In short, the CALLS rate plan is more of a shell game that allows ILECs offset revenue losses from lower switched access rates from other sources. Since the plan is revenue neutral, and may even increase revenues for price cap ILECs, price cap ILECs can sustain proposed target switching rates indefinitely, even if they are below incremental cost.[41] It has already been demonstrated in this proceeding that CLEC and ILEC cost structures are different and that CLECs face higher costs in providing access service than ILECs.[42] It has been also noted that CLEC cost structures are further removed from those of larger ILECs and that a more applicable point of comparison is those of the smaller rural ILECs.[43] Thus, it would be highly inappropriate to use the CALLS access rates as a basis for any benchmark for CLEC access rates. There is no way CLECs could recover their costs if such an approach is used.

3. CLEC Access Costs Are More Traffic Sensitive

The Commission has stated that one of its primary goals in regard to access charges is to better align rate structure with the manner in which costs are incurred.[44] Thus, the Commission observes that "non-traffic sensitive costs should be recovered through fixed, flat-rated fees," and "traffic sensitive costs should be recovered through corresponding per-minute access rates."[45] The Commission has determined that such an approach is consistent with principles of cost-causation and promotes economic efficiency.[46]

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41 Focal/ALTS Petition at p. 13.

42 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"); Comments of Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions at pp. 17 (October 29, 2000)("Focal/Adelphia Comments"); Reply Comments of the Association for Local Telecommunications Services at pp. 6-12 (October 29, 1999)("ALTS Reply Comments").

43 ICC Report at p. 11.

44 *CALLS Order* at ¶ 18.

45 *CALLS Order* at ¶ 12.

46 *Id.*

Based on its conclusion that loop costs are mainly incurred by local exchange carriers and their end users, the Commission has subscribed to the CALLS proposal of recovering a greater proportion of such costs through the flat-rated SLC as opposed to the per minute PICC and CCL.[47] The Commission deemed that this furthers its goal of "having price cap LECs recover a large share of their NTS common line costs from end users who cause them instead of carriers, and to recover these costs on a flat-rated, rather than usage sensitive basis."[48]

The costs of providing access for CLECs, however, are more traffic and usage sensitive that that for large ILECs. As the ICC Report noted:

> [g]iven that a large portion of the non-traffic sensitive costs of a switch stems from the line-side of a switch, a larger portion of the CLEC switching costs may be traffic sensitive (TS). The percentage of TS costs in originating and terminating long distance calls may be further increased due to the fact that, as discussed, the CLEC's forward-looking, state-of-the-art networks substitute additional transport facilities, with usage sensitive costs, for switching facilities. Thus, compared to the ILECs, the CLECs will have a greater ratio of TS-to-NTS costs.[49]

This is reflected in the CLEC access pricing regime where the majority of the CLEC access charges are per-minute charges and they do not rely on flat-rated charges such as the SLC.[50] Based on the Commission's cost recovery principles, CLECs must rely on per minute access charges to recover their costs and any benchmark based on the CALLS proposal's focus on lowering per minute, usage sensitive charges would be inapposite to the cost recovery needs of the CLECs. The ICC Report also noted that long distance traffic is a more significant cost driver for CLECs than ILECs because more of the traffic on CLEC networks is toll traffic.[51]

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47 *CALLS Order* at ¶ 31.
48 *Id.* at ¶ 76.
49 ICC Report at p. 10.
50 *Federal-State Joint Board on Universal Service*, CC Docket No. 96-45, Report and Order, FCC 97-157, ¶ 365 (1997); Focal/Adelphia Comments at p. 10.
51 ICC Report at p. 9.

Thus, at least as far as CLEC access costs are concerned, the primary cost causer is the long distance carrier and interexchange calls. CLECs then need to utilize an access cost recovery mechanism premised on per-minute traffic sensitive charges. Using the CALLS approach as any type of benchmark for CLEC access rates would not reflect the way in which CLEC access costs are incurred.

4. The Need for CLEC Involvement In Any Negotiated Industry Consensus

As noted, the essential justification for the CALLS plan is that it reflected a negotiated industry consensus. While in fact there was no consensus, nor did the Commission establish any procedures for conducting negotiations that could make negotiated rates and rule changes lawful, CLEC rates were not the subject of those negotiations. Nor did CLECs participate in those negotiations. Therefore, any justification of CALLS rates that they are lawful and reasonable for ILECs because they were negotiated by some ILECs and IXCs may not simply be lifted from that context and applied to CLECs. This would egregiously compound the evident substantive and procedural errors reflected in the *CALLS Order*. Accordingly, the Commission may not use price cap ILEC rates established in the *CALLS Order* as the basis for establishing any benchmark for CLECs, even if CALLS rates were otherwise lawful, which they are not for all the reasons stated above. 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.

IV. CLECS EXPERIENCE HIGHER COSTS THAT JUSTIFY A HIGHER BENCHMARK

The evidence elicited in this proceeding indicates that CLECs often face higher costs in the provision of access service than other local exchange carriers.[52] In the record of this proceeding, it has been demonstrated that the following factors lead to higher costs for CLECs in providing access services:

- 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.[53]

Thus, any benchmark instituted should reflect the fact that CLECs generally face higher costs in providing access service than ILECs,[54] and should allow for a benchmark rate that it higher than the corresponding ILEC rate.

