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

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CCB/CPD File No. 98-63

COMMENTS OF
BAYRING COMMUNICATIONS
and
LIGHTSHIP TELECOM, LLC

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SUMMARY

BayRing Communications and Lightship Telecom, LLC welcome the opportunity to respond to the request of the Federal Communications Commission for input on ways to reform the manner in which competitive local exchange carriers ("CLECs") may tariff the charges for the switched local exchange access service that they provide to inter-exchange carriers ("IXCs"). BayRing and Lightship believe that the Commission should not establish a benchmark for CLEC access rates. The Commission has encountered difficulties anytime it has attempted to establish benchmarks to govern a particular regulated activity. If the Commission does establish such a benchmark, it should be set well above ILEC rates. The record in this proceeding is clear that CLECs have cost characteristics that invariably result in higher access rates than those of ILECs.

The Commission and other parties have put forth a number of possible definitions of "rural" for the purposes of an exemption, but each of these definitions has problems. Instead, BayRing and Lightship urge the Commission to adopt a definition that is: 1) simple to administer; 2) will not result in a constant reanalysis of whether a competitive carrier satisfies the exemption; and 3) is broad enough to satisfy the purpose of the exemption, which is to ensure that CLECs providing service in rural areas do not constantly encounter the illegal self-help actions that have been so prevalent by IXCs during the past few years. For these reasons, BayRing and Lightship advocate adoption of a rural exemption that applies to interstate access charges with respect to any customer outside the density zone 1 of the top 50 Metropolitan Statistical Areas. This definition is appropriate because it would be easy to administer and because it reflects the factors that influence the cost of providing access service by CLECs.

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COMMENTS OF
BAYRING COMMUNICATIONS
and
LIGHTSHIP TELECOM, LLC

BayRing Communications ("BayRing") and Lightship Telecom, LLC ("Lightship")(collectively "the Commenters") welcome the opportunity to respond to the request of the Federal Communications Commission ("Commission") for input on ways to reform the manner in which competitive local exchange carriers ("CLECs") may tariff the charges for the switched local exchange access service that they provide to inter-exchange carriers ("IXCs"). In particular, the Commenters wish to comment on the Commission's proposal to establish a benchmark for CLEC access rates, with the possibility of a "rural exemption" for CLECs operating in rural or high-cost areas.

BayRing is the first CLEC licensed in New Hampshire. It is a full-service facilities-based telephone company serving rural areas in New Hampshire, Maine and Massachusetts. BayRing has a state-of-the-art fiber-optic network and digital switching technology that allows it

to provide a full range of Internet, local dial tone, long distance voice, and data communication services to both residential and business customers in these rural areas. As a result, BayRing is bringing true competition to the ILECs in these areas. Currently, BayRing services no more than 1-2% of the potential residential and business customers in its operating area. Most of its customers have less than 50 lines. As a result, BayRing incurs significant expenses as it works to expand and develop its market share.

Lightship also offers competitive local telecommunications services in 2nd and 3rd tier markets in Maine, Massachusetts, New Hampshire, and Vermont, such as Burlington, Vermont and Worcester, Massachusetts. Lightship also has a state-of-the-art fiber-optic network that allows it to offer businesses in these rural areas a panalopy of services such as Internet, local dial tone, long distance voice, and data communications services.

Therefore, as CLECs serving rural areas with high costs, the Commenters have real concerns with any benchmark the Commission might establish for access charges, particularly if there is not an exemption for rural carriers.

I. USING BENCHMARKS TO GOVERN CLEC INTERSTATE ACCESS CHARGES IS PROBLEMATIC

The Commission has encountered difficulties anytime it has attempted to establish benchmarks to govern a particular regulated activity. The record in this proceeding is already replete with comments pointing out the particular difficulties in establishing a benchmark approach to oversee CLEC interstate access charges. The Commenters also add their support to these previous comments and reiterate briefly below some of the myriad of problems associated with adopting a benchmark regime.

First, the Commenters believe the Commission has failed to justify the need for new regulations to govern CLEC access charges. During the last several years, some IXCs have

raised complaints about the access charges of a few CLECs, but there has been little public information made available to demonstrate a wide scale problem requiring Commission action. In fact, a study submitted by the Association for Local Telecommunications Services ("ALTS") shows that in most cases there is not a significant difference in the total access charges of the competitive carriers and the incumbents when properly compared taking different rate structures into account.[1] The fact that the Commission at this stage in the proceeding is still asking for additional cost information only reinforces the Commenters' belief that the Commission has not justified the need for benchmarks.

