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January 26, 2001

## VIA COURIER

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Federal Communications Commission  
445 Twelfth Street, S.W.  
Room TW-A325  
Washington, D.C. 20554

RECEIVED

JAN 26 2001

FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

Re: *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, CC Docket Nos. 96-262 and 94-1, and CCB/CPD File No. 98-63*

Dear Ms. Salas:

Enclosed for filing in the above-referenced proceeding pursuant to the Commission's December 7, 2000 Public Notice Requesting Comments are an original, and eight paper copies, of the Reply Comments of Focal Communications Corporation and Winstar Communications, Inc.

Please date stamp and return the enclosed extra copy of this filing in the self-addressed, postage prepaid envelope provided. Should you have any questions concerning this filing, please do not hesitate to call us.

Respectfully submitted,



Harisha J. Bastiampillai

Enclosures

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

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In the Matter of )  
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Access Charge Reform )  
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Price Cap Performance Review )  
For Local Exchange Carriers )  
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Interexchange Carrier Purchases of )  
Switched Access Services Offered by )  
Competitive Local Exchange Carriers )

JAN 26 2001

CC Docket No. 96-~~96~~ FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

CC Docket No. 94-1

CCB/CPD File No. 98-63

**REPLY COMMENTS OF  
FOCAL COMMUNICATIONS CORPORATION  
AND WINSTAR COMMUNICATIONS, INC.**

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January 26, 2001

## SUMMARY

The record of this proceeding, which now stretches to a length of almost two years, has not demonstrated that there is the crisis in regard to competitive local exchange carrier (“CLEC”) access charges that the major interexchange carriers (“IXCs”) allege. In fact, the record does not demonstrate any reason to deviate from the *status quo* in regard to how CLEC access charges are regulated. The vast majority of CLEC access charges are within a reasonable range, and any charges that may fall outside a range that may be deemed reasonable, can easily be addressed through the normal enforcement process such as Section 208 proceedings. The various surveys of CLEC access charges that this proceeding has produced demonstrates that most CLEC access charges are not excessive and fall within the range one would expect given the higher costs that CLECs face in providing access service. The IXCs concede that whatever problem they perceive there to be is limited to a minority of CLECs.

The IXCs, of course, continue to make their unilateral and unsubstantiated assertions that CLEC access charges are excessive, but they do not support these claims with the facts. Instead, the IXCs rely on inapposite comparisons of CLEC and incumbent local exchange carrier (“ILEC”) per minute access charge rates without considering differences between CLEC and ILEC access cost recovery mechanisms, and other sources of ILEC access cost recovery. Instead of taking them time to properly compare CLEC and ILEC access charge pricing and to consider cost differentials between the two systems, the IXCs instead invoke faulty economic arguments to support their claims.

For instance, Sprint argues that CLECs should effectively just “grin and bear” these higher costs of doing business much the way Sprint had to in the nascent days of long distance

competition. What Sprint fails to consider is that CLECs are already bearing costs and incurring losses as they attempt to deploy their networks and provide state-of-the-art competitive services to end users. In short, CLECs are experiencing the same growing pains that Sprint and MCI did a couple decades ago. The issue here, however, is not about bearing losses in regard to providing service to end users, but being compensated for use of one's network by another carrier. The Commission and the Act has ensured that carriers are compensated for such costs, and Sprint and MCI both relied on this cost recovery from carriers reselling service on their network to finance their own network deployments. Thus, CLECs are simply seeking the recovery of the costs of other carriers using their network to originate and terminate long distance calls. There is no question that CLECs are entitled to such a recovery.

The marketplace works to ensure that CLEC cost recovery is reasonable. If an IXC is dissatisfied with the particular rate a CLEC may charge, it can attempt to negotiate lower rates. If this fails, the IXC can file a complaint. IXCs have been availing themselves of both of these options. The IXCs, however, are seeking a pronouncement from this Commission that all CLEC access charge rates above ILEC access charge rates are unreasonable and should be subject to a limiting benchmark. The Commission has previously declined to make such categorical pronouncements recognizing that CLEC costs may exceed ILEC costs. The Commission should adhere to this approach and require IXCs to demonstrate that a particular CLEC's access charges are unreasonable. A Section 208 proceeding provides the best forum for this issue to be properly addressed. In such a forum, facts and evidence, as opposed to unsubstantiated rhetoric, govern.

