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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
	)	
Reform of Access Charges Imposed by	)	
Competitive Local Exchange Carriers	)	

**REPLY COMMENTS OF AT&T CORP.**

AT&T Corp. ("AT&T") submits these reply comments in response to the comments filed pursuant to the Commission's Seventh Report and Order and Further Notice of Proposed Rulemaking pertaining to competitive local exchange carrier ("CLEC") rates for originating switched access service for 8YY, toll-free traffic.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

The comments recognize that CLEC 8YY revenue-sharing arrangements create a special opportunity and incentive for artificial subsidies and fraudulent generation of 8YY traffic by CLECs and their customers. Further, the comments recognize that even though only the most blatant 8YY abuses are ordinarily detected, the 8YY abuse problem is widespread in the marketplace and substantial in its effects. Indeed, while few of the CLECs are willing to admit that they have engaged in 8YY revenue-sharing schemes, virtually all of the CLECs acknowledge that 8YY revenue-sharing arrangements with large 8YY aggregator customers are commonplace among CLECs. Nor is there any question but that CLEC 8YY revenue-sharing

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<sup>1</sup> See Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, FCC 01-146, CC Docket No. 96-262, ¶¶ 98-104 (rel. March 13, 2001) ("*CLEC Access Charge Reform Order*").

schemes impose wholly unnecessary costs on others, including not only the IXCs, but also their 8YY subscribers and end users attempting to place 8YY calls.

The appropriate remedy for CLEC 8YY access abuse problem is for the Commission to reduce the benchmark for 8YY access traffic to the level of the switched access rate charged by the competing ILEC. Only by this means will the Commission effectively eliminate the incentive for CLECs and their customers to engage in 8YY access abuses and thereby avoid the wasteful use of network resources and distortions of competition that such 8YY access abuses produce. In addition, the Commission should benchmark the CLEC switched access rate for 8YY traffic originated via dedicated access facilities at no more than the rate for the end office local switching element currently charged by the ILEC serving the same local market, and the Commission should declare that revenue-sharing arrangements between a CLEC and its customer based on the amount of 8YY traffic generated by the customer are an unjust and unreasonable practice under Section 201(b) of the Communications Act.

Although several of the CLECs assert without analysis that the 8YY abuse problem has already been adequately addressed by the Commission's new 2.5 cents per minute maximum benchmark for CLEC access rates, even the CLECs' own trade association, ALTS, states that "[t]he Commission should *not* assume that all [8YY] commission arrangements will disappear as access rates are reduced." ALTS Comments at 4 (emphasis added). The fact is that the Commission's 2.5 cent benchmark still leaves the CLECs with an 8YY access rate that is far above the market-based switched access rate established by the ILEC in most areas. As a result, that new benchmark falls far short of eliminating CLEC incentives to engage in abusive 8YY behavior. Similarly, the Commission's formal complaint process does not provide a practical or effective means of addressing the CLEC 8YY access problem because only the most blatant

abuses are ever likely to be detected, and because the complaint process is a prohibitively burdensome and expensive way to address a widespread industry problem – both for the IXC's and for the Commission. Only through the promulgation of industry-wide rules applicable to all CLECs will the Commission eliminate the CLEC 8YY access abuse problem.

**II. THE COMMENTS SHOW THAT THE CLEC 8YY ACCESS ABUSE PROBLEM IS WIDESPREAD AND HAS CAUSED SUBSTANTIAL INJURY TO COMPETITION.**

