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	)	
	)	

REPLY COMMENTS OF TIME WARNER TELECOM

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Time Warner Telecom ("TWTC"), by its attorneys, hereby submits these reply comments in response to the Further Notice of Proposed Rulemaking[1] in the above-referenced proceeding. In the *Notice*, the Commission sought comment on the appropriate treatment of CLEC originating 8YY, toll-free traffic under the benchmark rate transition plan adopted in the *Order*. As explained herein, nothing in the comments filed in this proceeding offers the Commission any basis for treating CLEC access for 8YY traffic differently than other CLEC access traffic.

I. INTRODUCTION AND SUMMARY

In their comments, the interexchange carriers ("IXCs") not surprisingly urge the Commission to require that CLECs set the price for interstate switched access service provided to generators of 8YY-bound traffic at the relevant ILEC rate rather than at the interim benchmark rate that would otherwise apply. But the IXCs have offered no basis in law or policy for such differential treatment of 8YY traffic. They assert that revenue-sharing for 8YY traffic is widespread among CLECs, but that assertion in no way advances the IXCs' cause. The Commission has long held that revenue-sharing arrangements used in situations analogous to 8YY traffic are reasonable and lawful business practices. Furthermore, the IXCs cannot point to any evidence that revenue-sharing for 8YY traffic introduces new inefficiencies that would not otherwise exist. Neither application of the interim benchmark nor revenue-sharing imposes extra access charge costs on IXCs because the actual user of the 8YY service is not the beneficiary of the revenue-sharing arrangement. The calling patterns of 8YY users are therefore unaffected by revenue-sharing.

Nor does revenue-sharing distort competition for serving generators of 8YY traffic. Any purported advantage that such arrangements give CLECs over ILECs (which are also free to share revenue in this case[2]) in serving 8YY generators is a function of the level of the interim benchmark, an issue that has been thoroughly reviewed by the Commission and is not at issue here. Moreover, IXCs are free to compete to serve 8YY generators by offering their own revenue-sharing arrangements.

The only remotely serious issues raised by the IXCs is the possibility that 8YY revenue-sharing might spawn widespread fraud. But the IXCs' claims in this regard are seriously overstated. They can point to only a single fraudulent scheme detected in the past, and the incentive to engage in such schemes has been dramatically reduced by the implementation of rate

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[1] *See Access Charge Reform; Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order ("*Order*") and Further Notice of Proposed Rulemaking ("*Notice*"), FCC 01-146 (rel. Apr. 27, 2001).

[2] The IXC commenters do not point to, and TWTC is not aware of, any prohibition against ILEC revenue-sharing in this context.

regulation for CLEC access. Also, revenue-sharing has been used for many years in analogous contexts in which the Commission has relied on its complaint process to detect and punish fraud. It strains credulity to assert that fraud is any more likely to arise in the instant context.

II. DISCUSSION

As TWTC and other CLECs explained in their comments, 8YY access traffic uses the same functionalities and facilities and causes CLECs to incur the same costs as all other interstate access services. *See* TWTC Comments at 2-3; Focal/US LEC Comments at 8-10. Moreover, there is simply no basis in Commission precedent or in policy to treat 8YY traffic differently from other CLEC access traffic.

AT&T, WorldCom, and Sprint offer several arguments in response to this position, none of which has any merit. To begin with, the IXCs make much of the fact that numerous CLECs have used sharing arrangements. *See* AT&T Comments at 3-6; Sprint Comment at 5-7. But as TWTC and other CLECs pointed out in their comments, the Commission has concluded that revenue-sharing used in situations that are highly analogous to 8YY traffic is a reasonable and lawful business practice. *See* TWTC Comments at 3-4; Focal/US LEC Comments at 5-8. For example, where AT&T's own practice of sharing operator service provider ("OSP") revenue with private payphone operators and premises owners was challenged, the Commission held that such revenue-sharing was fully consistent with the requirements of Section 203 (including the anti-rebate provision) as well as the prohibition against unreasonable discrimination in Section 202(a).[3] There, as here, the service provider paid a commission to one customer (the payphone operator or 8YY aggregator) so that its service would be available to a second set of customers

[3] *See AT&T's Private Payphone Commission Plan*, Memorandum Opinion and Order, 3 FCC Rcd 5834 (1988) ("*AT&T Private Payphone Order*").