There is no reason to disrupt the *status quo*. If, however, the Commission feels that a benchmark is necessary, the Commenters believe that Commission-sponsored negotiations might form a suitable approach to resolving regulatory issues concerning CLEC interstate access

charges. In this regard, Commenters support the ALTS GREAT proposal. Regardless of what action it takes on the benchmark issue, the Commission should curtail the IXCs' "self-help" remedies of blocking calls, refusing to accept new primary interexchange carrier designations from certain CLECs, and refusing to pay certain access charges. These actions circumvent statutory provisions and make IXCs, and not the Commission, the ultimate arbiter of what rates are just and reasonable.

Perhaps the ultimate evidence of the lack of a crisis, and the lack of a need for IXCs to engage in self-help procedures, is the thriving nature of the long distance industry. The Commission's latest report on the long distance industry shows that IXC revenues increased \$3 billion in 1999, and the three major IXCs control 75% of the market.<sup>1</sup> Thus, far from IXC revenues suffering, and long distance usage declining, the long distance market is expanding. The evidence also shows that CLEC access charges are migrating downwards, not upwards. The record of this proceeding shows the marketplace is working to police the situation and the Commission should be cautious in undertaking any action that would further regulate CLEC access charges.

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<sup>1</sup> *FCC's Latest Report on long distance industry*, Communications Daily, Vol. 21, No. 17 at p. 7 (Jan. 25, 2001).

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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
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

**REPLY COMMENTS OF  
FOCAL COMMUNICATIONS CORPORATION  
AND WINSTAR COMMUNICATIONS, INC.**

Focal Communications Corporation (“Focal”) and Winstar Communications, Inc. (“Winstar”)(hereinafter collectively “Commenters”) submit these reply comments in response to the Commission’s request in the Public Notice dated December 7, 2000.

**I. INITIAL COMMENTS DO NOT DEMONSTRATE A NEED FOR REFORM OF CLEC INTERSTATE ACCESS CHARGES**

**A. CLEC Access Charges Are Reasonable**

The clamor for “reform” of CLEC access charges comes primarily from one industry segment, the major interexchange carriers, and even within that group, primarily from AT&T and Sprint.<sup>2</sup> However, it is telling that AT&T admits, by its own estimation, that only 12% of CLECs are charging switched access charge rates higher than the

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<sup>2</sup> WorldCom, Inc. has changed its position and now feels a benchmark is appropriate based on the actions of some CLECs, but its position is much less strident that that of AT&T and Sprint. See, CC Docket No. 96-262, Further Comments of WorldCom, Inc. (January 11, 2001)(“*WorldCom Comments*”).

corresponding incumbent local exchange carrier (“ILEC”) rate.<sup>3</sup> Only 10% of CLECs are charging access rates higher than 2.5 cents per minute of use (“MOU”) and only 6% charge more than 5.0 cents per MOU.<sup>4</sup> The 5 cent per minute figure is a significant one because this is believed to be the rate that AT&T and WorldCom have negotiated with certain CLECs for switched access charges on a long-term basis.<sup>5</sup> The 5 cent figure also falls within the range of what smaller ILECs charge.<sup>6</sup> As Commenters demonstrated in their initial comments, the rates of the smaller ILECs, such as the NECA companies and independents, are a better point of comparison for CLECs as a NECA company cost structure is more reflective of CLEC cost structure.<sup>7</sup> The average rate for originating and terminating switched access of the CLECs that participated in the survey conducted by ALTS was 4.27 cents per minute.<sup>8</sup>

Far from showing CLEC access rates running out of control, the record, therefore, demonstrates that the vast majority of CLECs’ access charges fall within the range that one would have predicted their costs would produce. It has been argued that CLEC costs

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<sup>3</sup> CC Docket Nos. 96-262 and 97-146 and CCB/CPD File No. 98-63, AT&T Additional Comments at p. 7 (January 11, 2001)(“*AT&T Comments*”).

<sup>4</sup> *Id.*

<sup>5</sup> CC Docket Nos. 96-262 and 97-146, *Ex Parte Filing* of Focal Communications Corporation at p. 1 (Sept. 29, 2000)(“*Focal Ex Parte*”) citing, RBC Dominion Securities, *Switched Access Revenues Will Probably Become the Next CLEC “Overhang” Issue, But We Believe Concerns in Many Cases are Unwarranted*, at p. 5 (Aug. 24, 2000)(“*RBC Report*”).