Second, benchmark regulation in general is very burdensome on both carriers and the Commission. In fact, what experience the Commission has had with benchmark regulation should be enough to steer the Commission away from going down this path again. The Commission gained its most extensive experience with benchmark regulation while regulating cable service under the 1992 Cable Act.[2] During that experience what was initially intended to be a simple way of regulating turned out to be extremely complicated and burdensome as cable companies did not always adopt the same rate structure as contemplated in the Commission's benchmark.

As with cable regulation, the CLECs and the Commission will have a difficult time determining whether a CLEC is above or below a benchmark, especially when a CLEC uses a different rate structure than that reflected in the benchmark rate. The Commission will need to establish a methodology and form for converting rates of CLECs that choose not to have the

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[1] CC Docket Nos. 96-262, 94-1, CCB/DPD File No. 98-63, Reply Comments of the Association for Local Telecommunications Services, Attachment A, Integrated Communications Corporation, *Interstate Switched Access Charges, A National Survey: A Public Policy Analysis of Interstate Switched Access Charges, Including a Survey of 1,435 Incumbent Local Exchange Carrier Tariffed Rates.* ("ICC Report") (October 29, 1999).

[2] *See Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992 - Rate Regulation*, MM Docket No. 92-266, 8 FCC Rcd 5631 (1993).

same rate structure as that reflected in the benchmark rate. Further, to require CLECs to conform their rate structure to that reflected in the benchmark also will be very burdensome to CLECs.

Finally, if the Commission adopts benchmarks, it must also make it clear to IXCs that CLECs complying with the benchmarks must get interconnection and be paid at the established rate. Further, the Commission should use this proceeding to further impress upon IXCs their statutory obligations to interconnect with *all* carriers (including, obviously, all local exchange carriers). Previous commenters in this proceeding have shown that Sections 201(a), 202(a), 203, 214, 251(a) and 214 of the Communications Act clearly state that interexchange carriers may not unilaterally refuse to deliver or accept access traffic from any local exchange carrier. Unfortunately, however, the incidence of IXC refusal to pay tariffed rates appears to be increasing. Therefore, the Commission should strongly articulate its policy that IXCs may not refuse to deal with any local exchange carrier. If an IXC believes a CLEC's rates are too high, and do not comply with a benchmark rate, the IXC's only recourse should be to file a Section 208 complaint with the Commission. Unless the Commission unequivocally establishes that principle, end users may be left without service, competitive carriers may be forced into negotiating access rates with every interexchange carrier, and competition would be severely restricted.

Detariffing Would Impose Unacceptable Burdens on CLECs. It is possible that the Commission is contemplating that some form of mandatory detariffing of CLEC interstate access charges should play a role in amended regulations governing CLEC interstate access charges. For example, the Commission might impose mandatory detariffing on all CLEC interstate access charges, other than those eligible for the rural exemption, or impose detariffing only on CLECs

charging above some benchmark rate, except for those eligible for the rural exemption. Other detariffing schemes are also possible.

In the absence of tariffs, a CLEC would need to individually negotiate interstate access charges with every IXC that might use the CLECs originating or terminating access services, *i.e.* the several hundred IXCs that might be providing long distance service to the CLEC's local service customers or that offer long distance service to virtually any subscriber nationwide that may be calling the CLEC's customer. Simply stated, it is not feasible for CLECs to set interstate access charges through negotiations with the hundreds of IXCs that may use a CLEC's access services. CLECs would need to devote significant time and resources, which are largely unavailable as a practical matter in the current business environment, to negotiating access charges with numerous IXCs.

As it is, CLECs currently struggle to devote adequate resources to their negotiations with ILECs for the interconnection agreements that are critical to their operations. Moreover, the CLECs would be in an inferior bargaining position vis-à-vis interexchange carriers. Major IXCs possess tremendous resources, including financial resources and personnel to enter into protracted contract negotiations, and thus already have superior bargaining power over CLECs. This situation will be compounded by the fact that CLECs will be in critical need of establishing access service arrangements, thus, giving the IXCs an even more decisive negotiation advantage. CLECs cannot realistically compete for customers if they are unable to offer customers the ability to receive calls from the millions of customers of any of the major IXCs. On the other hand, it would be far less problematic if AT&T were unable to offer its customers the ability to reach the far fewer customers of a CLEC.[3] Unlike the interconnection negotiation process

[3] CC Docket Nos. 96-262, 97-146, Comments of Winstar Communications, Inc. at p. 8 (July 12, 2000) ("Winstar Detariffing Comments").

established by the Act between CLECs and ILECs, there are no formal procedures or time lines in place for CLECs to arbitrate the rates and terms of an access contract.

