

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

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In the Matter of )  
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Access Charge Reform )  
 )  
Reform of Access Charges Imposed by )  
Competitive Local Exchange Carriers )

CC Docket No. 96-262

**OPPOSITION OF AT&T CORP.  
TO PETITIONS FOR RECONSIDERATION  
OR CLARIFICATION**

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July 23, 2001

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AT&T Corp. (“AT&T”) submits this opposition in response to the petitions for reconsideration or clarification of the Commission’s Seventh Report and Order in this proceeding.<sup>1</sup>

**I. INTRODUCTION AND SUMMARY**

In its *CLEC Access Charge Reform Order*, the Commission recognized that numerous competitive local exchange carriers (“CLECs”) were taking advantage of their bottleneck monopolies over access to end users by charging rates to IXC’s for switched access service that far exceed the rates charged by the incumbent local exchange carrier (“ILEC”) for the same service in the same local market. The Commission further recognized that the loophole that the CLECs were exploiting had provided many CLECs with an unjustified windfall and had led to inefficient entry. *See, e.g., CLEC Access Charge Reform Order* at ¶¶ 30, 33-34.

Notwithstanding these findings, however, the Commission did not order the CLECs immediately to reduce their switched access rates to the competing ILEC rate as AT&T and

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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*” or “*Order*”).

other IXCs had advocated. Instead, the Commission ordered the CLECs to reduce their access rates to no more than 2.5 cents per minute – still about five times higher than most ILEC switched access rates – and established a series of transition rates pursuant to which CLEC rates in existing service areas will be reduced over a three-year period to the competing ILEC rate. *See id.* at ¶¶ 51-52. As to CLEC service to new areas, the Commission prohibited CLECs from charging rates in excess of the competing ILEC rate. *See id.* at ¶ 58. Finally, the Commission established a narrow exception for CLECs that serve rural areas pursuant to which they would be permitted charge higher NECA-based rates. *See id.* at ¶¶ 65-81.

Several CLECs now seek reconsideration of the Commission’s decision on the ground that the remaining subsidies are not sufficient. More specifically, several CLECs petition the Commission to abandon or substantially modify its rule benchmarking CLEC access rates at the level of the competing ILEC rate when CLECs enter new markets not previously served by the CLEC prior to the effective date of the Commission’s new CLEC access rate rules.<sup>2</sup> These petitions to abrogate the Commission’s rule for new markets should be recognized and firmly rejected by the Commission for what they are – requests by the CLECs for a subsidy for inefficient CLEC entry into new markets. These additional subsidy requests are in direct conflict with the pro-competitive, market-based scheme of telecommunications regulation created by Congress in the Telecommunications Act of 1996.<sup>3</sup> Indeed, allowing additional subsidized CLEC entry into new markets would extend the very inefficient CLEC market entry and resulting market distortions that the Commission’s Order is designed to eliminate. Further, the

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<sup>2</sup> *See* Time Warner Telecom Petition at 1-10; Focal-US LEC Petition at 1-11; TDS Metrocom Petition at 18-19; Minnesota CLEC Consortium at 11-13. The Commission’s CLEC access rate rule for such new markets is 47 C.F.R. § 61.26(d).

<sup>3</sup> Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 565 (codified at 47 U.S.C. §§ 151 *et seq.*) (“1996 Act”).

CLECs' claim that they did not receive adequate notice that their access rates in new markets might be limited to the competing ILEC rate is nonsense, and the CLECs' proposed alternative rules for such new markets are both plainly contrary to the public interest and unworkable.

Similarly deficient are the CLEC petitions to expand the scope of the Commission's rural exemption. The rural exemption was narrowly tailored by the Commission to deal with a particular problem – the unfairness of benchmarking the rates of rural CLECs at the rate of the competing ILEC in situations where the competing ILEC's access rates are based on state-wide averaging that includes both high-cost rural areas and lower cost urban and suburban areas. The rural exemption was never intended to provide a subsidy for all rural CLECs whether or not they face that problem. Although AT&T continues to believe that the creation of the rural exemption was unnecessary and unwise, there is no question but that the rural CLECs' attempts to extend that exemption far beyond its current limited scope are inappropriate and contrary to the public interest. Likewise, there is no justification for the proposal of TDS Metrocom to create an elaborate new set of graduated benchmarks for small and medium sized markets.

