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

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

JOINT REPLY COMMENTS OF
MGC COMMUNICATIONS, INC. d/b/a/ MPOWER COMMUNICATIONS CORP., ITC^DELTACOM, INC. AND BROADSTREET COMMUNICATIONS, INC.

MGC Communications, Inc. d/b/a Mpower Communications Corp. ("Mpower"), ITC^DeltaCom, Inc. ("ITC^DeltaCom"), and BroadStreet Communications, Inc. ("BroadStreet") (collectively, the "Joint Commenters"), by their undersigned attorneys, hereby submit these Reply Comments in response to the Public Notice in the above-referenced dockets.[1/]

INTRODUCTION

By and large, most Commenters reject mandatory detariffing as a method to constrain terminating access rates or as a market-based solution to allegedly excessive terminating charges.[2/] Many of these Commenters recognize that a permissive detariffing regime is not only

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

[2/] *See e.g.*, Association of Communications Enterprises Comments at 5 (mandatory detariffing of competitive LEC access services would allow large IXCs to use their market power position to dictate to small competitive LECs the prices they must charge for their services), ALTS Comments at 9 (CLECs run into roadblocks in provisioning services at every turn, and now is an inappropriate time to further unfairly disadvantage these carriers as they struggle to compete head-to-head with the ILECs), Prism

an administrative convenience for both competitive carriers and the Commission, but more importantly, it is an absolute requirement until major IXCs, the primary consumers of exchange access service, comply with their obligations under the Telecommunications Act of 1996 ("96 Act") and recent Commission decisions. Namely, the Commission must enforce the IXCs' duty to interconnect with all local exchange carriers, and may not refuse to order or pay for access services as a means of impermissible self-help.[3/] Moreover, the Commission should not credit the IXCs' abstract claims that CLEC access charges are unreasonable or "excessive" in light of the Commission's decision in *Sprint v. MGC* -- which squarely rejects the notion that the benchmark for determining CLEC access rates is the ILEC rate. Along these lines, the Commission should note that the competitive local exchange industry is wrestling with the subject of exchange access rates.[4/] However, there are at least two essential differences between

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Comments at 2 (mandatory detariffing will force exorbitant transaction costs), Time Warner Comments at 4 (in no event should the Commission mandatorily detariff CLEC interstate switched terminating access charges), CTSI, Inc., RCN Telecom Services, Inc. and Telergy, Inc. Comments at 2 (the illegal self-help actions of interexchange carriers should give the Commission even greater incentive to ensure that competitive carriers have the tool of tariffed rates if they desire to use it), Teligent Comments at 1 (the Commission should refrain from ordering mandatory detariffing), General Services Administration Comments at 3 (tariffs for services provided by competitive LECs to IXCs serve a vital function in promoting more competition), Focal Communications Corp. Comments at 3 (the proposed marketbased approach is premature), and WinStar Communications, Inc. Comments at 14 (it is premature to establish mandatory detariffing for CLECs). Even Global Crossing, despite its unfounded claims that CLEC access rates are "absolutely exorbitant," rejects a mandatory detariffing regime. Global Crossing Comments at 3.

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

[4/] ITC^DeltaCom notes that like many other CLECs, it is looking to reduce its access charges, evidencing further that any problem with CLEC access charges is self-correcting. Currently, ITC^DeltaCom's interstate access rates are comparable to current NECA rates - compare

ILEC access rates and CLEC rates: First, as the Commission has already recognized, CLEC costs to provide access are elastic; as demand and tariff volumes increase, their costs decrease.[5] Second, ILECs receive access revenue under the CALLS proposal that CLECs do not in the form of flat rated CCL charges and the Universal Service Fund established by the CALLS proposal.[6] CLECs do not benefit from either of these sources of access revenues as ILECs do, but rely instead on their traffic-sensitive tariffed access charges. In this context, the recent CLEC industry trend has nevertheless been to lower, not raise its access charges. Industry efforts are evidenced by the ALTS benchmarking proposal (which Mpower has openly supported) filed in the Access Charge Reform proceeding. The Commission should altogether ignore the self-serving complaints of those commenters which support a mandatory detariffing regime.[7] As discussed in the Joint Commenters' initial comments, these commenters can seek permissive

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ITC^DeltaCom's rate of $.00746 for local switching (LS2) to NECA's $.006901 for Rate Group 1 (the most urban area) and $.009201 for Rate Group 2.