Negotiating individual contracts with IXCs for access services will require much needed resources that could be more productively used to make the CLECs more competitive in the marketplace and ultimately result in lower prices for consumers. As CLEC operations begin to be able to take advantages of economies of scale and larger customer bases, which will lower the costs of providing access services, the market will witness further reductions in CLEC access charges.[4] Imposing the transactional costs that detariffing will bring will only increase CLEC costs and imperil competition in the local exchange marketplace.[5]

Moreover, in many cases where an IXC terminates calls to a CLEC, the CLEC may have no relationship with the IXC in a detariffed environment. This would also be true for originating access services for IXCs offering "dial around" service. Detariffing would effectively compel CLECs to offer free interstate access services to these IXCs.

The detariffing of CLEC access services in any manner also would place CLECs at a significant competitive disadvantage vis-à-vis ILECs. ILECs would be allowed to continue to take advantage of the use of tariffs for access charges. In addition, ILECs would continue to enjoy the benefits of the filed tariff doctrine. Thus, while ILECs enjoy efficiencies of tariffing to set rates,[6] CLECs would be forced to incur substantial transactional costs and potential litigation costs in establishing and enforcing access service arrangements. Requiring CLECs to detariff,

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[4] CC Docket No. 96-262, Initial Comments of RCN Telecom Services, Inc. at p. 2 (October 29, 1999).

[5] Such an action will imperil the already precarious state of competition in the local exchange market in favor of the long distance market which is already very competitive.

[6] The Commenters understand the factors that led the Commission to seek detariffing and the elimination of the filed tariff doctrine in the interexchange market. Not one party in this proceeding has demonstrated the need for such action in regard to the access service market. For all their complaints, the IXCs have failed to show any excessive rates or abuse of the tariff system. In fact, IXCs have opposed mandatory detariffing in this proceeding

and denying them use of the filed tariff doctrine, while providing ILECs these advantages would be unfairly discriminatory and necessitate the rejection of mandatory detariffing of CLEC access charges.

Perhaps most tellingly, AT&T noted the competitive disadvantage that CLECs would experience under mandatory detariffing:

> Because ILECs will continue to exercise market power over access services for the foreseeable future, the Commission properly requires them to file tariffs for their access services. However, the existence of such tariffs means that the ILECs need not incur any costs to create switched access arrangements with any IXCs; rather they can rely on their tariffs to establish a clear, binding obligations on IXCs to pay access charges. The disadvantage faced by CLECs who are denied the option of filing tariffs is substantially compounded by the costs of and risks attributable to litigation with recalcitrant access customers concerning their obligation to comply with their access terms. The Commission should be especially reluctant to adopt any proposal that would provide the entrenched incumbents with an additional cost advantage over new entrants.[7]

As noted earlier in this proceeding:

> The effect of mandatory detariffing would be to have an extra weight applied to each CLEC that would limit its ability to expand its customer base, thereby protecting the considerable market share held by incumbent LECs. Given the Commission's pronounced pro-competitive objectives, it should not now institute a policy that hinders the growth of CLECs. In a competitive market, the merits of a CLEC's service offerings, rather than the scope of its negotiating resources, should determine whether that CLEC is successful.[8]

The Commenters call to the Commission's attention the fact that major IXCs in a detariffed environment will insist on rates that are lower than ILEC rates. For example, the Commenters challenge AT&T to disclose on the record of this proceeding that it is

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and concede that the filed tariff doctrine is not a concern with respect to CLECs. Winstar Detariffing Comments at p. 12.

[7] Winstar Detariffing Comments at p. 9, *quoting,* AT&T Comments in CC Docket 97-146 (filed September 17, 1997) at p.6-7.

[8] CC Docket Nos. 96-262, 94-1, 98-157, CCB/CPD File No. 98-63, Comments of Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions at p. 17 (Oct. 29, 1999)("Focal/Adelphia Comments").

already refusing to pay CLECs any access charges unless significantly discounted from ILEC rates. Accordingly, the Commission should not rely to any significant extent on mandatory detariffing in any "reform" of CLEC interstate access charges.

II. ILEC RATES OTHER THAN NECA RATES SHOULD NOT BE USED AS A MODEL FOR CLEC RATES

In trying to establish a formula for benchmarks, the Commission asks for information on how CLEC rates compare to ILEC rates. In many respects, however, this would be like comparing apples with oranges. As demonstrated below, because of a variety of cost differences, CLEC access rates have little in common with ILEC rates, and should not be considered for purposes of establishing a benchmark.