The comments recognize that 8YY traffic creates a special opportunity and incentive for fraudulent use of the telephone network by CLECs and their customers and that this problem is both widespread and substantial. As WorldCom states, "Toll free originations create a near-perfect environment for abusive practices" by CLECs and their customers, and WorldCom confirms that it has in fact experienced the 8YY calling abuses which result from CLEC 8YY revenue-sharing arrangements. WorldCom Comments at 1-2. Moreover, WorldCom points out that "[i]t is likely to be the case that for every instance that is uncovered, many more go undetected." *Id.* at 2. Similarly, Sprint states that CLEC 8YY revenue-sharing schemes are both "widespread" and "substantial" in their magnitude. Sprint Comments at 5-7. For example, Sprint shows that 8YY traffic as a percentage of the interstate access minutes originated by CLECs during April 2001 was twice as high as the percentage of 8YY access minutes originated by ILECs during the same period. *Id.* at 5. Further, Sprint identifies a number of individual CLECs with disproportionately high percentages of 8YY traffic and at least four individual CLECs (MGC (now MPower Communications Corp.), BTI, TelePacific, and Time Warner Telecom) that continue to offer 8YY revenue-sharing arrangements to their customers. *Id.* at 5-6.

Although a few of the CLECs contend that *they* do not engage in such abusive 8YY revenue-sharing schemes,<sup>2</sup> virtually all of the CLECs acknowledge that CLECs have engaged, and are continuing to engage, in the kind of 8YY revenue-sharing agreements that are at issue here. TelePacific acknowledges, for example, that “some” CLECs “are paying commissions to customers based on 8YY traffic generated from the customer’s location.” TelePacific Comments at 4. Likewise, Time Warner Telecom admits that “CLECs enter into revenue-sharing agreements with large originators of 8YY traffic.” Time Warner Telecom Comments at 2. ALTS also does not dispute the existence of CLEC “commission arrangements” for 8YY traffic. ALTS Comments at 3-4. And while Focal states that it “has discontinued commission payments for new customers,” Focal and US LEC acknowledge that CLECs offer “incentive payments for 8YY traffic.” Focal-US LEC Comments at 3 n.10, 5.<sup>3</sup> While none of the CLECs address the magnitude of the 8YY revenue-sharing problem,<sup>4</sup> the CLEC comments clearly establish that such 8YY revenue-sharing arrangements are commonplace among CLECs and that many, if not most, CLECs are engaged in such activity.

Nor is there any question but that such 8YY revenue-sharing arrangements create incentives for abusive behavior by CLECs and their end-user customers. As RICA states: “RICA agrees [with AT&T] that sharing of [8YY] revenues with a high volume subscriber may

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<sup>2</sup> See, e.g., Z-Tel Comments at 2; RICA Comments at 2.

<sup>3</sup> See also ACUTA Comments at 3 (acknowledging that universities often “contract[] with a CLEC for shared revenue [on] outbound toll free calls” provided over dedicated outbound trunk facilities).

<sup>4</sup> Despite the Commission’s request for information on “the magnitude of the potential problem with 8YY traffic” (*CLEC Access Charge Reform Order* at ¶ 100), and the fact that only the CLECs have the data that would be required to determine the frequency and magnitude of the problem (see Sprint Comments at 4-5; AT&T Comments at 5-6), none of the CLECs has provided any such information in their comments.

create an incentive for generation of fraudulent traffic,” and that “[i]f the end-user is merely generating traffic for the purpose of obtaining shared revenues, the traffic is clearly not legitimate.” RICA Comments at 2-3.

Further, such abuses of CLEC 8YY revenue-sharing agreements are continuing to occur. For example, on June 27, 2001, AT&T detected a CLEC customer with an 8YY revenue-sharing arrangement that had made 1.1 million 8YY calls from two telephone numbers resulting in the transmission of 2.8 million minutes of unwanted traffic over AT&T’s network.<sup>5</sup> Similarly, on June 25, 2001, AT&T discovered a CLEC customer with an 8YY revenue-sharing arrangement that had placed 1.5 million 8YY calls for 255,000 minutes over AT&T’s network from four telephone numbers.<sup>6</sup> And just this past week, on July 9, 2001, AT&T discovered another CLEC customer with a revenue-sharing agreement that had ramped up the number of 8YY calls it was placing on AT&T’s toll-free network from an average of 924 calls for 625 minutes of use per day to 22,771 calls for 16,664 minutes of use per day.<sup>7</sup> Such egregious abuses of 8YY revenue-sharing agreements will continue to occur so long as the incentive for such misconduct exists.