<sup>6</sup> *RBC Report* at p. 2 (Smaller independent LECs who are collectively represented by NECA tend to have access charges in the 4.5cent to 8 cent per minute range).

<sup>7</sup> CC Docket Nos. 96-262 and 97-146 and CCB/CPD File No. 98-63, Comments of Focal Communications Corporation, RCN Telecom Services, Inc. and Winstar Communications, Inc., at pp. 24-25 (January 11, 2001)(“*Initial Comments*”).

<sup>8</sup> CC Docket Nos. 96-262 and 97-146, Comments of the Association Local Telecommunications Services at p. 7 (January 11, 2001)(“*ALTS Comments*”).

for providing access service are in the same range as those of smaller ILECs and their charges reflect this fact. There has been no demonstration that the rates charged by the vast majority of CLECs are excessive or unreasonable. There has been no demonstration that these rates are not reflective of the costs that CLECs face. In fact, there is nothing to support IXC claims that CLEC access charge rates are excessive or unreasonable other than mere IXC assertions that they are. The Commission just last summer rejected such unsubstantiated assertions in a complaint filed by Sprint against MGC Communications, Inc.<sup>9</sup> In that proceeding, Sprint filed a Section 208 complaint against a CLEC that had a 7.7 cent per minute rate for switched access. Sprint asked the Commission to create a *per se* rule that any CLEC access charge rate above the corresponding ILEC rate would violate Section 201(b) of the Act. The Commission rejected this reasoning holding:

[r]elying as it does, solely on the competing ILEC rate as a benchmark for what is just and reasonable, Sprint has failed to meet its burden in this action. We 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). Nothing in the Commission's existing rules or orders supports Sprint's legal position. In particular, Sprint's reliance on our access charge reform order is misplaced. There, we noted only that CLEC terminating access rates higher than the competing ILEC rates "may suggest" that the CLEC rates are excessive; in no way did we announce a *per se* rule of the sort for which Sprint now contends. As a CLEC, MGC is not subject to our part 69 access-charge rules, nor is it required to file tariffs under part 61 of our rules. Indeed, *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.* None of the rate-making decisions that Sprint cites is to the contrary.<sup>10</sup> (emphasis added).

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<sup>9</sup> *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, File No. EB-00-MD-002, Memorandum Opinion and Order, FCC 00-206, 2000 WL 732918 ( June 2000)("Sprint Order).

<sup>10</sup> *Id.* at ¶ 6.

IXCs are now trying to achieve in a broader proceeding what Sprint could not obtain in a fact-specific complaint. None of the IXCs have been able to establish that the rates charged by the majority of CLECs is unreasonable or not reflective of costs. The IXCs cannot arbitrarily determine what they believe is an appropriate rate and then ask this Commission to base a benchmark on that rate. Of course, it is ironic that the rates charged by affiliates of the major IXCs for switched access substantially exceed the proposed ceiling of the major IXCs.<sup>11</sup> It is completely disingenuous for these IXCs to criticize CLEC access charges when the charges assessed by their affiliates are at the same level or much higher.

AT&T admits that to the extent that there is a problem concerning CLEC access charges it is rooted in what it terms an “abusive minority” of CLECs.<sup>12</sup> The IXCs ask this Commission to undertake significant regulation of CLEC access charges, and the further costs and burdens that such regulation would place on CLECs, based on the charges of 5-10% of CLECs. Such regulation is unnecessary as the current regulatory framework can deal with any excessive CLEC access charges.

Apart from the availability of complaint proceedings under Section 208, there is nothing that precludes an IXC from negotiating lower rates with CLECs. AT&T has availed itself of this option in quite a significant manner. AT&T states that it “has negotiated with a number of CLECs that, collectively, provided AT&T over 2.8 billion MOU of switched access service in calendar year 2000 (or approximately 400 million

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<sup>11</sup> *ALTS Comments* at p. 7.

<sup>12</sup> *AT&T Comments* at p. 6.

annualized MOU more than other CLECs combined).”<sup>13</sup> AT&T seems quite content with the rates it negotiated, and there is no indication that it cannot pursue this option with other CLECs. If such negotiations are fruitless, and AT&T is still dissatisfied with the rates, it, or any other IXC, may file a complaint with the Commission.