The Commission's public notice makes reference to the recently negotiated rates between some ILECs and some IXCs adopted in the *CALLS Order*.[9] Not only does it make little sense to compare CLEC rates to these rates because of cost differences, the Commenters have serious concerns about the legality of the rates established in the *CALLS Order*. In fact, for the reasons presented in petitions for reconsideration of the *CALLS Order*,[10] the rate adjustments and rule changes adopted in the *CALLS Order* are unlawful because, among other reasons, they are inherently arbitrary, such as the use of the X-Factor for non-productivity purposes; because the Commission's assumption that the CALLS' rate adjustments and rule changes reflect an industry consensus was erroneous in that the CALLS proposal was opposed by significant industry segments including CLECs; because the Commission did not establish any procedures for adjusting price cap rates based on industry negotiations instead of price cap rules; and because the size of the new universal service fund is completely arbitrary. Accordingly, the Commission

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9 *Access Charge Reform*, Sixth Report and Order, CC Docket No. 96-262, 15 FCC Rcd 12962 (2000) ("*CALLS Order*").

should not even be considering establishing any benchmark governing CLEC interstate access charges founded on any rates or rule changes adopted in the *CALLS Order*. At a minimum, the Commission should resolve petitions for reconsideration of the *CALLS Order* and permit any appeals to be resolved before considering any CLEC benchmark with respect to CALLS ILEC rates.

Although the rates negotiated in the CALLS proceeding bear little relevance to appropriate CLEC rates, the Commission can take as instructive the way a contentious access charge issue was resolved through a negotiated settlement. The Commenters believe that Commission-sponsored negotiations might form a suitable approach to resolving any regulatory issues concerning CLEC interstate access charges. However, the rates that the ILECs negotiated for themselves may not be presumed applicable, or automatically applied, to the CLECs. The CLEC rates were not the subject of the CALLS negotiations, nor did the CLECs participate in those negotiations. Therefore, the CALLS rates may not simply be lifted from the context of the CALLS negotiations and applied to CLECs. This would merely exacerbate all of the substantive and procedural errors contained in the *CALLS Order*. Accordingly, the Commission should not use price cap ILEC rates established in the *CALLS Order* as the basis for establishing any benchmark or other regulation governing CLEC interstate access charges. Instead, to the extent that the Commission chooses to adopt a scheme governing CLEC interstate access charges based on industry negotiations, it must do so on the basis of negotiation by CLECs, not ILECs. The Commenters cannot emphasize enough to the Commission that the CALLS rates should not play any role with respect to CLEC interstate access charges.

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[10] *See* Petition for Reconsideration filed by the Association for Local Telecommunications Services and Focal Communications Corporation, CC Docket No. 96-62, filed July 21, 2000.

To the extent the Commission uses ILEC rates as a benchmark for CLEC rates, the Commission should look at NECA rates. It has already been suggested that NECA rates could serve as a useful benchmark for CLEC access rates.[11] It is illuminating to note that the ICC surmised that the cost structure that is most reflective of CLECs is that of smaller ILECs such as NECA companies and independents. The ICC observed:

> [o]bviously the comparison between small rural ILECs and CLECs that operate mostly in urban areas has its limitations. Nevertheless, there are a number of similarities that are worth noting. The similarities between CLECs and smaller ILECs such as NECA companies, are the following:
>
> - Both CLECs and smaller, rural ILECs may have lower levels of switch utilization. Due to the lumpiness of capital, neither type of company may have a sufficiently large customer base to fully utilize switch facilities.
> - CLECs, like smaller, rural LECs with longer than average loops, serve customers at great distances from their switching facilities.
> - Both CLECs and smaller rural ILECs may serve a sparse customer base. This is true even though the CLECs tend to operate in densely populated areas as long as the customer base is expressed on a number-of-customer-per-square-basis.
>
> Thus, in some regards, the CLECs' cost characteristics are comparable to those of smaller rural, ILECs, such as the NECA companies.[12]

If, the applicable point of comparison for CLECs operating in urban areas are the rates charged by the NECA companies, then those CLECs operating in rural and other high-cost areas should be able to charge rates higher than the NECA rates. This is because the ILEC in a rural area will still have advantages in terms of type and location of existing facilities, utilization rates, and economies of scale vis-à-vis the CLEC operating in the area. These advantages would mirror the advantages that a large ILEC would possess over a CLEC in an urban area. For instance, the rural ILEC would be able to reap the same advantages of having a mature network

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11 CC Docket No. 96-262, 94-1, Comments of MCI WorldCom at p. 21 (Oct. 1999).

12 ICC Report at p. 11.

serving an established customer base that its larger ILEC brethren possess. For this reason, any benchmark based on NECA rates should create an exemption for CLECs operating in rural areas.