The comments also make clear that such CLEC 8YY revenue-sharing schemes cause harm both to other parties and to competition. As WorldCom explains,

[T]he negative consequences of this behavior do not affect IXCs only, but also harm toll free customers. Increased volumes of toll free calling, stimulated by CLECs seeking to enhance their revenue, mean higher charges for toll free customers. They may also result in usage spikes that prevent legitimate calls from being completed.

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<sup>5</sup> See Declaration of William J. Taggart III (attached hereto as Exhibit 1), at ¶ 3.

<sup>6</sup> See *id.* at ¶ 4.

<sup>7</sup> See *id.* at ¶ 5.

While some of CLECs argue that CLEC 8YY revenue-sharing arrangements “promote competition” by enabling CLECs to obtain customers who are large aggregators of 8YY traffic,<sup>8</sup> the fundamental flaw in that argument is that the competitive advantage thereby gained by the CLECs is not the product of competition, but of the fact that the CLECs possess “bottleneck monopolies over access” to each of their end-users customers which permit the CLECs to charge rates for switched access service that are a multiple of the prevailing market rate established by the competing ILEC. As a result, the CLECs’ 8YY revenue-sharing arrangements are not a means of promoting competition, but an unfair and inappropriate means of “exploiting the market power” possessed by the CLECs over access so as to shift a substantial portion of their costs to the IXCs. *See CLEC Access Charge Reform Order* at ¶¶ 30, 34, 39, 59. CLEC 8YY revenue-sharing arrangements are, thus, not a legitimate competitive tool, but a distortion of competition that “could not be sustained in an effectively competitive market.” Sprint Comments at 7-8. Insofar as the reduction of CLEC 8YY access charges and the elimination of CLEC 8YY revenue-sharing arrangements would deprive certain CLECs of an advantage over their competitors, therefore, the elimination of that competitive advantage is warranted and fully consistent with – indeed, mandated by – the public interest. *See CLEC Access Charge Reform Order* at ¶ 59.

### **III. THE COMMISSION SHOULD ESTABLISH RULES THAT WILL BOTH TERMINATE AND PREVENT FUTURE CLEC 8YY ACCESS ABUSES.**

In its initial comments, AT&T proposed that the Commission take three actions to eliminate the problems posed by CLEC 8YY access abuses. First, the Commission should immediately benchmark the CLEC rate for originating switched access on 8YY calls to a level no higher than the switched access rate charged by the competing ILEC. *See AT&T Comments*

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<sup>8</sup> *See, e.g., Focal-US LEC Comments* at 8; *ALTS Comments* at 4.

at 10-11. Second, the Commission should benchmark the CLEC rate for originating access on 8YY calls carried over high-capacity access facilities dedicated in whole or in part to 8YY traffic to a level no higher than the end office local switching element rate charged by the competing ILEC. *See id.* at 10-12. And third, the Commission should find that CLEC revenue-sharing agreements based on the amount of 8YY traffic generated by the customer are an unjust and unreasonable practice under Section 201(b) of the Communications Act. *See id.* at 14-15. The comments bearing on each of these three proposals are addressed in turn.

**A. The CLEC Originating Access Rate For 8YY Calls Should Be Benchmarked At The Access Rate Of The Competing ILEC.**

With the exception of the CLECs, the parties filing comments agree that an appropriate remedy for the CLEC 8YY revenue-sharing scam is for the Commission to require all CLECs immediately to reduce their access rates for originating 8YY calls to a level no higher than the rate charged by the competing ILEC for the same access service. *See AT&T Comments at 10-11; Sprint Comments at 1, 8-9; WorldCom Comments at 1, 2-3.* As the Commission has already found, if the provision of switched access service were a competitive market, the CLECs would be able to charge no more than the prevailing market price presently being charged by the incumbent access provider, the ILEC operating in the same geographical service area. *See CLEC Access Charge Reform Order at ¶¶ 45, 59.*<sup>9</sup> In view of the unique incentives for abuse of any CLEC rate for 8YY traffic higher than the competing ILEC rate, the Commission should require that CLEC access rates for all 8YY traffic be reduced immediately to the competing ILEC rate.