(payphone users and originators of 8YY calls). *See AT&T Private Payphone Order* ¶ 21. In the OSP context, as here, the commissions were paid based on the volume of traffic originated by the second set of customers. The Commission found such commissions to be lawful because they were not paid to the purchaser of the OSP service. *See id.* The Commission therefore concluded that revenue-sharing was a legitimate business expense to induce payphone operators to make service available to third parties. *See id* ¶ 20.

Moreover, the Commission later relied on its analysis in the *AT&T Private Payphone Order* to conclude that revenue-sharing arrangements AT&T offered to hotels did not violate the anti-rebate provision of Section 203.[4] The Commission again explained that the revenue-sharing arrangement offered to hotels was permissible because it was not paid to the actual end user of the service in question. *AT&T Hotel Order* ¶ 12. Once again, this case conclusively determined that revenue-sharing arrangements are reasonable and lawful where they do not benefit the actual user of a carrier's service. Indeed, the factual context of the *AT&T Hotel Order* is almost exactly the same as the 8YY situation.

The only possible response to these arguments is that there is something peculiar about 8YY revenue-sharing arrangements that (unlike other revenue-sharing arrangements that do not benefit end users) introduces inefficiencies that would not exist if they were prohibited. But the IXCs offer no basis for reaching this conclusion. For example, AT&T states in passing that CLEC 8YY revenue-sharing has "obvious adverse effects" on IXCs. *See* AT&T Comments at 6. But the adverse effects are anything but obvious. Again, the users of 8YY service do not receive any benefit from the revenue-sharing arrangements. They therefore have no increased incentive to generate 8YY calls than they would in the absence of revenue-sharing. It follows that revenue-sharing *per se* does not cause IXCs to incur more access charge costs than would be the case in the absence of revenue-sharing.

AT&T also makes the related claim that CLEC 8YY revenue-sharing "distorts competition among potential service providers to serve those customers which [sic] generate large volumes of 8YY traffic." *See id.* AT&T seems to think that a CLEC can win the business of large 8YY generators even where the CLEC is less efficient than its ILEC or IXC competitors. But of course this argument (like all of the IXC arguments) boils down to the complaint that the Commission should not have instituted an interim benchmark to phase down CLEC access charges, but should have instead mandated that CLECs immediately set interstate switched access rates at the ILEC level. AT&T does not, and cannot, assert that the ILECs are precluded from engaging in revenue-sharing with 8YY aggregators. Rather, it worries that ILECs are not able to engage in revenue-sharing to the extent that CLECs can engage in this practice. But this is an obvious and inherent part of the interim benchmark scheme. It is in principle no different than the CLECs' ability under the interim benchmark to fund a reduction in retail rates with access charges.[5] That situation (and it is only temporary) was well-understood by the Commission when it adopted the interim benchmark scheme, and any attempt to revisit that issue belongs in a petition for reconsideration or court appeal.

AT&T's concern that CLEC revenue-sharing somehow precludes IXCs from serving 8YY generators is no more relevant or serious than its concern regarding ILECs. To begin with,

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[4] *See Telesphere International, Inc. v. AT&T*, Memorandum Opinion and Order, 8 FCC Rcd 4945 (1993) ("*AT&T Hotel Order*").

long distance carriers can and, apparently in AT&T's case do,[6] engage in revenue-sharing with 8YY aggregators. Indeed, if the access charge problem were as serious as the IXCs contend, their very substantial CLEC affiliates would be competing for the service of 8YY aggregators by offering similar revenue-sharing arrangements. For example, an IXC's CLEC affiliate could presumably share switched access revenues for 8YY calls destined for unaffiliated IXCs. For calls destined for the affiliated IXC, the CLEC could impute an access charge to its long distance affiliate (a cost the IXC is already incurring and presumably recovering from its customer on an averaged basis) and again share the revenue with the 8YY generator.