Finally, TelePacific's petition for clarification of which ILEC rate is to be used where the CLEC's service area includes areas served by more than one ILEC is without merit because there is no ambiguity regarding the "competing ILEC rate" that CLECs are permitted to tariff. For every customer, there is only one "competing ILEC" and only one "competing ILEC rate." Although CLECs remain free to tariff a rate below the competing ILEC rate, after the three-year transition period they cannot tariff a higher rate.<sup>4</sup>

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<sup>4</sup> Although AT&T disagrees with Qwest that there is any ambiguity in the Commission's Order regarding the matters raised in Qwest's petition for clarification, AT&T agrees with Qwest that (1) that CLECs may charge the competing ILEC rate only for those access service functions that the CLEC actually provides, and (2) that an IXC is not required to accept traffic from a CLEC that fails to provide the IXC with sufficient information to enable the IXC to bill the CLEC's end-user customer for long distance calls carried over the IXC's network. Accordingly, to the

**II. THE COMMISSION SHOULD DENY THE CLEC REQUESTS TO ABANDON OR MODIFY ITS RULE FOR CLEC ENTRY INTO NEW MARKETS.**

The petitions for reconsideration of the Commission's rule for CLEC entry into new markets amount to nothing more than a request that CLECs should be permitted to expand their abuse of the access tariff system by extending supra-competitive access rates into new markets as well as markets which they entered prior to June 20, 2001. Such an expansion of the CLECs' abuse of their monopoly power and the market distortions arising from the CLECs' switched access rate subsidy would be directly contrary to the Commission's efforts to curtail and eventually eliminate inappropriate CLEC access abuse activity. The additional subsidy requested by the CLECs would also violate the prohibition in the 1996 Act against the use of "services that are not competitive to subsidize services that are subject to competition."<sup>5</sup>

In its *CLEC Access Charge Reform Order*, the Commission found that some CLECs were exploiting their "bottleneck monopolies over access" to individual end users by tariffing supra-competitive rates for switched access services, and that the effect of this conduct was inappropriately to shift an excessive portion of the CLECs' start-up and network build-out costs onto the IXCs and the long distance market generally.<sup>6</sup> The Commission found that this cost

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extent that the Commission finds that any clarification of the issues raised by Qwest is necessary or appropriate, it should grant the clarifications requested by Qwest.

<sup>5</sup> 47 U.S.C. § 254(k). The Commission has made clear that this statutory prohibition against using monopoly services to subsidize competitive services is fully applicable to CLECs. See *AT&T Corp. v. Business Telecom, Inc.*, FCC 01-185, File No. EB-01-MD-001 (rel. May 30, 2001) ("*BTI Order*"), at ¶ 61; *Implementation of Section 254(k) of the Communications Act of 1934, as Amended*, 12 FCC Rcd 6415, 6421 (¶ 9) (1997). See also 47 U.S.C. § 160(b) (requiring the Commission to "promote competitive market conditions").

<sup>6</sup> *CLEC Access Charge Reform Order* at ¶ 30 ("once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes a bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user"). See also *id.* at ¶¶ 31-34, 39.

shifting by CLECs promoted both “economically inefficient entry into local markets” and a distortion of long distance markets. *Id.* at ¶ 33. Although the Commission found that the competing ILEC rate was the appropriate end point for just and reasonable CLEC access rates,<sup>7</sup> the Commission elected not to require CLECs to “flash-cut” their access rates immediately to the competing ILEC rate so as “to avoid too severe of a disruption in the CLEC sector of the industry.” *See id.* at ¶¶ 37, 44-45. Instead, the Commission ordered CLECs to reduce their access rates over a three-year transition period to a level no higher than the rate of the competing ILEC – the prevailing market rate which a new entrant would have to meet if the market for access services were a competitive market. *See id.* at ¶¶ 45, 59.