Utilization Rates for Facilities. CLECs typically purchase large switches capable of serving tens of thousands of customers and SONET facilities capable of carrying large amounts of traffic.[55] As has been noted, however:

> [m]ost 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

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[52] 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"); Comments of Focal Communications Corporation and Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions at pp. 17 (October 29, 2000)("Focal/Adelphia Comments"); Reply Comments of the Association for Local Telecommunications Services at pp. 6-12 (October 29, 1999)("ALTS Reply Comments").

[53] ALTS Reply Comments, 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"); *see also White Paper 2* at p. 32.

[54] Any benchmark established should be set well above ILEC rates. *See* Allegiance Comments at p. 12.

[55] ICC Report at p. 8.

> digital switch, the company does so to replace an old analog switch that is already serving a large amount of customers.[56]

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."[57] Further,

> [t]hese 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.[58]

Thus, CLECs will need higher access charges to be able to recover the increased costs they face.[59]

Long Distance Traffic on CLEC Networks. Evidence submitted in the record of this proceeding shows that:

> [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.[60]

Thus, since long distance traffic will be an even greater cost driver on CLEC networks, CLEC costs and revenues will be even more dependent on access charges than those of the ILECs.[61]

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56 ICC Report at p. 8.

57 *Id.* at p. 9.

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

59 Rates for ILECs are premised on the assumption that they will be able to fully recover costs of facilities over a number of years. This produces lower rates. Holding CLECs to the same standard would discourage investment by CLECs and hinder the development of facilities based competition. Allegiance Comments at p. 16.

60 ICC Report at p. 9.

61 *White Paper 2* at p. 30.

Spare Customer Bases/Distance from CLEC Switches. 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 out throughout the region and the CLEC will serve a fraction of the customers in the region. It has been noted that "if the CLEC's customer base is expressed on a customer-per-square-mile basis, it is sparse relative to that of the urban LECs."[62] Thus, even in densely populated areas, CLEC customers tend to be located at substantial distances from the CLEC's serving central office.[63] CLECs will have to incur higher transport costs to service these customers.

These factors show that when considered "individually, but certainly in combination.... suggest that switched access charges for some CLECs could be in excess for those for the ILECs."[64] The Commission has stated its intent to have access charges be more reflective of the costs of providing access service.[65] The Commission needs to recognize the higher costs that CLECs face and allow for these CLECs to recover these higher costs through higher rates for access service.

It is illuminating to note that the many commenters have 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

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62 ICC Report at p. 9.

63 *Id.*

64 ICC Report at p. 10.

65 *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*").

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.[66]

Another commenter observed that:

And while CLECs operating in urban markets may have cost characteristics more comparable to those of ILECs operating in rural areas in a number of respects, including those that result from smaller number of customers served, smaller service areas, lack of economies of scale, and reduced density of customers within the carrier's service area, the averaged ILEC rates in urban areas are still not suitable for use as a benchmark for CLECs operating in those areas. In fact, an ILEC's rate in an urban area is likely to be below startup CLEC costs in that area, even if the ILEC's rates are above the ILEC's cost of providing service there.[67]

Because of these factors, some CLECs have even suggested that the NECA rates might serve as a useful benchmark for CLEC access rates in urban areas.[68] The Commission should ensure that whatever benchmark it chooses reflects the higher costs of CLECs in providing access service. The higher costs described above will most likely be exacerbated for those CLECs that also operate in rural areas, and the Commission should allow for an exemption from the benchmark for those CLECs that provide service in rural or other high cost areas.

The Commission and other parties have put forth a number of possible definitions of "rural" for the purposes of an exemption. The Commenters believe that there are problems with

[66] ICC Report at p. 11.

all of those definitions and suggest that the Commission must adopt a definition that is 1) simple to administer;[69] 2) will not result in 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 competitive LECs providing service in rural areas do not constantly encounter the illegal self-help actions that have been so prevalent by interexchange carriers in the past few years.

For these reasons, we advocate that the Commission allow for a rural exemption that applies to interstate access charges with respect to any customer outside the top 50 Metropolitan Statistical Areas ("MSAs").[70] We find this definition to be appropriate because of its simplicity and ease of application. The simplicity of the definition is self-evident. The definition creates a bright line demarcation that will not engender disputes about application. It would be truly ironic that as this Commission is trying to reduce the definitional complexity that is the ILEC access charge regime that it would create a new monster for CLEC access charges. CLECs should be able to employ a simple demarcation between their access charges for rural/high-cost and non-rural/high cost areas.

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[67] Allegiance Comments at p. 15.

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

[69] The record does not support regulation of CLEC access charges. If, however, the Commission does decide to impose regulation on CLEC access charges, the regulations should be the least intrusive regulation possible. Focal/Adelphia Comments at p. 8.

[70] An MSA is made up of a county or group of contiguous counties surrounding a city with a population of 50,000 or more. *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").

V. CONCLUSION

The Commenters urge the Commission to be cautious in any "reform" that is made of CLEC access charges. There is no need to regulate CLEC access rates, but if any regulation is implemented it should be done with the purpose of ensuring CLEC recovery of their access costs and preserving interconnection between CLECs and IXCs as mandated by the Act. Any benchmark established should reflect the higher costs of CLECs in providing access service, and allow for CLECs operating in high cost areas to be eligible for an exemption.

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January 11, 2001

CERTIFICATE OF SERVICE

I, Harisha J. Bastiampillai do hereby certify that on this 11th day of January, 2001 the foregoing Comments of Focal Communications Corporation, RCN Telecom Services, Inc. and Winstar Communications, Inc. was delivered by hand and first class mail to the following:

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