In short, there is no indication that the market is not functioning in setting CLEC access charge rates. If, despite the evidence of the market properly functioning to address the issue, this Commission still sees a need to craft a benchmark, it should incorporate CLECs into the consultative process on the precise nature of such a benchmark. The Commenters believe that Commission-sponsored negotiations might form a suitable approach to resolving regulatory issues concerning CLEC interstate access charges. In this regard, Commenters support the ALTS GREAT proposal.

**B. Price Cap ILECs Access Charge Rates Are Not An Appropriate Point of Comparison**

The major IXCs have built their case for “reform” on a comparison of the rates charged by CLECs and the rates charged by the price cap ILECs. As Commenters noted in their *Initial Comments*, the switched access rates charged by the price cap ILECs were already a poor point of comparison for CLEC rates, and the adoption of the *CALLS* proposal has rendered such comparisons even more inappropriate.<sup>14</sup> The comparative analysis of rates conducted by the major IXCs bear this out. The major IXCs conduct an indiscriminate comparison of the rates charged by CLECs and major ILECs. For instance, while it has been demonstrated in this proceeding that CLECs do not utilize the

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<sup>13</sup> *AT&T Comments* at p. 10.

<sup>14</sup> *Initial Comments* at p. 14.

complex access charge rate structure that price cap ILECs do, *i.e.*, many CLECs do not assess subscriber line charges (“SLCs”), primary interexchange carrier charges (“PICC”), and other flat non-traffic sensitive fees imposed by incumbent LECs, IXCs still insist on conducting a straight comparison.<sup>15</sup> This is an inappropriate comparison as CLECs concentrate their cost recovery for access service through per minute charges while ILECs impose more flat-rated, non-traffic sensitive fees.<sup>16</sup>

None of the major IXCs, in their comparative analysis of rates, took into count the SLC assessed by price cap ILECs, and AT&T failed to take into account the PICC as well.<sup>17</sup> Thus, the per minute rates of the price cap ILECs do not give an accurate characterization of what price cap ILECs charge for access service. WorldCom implicitly concedes this by noting that “ILEC rates used in developing the benchmark should reflect all switched access revenue sources available to the ILEC, including the PICC.”<sup>18</sup>

As Commenters noted, the *CALLS Order* further exacerbated differences in the per minutes rates between price cap ILECs and CLECs by switching much of the price cap ILEC cost recovery for access service from traffic-sensitive per minute rates to flat-

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<sup>15</sup> *Initial Comments* at p. 14 quoting 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. 10 (October 29, 1999).

<sup>16</sup> *Id.*

<sup>17</sup> *AT&T Comments* at pp. 7-8; CC Docket No. 96-262, Comments of Sprint Corporation at p. 7 (January 11, 2001)(“*Sprint Comments*”); CC Docket No. 96-262, Further Comments of WorldCom, Inc. at p. 3 (January 11, 2001)(“*WorldCom Comments*”).

<sup>18</sup> *WorldCom Comments* at p. 5.

rated, non-traffic sensitive charges.<sup>19</sup> Sprint noted that the *CALLS* proposal switched 25% of the MOU switching costs to the common line basket (and to the SLCs).<sup>20</sup> The goal was primarily to have “price cap ILECs recover a large share of their NTS common line costs from end users who cause them instead of from carriers, and to recover the costs on a flat-rated, rather than usage-sensitive basis.”<sup>21</sup> By not considering the flat-rated charges of the price cap ILECs, and their other sources of revenue recovery for switched access service, such as USF charges, the cost comparisons formulated by the IXC are, at the very least, inaccurate, and give a distorted view of CLEC rates for access service.

The fact that the *CALLS* pricing scheme does not result in a reduction in revenue for price cap ILECs demonstrates that while ILEC switched access charges are lowered, the price cap ILECs are recovering their costs elsewhere.<sup>22</sup> The SLC is currently capped for primary residential and single line businesses at \$4.35 and will increase to \$6.00 on July 1, 2001.<sup>23</sup> The SLC cap for non-primary residential lines is \$7.00. The SLC for multi-line businesses will be in the \$9.20 range with a continued assessment of the multi-line business PICC that is capped at \$4.31.<sup>24</sup> Thus, there are still significant charges for

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<sup>19</sup> *Initial Comments* at pp. 14-15.

<sup>20</sup> CC Docket 96-262, Comments of Sprint Corporation at pp. 10-11 (October 29, 1999)(“*Sprint 1999 Comments*”).