In the case of markets which the CLECs are not yet serving, no such “disruption” of existing CLEC services is presented and, hence, no transition period is necessary. *See id.* at ¶ 58. Further, the Commission found that permitting CLECs to enter new markets with access rates above the prevailing ILEC rate would likely result in additional “economically inefficient entry” by CLECs, thereby exacerbating the very problems that the Commission was attempting to eliminate. *Id.* Accordingly, the Commission prohibited CLECs from tariffing switched access rates at a level higher than the competing ILEC rate in any market which the CLEC enters after the effective date of the Commission’s new rules. *Id.* Further, because the Commission’s new

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<sup>7</sup> *See id.* at ¶ 45 (“We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC’s service area”), ¶ 61 (“we have adopted, on a prospective basis and over the long run, the IXCs’ argument that the reasonable rate for CLEC access service is the rate that the ILECs are charging for similar service in the market”). *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”).

CLEC access rules did not go into effect until June 20, 2001, nearly two months after the Commission's Order was released, the Commission effectively gave CLECs an additional two months to enter new markets at the higher benchmark rates or to revise their inefficient entry plans.

A number of CLECs challenge this aspect of the Commission's Order and request reconsideration. In support of these petitions, the CLECs argue that requiring the CLECs to charge no more than the competing ILEC rate when CLECs enter new markets is unfair and that they did not receive adequate notice that the Commission might impose this requirement on CLEC entry into new markets. Alternatively, the CLECs propose various alternative rules for entry into new markets. All of these claims or proposals are without merit.

**A. There Is No Justification For Requiring IXCs To Subsidize CLEC Entry Into New Markets.**

The CLECs' request that the Commission permit them to obtain subsidized entry into new markets would extend into new markets the very unlawful cross-subsidies and resulting inefficient CLEC market entry that the 1996 Act was designed to eliminate. If, as the CLECs claim, the elimination of that artificial subsidy will in fact "deprive [CLECs] of the revenues needed to justify the new market deployment" (TDS Metrocom Petition at 18), then entry into such new markets is not economically justified and deprivation of the subsidy is appropriate to avoid inefficient CLEC entry. If entry into a new market cannot be justified without a subsidy from the IXCs, that entry should not take place in the first instance, and it certainly should not be encouraged by the Commission through artificial subsidies. The Commission should only encourage CLEC entry into new markets that is economically efficient at the ILEC rate, and such efficient CLEC entry does not need any subsidy from the IXCs.

The Commission should also reject the argument of the CLECs that they need a subsidy

from the IXCs while they ramp up their traffic to serve a large customer base. See Time Warner Telecom Petition at 8-9. Such start-up and build out costs are precisely the costs that new entrants are supposed to obtain from their investors or lenders in a properly functioning competitive market, not from captive customers faced with a CLEC bottleneck monopoly. Furthermore, using artificial subsidies to encourage CLECs to enter new markets and ramp up to serve a large customer base in a market which cannot be economically served at the ILEC rate will only increase the magnitude of the “disruption” and “dislocation” in the market that will ultimately result from inefficient CLEC entry. See *CLEC Access Charge Reform Order* at ¶¶ 58, 62.<sup>8</sup>

**B. The CLECs Received Ample Notice That Their Access Rates In New Markets Might Be Limited By The Competing ILEC Rate.**

The further claim of Focal and US LEC that the Commission did not provide adequate notice that it might require CLEC access rates for new markets to be limited to the level of the competing ILEC rate<sup>9</sup> is nonsense. In its *Pricing Flexibility Order and Further Notice of Proposed Rulemaking* initiating the Commission’s investigation of CLEC access rates, the Commission specifically requested comments on “whether the incumbent LEC’s terminating access charges should serve as a benchmark” for CLEC terminating access rates and whether the

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<sup>8</sup> Although the Minnesota CLEC Consortium argues that “the risk of encouraging ‘inefficient’ entry by allowing CLECs to use the rural benchmark [for entry into new markets] is small” (Minnesota CLEC Consortium Petition at 13), the rural CLECs concede that “the Rural CLECs’ cost of serving the rural areas are typically higher than the ILECs in the same area” and even that “their costs are *well above* the ILEC costs” to serve the same rural areas. RICA Petition at 4, 6 (emphasis added). If that is true, there is a very high risk that allowing CLECs to use the higher rural benchmark for entry into new markets will encourage inefficient entry.