[5] "The Commission has recognized that smaller telephone companies have higher local switching costs than larger incumbent local exchange carriers (ILECs) because the smaller companies cannot take advantage of certain economies of sale." *National Exchange Carrier Assn., Inc. Proposed Modification to the 1998-99 Interstate Average Schedule Formulas*, 13 FCC Rcd 24225 1998 FCC Lexis 6539 (Dec. 22, 1998) at n. 6.

[6] *See also In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket Nos. 96-262 and 94-1, Petition for Reconsideration (filed July 21, 2000 by ALTS and Focal Communications Corp.) ("*Petition for Reconsideration*") at 12 (arguing that the CALLS proposal is a vehicle for ILECs to anticompetitively shift productivity reductions from common line to switching in order to harm CLECs and preserve revenues.

[7] By comparison, a minority of commenters (largely the major IXCs) argue in favor of mandatory detariffing or a permissive detariffing regime that turns on whether the CLEC rate does not to the ILEC rate. *See e.g.*, Sprint Comments at 3 (suggesting mandatory detariffing may be a "constructive step"), WorldCom Comments at 3, and Ad Hoc Telecommunications Users Committee Comments at 3.

detariffing when it benefits them and attempt to deny those same benefits to CLECs for improper motives. These Commenters have presented no evidence to support a finding that a mandatory detariffing regime is more favorable than the Commission's current permissive detariffing regime.

I. THE RECORD PRESENTS NO EVIDENCE TO SUPPORT A FINDING THAT CLEC ACCESS RATES ARE UNREASONABLE OR EXCESSIVE.

Several commenters have described CLEC access rates as excessive, unreasonable and exorbitant - - and have done so with absolutely no reasoned analysis. At best, these commenters stubbornly cling to a premise recently rejected by the Commission.[8] In the *Sprint v. MGC* decision, the Commission specifically stated that "to the extent a review of the reasonableness of a CLEC's rates depends on a carrier-specific review of the costs of providing service, it is impossible to be categorical on this point since a CLEC's costs may not be comparable to those of an ILEC."[9] Nothing in the present record overcomes this principle. Rather, the commenters in favor of mandatory detariffing outright ignore the law without offering either substantial evidence or cogent argument as to why a deviation from the Commission's principle is justified.

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[8] These commenters completely disregard the Commission's decision to "decline Sprint's invitation to hold that any access rate that is higher than the ILEC's is necessarily unjust and unreasonable under section 201(b)." *See Sprint Communications Company v MGC Communications, Inc.,* File No. EB-00-MD-002 at 6 (rec. June 9, 2000); *Sprint Communications Company, L. P. v. FCC, No. 00-1260,* No. 00-1260 (D.C. Cir. June 20, 2000).

[9] *Id.*

AT&T's support for permissive detariffing is more form than substance. Its support for permissive detariffing is contingent upon whether the CLEC is charging the ILEC rate: "[t]he 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 only the rates of those CLECs whose charges exceed those levels." Interestingly, AT&T charges above the ILEC rate, while advocating an ILEC benchmark for everyone else.[10] AT&T's litmus test has been rejected by the Commission as a barometer for the reasonableness of CLEC access charges. The Commission should reject any such request. As correctly observed by the Association of Communications Enterprises (the "ACE"), "the large IXCs have made it clear that they will not accept access charges set higher than those assessed by the incumbent LEC serving the same geographic area as a competitive LEC."[11]