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<sup>9</sup> *See also AT&T Corp. v. Business Telecom, Inc.*, FCC 01-185, File No. EB-01-MD-001 (rel. May 30, 2001) (“*BTI Order*”), at ¶ 54 (“in a properly functioning competitive market, CLECs would charge no more for their access services than do the ILECs with which they compete”), ¶ 32 (“according to fundamental economic principles, in a properly functioning competitive market, the access rates of [a CLEC’s] primary access competitors would have been a substantial factor in [the CLEC’s] setting of its own access rates”).

Reducing the CLEC benchmark for all 8YY access service to no higher than the ILEC rate would effectively deprive the CLECs of the excessive 8YY access revenues that the CLECs have used to fund their 8YY revenue-sharing schemes and eliminate the inappropriate and unfair advantage enjoyed by CLECs in competing with the ILEC and the IXCs to serve the telecommunications needs of customers with large aggregations of 8YY traffic. *See* AT&T Comments at 7-8; Sprint Comments at 8-9. Such a reduction would also greatly reduce the incentive on the part of the CLECs and their customers to artificially increase the volume of 8YY toll-free calling in order to increase access revenues. *See* WorldCom Comments at 2-3. Thus, requiring all CLECs immediately to reduce their access rates for 8YY traffic to ILEC rates is a workable and practical way for the Commission to shut down the CLEC 8YY revenue-sharing scam with its attendant inappropriate incentives, wasteful use of network resources, and distortions of competition.

**1. The Commission's New CLEC Benchmark Rates Are Not Adequate To Eliminate Or Prevent CLEC 8YY Access Abuses.**

A number of CLECs argue in opposition to the proposed reduction of CLEC 8YY access rates to the competing ILEC rate that such a reduction is unnecessary because the Commission's new 2.5 cents per minute benchmark for CLEC access services will effectively eliminate the CLEC 8YY access abuses documented by AT&T.<sup>10</sup> This contention is not correct. Indeed, even the CLEC's own trade association, ALTS, states that "[t]he Commission should *not* assume that all [8YY] commission arrangements will disappear as access rates are reduced." ALTS Comments at 4 (emphasis added).

The Commission's recent order capping the future rates that CLECs can charge for switched access service at 2.5 cents per minute plainly does not solve the special problems posed

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<sup>10</sup> *See, e.g.*, TelePacific Comments at 2-4; Focal-US LEC Comments at 2; RICA Comments at 4.

by 8YY traffic. While the new 2.5 cents per minute benchmark should curtail somewhat the ability of the CLECs to enter into inappropriate 8YY revenue-sharing schemes with their customers, the new CLEC access charge benchmarks by no means eliminate that incentive. At 2.5 cents per minute, the CLEC switched access rate is still about five times higher than the market-clearing rate charged by most of the larger ILECs.<sup>11</sup> This substantial rate differential therefore still provides CLECs with ample opportunity and incentive to engage in 8YY revenue-sharing schemes and the wasteful generation of unnecessary 8YY traffic whose costs are imposed on others. Indeed, as shown in the attached Taggart Declaration, such 8YY abuses are in fact continuing to occur notwithstanding the Commission's new CLEC access rate benchmarks.

Accordingly, the Commission's new 2.5 cents per minute benchmark is plainly inadequate to deal with the unique problems posed by 8YY traffic. So long as the CLECs are permitted to charge any above-market access rates for 8YY traffic, a strong incentive exists for CLECs to enter into inappropriate 8YY revenue-sharing arrangements with their customers with the resultant generation of unnecessary and wasteful amounts of 8YY traffic to the injury of all providers, customers, and users of 8YY services.