<sup>9</sup> See Focal-US LEC Petition at 2-6.

rules proposed for terminating access should also “apply to [CLEC] originating access rates.”<sup>10</sup>

Consistent with that request, several parties proposed that “the rates of the ILEC operating in the CLEC’s service territory” be used as the benchmark for all CLEC access rates,<sup>11</sup> and the Commission agreed in its Order that the access rate charged by the competing ILEC is the “prevailing market price” and the appropriate long-run benchmark rate for CLEC access charges. *Id.* at ¶¶ 45, 59.

In these circumstances, the CLECs were obviously on notice that their access rates might be reduced to the level of the competing ILEC rate, and they should not be heard to complain that the Commission did not impose the ILEC rate as the benchmark rate for all CLEC access rates on a flash-cut basis. The fact that the Commission gave the CLECs a windfall – wholly unwarranted in AT&T’s view – in the form of a three-year transition period for the reduction of their access rates to the competing ILEC rate for existing markets and markets entered through June 20, 2001, plainly did not require the Commission to apply the same transition benchmarks to CLEC access rates in markets entered after that date, and it certainly does not mean that the CLECs did not receive sufficient notice that the Commission might use the competing ILEC rate as the benchmark for CLEC access rates in such situations.

Finally, any possible disruption of CLEC market entry plans is mitigated by the fact that the Commission has already given CLECs two months – from April 27 to June 20 – to decide what entry plans for new markets should be implemented and which should be revised because they were not economically justified at the competing ILEC rate and could not be accelerated to

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<sup>10</sup> Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (rel. Aug. 27, 1999) (“*Pricing Flexibility Order and Further Notice of Proposed Rulemaking*”), at ¶¶ 247, 254.

<sup>11</sup> See, e.g., *CLEC Access Charge Reform Order* at ¶ 36 & n.87 (citing comments of Sprint, AT&T and WorldCom as supporting the use of the competing ILEC rate).

beat the Commission's June 20, 2001 date for obtaining a subsidy.<sup>12</sup> That period was more than sufficient to enable the CLECs to redeploy any resources that were to be used for future market entry that is no longer economically viable without a subsidy from the IXCs. The public interest demands that such inefficient market entry be discouraged, not that it be artificially encouraged by an extension of subsidies from the IXCs and their customers for a further extended period of time.<sup>13</sup>

**C. The Alternative Rules For Entry Into New Markets Proposed By The CLECs Are Unnecessary And Unworkable.**

The alternative CLEC access rate rules proposed by the CLECs for entry into new markets are arbitrary, unworkable and clearly contrary to the public interest. The Time Warner Telecom alternative rule would simply extend the deadline for subsidized CLEC entry into new markets by an additional 12 months from June 20, 2001, to June 20, 2002. *See* Time Warner Telecom Petition at 5. This arbitrary cut-off for subsidized entry would give CLECs 14 months from the release of the Commission's *CLEC Access Charge Reform Order* to plan and implement additional subsidized entry into new markets. This additional time could significantly increase the amount of uneconomic CLEC market entry and the market disruptions that would likely result for carriers and customers alike. As Focal and US LEC state, CLEC market entry can be implemented in as little as eight months. Focal-US LEC Petition at 9. Further, where some of the necessary steps have already been taken by the CLEC, that interval could be

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<sup>12</sup> In fact, AT&T believes that a number of CLECs accelerated their entry into new markets in order to beat the Commission's June 20, 2001 subsidy deadline.

<sup>13</sup> Insofar as the Commission's decision to cut off the IXC subsidy for CLEC entry into new markets on June 20, 2001, the effective date of the Commission's new rules, might confer some competitive advantage on CLECs which entered the particular market prior to that date (*see* Focal-US LEC Petition at 9-10; TDS Metrocom Petition at 18), the appropriate remedy is to eliminate all artificial subsidies by benchmarking all CLEC access rates at the competing ILEC rate, not to create new subsidies in a misguided attempt to manage "fair" competition.

substantially shorter. This means that CLEC access abuses could be expanded substantially in scope if all new market entry within 14 months of the Commission's Order were eligible for a subsidy from the IXCs.