III. ANY BENCHMARK ESTABLISHED FOR CLEC INTERSTATE ACCESS CHARGES MUST BE WELL ABOVE ILEC RATES

The Commission's Public Notice recognizes that CLECs have cost characteristics that may result in higher access rates than those of ILECs.[13] As detailed below, ILECs do, in fact, enjoy a number of economic advantages over CLECs that result in higher CLEC access costs. For instance, in a study of CLEC access charges commissioned by ALTS, the Integrated Communications Corporation ("ICC")[14] found the following factors led to higher costs for CLECs in providing access services:

- CLECs use optimally efficient state-of-the-art facilities;
- CLECs experience lower levels of utilization for switching and transport facilities;
- Long Distance Traffic is a much more significant cost driver for CLECs;
- CLECs tend to serve a sparse customer base and CLEC customers tend to be located at a greater distance from CLEC switching facilities.

If the Commission adopts a benchmark, the Commission must account for these higher CLEC costs. Failure to do so will increase the already substantial barriers that CLECs face as they struggle to gain a foothold in local markets.

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[13] CC Docket No. 96-262, Public Notice (December 7, 2000) ("December 7 Notice") at ¶ 4 (citing Access Charge Reform, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 CC Rcd 14221, 14343, ¶ 244 (1999).

[14] *See* ICC Report.

A. CLECs Incur Higher Costs Because Of The Customer Bases And Geographic Areas That They Inherently Serve.

As the Commission has observed, CLECs have much smaller customer bases over which to spread costs than those of ILECs with their established operations and large numbers of customers.[15] According to data available as of June 30, 2000, ILECs serve the vast majority of local telephone lines, with CLECs serving only 6.7% of such lines.[16] CLEC access rates can be expected to decline as competition develops and CLECs gain greater volumes of traffic over which costs can be spread. In the meantime, however, the simple fact is that CLECs have far fewer "access minutes" over which to spread their costs. Any benchmark adopted by the Commission should reflect this reality of the market as it exists today and will likely continue to exist into the foreseeable future.

CLECs also experience higher costs because of the density of their customer bases in a given market. Although most CLECs have focused on more dense urban areas, CLECs have only begun to make inroads into these markets. The typical CLEC customer base in any given urban area constitutes only a fraction of the customer base of the ILEC serving the same area. Thus, CLEC customers, even in urban areas, tend to be distributed at a density rate comparable to that of an ILEC that serves a suburban or rural area. It is well established that ILECs experience higher costs when serving customers in less densely populated areas. Similarly, CLECs, with their more widely distributed customer bases even in urban areas, experience higher costs than ILECs serving the same areas. Any benchmark adopted by the Commission

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[15] December 7 Notice at ¶ 4.

[16] Local Telephone Competition: Status as of June 30, 2000, Industry Analysis Division, Common Carrier Bureau, (rel. Dec. 4, 2000) ("*FCC 2000 Local Competition Report*").

should be based on these facts, and not mere assumptions put forward by ILECs, regarding the density of the geographic areas served by CLECs.

The Commission's benchmark should also take into account the fact that CLECs are gaining an increasing number of lines in smaller, more remote suburban and rural markets. The Commission's most recent Local Competition Report shows that 54% of all Zip Codes are now served by at least one CLEC.[17] As detailed more below, CLECs that target these smaller markets face higher costs for many of the same reasons that ILECs do, yet CLECs are less likely in the initial stages of entry to have a substantial lower-cost urban customer base over which to spread these higher costs. The benchmark therefore should not be based on an inaccurate assumption that all CLECs only "cherry pick" from downtown metropolitan areas. A benchmark based on such an assumption would result in under-recovery of CLEC costs and would impede the development of competition in under-served non-urban markets. And as detailed below, the Commission should establish a complete exemption from the benchmark for carriers focused on serving rural areas.

B. ILECs Enjoy Cost Advantages That Are Not Currently Available To CLECs Because Of Differences In Their Respective Networks And Facilities.

The higher costs associated with CLECs' smaller and more disperse customer bases are compounded by differences in CLECs' and ILECs' networks and facilities. Because of these differences, ILECs enjoy substantial economies of scope and scale that are not available to CLECs in the early stages of competition. For example, as CLECs enter a particular market they typically deploy fewer switches than ILECs have deployed to serve the same geographic area. CLECs' network configurations thus typically require more "backhauling" of traffic to and from

[17] FCC 2000 Local Competition Report, Table 9.

switching facilities, resulting in higher transport costs. The Commission has correctly observed that any efficiencies to be gained from these CLEC network characteristics do not enable CLECs to achieve scale economies comparable to those enjoyed by ILECs.[18] These same network characteristics result in higher traffic-sensitive costs to perform many of the functions performed by ILEC Class 5 switches, which reflect mostly non-traffic sensitive costs. CLECs therefore must recover a greater portion of their costs through usage-sensitive charges.