**2. Setting The Benchmark For CLEC 8YY Access Rates At The Prevailing Market Rate Set By The Competing ILEC Does Not Require A Cost Justification.**

There is also no basis for the claim of some CLECs that the Commission cannot set a lower benchmark rate for CLEC 8YY access service than for other CLEC access services

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<sup>11</sup> Most of the larger ILECs are presently charging less than 0.5 cents per minute for switched access services. *See, e.g., BTI Order* at ¶ 32 (finding that BellSouth's rate for switched access service to be 0.48 cents per minute). Further, the Commission's new 2.5 cents per minute benchmark is "many multiples" of most CLECs' forward-looking cost. *See WorldCom Comments* at 1.

without a “cost-based justification.”<sup>12</sup> In the first place, the Commission has made clear that CLEC access rates are to be set on the basis of “a marketplace analysis” and not on the basis of the CLEC’s costs. *BTI Order* at ¶ 45.<sup>13</sup> As the Commission explained in its recent *BTI Order*, “we should assess the reasonableness of [CLEC] access rates by evaluating the market for access services, rather than by ascertaining [the CLEC’s] costs of providing access services. *Id.* at ¶ 17; *see also id.* at ¶¶ 20, 45 (“examination of [the CLEC’s] costs is [n]either necessary [n]or appropriate”). That marketplace analysis shows that 8YY access services create a unique opportunity and incentive for CLECs and their end-user customers to game the system for their own financial advantage by imposing costs on others at no cost to themselves. It is those market characteristics that necessitate a lower benchmark for CLEC 8YY access services, not a difference in the CLECs’ cost of providing the service.<sup>14</sup>

In addition, the CLECs’ cost arguments must be rejected because none of the CLECs have provided *any* evidence regarding their costs of providing switched access service for any kind of service. As the Commission found in its *CLEC Access Charge Reform Order*, “CLEC commenters have not submitted, in this proceeding, any data to justify their rates. Rather, these commenters have relied upon generalized assertions that their rates are justified by higher costs”

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<sup>12</sup> Z-Tel Comments at 3. *See also* ASCENT Comments at 3; ALTS Comments at 4; Focal-US LEC Comments at 8-9; TelePacific Comments at 5; Time Warner Telecom Comments at 2.

<sup>13</sup> *See also* RICA Comments at 3 (“the Commission has rejected the concept of establishing rates on the basis of cost analysis of individual carriers in favor of a market based approach”).

<sup>14</sup> In any event, even under the CLECs’ theory that their costs are relevant – which they are not – the only pertinent cost question would be whether setting the benchmark for CLEC 8YY access rates at the competing ILEC rate would permit the CLECs to recover their cost of providing the service. So long as the rates set are not confiscatory – and there is no evidence that they would be – there is no need to establish a difference in cost of service in order to establish a difference in rates, and there is certainly no requirement that AT&T justify its proposal to reduce the benchmark for 8YY access rates on the basis of evidence that the CLECs’ costs of providing 8YY access service are lower than the CLECs’ costs of providing other access services.

(at ¶ 46 n.104).<sup>15</sup> The same is true here. As a result of the CLECs' failure to provide any information regarding their access costs, neither AT&T nor the Commission has any information about the CLECs' costs of providing *any* access services, and there is obviously no basis in the record for any CLEC claim that setting the benchmark rate for 8YY access at the competing ILEC rate would unfairly prevent the CLECs from recovering their costs.

Finally, as discussed in AT&T's initial comments, the record in this case demonstrates that the CLECs' costs for providing 8YY access service *are* lower when the CLEC provides such service by means of a high-capacity dedicated facility for 8YY traffic from the premises of a large aggregators of 8YY traffic like a hotel or university. *See* AT&T Comments at 3-4, 9-11. Because in that situation the dedicated connection between the customer and the CLEC's local switch is leased by the CLEC to the customer, that portion of the originating access function has already been paid for by the CLEC's customer, and the costs of that dedicated access facility should not also be recovered from the IXCs. Accordingly, the CLECs' costs of providing originating 8YY access in that situation are lower than its costs of providing access for non-8YY calls.<sup>16</sup>

**3. Applying The ILEC Benchmark To All 8YY Access Service Provided By All CLECs Is An Appropriate Way To Control The CLEC 8YY Access Problem.**

Some of the CLECs also argue that applying the ILEC benchmark to all 8YY traffic provided by all CLECs paints with too broad a stroke by reducing the access rates of all CLECs

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<sup>15</sup> *See also BTI Order* at ¶¶ 45-50 (finding that, "even if it were relevant, BTI's cost showing would fall far short of cost-justifying" its switched access rates).