As another alternative, Focal-US LEC propose that a CLEC should be entitled to a subsidy from the IXCs in any market in which the CLEC had any "investments" or "signed customers" prior to June 20, 2001. *See* Focal-US LEC Petition at 10-11. This amorphous alternative rule for new markets is both contrary to the public interest and unworkable. Not only would it greatly expand the scope of the CLEC access abuse problem into new markets, it would introduce a vague, subjective standard into the analysis – an approach directly contrary to the Commission's objectives of "administrative simplicity" and reliance upon "objectively available information."<sup>14</sup> Accordingly, the CLECs' proposed alternative rules for CLEC entry into new markets should be denied.

### **III. THE COMMISSION SHOULD DENY THE CLEC REQUESTS TO EXPAND THE RURAL EXEMPTION AND CREATE ADDITIONAL EXEMPTIONS.**

In its prior comments to the Commission on the creation of a "rural exemption" from the Commission's CLEC access rules, AT&T warned that the creation of a rural exemption would serve no legitimate purpose and would embroil the Commission in unduly complex implementation and administration issues that would impose a significant drain on scarce agency resources.<sup>15</sup> That process has now begun. Both the Rural Independent Competitive Alliance ("RICA") and the Minnesota CLEC Consortium have filed elaborate petitions for

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<sup>14</sup> *See, e.g., CLEC Access Charge Reform Order* at ¶ 75 ("Administrative simplicity is an important consideration in our choice of [rules], and definitions should "rely on objectively available information that will not require extensive calculation or analysis").

<sup>15</sup> *See, e.g., AT&T Additional Comments*, filed January 11, 2001, at 12-16; *AT&T Additional Reply Comments*, filed January 26, 2001, at 11-17.

reconsideration or clarification of the Commission's rural exemption in which they challenge or seek to alter virtually every aspect of the rural exemption. Although AT&T continues to believe that the creation of *any* rural exemption was unnecessary and unwise, the Commission should firmly deny the attempt of the rural CLECs now to extend that exemption far beyond the narrow purpose for which it was created.

**A. The Commission Should Deny The Rural CLECs' Petitions To Expand The Rural Exemption.**

The sole rationale for the Commission's adoption of a rural exemption from its CLEC access rate rules was that a rural CLEC serving only high-cost rural areas might be unduly disadvantaged if it had to reduce its access rates to the level of the competing ILEC where the rural CLEC is competing against a non-rural ILEC that averages its switched access rates across state-wide study areas including both high-cost rural areas and lower cost urban and suburban areas.<sup>16</sup> Accordingly, the Commission explicitly, and appropriately, limited its rural exemption to the situation where "a rural CLEC [is] competing with a non-rural ILEC." 47 C.F.R. § 61.26(e).

Nevertheless, the rural CLECs now argue that the application of the rural exemption should not depend on whether or not the ILEC serving the same rural area is a "non-rural ILEC." Minnesota CLEC Consortium Petition at 8-11; RICA Petition at 7-8. This proposed change would undermine the whole purpose of the rural exemption. Rural ILECs do not have the same ability as non-rural ILECs to subsidize their access rates in rural areas by averaging their access rates across state-wide study areas that include lower cost urban and suburban areas. If a rural

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<sup>16</sup> See *CLEC Access Charge Reform Order* at ¶ 66 (finding that CLECs that operate only in high-cost rural areas "lack[] the lower-cost urban operations that non-rural ILECs can use to subsidize their rural operations"), ¶ 79 (rural exemption applies "only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers").

CLEC is competing against a rural ILEC, the state-wide averaging problem disappears, and the rural CLEC's access rates should be benchmarked at the competing rural ILEC rate just like any other CLEC.

Similarly, the Commission should firmly reject the rural CLECs' request that the rural exemption should apply "to the extent" that a CLEC provides access services in rural areas even though the CLEC also provides access services in urban areas. Minnesota CLEC Consortium Petition at 2-8; RICA Petition at 10-11. The sole purpose of the rural exemption is to avoid the hardship that might be imposed on rural CLECs if they were required to charge no more than an ILEC rate that is below the cost of serving that rural area because it is based on state-wide averaging of high-cost rural areas with lower cost urban and suburban areas. If a rural CLEC can also go outside its rural area and sign up customers in lower cost urban and suburban areas, it too can average its cost of serving high-cost rural areas with the lower cost of serving urban and suburban areas, and there is no need for the rural exemption.

