BEFORE THE

Federal Communications Commission

WASHINGTON, D.C.

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

PETITION FOR RECONSIDERATION

Time Warner Telecom ("TWTC"), by its attorneys and pursuant to 47 C.F.R. § 1.429, hereby submits this Petition for Reconsideration of the Seventh Report and Order in the above-captioned docket.[1] This petition seeks reconsideration of the Commission's decision that a CLEC may not take advantage of the transitional benchmark, and must instead set prices at the rate charged by the ILEC, in Metropolitan Statistical Areas ("MSAs") in which the CLEC begins serving customers after the rules established in the *Order* become effective.

I. INTRODUCTION AND SUMMARY

In the *Order*, the Commission appropriately declined to mandate that CLEC interstate access rates be reduced immediately to the ILEC level, and instead implemented a three-year transitional benchmark for phasing in rate reductions. The Commission held that this transition was necessary to give CLECs the chance to adjust to the new regulatory regime implemented in the *Order*. At the same time, however, the Commission ruled that a CLEC may not take

advantage of the transitional benchmark, and must instead set prices immediately at the ILEC rate, in MSAs in which the CLEC begins serving customers after the rules established in the *Order* become effective. This new market rule is completely at odds with the rationale underlying the transitional benchmark.

In revising their business plans to adjust to the new regulations adopted in the *Order*, CLECs will rely on market research and experience accumulated over the next several years. The critical point for this petition is that CLECs will rely on this *same* process and information to make adjustments for both the markets they have already entered and the markets they plan on entering in the future. It follows that the CLECs need the transition to adjust their business plans for markets in which they will begin serving customers within the next three years just as much as they need it for markets in which they happen to already serve customers. The Commission should therefore allow CLECs that begin serving end users in a particular MSA after the effective date of the *Order* to tariff switched access rates for that MSA at the levels permitted under the transitional benchmark. But even if the Commission does not repeal the rule entirely, it must at the very least permit all CLECs that begin serving customers in an MSA within 12 months of the effective date of the *Order* to tariff rates at levels permitted under the transitional benchmark.

II. THE COMMISSION SHOULD REPEAL OR AT THE VERY LEAST SCALE BACK ITS NEW MARKET RULE.

In the *Order*, the Commission concluded that the provision of originating and terminating interstate access service by CLECs is characterized by market failure and that CLEC rates for

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[1] *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order (rel. Apr. 27, 2001) ("*Order*").

these services must therefore be regulated. *See Order* ¶¶ 30-33, 38-40. The Commission chose to regulate those rates by mantadorily detariffing CLEC access rates above a benchmark level. The Commission declined, however, to set the level of the benchmark immediately at the level of the ILEC's tariff in the geographic area in which a CLEC provides service (the "ILEC rate"). As the Commission found, "CLECs have, in the past, set their rates without having to conform to the regulatory standards imposed on ILECs, and this Commission has twice ruled, in essence, that a CLEC's rate is not per se unreasonable merely because it exceeds the ILEC rate." *See id.* ¶ 37. Based on this past treatment of CLEC rates, the Commission found a "flash-cut" reduction of CLEC access rates to the level of the competing ILEC "would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs." *Id.* ¶ 45. The Commission concluded therefore that "a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models." *Id.* ¶ 37. Under the transitional benchmark, CLECs are initially permitted to tariff rates for switched interstate access up to 2.5 cents per minute or the competing ILEC rate, whichever is higher. *Id.* ¶ 45. The transitional benchmark then declines over three years until it reaches the competing ILEC rate. *Id.*[2]

Unfortunately, the Commission established an exception to this rule for CLECs entering new markets that is completely at odds with the rationale underlying the transitional benchmark. The Commission was concerned that its new rules not present "CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on the tariffed

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[2] The Commission established separate rules designed to (1) prevent CLECs from increasing their interstate switched access rates above levels charged prior to the adoption of the transitional benchmark, and (2) apply to CLECs serving rural areas. This petition does not seek reconsideration of those aspects of the *Order*.

access rates above those of the competing ILEC." *Id.* ¶ 58. The Commission therefore held that CLECs are not permitted to file tariffs in accordance with the transitional benchmark in those MSAs in which they begin serving customers after the effective date of the rules adopted in the *Order*.