<sup>16</sup> For this reason, the claim of Focal and US LEC that CLEC "access for 8YY traffic has the same cost structure and operational characteristics as other access traffic" (Focal-US LEC Comments at 8-10) is simply not true.

whether or not they are engaged in any inappropriate 8YY revenue-sharing schemes.<sup>17</sup>

However, so long as the CLEC switched access rate for 8YY traffic exceeds the competing ILEC rate, any CLEC has an opportunity and an incentive to engage in inappropriate activities in the handling of 8YY traffic for their customers. Only by eliminating that rate differential will the Commission eliminate the CLEC incentive to engage in conduct that is contrary to the public interest. Whether or not a particular CLEC has engaged in such improper conduct in the past, therefore, all CLEC 8YY switched access rates should be benchmarked immediately at the competing ILEC rate – the market-based rate – with no transition period. In view of the public interest considerations involved, there is ample justification for the establishment of special prophylactic rules for 8YY traffic, and the CLECs which have not engaged in such unreasonable behavior in the past will not suffer undue hardship by the establishment of market-based access rates now for all 8YY traffic.<sup>18</sup>

**4. The Commission's Complaint Process Is Not A Practical Or Effective Alternative Way To Eliminate Or Prevent CLEC 8YY Access Abuses.**

Another CLEC ploy to perpetuate the subsidy that the CLECs currently enjoy from the provision of originating 8YY access service is to urge the Commission to rely on its formal complaint process to deal with the 8YY access abuse problem rather than the formulation of general rules applicable to all CLECs.<sup>19</sup> However, the comments make clear that reliance on the Commission's process is not a feasible or practical means of addressing CLEC 8YY revenue-

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<sup>17</sup> See, e.g., ASCENT Comments at 3; ALTS Comments at 3; RICA Comments at 5; Minnesota CLEC Consortium Comments at 4.

<sup>18</sup> No party supported limiting a rule immediately benchmarking CLEC 8YY access rates at the ILEC rate to only those CLECs that carry "exclusively" 8YY traffic or any other percentage. See *CLEC Access Charge Reform Order* at ¶ 103; AT&T Comments at 13-14.

<sup>19</sup> See, e.g., ASCENT Comments at 5; ALTS Comments at 3; Minnesota CLEC Consortium Comments at 3; Time Warner Telecom Comments at 6 n.7.

sharing schemes. Most importantly, while AT&T and WorldCom have been able to identify some CLECs and CLEC customers that have engaged in egregious misconduct in this area, it would be difficult, if not impossible, for IXCs to detect and police more limited abuses of 8YY access schemes by CLECs or their customers.<sup>20</sup> As WorldCom notes,

Enforcement actions alone will never solve this problem. IXCs are likely to detect only the most blatant examples of toll free stimulation. In some cases, it may be difficult to prove that any rule violation has occurred. The only practical, effective way to fix this problem is to remove the incentive by immediately reducing the benchmark for CLEC toll free originations to parity with ILEC charges.

Further, it would be prohibitively burdensome and expensive for the IXCs to bring formal complaints against all of the CLECs that are believed to be engaged in this activity and for the Commission to adjudicate such formal complaints. As Sprint states on the basis of its experience, "Use of the complaint proceedings to address an industry wide problem is . . . inefficient and may not cure the problem." Spring Comments at 8. The only reasonable and practical way to limit the continuing injury caused by CLEC 8YY revenue-sharing schemes is for the Commission to address the problem on an industry-wide basis through rules applicable to all CLECs.

The need for the Commission to act through industry-wide rules is further illustrated by the petition for reconsideration recently filed by ALTS and five individual CLECs in the *BTI* complaint case.<sup>21</sup> In that petition, ALTS argues – incorrectly – that the Commission cannot award past damages for unjust and unreasonable CLEC access rates in a complaint case because

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<sup>20</sup> As the CLECs recognize, there is no practical way to distinguish "legitimate" CLEC 8YY traffic from CLEC 8YY traffic generated "for the purpose of obtaining shared revenues [which] is clearly not legitimate." RICA Comments at 3. *See also* Minnesota CLEC Consortium Comments at 2.