The real reason that the rural CLECs are so desperate to expand the rural exemption and obtain the higher access charges that it would allow even when they are competing against rural ILECs is revealed in RICA's Petition – "their costs are well above the ILEC costs." RICA Petition at 6. As RICA states, "The record shows that the Rural CLECs' costs of serving the rural areas are typically higher than the ILECs in the rural areas." *Id.* at 4. Higher cost, inefficient CLEC entry, however, is plainly not something that the Commission should encourage through artificial subsidies assessed against the long distance market. Of course, the rural CLECs also contend that they are providing "service that is both higher quality and more advanced than the ILECs" (*id.*), and such market-based competition between CLECs and ILECs to serve rural areas is to be encouraged. But such competition should be regulated by market

forces, not artificially maintained by subsidies assessed against other captive customers. The Commission should let the market decide whether rural customers are willing to pay higher costs for higher quality and more advanced services; it should not interfere in that competitive struggle by artificially supporting the efforts of rural ILECs to compete by requiring long distance carriers and their customers to subsidize the higher costs of the rural CLECs. To the extent that a CLEC is offering higher quality or more advanced services that benefit end users, it is those end users who should decide whether they are willing to pay more for better service.<sup>17</sup>

**B. The Commission Should Deny The Request Of TDS Metrocom For Different Rules For Small And Medium Sized Markets.**

The Commission should also firmly reject TDS Metrocom's proposal for a separate set of "graduated Tier 2 and Tier 3 benchmarks" for higher-cost CLECs serving small and medium sized markets. *See* TDS Metrocom Petition at 5. The elaborate TDS Metrocom proposal represents just the sort of proliferating array of artificial subsidies that the Commission was trying to avoid in its *CLEC Access Charge Reform Order*. CLECs, which can pick and choose in which local markets they wish to compete, should respond to appropriate market signals, not artificial subsidies assessed against other markets that will only encourage inefficient market entry. The TDS Metrocom proposal would only expand and perpetuate indefinitely the

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<sup>17</sup> RICA's further request that the Commission should clarify the statutory obligation of IXCs to purchase CLEC access services (RICA Petition at 12-15) should be rejected in view of the Commission's ruling that IXCs are not required under Sections 201(a) or 251(a)(1) to purchase CLEC access services (other than CLEC access services priced within the new "safe harbor" after June 20, 2001) (*see CLEC Access Charge Reform Order* at ¶ 92); the Commission's recent decision in *Total Telecommunications Services, Inc. v. AT&T Corp.*, FCC 01-84 at ¶¶ 19-35, File No. E-97-003 (March 13, 2001) ("*Total Order*"), holding that nothing in Sections 201, 251, 214 or 202 prohibits AT&T from declining to purchase a CLEC's access services; and the fact that these issues are fully briefed and awaiting decision by the Commission in *AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues*, File No. CCB/CPD No. 01-02. Nor is any clarification required that CLECs can provide access services to IXCs pursuant to intercarrier agreements subject to Section 211 of the Act instead of under their tariffs.

uneconomic CLEC access rates and the inefficient market entry that such incorrect market signals produce. CLECs in all markets should be required to move their access rates as soon as possible to the prevailing market rate established by the incumbent access provider, the competing ILEC. No justification has been presented for the elaborate scheme of higher graduated CLEC access rates for small and medium sized markets proposed by TDS Metrocom.

TDS Metrocom's further proposal that the Commission should abandon its market-based approach to competition in local exchange markets and go back to a system of "cost-based" rate regulation (TDS Metrocom Petition at 13-14, 17) should also be firmly rejected. As the Commission has made clear in numerous decisions, the Telecommunications Act of 1996 directs the Commission wherever possible to rely on competitive market factors rather than historical cost considerations in regulating telecommunications carriers because "competitive markets are superior mechanisms for protecting consumers' by ensuring that services are provided and priced in the most efficient possible manner."<sup>18</sup> Accordingly, the Commission has appropriately ruled that it should assess the reasonableness of a CLEC's access rates "by evaluating the market for access services, rather than by ascertaining [the CLEC's] costs of providing access services." *BTI Order* at ¶ 17.<sup>19</sup> CLEC decisions to enter or remain in a particular market should be based on the pricing signals provided by the market, and CLECs which cannot compete because they have costs that are higher than a competitive market can sustain should exit the market, not be authorized to recover those higher costs in perpetuity from captive customers. Accordingly, no "examination of [the CLEC's] costs is necessary or appropriate" in evaluating the reasonableness

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<sup>18</sup> *BTI Order* at ¶ 18, quoting First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, 16094-95, ¶ 263 (1997) ("*Access Charge Reform Order*").