Because CLECs are in the initial stages of entry, their switching and transport facilities are underutilized, further contributing to their higher usage-sensitive costs. The ICC noted that CLECs typically purchase large switches capable of serving tens of thousands of customers and SONET facilities capable of carrying large amounts of traffic.[19] As the report noted, however:

> most CLECs must place these facilities substantially before they are able to acquire sufficient numbers of customers to achieve levels of utilization for which the facilities are designed. This means that over the ramp-up period, the utilization of CLEC facilities is substantially below full capacity. This situation contrasts sharply with that of the ILECs. Often, when an ILEC places a new digital switch, the company does so to replace an old analog switch that is already serving a large amount of customers.[20]

Thus, "even though CLECs may employ optimally efficient, state-of-the-art facilities, they are likely to experience average utilization rates – over the economic life of the facilities – below those enjoyed by the larger ILECs."[21]

The rate structures and networks of ILECs and CLECs differ significantly too because the primary sources of their revenue differ. The ICC study observed the following in regard to the type of traffic flowing over their networks:

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18 *In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, FCC 99-238, at ¶ 279, fn. 551 (1999)("UNE Remand Order").

19 ICC Report at p. 8.

20 *Id.*

> [m]ost of the calls on the ILECs' networks are local in nature. Thus, the ILEC's network is largely designed to accommodate intra-office and interoffice on-net local calling. By contrast, CLECs have very little on-net calling. Most of their traffic is off-net, and much of its is long distance. As a result, the CLEC's network is designed to accommodate a much larger percentage of off-net, long distance calling. That is, originating and terminating long distance calls are a much more significant cost driver in the CLEC network than in the ILEC network.[22]

Independently of costs associated with particular network configurations, CLECs incur substantial costs as a direct result of their status as entrants into a market currently dominated by ILECs.[23] Coordinated cutover costs, for example, naturally fall disproportionately on CLECs as customers migrate from the ILECs to CLECs. Also, CLECs inherently experience higher costs when purchasing UNEs from ILECs because, under 47 U.S.C. § 252(d) and the Commission's TELRIC pricing rules, UNE prices include a component for ILEC profit. CLECs also incur substantial costs to collocate at the ILECs facilities – a cost advantage ILECs will continue to enjoy for as long as CLECs remain dependent on the ILECs' loop plant to provide connectivity to end users. CLECs can also be expected to incur higher costs when purchasing their own equipment because they do not enjoy high volume discounts that are available to ILECs. The disparities in CLEC and ILEC costs described above will likely diminish over time as CLECs build upon their initial footholds into local markets, allowing them to realize economies and scopes of scale that established ILECs currently enjoy. In the meantime, however, any benchmark adopted by the Commission should reflect the fact that these differences cause CLECs to incur significantly higher costs.

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21 *Id.* at p. 9.

22 ICC Report at p. 9.

23 UNE Remand Order at ¶¶263-266.

C. The Commission's Access Rules Allow ILECs To Recover Greater Access Costs With Respect To Certain End Users

The 1997 Access Reform rules and the 2000 CALLS access rules provide a further economic advantage for ILECs in the recovery of access costs. Under these rules ILECs recover a substantial portion of their costs through monthly subscriber line charges ("SLCs") paid by end users rather than through per-minute charges paid by IXCs. The SLCs paid by multi-line business end users are significantly higher than those paid by single-line business and residential end users.[24] CLECs that serve primarily residential customers are not able to recover the higher revenues associated with the multiline SLC charge that is available to ILECs. Any benchmark adopted by the Commission should account for this disparity so that CLECs who focus on providing service to under-served residential markets are not penalized.

D. CLECs Incur Substantial "Hidden" Costs Resulting From Anti-Competitive ILEC Practices

In addition to the higher costs described above, CLECs also incur substantial costs resulting from anti-competitive practices, whether intentional or not, by the ILECs on whom CLECs depend for critical services and facilities. These costs come in the form of missed revenue opportunities resulting from installation delays and poor service quality, inflated charges, and other performance-related failures and inequities. These cost are largely unquantifiable but nonetheless real, as shown by comments in various proceedings to consider ILEC requests for authority to provide in-region, interLATA service under 47 U.S.C. § 271. In adopting a benchmark, the Commission should take into account that these costs represent a significant difference in the amounts that CLECs and ILECs must recover through their respective access charges.

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[24] *See Pricing Flexibility Order*, ¶ 193; Access Charge Reform, CC Docket No. 96-262, Sixth Report and Order, FCC 00-193, ¶ 72 (rel. May 31, 2000).