<sup>21</sup> *See* Joint Petition for Reconsideration of ALTS *et al.*, filed June 29, 2001, in *AT&T Corp. v. Business Telecom, Inc.*, File No. EB-01-MD-001.

there were “no [Commission] rules in effect governing CLEC access charges.” *Id.* at 11. In other words, when they are before the Commission in a rulemaking proceeding, the CLECs argue that only the complaint process should be used to address access rate abuses, but when they are before the Commission in a complaint case, the same CLECs argue that only rulemaking can be used to deal with the problem. Although ALTS’ retroactive rulemaking argument is clearly incorrect as a matter of law, it further demonstrates the need for the Commission to eliminate the opportunities for such gamesmanship by addressing the CLEC 8YY abuse problem on an industry-wide basis through rules applicable to all CLECs.

**5. No Party Claims That The Establishment Of A Different Benchmark For 8YY Traffic Would Be Unduly Burdensome For CLECs To Implement And Administer.**

None of the parties filing comments has contended that would be either technically difficult or costly for CLECs to charge a different switched access rate for originating 8YY traffic generated by their customers. The CLECs have the necessary information to identify outbound 8YY calls and to charge a different benchmark access rate for such traffic. *See* AT&T Comments at 12-13.

**B. The CLEC Originating Access Rate For 8YY Calls Carried Over Dedicated Access Facilities Should Be Benchmarked At The End Office Switching Rate Of The Competing ILEC.**

Because CLECs incur lower costs when they transport 8YY traffic from their customers via dedicated facilities which are paid for by the customer, CLEC 8YY access rate for such traffic should be limited to the level of the end office local switching element of the access rate charged by the competing ILEC. *See* AT&T Comments at 3, 9-11, 13-14, 15. *Originating* switched access service ordinarily encompasses three functions: (1) a connection between the caller and the local switch, (2) local switching, and (3) a connection between the local switch and the IXC’s point of presence. *See CLEC Access Charge Reform Order* at ¶ 55. However, in the

situation where outbound 8YY traffic is carried by the CLECs over dedicated high-capacity facilities for customers which aggregate large volumes of 8YY traffic, the dedicated connection between the caller and the CLEC's local switch is generally leased by the CLEC to the customer, and thus has already been paid for by the CLEC's customer. Similarly, the connection between the CLEC's local switch and the IXC's point of presence is provided in large part by the ILEC which operates the tandem switch, and the ILEC recovers its tandem access costs directly from the IXC through separate tandem access and transport charges. The only rate element of ordinary switched access service that applies to outbound CLEC 8YY traffic provided over dedicated facilities, therefore, is the local switching element. It follows that in establishing a benchmark for CLEC access services for outbound 8YY traffic carried over dedicated local access facilities, the appropriate benchmark is the ILEC's local end office switching charge for originating switched access services.<sup>22</sup>

**C. CLEC 8YY Revenue-Sharing Agreements Should Be Prohibited As An Unreasonable Practice.**

In addition, as AT&T urged in its initial comments, the Commission should find that all revenue-sharing arrangements between CLECs and their customers based on the amount of 8YY traffic generated by the customer are unjust and unreasonable practices under Section 201(b) of the Communications Act. *See* AT&T Comments at 14-15. As AT&T has demonstrated, the CLEC practice of entering into 8YY revenue-sharing arrangements with customers creates pernicious incentives for customers to generate superfluous 8YY traffic which adds unnecessary

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<sup>22</sup> When an ILEC or CLEC performs an 8YY database query in order to identify the carrier to whom an 8YY number is assigned, the ILEC or CLEC incurs an 8YY database query cost which is ordinarily recovered from the carrier directly through an 8YY database query charge. *See, e.g.,* Z-Tel Comments at 3. Because of the potential for abuse, such 8YY database query charges should also be limited by the Commission based on the ILEC charges for such 8YY database queries. *See id.* (arguing that it is reasonable for a CLEC to set its 8YY database query charges "based on a composite of incumbent local exchange carrier rates").

