

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

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

**Reply Comments of the
Ad Hoc Telecommunications Users Committee**

The Ad Hoc Telecommunications Users Committee (“the Committee” or “Ad Hoc”) hereby submits its reply to the comments filed in response to the Commission’s December 7, 2000 *Public Notice* seeking comment on establishing a rural exemption to benchmarked rates for CLEC access charges.¹ As described below, the Commission should not attempt in this proceeding to develop benchmarks that reflect detailed specifications of the particular cost and operational characteristics of every CLEC. Rather, the Commission need only

¹ *Public Notice*, “Common Carrier Bureau Seeks Additional Comment on Issues Related to CLEC Access Charge Reform,” DA 00-2751, CC Docket Nos. 96-262 and 97-146 (December 7, 2000) (“*Public Notice*”). By *Public Notice*, DA 00-2866 (December 20, 2000), the reply comment deadline was extended until January 26, 2001.

establish “rough cut” benchmarks that can be used to ensure continued service pending final determinations as to reasonable rate levels in procedurally appropriate proceedings such as formal complaints or rate investigations under Section 205 of the Act.

I. Background

The public interest is best served by a Commission approach to CLEC terminating access charges that achieves three policy objectives. First, competitive carriers should not be permitted to use the filing of tariffs and the filed tariff doctrine to unilaterally modify or abrogate their contractual obligations to their customers. Second, every telephone call placed in the United States should be delivered to the called party whenever technically possible. Third, providers of exchange access should not be permitted to exploit in an uneconomic and unreasonable fashion the fact that the party who chooses the terminating access provider does not bear the costs of terminating access.

In comments and reply comments filed earlier in this proceeding, Ad Hoc argued that CLEC access services should be subject to mandatory detariffing in order to ablate the pernicious effects of the filed tariff doctrine. In addition, in order to protect end users from service disruptions, Ad Hoc urged the Commission to require that IXCs deliver, and CLECs terminate, all calls delivered to the interexchange network, regardless of whether a negotiated access agreement is in place between the IXC and the terminating CLEC. Third, to prevent anti-competitive pricing by CLECs, Ad Hoc advocated a hierarchy of procedures and presumptions that would govern IXC payment of disputed CLEC access charges

pending resolution of the dispute. If a negotiated agreement were in place, then the terms of that agreement would govern the compensation paid by the IXC to the terminating CLEC. If no agreement were in place, the IXC would be required to pay the CLEC's terminating charges in exchange for the CLEC's completion of the call. If the IXC considered the CLEC's terminating access charges to be excessive, the IXC would have the right to recover some or all of these charges in a complaint proceeding or Section 205 rate investigation before the FCC. In either proceeding, the Commission would apply a presumption of reasonableness for any terminating access rate equal to or less than a benchmark defined as the ILEC-tariffed rate for that study area. If the CLEC's rates were to exceed the benchmark, the burden would be on the CLEC to demonstrate that the difference is reasonable.

II. Discussion

The *Public Notice* seeks additional information necessary to establish highly tailored benchmarks that reflect characteristics such as: the overall population density within a particular CLEC's service area; the density of the CLEC's customers within its service area; the presence of towns or incorporated villages within the CLEC's service area; the CLEC's status as an eligible telecommunications carrier for purposes of the universal service funding rules; whether the CLEC receives universal service funds; differences in population densities within a service area; the number and type of CLEC customers; and the volume of traffic generated (and received) by the CLEC's customers.²

² *Public Notice*, ¶¶5-7.

In short, the public notice seeks detailed factual information regarding the rates, costs, and operational characteristics unique to each CLEC.

By its nature, this approach to the development of benchmark rate levels could easily defeat the whole purpose of benchmarks. Given each CLEC's unique structural and operational characteristics, it is likely that their access cost structures will vary. Therefore, no benchmark would necessarily predict with precision the appropriate access charges for each of the nation's rural CLECs. Rather, as the Commission itself has observed in this proceeding, benchmarks are useful for determining whether a CLEC's rates are in a reasonable "ballpark" for purposes of procedural and evidentiary consequences.

The selection of a benchmark appropriate for these purposes is not the same as a determination that a particular rate is just and reasonable under Section 201. That determination must necessarily include an assessment of the particular cost and operational characteristics of an individual carrier and can only be made in a formal complaint or tariff investigation under Section 205, both of which allow the Commission and the carriers involved to assemble the detailed and carrier-specific factual record required to resolve their dispute. However, that level of detail and specificity, which the Commission appears to be seeking in the *Public Notice*, is not necessary to develop appropriate benchmarks, if the benchmarks are used for the purposes described below. Instead of pursuing greater (and unnecessary) precision in the establishment of benchmark levels, Ad Hoc urges the Commission to consider refinements in the process for using benchmark rates to resolve disputes between IXCs and CLECs.

In earlier pleadings, as described above, Ad Hoc advocated an approach to the use of benchmark rates that balanced: (1) the users' interest in ensuring that calls are completed; (2) the IXCs' interest in paying reasonable rates; and (3) the CLECs' interest in being compensated for the access services they provide. Under Ad Hoc's original approach, IXCs would be required to deliver calls to (and accept calls from) a CLEC and to pay the CLEC's rate, pursuing any challenge to that rate in a complaint proceeding. Thus, users would be protected from uncompleted calls and CLECs would be compensated for their services. In the complaint proceeding (or a Section 205 rate investigation if the Commission concluded one was warranted), benchmark rates set at the level of the ILEC competing with the CLEC in the same study area would establish presumptively reasonable rate levels for the CLEC. An IXC would be free to challenge those rates if it believed they were too high, but the CLEC would bear the burden of justifying rates above the benchmark. Thus, IXCs would be protected from unreasonable rates.

In light of the support for a benchmark approach which has emerged in the record,³ and the factual differences among CLECs highlighted by the Commission in the *Public Notice*, Ad Hoc has concluded that it can refine the approach it advocated originally to better balance the competing interests and reflect differences among CLECs. First, in the absence of a negotiated access agreement, benchmark rates—not rates set unilaterally by the CLEC—should be used to determine the amount IXCs must pay pending resolution of any formal

proceeding challenging the reasonableness of the CLEC's rates. By requiring IXCs to pay benchmark rates pending resolution of a dispute in a procedurally appropriate setting, the refined approach protects the user's interest in having calls completed; protects IXCs from any incentive CLECs might have to overcharge pending final resolution of a dispute; and protects the CLEC's revenue stream. Second, the benchmark rate should be the rate charged by the ILEC in the CLEC's serving area and not the rate of any other ILEC who may provide service in the study area in which the serving area is situated. Serving areas, rather than study areas, will better reflect the conditions facing CLECs who operate in rural areas and any geographic and population density differences with other ILECs.

III. Conclusion

Requiring a high level of detail and precision for benchmark rates would be unrealistic and counterproductive. In light of the purposes for which benchmark rates would be used, the Commission need not fine-tune its calculation of benchmark rates to incorporate the detailed specifics of a CLEC's rates, costs, and operating characteristics. Pending resolution of challenges to a CLEC's rates, and the development of a factual record in a formal complaint or Section 205 rate

³ See, e.g. Rural Independent Competitive Alliance Comments at 4; Organization for the Promotion and Advancement of Small Telephone Companies Comments at 3-4; Minnesota CLEC Consortium Comments at 2-3.

investigation, rates benchmarked to those of the ILEC in a CLEC's serving area can adequately balance the interests of users, IXCs, and CLECs.

Respectfully submitted,

Ad Hoc Telecommunications
Users Committee



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