It is a bedrock principle of administrative law that an agency's rules must be reasonable and must, all other things being equal, treat similarly situated parties in the same way.[3] The new market rule adopted in the *Order* fails to meet this requirement because CLECs are in just as much need of a transition for markets they plan to enter in the future as markets in which they happen to have already begun serving customers.

When a CLEC develops an overall business plan, it generally determines the set of services that it will provide in the geographic markets it enters in the future. Indeed, when CLECs pre-fund their business plans, they make fairly specific commitments to the public markets as to how they will position themselves in the market. In formulating this overall approach, telecommunications service providers pay close attention to the relevant regulatory precedents governing the services they plan to provide. Thus, when a CLEC like TWTC has settled on the mix of switched and dedicated services that it intends to provide in the markets it will enter in the next few years, it is significantly influenced by past FCC decisions. It follows that TWTC needs time to adjust to significant changes in FCC policy.

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[3] *See McElroy Electronics Corp. v. FCC*, 990 F.2d 1351, 1365 (DC. Cir. 1993) ("[W]e remind the Commission of the importance of treating similarly situated parties alike or providing an adequate justification for disparate treatment."); *New Orleans Channel 20, Inc. v. FCC*, 830 F.2d 361, 366 (D.C. Cir. 1987) ("*Melody Music* and its progeny appropriately recognize the importance of treating parties alike when they participate in the same event or when the agency vacillates without reason in its application of a statute or the implementing regulations."); *Melody Music, Inc. v. FCC*, 345 F.2d 730, 733 (D.C. Cir. 1965).

The critical point for this petition is that TWTC must rely on the same market research and experience when making adjustments to both geographic markets it currently serves and geographic markets TWTC plans to enter in the future. It follows that TWTC is unlikely to be better prepared to adjust its business strategy to the new regulatory environment when it begins serving its first end user in geographic market A on, for example, July 1, 2002 than is the case on the same date in geographic market B, in which it has served customers since 1998. In fact, to the extent that past experience in a particular market eases the transition, quite opposite is likely to be true.

Of course, the need for a graduated transition in lowering rates is directly proportionate to how long a firm has to adjust to the new rules. Again, this is true for both existing markets and markets TWTC plans to enter in the future. It is obviously easier for TWTC to rely on its market experience to find the right mix of service offerings for an MSA in which it will begin serving customers two years from now than is the case for an MSA in which it plans to begin to provide service two months from now. If applicable to new markets, the transitional benchmark would appropriately lower the rate available in the new market depending on the year the CLEC begins serving customers. That is, the transitional benchmark would lower rates as CLECs are better positioned under the new rules entry into new markets further and further into the future. It is completely consistent with the rationale underlying the transitional benchmark, therefore, to make it available to markets in which CLECs begin serving end users after the effective date of the *Order*.

But even if the Commission declines to repeal its new market rule altogether, it must at the very least limit its application to those markets in which a CLEC begins serving end users 12 months after the effective date of the rules adopted in the *Order*. In any market in which a

CLEC plans to begin serving customers within 12 months of the effective date of the *Order*, the CLEC will have already made significant investments in obtaining the inputs necessary to provide service in that geographic market. There is no basis for distinguishing a CLEC in this position from a CLEC that has already begun serving end users.

A facilities-based CLEC's entry into a new geographic market is a lengthy process that includes the formation, review and approval of the business plan, the deployment of the network, and the acquisition of any necessary governmental approvals. In TWTC's case, it takes four to six months alone to formulate the business plan (addressing such things as which particular part of a geographic market fits the overall company business plan, the level of competition in that area, etc.), obtain senior management approval, and finally approval by the board of directors. TWTC's business plans take into account and rely on past regulatory treatment of important sources of revenue such as CLEC access.

Once the process of formulating and obtaining board approval of a business plan is complete, TWTC must then deploy its network in the new markets. For facilities-based CLECs like TWTC, this process at the very least includes acquiring and preparing space to deploy TWTC's switch as well as purchasing, testing and deploying the switch, obtaining collocation space for multiplexers in the ILEC central offices, and obtaining any necessary government approvals (such as local franchises to provide telecommunications service). Importantly, this pre-entry process requires TWTC to incur some of the most significant costs of providing telecommunications service. These costs are generally incurred before any customer is served.