In addition, IXCs reiterate their argument that revenue-sharing arrangements create the incentive for CLEC customers to engage in fraudulent schemes to artificially generate large volumes of 8YY traffic, to the detriment of both providers and purchasers of 8YY. *See* AT&T Comments at 8-9; WorldCom Comments at 1-3; Sprint Comments at 4. This is in fact the only remotely serious issue raised by the IXCs. But there is no basis for concluding that 8YY revenue-sharing would result in any significant amount of fraud. The IXCs can point to only a single example of fraudulent behavior, and that took place before rate regulation. Both the commissions and the incentive to engage in fraud are likely to have been greater in the absence of rate regulation. The incentive to engage in fraudulent schemes have therefore already been dramatically reduced, and probably eliminated.[7] Moreover, revenue-sharing has, as mentioned,

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[5] Of course, this limited advantage pales in comparison with the enormous legacy advantages enjoyed by ILECs, such as the economies of scale and scope that they established solely by virtue of their protected monopoly status.

[6] *See* Sprint Comments at 6-7.

[7] This is all the more true because, with lower tariffed CLEC rates under the interim benchmark, fraudulent schemes (to the extent they exist at all) would probably only be attempted if large volumes of traffic can be generated. This in turn makes detection and punishment easier, thus further reducing the likelihood that they will be tried in the first place.

been used for many years in situations that are analogous to CLEC access. It is hard to see how the potential for fraud in the instant context would warrant a prohibition against revenue-sharing any more than in the OSP or hotel commission context. It is for this reason that the Commission should feel comfortable relying on the complaint process to detect and punish any fraudulent behavior.

Finally, AT&T makes a rather confusing argument that, unlike other forms of switched access, which generally involve the provision of the loop, local switching, and transport to the IXC point of presence, the origination of 8YY traffic often causes CLECs to provide only local switching. *See* AT&T Comments at 9-10. While AT&T's point here is somewhat obscure, it can at least be said that TWTC performs the same network functionalities and uses the same technical configuration when it provides service to large generators of 8YY traffic as it uses when providing switched access to other high capacity end users. This would appear to be a complete response to AT&T's argument.

For all of these reasons, the Commission should not be concerned about the existence of revenue-sharing arrangements for 8YY traffic and should in no event treat 8YY-bound access traffic differently than other switched access traffic. But even if the Commission were concerned about revenue-sharing, it must recognize that past examples of business plans purportedly built around revenue-sharing arrangements arose in the context of unregulated CLEC access rates. As the Commission has concluded, CLECs have been able to exploit a market failure in providing switched access. The Commission has now addressed that central underlying problem by regulating the CLEC rates.[8] The IXCs all speculate that the practice of revenue-sharing will continue to grow even after rate regulation takes effect. *See* AT&T Comments at 6; Sprint Comments at 6; WorldCom Comments at 3. But this seems highly unlikely for the reasons described above. The incentive to engage in revenue-sharing is directly related to the margins and volume associated with 8YY access. Because of rate regulation, the margin on this business has dropped dramatically and will continue to drop over the next several years. Moreover, as explained, there is no reason to believe that the total volume of this traffic will increase. Thus, even if the existence of revenue-sharing were a serious concern (and it should not be), there is simply no apparent basis for the IXCs' speculation that such practices will continue to grow. All the available evidence indicates that such practices will become less and less common.

III. CONCLUSION

TWTC respectfully requests that the Commission affirm that CLEC 8YY access charges are subject to same transition to the ILEC benchmark rate as other CLEC access traffic, in accordance with the recommendations made herein.

[8] To the extent that the Commission has in the past been concerned about revenue-sharing by CLECs in the provision of switched interstate access, it has been because revenue-sharing arrangements indicated that a CLEC's rates might be too high. This was the case, for example, in the BTI case. *See AT&T v. Business Telecom, Inc.*, Memorandum Opinion and Order, FCC 01-185, ¶ 42 (rel. May 30, 2001). That issue, however, has now been fully addressed in the establishment of conclusively reasonable benchmark rates for tariffed CLEC interstate switched access. Cases such as BTI therefore have no relevance to the instant proceeding.

Respectfully submitted,

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