<sup>21</sup> *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193, ¶ 76 (May 31, 2000)(“*CALLS Order*”).

<sup>22</sup> *Id.* at ¶ 41.

<sup>23</sup> *Id.* at ¶ 70.

<sup>24</sup> *CALLS Order* at ¶¶ 71-73.

access service from ILECs, but they are directed towards end users in the form of flat-rated charges as opposed to IXC charges in a per-minute form. Comparing per minute charges of price cap LECs with CLECs does not look at the full picture and leaves out significant sources of access service cost recovery for the price cap ILECs.

It would be inappropriate for CLECs, however, to impose flat-rated charges directly on its end user as these charges would not be reflective of how CLECs incur costs. It has been demonstrated in the record of this proceeding that CLECs incur costs differently than price cap ILECs. For instance, while most of the calls on an ILEC network are local in nature, CLECs have a different mix of customers with proportionally greater long distance usage.<sup>25</sup> Thus, while the Commission might deem it appropriate to classify the end user as the cost-causer in regard to switched access on the ILEC network; the IXCs, and their customers, play more of a role as cost-causers on the CLEC network. In addition, CLECs have more traffic-sensitive costs than ILECs given the configuration of their network.<sup>26</sup> The per-minute, traffic sensitive charges applied by CLECs are more reflective of these costs and cost-causation principles than flat-rated charges.

### **C. Sprint's Faulty Economic Theories**

Sprint argues that its position that CLECs should charge no more for access service than price cap ILECs is based on the "sound economic policy" that rates should be set on the basis of the lowest-cost, most efficient carrier.<sup>27</sup> Sprint argues that there is a "longstanding Commission precedent that in a multi-carrier market, no single carrier is

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<sup>25</sup> *Initial Comments* at pp. 23-24.

<sup>26</sup> *Initial Comments* at pp. 19-21.

entitled to cover its costs.”<sup>28</sup> Sprint, of course, fails to mention that the Commission rejected Sprint’s reading of this “precedent” just a few months ago in the complaint proceeding it filed.<sup>29</sup> Notwithstanding this rejection, Sprint’s theories rest on faulty premises.

First, it is ridiculous to suggest that the price cap ILECs are the “least cost, most efficient” provider. The reason that ILEC switched access rates are at the level they are at today are due to “competitive and regulatory pressures.”<sup>30</sup> Sprint, one of the carriers that a mere four years ago was lamenting the way in which ILECs were using above-cost access charges to help keep their local rates low, and arguing that ultimately interstate access charges should be based on cost, is now claiming that these same ILECs are the “least cost, most efficient” provider.<sup>31</sup> Sprint would base CLEC charges on the charges of price cap ILECs who “have operated for decades under an effectively guaranteed rate of return with a captive ratepayer base” while CLECs “must compete for customers, are capitalized by debt and the stock market, and operate under pressure from the market to ramp up revenues and show a return on investment.”<sup>32</sup> Even when the ILEC switched access rates were lowered under the *CALLS* Proposal, their revenues were protected, so that there was no net reduction in revenue. CLECs have not had the luxury of crafting

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<sup>27</sup> *Sprint Comments*, p. 2.

<sup>28</sup> *Sprint Comments* at pp. 1-2.

<sup>29</sup> *Sprint Order* at ¶¶ 4-6.

<sup>30</sup> *See, RBC Report* at p. 2.

<sup>31</sup> CC Docket 96-262, Comments of Sprint Corporation at pp. 2-4 (January 29, 1997)(“*Sprint 1997 Comments*”).

their networks under a monopoly regime, and have faced competitive pressures from their inception. As a result, CLECs have had little choice but to price their access services to reflect cost and marketplace pressures.

Second, Sprint, and the other major IXC, while freely invoking the notion of costs, fail to address the evidence in the record that CLECs do face higher costs in providing access service.<sup>33</sup> For instance, Sprint has noted that its own experience shows that there exists “a demonstrable inverse relationship between switching costs and density” with costs rising sharply as the number of lines connected to a switch fall below 20,000.<sup>34</sup> CLECs have demonstrated that one of the main reasons their costs are higher than ILECs is the low utilization rates for its facilities, particularly switches.<sup>35</sup> The IXCs fail to address this cost disparity that CLECs face. Sprint has also argued in this proceeding that the ILEC rate would not be appropriate as a benchmark for all carriers and services because some carriers have “different traffic-sensitive cost characteristics.”<sup>36</sup> Sprint, of course, was talking about mobile wireless carriers, and, thus, has a significant interest in the access rates of wireless carriers such as Sprint PCS. Sprint, however, fails to address the fact that a CLEC has more traffic sensitive costs than an ILEC, and, why

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<sup>32</sup> CC Docket Nos. 96-262, 94-1, 98-157, and CCB/CPD File No. 98-63, Comments of Winstar Communications, Inc. at pp. 2-3. (October 29, 1999)(“*Winstar 1999 Comments*”).