IV. THE COMMISSION SHOULD ESTABLISH A "RURAL EXEMPTION" TO ANY BENCHMARK GOVERNING CLEC INTERSTATE ACCESS CHARGES

A. The Need for a Rural Exemption

If the Commission decides to adopt a benchmark for CLEC access charges, it should also adopt an exemption for CLECs operating in rural and high cost areas. This is true even if the Commission's benchmark is set well above ILEC rates. As the Commission, Congress and virtually all participants in the telecommunications industry have recognized there are, in general, significant cost differences in the provision of service between urban, highly populated areas and rural, less populated areas. While the Commenters have concerns in general about the adoption of a benchmark applicable to competitive carriers, application of such a benchmark would be particularly harmful to competitive carriers like BayRing and Lightship that provide service in rural areas.

The Commission already has received ample evidence in this proceeding demonstrating that CLECs often face higher costs in the provision of access service than other local exchange carriers.[25] When these factors are considered in the context of CLECs providing service in rural and high cost areas, it becomes even clearer that CLECs will face even higher costs in providing such service. Therefore, any benchmarks established by the Commission should not be applicable to CLECs serving rural areas.

B. Optimal Facilities

In the ICC report noted above, the FCC found that CLECs generally deploy "state-of-the-art, optimally efficient facilities."[26] This is critical, because, unlike ILECs and independent

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[25] CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, Comments of Allegiance Telecom, Inc. at pp. 12-16 (October 29, 1999)("Allegiance Comments"); Focal/ Adelphia Comments at pp. 17; Reply Comments of the Association for Local Telecommunications Services at pp. 6-12 (October 29, 1999)("ALTS Reply Comments").

[26] ICC Report at p. 8.

telephone companies, CLECs do not restrict deployment and use of such facilities to their most populous areas. The Rural Independent Competitive Alliance recently released a survey of its members that provide competitive local exchange service in rural areas. The survey found that rural CLECs were bringing new services and technologies into rural markets.[27] For instance, they were providing such services as Caller ID, voice mail, video programming and broadband connections for the first time in many of their service areas. In the case of the Commenters, not only are they bringing these new services to their markets more quickly than the ILECs, but the services offered are higher quality and less expensive than those of the ILECs.

The introduction of these services into historically underserved areas is clearly in the public interest, but it comes at a price. CLECs have spent over $140 million to improve service in rural America and 79% are providing service via overbuild strategies that supplement the ILEC's deployment. Thus, in many cases it is CLECs that are fulfilling the wishes of the Commission and Congress to extend new telecommunications services into rural areas.

While the deployment of state-of-the-art facilities is expensive, the cost is even greater in rural and other high cost areas given the higher cost of loops.[28] On average, the RICA members spent $6.3 million on capital investments. Yet RICA members are unable to recoup these costs the way ILECs do. The average ILEC participating in NECA's tariffs receives $5.57 per month per access line in explicit universal service subsidies to compensate it for higher loop costs.[29] Only 29% of RICA's members receive USF subsidies so they are clearly much more dependent on access charges to recover the costs of their facilities.[30] Therefore, deployment in rural areas

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27 CC Docket No. 96-262, Summary of *Ex Parte Meeting of Rural Independent Competitive Alliance,* Member Survey Report at p. 2 ("RICA Report").

28 ALTS Reply Comments at p. 11.

29 *Id.*

30 RICA Report at p. 9.

will be frustrated if CLECs are not allowed to recover some of the cost of such facilities through access charges.

The deployment of state-of-the-art facilities and the introduction of new services into underserved rural areas are positive developments that need to be encouraged. A thriving rural market will benefit all concerned including interexchange carriers. For this development to continue, CLECs need to be able to recover the cost of these facilities from all who use them. Unfortunately 60% of the RICA members have experienced problems with long distance carriers refusing service to their customers. Some IXCs are withholding payment from rural CLECs.[31] The real loser in this situation are the rural customers who will find their hopes of competitive and innovative local exchange service being held ransom by long distance carriers who do not want to reimburse CLECs for use of their network.

C. Utilization Rates for Facilities

As noted above, CLECs experience low utilization rates for their facilities. This situation is only heightened for CLECs in rural areas where there is an even smaller pool of customers from which the CLECs can draw to recover the costs of these facilities. As RICA notes:

> These costs [of providing access service] are typically higher on a per-unit basis than incumbent access rates because the costs are spread over a smaller customer base. Further, these charges are based on recent investment in modern facilities built to compete with obsolete and fully depreciated plant of the incumbents.[32]

Thus, CLECs operating in rural areas need higher access charges to be able to recover the increased costs they face.

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[31] RICA Report at p. 4.

[32] CC Docket Nos. 96-262 & 97-146, Comments of the Rural Independent Competitive Alliance at p. 3 (July 12, 2000)("RICA Comments").