congestion to the network and imposes cost burdens not only on the IXCs, but on the ILECs, the parties receiving 8YY calls, and the parties attempting to place them. *See id.* at 6-10. Because such revenue-sharing schemes have the effect of generating unnecessary and wasteful 8YY traffic for the sole purpose of extracting additional access charges from the IXCs, such revenue-sharing schemes constitute an unreasonable practice in violation of Section 201(b) of the Communications Act. As the Commission held in *Total Telecommunications Services, Inc. v. AT&T Corp.*, FCC 01-84 at ¶ 16, File No. E-97-003 (rel. March 13, 2001) (“*Total Order*”), arrangements by CLECs “designed solely to extract inflated access charges from IXCs” constitute an “unreasonable practice in connection with the provision of access service, in violation of section 201(b) of the Act,” and should be terminated at once.

Several CLECs object to this proposal on the ground that revenue-sharing has been found to be lawful in other aggregator contexts such as operator services and payphone calls.<sup>23</sup> However, at best, the prior Commission cases cited by the CLECs hold only that revenue-sharing arrangements with operator services and payphone providers are “not unlawful *per se*.” *See AT&T’s Private Payphone Commission Plan*, 7 FCC Rcd 7135, 7135-36 (1992) (“*Private Payphone*”); *Telesphere Internat’l, Inc. v. AT&T*, 8 FCC Rcd 4945, 4947 (1993) (“*Telesphere*”). Those cases plainly do not hold that revenue-sharing arrangements are always lawful. Quite the contrary, in both of those cases the Commission found that the revenue-sharing arrangements at issue were “an unreasonable practice in violation of Section 201(b) of the Communications Act.” *See Private Payphone*, 7 FCC Rcd at 7137 (¶ 16); *Telesphere*, 8 FCC Rcd at 4947-48 (¶ 14).

More importantly, however, the prior Commission decisions do not address the unique incentives for abuse and waste by CLECs and their customers that are created by CLEC revenue-

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<sup>23</sup> *See, e.g.*, ASCENT Comments at 4; ALTS Comments at 3-4; Focal-US LEC Comments at 5-8; TelePacific Comments at 5-6; Time Warner Telecom Comments at 3-5.

sharing arrangements based on the volume of 8YY traffic. In the case of operator services and payphone calls, the end user placing the call still pays the IXC's full tariffed rate for long distance calls, and this charge acts to prevent the end user from generating unnecessary calls simply to increase revenues. However, 8YY calls can be made at no cost to the CLEC end-user customer. As a result, an aggregator with an 8YY revenue-sharing arrangement has a financial incentive to generate unnecessary 8YY traffic because it can increase its own revenue thereby at no cost to itself, while the costs of the additional traffic are imposed on others, including the IXCs, their toll-free customers, and other legitimate users of 8YY services. Whether the customer uses an automatic dialer or merely instructs its night operator to place extraneous 8YY calls whenever other traffic is slow, the result is an artificial subsidy for the CLEC and its customer and higher costs both for the IXCs and for other 8YY users.

**IV. CONCLUSION**

For the foregoing reasons and the reasons stated in AT&T's initial comments, the Commission should immediately benchmark the CLEC switched access rate for originating 8YY traffic at the competing ILEC rate. For 8YY traffic originated via dedicated access facilities, the benchmark rate should be no more than the rate for the end office local switching element currently charged by the ILEC serving the same local market. Further, the Commission should declare that revenue-sharing arrangements between a CLEC and its customer based on the amount of 8YY traffic generated by the customer are an unjust and unreasonable practice under Section 201(b).

Respectfully submitted,

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July 20, 2001

**Certificate of Service**

I, Mark Trocinski, hereby certify that on this 20<sup>th</sup> day of July, 2001, I caused a true and correct copy of the foregoing Reply Comments of AT&T Corp. to be served on the following by hand-delivery and first class mail to the following addresses:

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