In addition to being expensive, the network deployment process is very slow. TWTC has found that it generally takes between 12 to 14 months to complete. This estimate is consistent

with the evidence submitted in the *UNE Remand Order*[4] proceeding regarding the delay associated with deploying switches. The record in that proceeding indicated that "it takes approximately six months to one year to engineer, furnish and install a switch." *UNE Remand Order* ¶ 268. Moreover, this estimate did not even include the time required to obtain collocation (which is generally about four months) and to obtain necessary governmental approvals.

In sum, it generally takes TWTC between 16 and 20 months, from beginning work on the formation of a business plan to actually turning up the switch and serving end users, to enter a new market using its own switch. It follows that, even in those MSAs in which a CLEC like TWTC is still in the midst of the pre-entry stage of its business plan, the CLEC has likely made very substantial investments in reliance on past FCC treatment of CLEC switched access. For example, in an MSA in which the CLEC plans to begin serving end users 12 months from the effective date of the new rules, the CLEC has probably already invested 4 to 8 months of time and likely already made significant investments in applying for government approvals, obtaining real estate on which it can construct its central office, hiring new employees to work in the new market, purchasing a switch and so forth.

In light of these facts, there is no way to justify excluding from the transitional benchmark MSAs entered within 12 months of the effective date of the *Order*. CLECs that have spent substantial sums in the planning and deployment of new networks are just as, if not more than, in need of a "gradual transition" in CLEC access rates to allow them to "adjust their business models" as CLECs that have already begun to serve customers.

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[4] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, 15 FCC Rcd

Moreover, for TWTC in particular, this issue has significant practical implications. TWTC plans to begin serving end user customers in Chicago, Columbia, Minneapolis, Denver, and Atlanta before the end of the year. In every one of these markets, TWTC made very substantial investments in the planning and deployment of its network prior to the adoption of the *Order*. It cannot be said that TWTC relied on past FCC treatment of CLEC access in these markets any less than in markets in which it started serving end users soon before the adoption of the *Order*.

Finally, the Commission need not be concerned that an appropriate adjustment to the new market rule in the *Order* would somehow necessarily mandate a similar change in the new market rule adopted for the exchange of ISP-bound traffic. TWTC opposes the latter rule and supports its repeal. Nevertheless, the case is even stronger for changing the CLEC access new market rule than the new market rule for ISP-bound traffic.

This is because the real world consequences of allowing CLECs to charge rates consistent with the transitional benchmark in new markets are likely to be less significant than if similar relief were granted for ISP-bound traffic. A CLEC can enter a new market and sign up a single large ISP and immediately generate large volumes of traffic. But this opportunity to immediately ramp up to large volumes of traffic soon after entry is simply not available in the same way for switched access. Individual customers generally do not generate significant volumes of switched access traffic. Once a customer reaches a significant volume, it usually replaces switched access arrangements with dedicated access. For a CLEC to generate large

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3696 (1999) ("*UNE Remand Order*").

volumes of switched access traffic, it must generally build a large customer base, a process that takes time.

The only limited exception to this rule is large generators of 8YY traffic, such as hotels. Yet the volume of 8YY traffic generated by hotels and similar facilities is a fraction of the volume generated by ISPs. Furthermore, there are very substantial limits on the growth of 8YY traffic. Customers using 8YY service at hotels are generally dialing around to reach their preferred long distance carriers. Callers pay for this service at per minute rates (usually at relatively high per minute rates), and their incentive to use the service is therefore limited (in contrast to ISP-bound traffic that is not priced a per minute rate for end users). Furthermore, increasing use of CMRS phones also is likely to diminish the volume of 8YY traffic at hotels and similar locations.

It follows therefore that there is not the same opportunity to generate large volumes of traffic quickly in switched access as there is for ISP-bound traffic. This is of course not to say that the incremental switched access revenues that a CLEC could earn under the transitional benchmark are inconsequential to a CLEC. Such revenues are significant when considered as part of the early stage entry process into a new geographic market. They are not significant, however, when viewed from a national policy perspective. This is of course especially true at a time when few CLECs are even planning to enter new geographic markets in the near future.

III. CONCLUSION

The Commission should therefore reconsider its new market rule adopted in the *Order*, and should instead repeal that rule altogether or, at the very least, permit any CLEC to take advantage of the transitional benchmark in an MSA in which it begins serving end users within 12 months of the effective date of the rules adopted in the *Order*.

Respectfully submitted,

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