For example, Sprint argues that CLEC access charges reflect "inefficient entry," constitute "excess profits," or provide a source of funds to cross-subsidize retail local service and thereby allow CLECs to compete unfairly with ILECs whose access rates are constrained by regulation.[12] What Sprint ignores is that CLEC access rates reflect the costs for new entrants to provide access services considering they lack the market share over which the ILECs can spread

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[10] On July 10, 2000, for example, AT&T invoiced ITC^DeltaCom for local switching terminating minutes at a rate of $.006090600, which was higher than the Bell South tariffed rate of $.004497 at that time. *See* BellSouth's FCC Access Services Tariff No. 1.

[11] ACE Comments at 6.

[12] Sprint Comments at 2.

their costs. As these new entrants continue to gain competitive ground and market share (notwithstanding the obstacle of Sprint's refusal to pay valid tariffed charges) CLEC access rates should decline. For example, as mentioned previously by the Joint Commenters, ALTS has commissioned a national study on interstate switched access charges.[13] The study concluded that a reasonable benchmark for the CLEC interstate switched access rates is appropriately established at $0.058 per MOU.[14] Mpower is on record as supporting this benchmark, and ITC^DeltaCom and BroadStreet agree that the ALTS proposed benchmark is reasonable. If and when such a benchmark is approved by the Commission, this will be another stage in the continuing decline of CLEC access charges. As other CLECs begin implementing such benchmarks and CLECs gain market share, a downward trend in CLEC access charges may be expected. Indeed, the industry is making strides toward ensuring that CLEC access charges are

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[13] The objective of the study is to provide a more fact intensive basis upon which switched access charges assessed by CLECs can be compared to prevailing switched access charges currently assessed by ILECs under approved FCC tariffs. The switched access rate compilation in this study includes the usage sensitive rate elements faced by IXCs for connecting at the ILEC tandem and using the ILEC's shared transport services. Also included are the flat-rated Presubscribed Interexchange Carrier Charges (PICCs). The PICCs are converted to per-minute of-use (MOU) charges so that for each LEC a total composite per MOU interstate switched access rate can be established. By constructing a composite per MOU rate for each ILEC, the study considers the actual price paid by IXCs for originating and terminating their interstate traffic on incumbent LECs. The study established the actual per MOU prices paid by IXCs as the proper basis on which CLEC switched access rates should be compared.

[14] It appears that many CLECs currently offer rates that are far below the rate ceiling proposed by ALTS. For example, e. spire Communications, Inc. offers $.011766 for local switching, per access minute. *See* American Communications Services, Inc. FCC Tariff No. 3. at 5th Revised Page 179. FairPoint Communications Corp ("FairPoint") offers $.020600 for its end office local switching. *See* FairPoint FCC Tariff No. 2 at 1st Revised page 174. Rates among CLECs vary and broad sweeping judgments regarding the excessiveness of CLEC industry rates as a whole are therefore unpersuasive.

reasonable. Intervention by the Commission in the form of mandatory detariffing is therefore not required.

Contrary to the pro-competitive trend in CLEC access charges is the anticompetitive trend in ILEC rates established under the CALLS proposal. As recently argued by ALTS and Focal Communications Corp. in their Petition for Reconsideration of the CALLS proposal, the Commission did not adequately address the adverse competitive impact of switching reductions.[15/] As the Petitioners argue, the Commission merely repeated – without verifying-- the allegations of Sprint that the marketplace is failing to adequately constrain CLEC access charges.[16/] The Commission's determination was erroneous in that proceeding, and should not be repeated here. As stated by the Petitioners, the Commission accepted Sprint's allegation without any finding to address the Petitioner's concerns that the CALLS proposal is a vehicle for ILECs to anticompetitively shift productivity savings to their switching (traffic sensitive) access charge pricing, not to their common carrier line basket rates which are by comparison fixed and do not compete with the CLECs.[17/] Sprint overlooks the anticompetitive effects of the CALLS proposal in its Comments in the instant proceeding and argues that an alleged $1 billion difference between the tariffed access charges of the CLECs and the amounts charged by the ILECs serving

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15/ Petition for Reconsideration at 11.