D. Long Distance Traffic on CLEC Networks

In rural areas, the prevalence of long distance traffic is even greater as CLECs generally do not have facilities in most local calling areas. Therefore, much of the traffic is interexchange in nature. Thus, long distance traffic is an even greater cost driver on CLEC networks in rural areas.

E. Spare Customer Bases/Distance from CLEC Switches

As noted above, even when CLECs operate in urban areas with high population densities, the CLECs will not have the dense customer bases that ILECs operating in those areas will have. Instead, their customers will be spread throughout the region and the CLEC will serve a fraction of the customers in the region. Thus, even in densely populated areas, CLEC customers tend to be located at substantial distances from the CLEC's serving central office.[33]

In rural areas with lower population densities, CLEC customers will be even more spread out. CLECs operating in those areas will likely have customers that are located at even larger distances from their switches. As a result, CLECs will have to incur higher transport costs to service these customers.

The ICC Report when considering these factors in the context of CLECs providing service in predominantly urban areas determined that the factors when considered "individually, but certainly in combination – suggest that switched access charges for some CLECs could be in excess for those for the ILECs." As we have demonstrated, when one considers these factors in the context of CLECs providing service in rural areas, one can see how the costs of providing access service are even greater. If the Commission does adopt a benchmark for CLEC access charges it will need to craft an exemption for those CLECs providing service in rural and other

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[33] *Id.*

high cost areas. The Commission has unequivocally stated its intent to have access charges reflect the costs of providing access service.[34] The Commission needs to recognize the higher costs that CLECs operating in rural markets face and allow for these CLECs to recover these higher costs through higher rates for access service.

F. Defining the Rural Exemption

The Commission and other parties have put forth a number of possible definitions of "rural" for the purposes of an exemption. As detailed below, the Commenters believe that there are problems with all of those definitions. Instead, BayRing and Lightship urge the Commission to adopt a definition that is: 1) simple to administer; 2) will not result in a constant reanalysis of whether a competitive carrier satisfies the exemption; and 3) is broad enough to satisfy the purpose of the exemption, which is to ensure that CLECs providing service in rural areas do not constantly encounter the illegal self-help actions that have been so prevalent by IXCs during the past few years.

For these reasons, BayRing and Lightship advocate adoption of a rural exemption that applies to interstate access charges with respect to any customer outside the density zone 1 of the top 50 Metropolitan Statistical Areas ("MSAs").[35] This definition is appropriate because it would be easy to administer and because it reflects the factors that influence the cost of providing access service by CLECs. As noted in the previous section, a CLEC's costs for providing access service are affected by the location of its facilities vis-à-vis its customer base.

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[34] *In the Matter of Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition for U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket Nos. 96-262, 94-1, CCB/CPD File No. 98-63, and CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, FCC 99-206, at p. 4 (August 27, 1999)("*Pricing Flexibility Order*").

[35] An MSA is made up of a county or group of contiguous counties surrounding a city with a population of 50,000 or more. *See* UNE Remand Order at ¶ 279, fn. 551. In cases where several Primary Metropolitan Statistical

The Commission has previously determined that most of the CLEC switches are located within the density zone 1 of the top 50 MSAs.[36] Approximately 61% of all requesting carrier switches have been deployed in these areas and 96% of the top 50 MSAs have four or more switches.[37] This also is the area where most CLEC lines are located.[38] Thus, CLECs outside of major metropolitan areas will have higher costs because they will enjoy lower utilization rates and longer distances from end user locations to the switches. It is when CLECs provide service outside the density zone 1 of the top 50 MSAs that they experience higher costs. Of course, all CLECs, including those in major metropolitan areas, experience higher costs that justify higher than ILEC rates for all the reasons discussed above.[39]

G. Problems With Other Definitions

1. Sprint Definition

Sprint proposes that rural areas be defined as areas outside of Metropolitan Statistical Areas. To qualify for an exemption: (i) a CLEC could only operate in rural areas and would not qualify if it also offered service within an MSA; (ii) a CLEC would have to be competing with ILECs that offer service in both rural and non-rural areas of the state; (iii) a CLEC would have to make its services available to all customers in its service area rather than limit such service to business customers or customers in towns within the area.[40]

Sprint is correct in using the MSA as the applicable definitional boundary, but its exceptions virtually swallow the definition. Sprint is seeking to limit use of the exemption to all

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Areas are combined to create a Consolidated MSA, the Commission treats the individual PMSAs as MSAs in determining the top 50 MSAs.

36 UNE Remand Order at ¶ 285.

37 *Id.* at ¶ 280.

38 *See,* UNE Remand Order, ¶ 281, fn. 557.

39 UNE Remand Order at ¶ 287.

40 CC Docket No. 96-262, *Ex Parte Presentation of Sprint Corporation* at pp. 1-2 (October 11, 2000).