access at supracompetitive levels without losing market share. In short, terminating access presents an example of market failure that requires Commission action.

[23] *See, e.g.* AT&T Comments at 5; Sprint Corp. Comments at 1-2 (noting that Sprint is overcharged for both terminating and originating access); Global Crossing Comments at 2-3 (noting market failure in both originating and terminating access).

In formulating a terminating access policy for CLECs, the Commission must harmonize a number of statutory mandates. First, pursuant to Sections 1,[24] 201(a),[25] and 251(a)(1)[26] of the Communications Act, the Commission should attempt to ensure that every call dialed in the United States is delivered to the terminating subscriber. Second, pursuant to Sections 1 and 201(b)[27] of the Communications Act, the Commission should attempt to ensure that the rates paid by Americans for telecommunications services are "just and reasonable." Finally, pursuant to the purpose of the Telecommunications Act of 1996[28] and Sections 10[29] and 257(a)[30] of the Communications Act, the Commission should act in a pro-competitive, deregulatory fashion, and eliminate as many barriers to entry into the telecommunications market as possible.

The best way to satisfy these statutory requirements is to order IXCs to deliver, and CLECs to terminate, all calls delivered to the interexchange network, regardless of whether a negotiated access agreement is in place between the IXC

[24] 47 U.S.C. § 151 (1999) (The purpose of the FCC is to "make available, so far as possible, to all the people of the United States … a rapid, efficient, nationwide, and world-wide wire and radio communication service with adequate facilities at reasonable charges").

[25] 47 U.S.C. § 201(a) (1999) ("It shall be the duty of every common carrier engaged in interstate or foreign communication … to establish physical connections with other carriers").

[26] 47 U.S.C. § 251(a)(1) (1999) ("Each telecommunications carrier has the duty—to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers").

[27] 47 U.S.C. § 201(b) (1999) ("All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable …").

[28] *See* S. Rep. No. 104-23, at 1 (1995) (The purposes of the Telecommunications Act of 1996 is to "provide for a pro-competitive, de-regulatory national policy framework designed to accelerate rapidly private sector deployment of advanced telecommunications and information technologies and services to all Americans by opening all telecommunications markets to competition ").

[29] 47 U.S.C. § 160 (1999) (regulatory forbearance).

[30] 47 U.S.C. § 257(a) (1999) ("the Commission shall complete a proceeding for the purpose of identifying and eliminating, by regulations pursuant to its authority under this chapter (other than

and the terminating access provider. If a negotiated agreement is in place, then the terms of that agreement will govern the compensation paid by the IXC to the terminating CLEC. If no agreement is in place, the IXC will be required to pay the CLEC whatever access fee the CLEC charges, in exchange for the CLEC completing the call. If the IXC believes the CLEC's access charges to be excessive, the IXC will then have the right to recover some or all of these charges in a complaint proceeding before the FCC. In such a complaint proceeding, a presumption of reasonableness should attach to any terminating access rate equivalent to, or below the ILEC tariffed rate for that study area.[31] Thus, if the rate does not exceed the ILEC's terminating access rate for the study area in question, the burden would be on the complaining IXC to demonstrate that the rate is unreasonable. On the other hand, if a CLEC's terminating access rate exceeds the ILEC's tariffed rate for the study area, the burden would be on the CLEC to justify that rate as reasonable. Finally, in order to ensure the rapid resolution of these inter-carrier complaints, the Market Disputes Resolution Division of the Enforcement Bureau should be required to hear such complaints on an accelerated basis.

The aforementioned regulatory regime for CLEC terminating access is as deregulatory as possible, while still ensuring that all dialed calls are completed, and still protecting the American public against unreasonable rates. As such, it

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this section), market entry barriers for entrepreneurs and other small businesses in the provision and ownership of telecommunications services and information services").

[31] *See* AT&T Comments at 9 (favoring permissive detariffing where CLEC access rates do not exceed those of the corresponding ILEC); Sprint Comments at 2-3 (CLEC access charges should be capped at ILEC levels).

best satisfies the requirements of the Communications Act and serves the public interest.

IV. Conclusion

In order to create a more competitive market for access services, the Commission should order the mandatory detariffing of all CLEC access services. Because market mechanisms will not protect consumers from inflated CLEC terminating access charges, however, the Commission should set presumptively reasonable prices for this service, and allow carriers to enforce these pricing presumptions through an accelerated complaint process.

Respectfully submitted,

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