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

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

SUPPLEMENTAL REPLY COMMENTS OF AT&T CORP.

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July 24, 2000

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SUPPLEMENTAL REPLY COMMENTS OF AT&T CORP.

Pursuant to the Commission's June 16, 2000 Public Notice,[1] AT&T Corp. ("AT&T") respectfully submits these supplemental reply comments.

In its supplemental comments, AT&T proposed that the Commission retain its current 'permissive detariffing' policy for those CLECs whose switched access rates do not exceed those of the ILECs in their service territories, and detariff only the rates of those CLECs whose charges exceed those levels. AT&T Supp. Comments, p. 2. As AT&T explained, this proposal would substantially alleviate the problems arising from the serious market failures that often characterize CLEC provision of access, while at the same time preserving the efficiencies of tariffing for those numerous CLECs offering competitive prices for access, *i.e.*, no more than the price charged by the ILEC in the same service territory.[2] AT&T Supp. Comments, pp. 5-8. Although commenters almost uniformly object to the Commission's proposal in the Further Notice to adopt mandatory detariffing for CLEC access services, none of the objections raised by

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

[2] AT&T also urged the Commission to make explicit that IXCs such as AT&T have no legal obligation to order or otherwise accept a CLEC's access services – either under a tariff or an inter-carrier contract. AT&T supplemental comments, p. 2.

these commenters to the Commission's proposal provides any basis for rejecting the balanced approach proposed by AT&T.

First, a number of CLECs assert that "there is no basis for the Commission to conclude that there has been a market failure" with respect to the provision of access by CLECs. Focal, p. 2; ALTS, pp. 1-2; CTSI, pp. 3-4; ASCENT, pp. 3-4; Minnesota CLEC Coalition, p.2. These CLECs, however, do not and cannot dispute that there are no market forces that could operate to constrain CLEC access pricing. As Dr. Frederick Warren-Boulton, a former Deputy Assistant Attorney General for Economic Analysis, Antitrust Division, Department of Justice, testified in detail in the *MGC* case, the markets for both terminating and originating access are characterized by significant market failures. *See* Testimony of Dr. Frederick Warren-Boulton, pp. 1227-142, *MGC Communications, Inc.* v. *AT&T Corp.*, File No. EAD 99-002 (June 28, 1999) (attached to AT&T's November 29, 1999 FNPRM reply comments). With regard to terminating access the cause of the market failure is obvious: "the choice of service provider for terminating access is made by the called party," whereas the "decision to place the call and payment for the call lies [] with the calling party." *Fifth Report and Order and FNPRM*, ¶ 181. Because the called party is indifferent to the charges incurred by the calling party in placing the call, the called party's choice of access provider (*i.e.*, in the case of switched access, its choice of LEC) is not constrained by market forces.

Contrary to the Commission's suggestion in the *Fifth Report and Order and FNPRM*, however, this market failure is not limited to terminating access. As the Commission has recognized, "IXCs are required by statute to charge averaged rates." *Fifth Report and Order and FNPRM*, ¶ 181. While end users have an incentive to choose a low-priced provider of local exchange service – for which the end user pays – an end user has no incentive to choose a low-priced provider of originating access because the costs imposed by a high priced access provider must be spread among an IXC's total customer base and will have at most a negligible effect on the end user's own long distance rates. Indeed, because the end user alone bears the full cost of his or her local exchange service while the originating access rates charged by the user's CLEC are externalized on others, end users in fact have an incentive to choose *high*-priced access providers, because such providers generally attract end users (and hence access revenue) by pricing their local exchange service at rock-bottom prices. In short, far from being aligned, when it comes to the selection of a CLEC access provider the economic interests of the end user and the IXC are generally opposed.

In the *Fifth Report and Order and FNPRM* in this docket, the Commission suggested that market forces might nevertheless constrain a CLEC's originating access rates, reasoning that if a CLEC charged "excessive originating access rates" the "IXCs will shift their traffic from that carrier to a competing access provider." *Fifth Report and Order*, ¶ 181. This suggestion is inexplicable. In the case of switched access – which was the subject of AT&T's Petition for Declaratory Ruling – the provider of access to a particular end user is by necessity the end user's LEC. IXCs can originate calls from, and terminate calls to, that end user only through the end user LEC's switch and loop. IXCs simply have no way of "shifting" traffic to another provider of access unless the end user changes its provider of local exchange service, and, as just discussed, end users have virtually no incentive to change LECs in order to reduce an IXC's access costs.