<sup>33</sup> *Initial Comments* at pp. 22-25.

<sup>34</sup> *Sprint 1999 Comments* at p. 7.

<sup>35</sup> *Initial Comments* at pp. 22-23.

<sup>36</sup> *Sprint 1999 Comments* at p. 21.

under the same reasoning, CLECs should not be held to an ILEC benchmark.<sup>37</sup> It is clear that the only considerations of cost the IXC's have paid attention to are their own.<sup>38</sup>

Third, Sprint totally misses the mark in regard to recovery of access costs. Sprint argues that there is no requirement that CLECs be allowed to recover their costs of providing access service. If this is the case, it would be totally inapposite to the history of ILEC access charge recovery. Sprint notes that the ultimate goal of access reform is that ILECs will be allowed to charge TELRIC-based access charges.<sup>39</sup> By its very definition, TELRIC allows for a recovery of costs plus a reasonable return. Yet for CLECs, Sprint advocates a Darwinian notion that CLECs should not recover their costs and that it should absorb these higher costs and incur losses the way Sprint and MCI did in the early years of long-distance competition.<sup>40</sup>

It is a truism that in a competitive market there is no guarantee that a service provider will recover their costs from the end user customer. Sprint and MCI would have incurred significant losses in its initial period of competition with AT&T. Their experience is being revisited today by CLECs who are incurring initial losses as they deploy facilities while still trying to provide competitive service at competitive rates vis-a-vis the RBOCs. Access service, however, is not akin to products a company markets to end user. Access charges are charges for use of a carrier's network to originate and terminate long distance calls and are assessed against IXC carriers using a CLEC's

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<sup>37</sup> *Initial Comments* at pp. 20-21.

<sup>38</sup> WorldCom does recognize that ILECs are not providing some of the essential inputs that CLEC use to provide switched access service at economic cost. *WorldCom Comments* at p. 5.

<sup>39</sup> *Sprint 1997 Comments* at pp. 4-7.

<sup>40</sup> *Sprint Comments* at p. 2.

network to provide such service. There has been no Commission requirement that a carrier cannot recover its costs for providing such service, or that a carrier is required to provide such service below cost. If the Commission were to mandate that CLECs cannot recover their costs for providing access service this would surely be a taking and an anathema to the philosophy behind access charges.

The situation is similar to what transpired in the 1980s in the long distance market. Sprint and MCI became not only retail, but wholesale providers, of long distance service reselling the use of their network to other carriers. Surely, Sprint does not suggest that it financed the operations of those resale carriers utilizing their networks by charging below cost rates. A perusal of Section 208 proceedings and Section 207 federal court proceedings filed by Sprint and MCI to collect tariffed resale IXC charges will surely demonstrate that these companies firmly defended their right to recover the costs imposed by other carriers utilizing their network. Likewise, the CLEC network is used by a CLEC not only to provide local service to its customers, but also to originate and terminate the traffic of IXCs. CLECs are entitled to the recovery of their costs for such service. CLECs are not required to charge below their costs simply to increase the revenues of IXCs.

Fourth, Sprint incorrectly argues that that CLECs have an incentive to charge even more for access than would a monopolist ILEC.<sup>41</sup> If Sprint had considered the nature of a CLEC's costs as demonstrated in the record of this proceeding, Sprint would recognize that "supracompetitive" access charge rates would harm a CLEC's revenues. It has been demonstrated that a CLEC network is more characterized by long distance

traffic than the ILEC network and is more traffic-sensitive. If a CLEC drives up access charges, it will reduce the amount of access traffic on its network. For instance, Sprint notes that many CLEC customers seem to be receiving originating long distance service from the CLECs themselves.<sup>42</sup> Sprint also noted that nearly all CLECs charge the same for originating and terminating access.<sup>43</sup> If CLECs charged exorbitant access rates, its customers would be paying the price in the form of high long distance charges. This would be a sure-fire way for CLECs to lose customers. It would also lessen the toll traffic on its network given the elasticity of demand for such traffic. CLECs would imperil their ability to recover costs as both a LEC and a provider of IXC services if it priced access charges above market rates.