16/ *Id.*

17/ Petition for Reconsideration at 11-13.

the same territories offsets half of the switched access reductions from the CALLS plan.[18] Notwithstanding the lack of any support for its $1 billion guesstimate, Sprint's analysis of switched access reductions from the CALLS plan is an apples-to-oranges comparison of access charge trends in the CLEC and ILEC industries. The Commission must fully and fairly consider industry trends in both the CLEC and ILEC exchange access markets before imposing mandatory detariffing upon CLECs.

II. THE COMMISSION MUST CLARIFY THAT IXCs HAVE A DUTY TO INTERCONNECT AND ANY REFUSAL TO ORDER OR PAY FOR SERVICES RENDERED BY CLECs AMOUNTS TO NOTHING MORE THAN IMPERMISSIBLE SELF-HELP.

The Joint Commenters agree with ALTS that the Commission should clarify that IXCs have the duty to interconnect with CLECs regardless of whether CLEC services are tariffed or not.[19] Moreover, as stated by the General Services Administration, because of IXC interconnection obligations, IXCs cannot lawfully refuse to carry traffic presented to them on the grounds that originating or terminating access charges are too high.[20] As ALTS explains, the 96 Act clearly defines an IXC's duty to interconnect. Section 254 requires that consumers have access to telecommunications service, including interexchange services. Sections 201(a) and 251(a)(1) require carriers to interconnect. Moreover, Section 251(b)(3) requires CLECs to allow

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18/ Sprint Comments at 2.

19/ ALTS Comments at 12.

20/ General Services Administration Comments at 3.

their customers "1+" access to the interexchange carrier of their choice, requiring the originating CLEC to interconnect with the local customer's chosen IXC.[21] Contrary to the clear obligations of all carriers under the 96 Act, AT&T urges the Commission to "reaffirm that under existing law IXCs have no obligation to order access from any CLEC."[22] AT&T's comments seem to request authority from the Commission to squeeze new entrants out of the market by altogether refusing to order services and as a result interconnect with them. AT&T cannot expect the Commission to undermine the 96 Act in this manner. If AT&T or any other IXC wishes to challenge CLEC access rates, it has formal complaint remedies it can pursue under Sections 207 and 208 of the Act. The Commission must explicitly acknowledge a baseline IXC statutory interconnection obligation.[23] The Commission should clarify that IXCs may not engage in unlawful "self-help" efforts such as refusing to pay tariffed CLEC interstate access charges or refusing to accept or complete calls from or to CLEC customers because of issues concerning CLEC interstate access charges.[24]

CONCLUSION

For the foregoing reasons, the Commission should reject a mandatory detariffing regime for CLEC interstate exchange access service. Imposing mandatory detariffing upon these

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[21] ALTS Comments at 12.

[22] AT&T Comments at 3.

[23] *See* Teligent Comments at 3.

[24] *See* WinStar Comments at 5-6.

providers would only frustrate entry and stifle competition in the local exchange access markets. Moreover, the Commission must fully consider industry trends in CLEC access charges *vis a vis* anticompetitive trends in ILEC markets before attempting to impose mandatory detariffing upon CLECs.

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Dated: July 24, 2000

CERTIFICATE OF SERVICE

I, Sana D. Coleman, do hereby certify that on the 24th day of July, 2000, a copy of the foregoing JOINT REPLY COMMENTS OF MGC COMMUNICATIONS, INC. d/b/a/ MPOWER COMMUNICATIONS CORP., ITC^DELTACOM, INC. AND BROADSTREET COMMUNICATIONS, INC. was caused to be served, by First Class U.S. Postal service upon the following:

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