Second, almost without exception, the supplemental commenters oppose the Commission's proposal to impose mandatory detariffing of CLEC access services on the ground that "without the option of tariffing their access services, each CLEC will be required to negotiate individual contracts with *every* IXC that is certified to provide service throughout the country." ALTS, p. 5; ASCENT, pp. 5-6; e.spire, pp. 6-8; Focal, p.4. This argument is both ironic and wrong. The argument is ironic, because it is undisputed that mandatory detariffing of interexchange services imposes far greater costs on IXCs and their customers, and yet the Commission has consistently determined that the benefits of detariffing interexchange service outweighs the costs. Clearly, there is no basis to reject detariffing here, where the benefits to customers (IXCs) are greater and the costs imposed by detariffing are lower. In any event, this argument is wrong, because AT&T's proposal *would* allow tariffs in cases where CLEC conduct and pricing does not threaten the customer harms identified by AT&T.

Third, a number of CLECs claim that if AT&T had the right to decline to purchase their access services, AT&T could use that asserted "power" to force CLECs to provide service at unreasonably low rates. e.spire supplemental comments, p. 11; ASCENT, pp. 2-3; Focal, pp. 5-7. This claim is baseless. The reality is that CLECs have at least as much "leverage" as would IXCs in any negotiation. If AT&T declined to purchase a CLEC's access services, that CLEC's customers could still choose to presubscribe to the services of another IXC that did order the CLEC's services. By contrast, if the IXC declined to purchase the CLEC's services, the IXC would have no other way of providing its services to any but the largest of the CLEC's customers. For this reason, the price that would result from negotations between a CLEC and an IXC would be closer to the reservation price of the IXC than of the CLEC. That is, the resulting price would be far above the miminal price at which the CLEC would be willing to provide service. Warren-Boulton Testimony, pp. 141-149;187-195.

Indeed, allowing an IXC to decline to purchase a particular access provider's services is exactly the type of market transaction that the Commission envisioned in its *Access*

Charge Reform Order. First Report and Order, *Access Charge Reform*, 12 FCC Rcd. 15982 (1997) ("*Access Charge Reform Order*"). In that decision, the Commission rejected the requests made by AT&T and other IXCs to prescribe access rates based on forward-looking costs. *Id.* ¶¶ 262-63. Although the Commission agreed that interstate access charges should "ultimately reflect the forward-looking economic costs of providing interstate access services," the Commission decided to rely on a "market-based approach" to achieve that end. *Id.* In adopting this approach, the Commission expressly concluded that IXCs could choose "to bypass" the "interstate switched access services" of a particular LEC "where the prices (interstate access charges) do not reflect the economic costs of providing the underlying services," and that one form of bypass would be to choose a different access provider. *Id.* ¶ 265.

The Commission's conclusion that an IXC could choose to bypass the switched access offerings of a high-priced access provider by shifting its traffic to a competing access provider can mean only one thing: that an IXC such as AT&T has the right to decline to engage in business with providers whose prices are in AT&T's judgment too high. As discussed above, IXCs simply have no way of shifting traffic to another provider of switched access unless the end user changes its provider of local exchange service. Thus, the only way to "bypass" an uneconomic LEC is to decline to purchase its services.

For this reason, the claims by a number of commenters that AT&T should not have the right to decline to purchase their services would stand the market-based approach on its head. As the Commission explained in its recent *Third Pay Telephone Order* in concluding that it had no choice but to regulate the default compensation rate to be paid to PSPs, "where the seller must sell and the buyer must buy . . . market forces are rendered ineffective as a means of achieving an efficient price." Third Report and Order, *Implementation of the Pay Telephone*

Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 14 FCC Rcd. 2545, ¶ 65 (1999) ("*Third Pay Telephone Order*"). *See also id.* ¶ 66 ("IXCs ideally should be able to decline calls from payphones they believe to be excessively priced"). The Commission thus "strongly encourage[d] the IXCs to develop targeted call blocking . . . [as] an essential element to an IXC's ability to negotiate with PSPs in a true market setting." *Id.* ¶ 67. A ruling that AT&T "must buy" would be fundamentally irreconcilable with the reasoning of the *Third Pay Telephone Order*. Indeed, it would require the Commission, as it did in that Order, to abandon its market-based approach and impose immediately a regulatory cost-based limit on CLECs' access charges.

For the foregoing reasons, as well as those set forth in AT&T's supplemental comments, the Commission should retain its current "permissive detariffing" policy for those CLECs whose switched access rates do not exceed those of the ILECs in their service territories, and detariff the rates of those CLECs whose charges exceed those levels.

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July 24, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 24th day of July, 2000, I caused true and correct copies of the foregoing Supplemental Reply Comments of AT&T to be served on all parties by depositing it in the United States mail, postage prepaid to the following addresses:

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