This reality is borne out by the CLEC access charge rates adduced in this proceeding, which contrary to being sky-high, fall mostly at or near ILEC rates. In fact, contrary to Sprint's assertion that "if one CLEC enters the market with high access charges . . . other CLECs, even those that believe that high access charges are unjustified as a matter of principle, have no choice but to follow suit"<sup>44</sup> is belied by the downward trend in CLEC access charges. Most CLECs, instead of migrating towards the access

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<sup>41</sup> *Sprint Comments* at p. 2.

<sup>42</sup> *Sprint 1999 Comments*, Jan Paul Acton and Stanley Besen, *An Economic Analysis of CLEC Access Pricing*, at p. 15 (October 28, 1999) ("*Sprint Report*").

<sup>43</sup> *Sprint 1999 Comments* at p. 16. The parity in terminating and originating rates also suggests that CLECs do not have greater market power for terminating access. It was thought that given the fact that the customer terminating the call is not the CLEC customer, CLECs may have incentives to charge higher rates for terminating access. The CLEC access rates do not evidence such an occurrence. See *AT&T Comments* at p. 2.

<sup>44</sup> *Sprint 1999 Comments* at p. 17.

rates on the higher end of the scale charged by a few CLECs are moving towards ILEC access rates.<sup>45</sup>

## II. THE COMMISSION SHOULD LIMIT IXC 'SELF-HELP' REMEDIES

The Commenters are deeply concerned about the continued threat of IXCs on the record of this proceeding to block calls, to refuse to accept long distance traffic, and to pay access charges. WorldCom states that IXCs may have no alternative than to block calls from certain CLECs.<sup>46</sup> Sprint has a long standing practice of disputing charges that exceed the charges that it deems would have been billed by the ILEC serving the same area.<sup>47</sup> As noted in the *Initial Comments*, AT&T may be implementing a policy of refusing to accept PICs from certain CLECs.<sup>48</sup> The IXCs are creating their own enforcement mechanism based on their own unilateral determination of what rates are just and reasonable.

The Commission has held that in providing long distance service, IXCs are subject to a broad variety of statutory constraints including without limitation, sections 201, 202, 203, 214 of the Act and section 63.71 of the Commission's rules.<sup>49</sup> IXC self-help tactics will render these statutory provisions a nullity and establish IXCs as the ultimate arbiter of what rates should be charged. As the United States Telecom Association noted, allowing IXCs such unfettered discretion, would "undermine the

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<sup>45</sup> See *RBC Report* at pp. 4-5.

<sup>46</sup> *WorldCom Comments* at p. 1.

<sup>47</sup> *Sprint 1999 Comments* at p. 15.

<sup>48</sup> *Initial Comments* at p. 11.

Commission's statutory authority to determine the just and reasonableness of rates, renders the complaint process and Section 214 requirements meaningless, limits customer choice, creates customer confusion, and reduces competition."<sup>50</sup> The IXCs' self-help tactics would never be justified, but are particularly inappropriate here where the record demonstrates that the vast majority of CLEC access charges are just and reasonable.

### **III. CONCLUSION**

The Commenters urge the Commission to be cautious in any "reform" 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 all CLECs in

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<sup>49</sup> *MGC Communications v. AT&T*, File No. EAD-99-002, DA 99-1395, Memorandum Opinion and Order at ¶ 12, 14 FCC Rcd. 11647 (1999).

<sup>50</sup> CC Docket No. 96-262, Comments of the United States Telecom Association at p. 3 (January 11, 2001).

providing access service, and allow for CLECs operating in high cost areas to be eligible for an exemption.

Respectfully submitted,



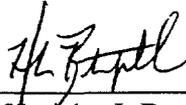
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January 26, 2001

**CERTIFICATE OF SERVICE**

I, Harisha J. Bastiampillai do hereby certify that on this 26<sup>th</sup> day of January, 2001 the foregoing Reply Comments of Focal Communications Corporation and Winstar Communications, Inc. was delivered by hand and first class mail to the following:



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