<sup>19</sup> *See also id.* at ¶ 45 ("we should examine marketplace factors, rather than [the CLEC's] costs, to determine whether [the CLEC's access] rate was and is just and reasonable").

of CLEC access rates.” *BTI Order* at ¶ 45.

Further, there is no evidence whatsoever that the Commission has “prescribed below-cost rates” for CLECs serving small and medium sized markets. *See TDS Metrocom Petition* at 17. Over the past several years, the Commission has offered the CLECs numerous opportunities to present cost data in support of their access rates. Notwithstanding these many opportunities, not one CLEC has submitted *any* cost data to support their claims that higher CLEC rates are justified by higher CLEC costs,<sup>20</sup> and TDS Metrocom has offered none in its petition for reconsideration. There is no factual basis in the record, therefore, for TDS Metrocom’s claim that the Commission has prescribed below-cost rates.

Finally, even if cost data were presented, it would not support the rules proposed by TDS Metrocom. In a competitive market, competitors must be able to compete at the prevailing market price, and if they cannot recover their costs by charging the prevailing market price, they should not be artificially supported by uneconomic subsidies assessed against other captive customers.<sup>21</sup>

#### **IV. THE COMMISSION SHOULD DENY THE CLARIFICATION REQUESTED BY TELEPACIFIC REGARDING WHICH COMPETING ILEC RATE TO APPLY.**

In addition to the petitions for reconsideration of the Commission’s *CLEC Access Charge*

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<sup>20</sup> *See CLEC Access Charge Reform Order* at n.104 (“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”) (emphasis added). *See also BTI Order* at ¶ 50 (finding that, “even if it were relevant, BTI’s cost showing would fall far short of cost-justifying its access rate”).

<sup>21</sup> The Commission has already rejected the further proposal of TDS Metrocom that the Commission should “work with companies serving small and medium sized and residential markets to craft a workable nationwide density-based plan” (TDS Metrocom Petition at 10) in its finding that population “density figures for the irregular areas likely to be served by CLECs are not readily available” and thus do not provide the “objectively available information” required for the Commission’s rules. *See CLEC Access Charge Reform Order* at ¶ 75.

*Reform Order*, U.S. TelePacific (“TelePacific”) petitions the Commission for clarification as to which competing ILEC rate should be applied when a CLEC’s local service area includes areas served by more than one ILEC. TelePacific Petition at 1, 3. Contrary to TelePacific’s petition, however, there is no ambiguity about which ILEC rate apply, and thus no need for clarification.

In its *CLEC Access Charge Reform Order*, the Commission concluded that, following an initial three-year transition period, the maximum benchmark rate for all CLEC access charges will be the “competing ILEC rate.” *CLEC Access Charge Reform Order* at ¶ 45. The term “competing ILEC” is defined in the Commission’s rules as the ILEC “that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC.” 47 C.F.R. § 61.26(a)(2). Thus, for any particular end user customer of the CLEC, there is only one “competing ILEC” and only one “competing ILEC rate.” If the CLEC’s service area covers more than one ILEC service area, therefore, the CLEC must charge no more for access service to a particular end user than the access rate that would have been charged for access to that end user by the ILEC in whose service area the end user resides.

TelePacific further complains that its existing billing systems do not distinguish its customers on the basis of the ILEC service area within which the end user resides. *See* TelePacific Petition at 5-6. The answer to that problem is that TelePacific and other CLECs have been given a three-year transition period to adjust their existing billing systems to the Commission’s new CLEC access charge system, and the record shows that charging different access rates in different areas would not be significantly burdensome for CLECs.<sup>22</sup> Another

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<sup>22</sup> As the Minnesota CLEC Consortium states, “tariffing different access rates for different areas is not a significant burden.” Minnesota CLEC Consortium Petition at 7. *See also* RICA Petition at 10-11 (“the increase in complexity” for a CLEC to charge different rates for different areas “would not be significant”). Indeed, as discussed above, both RICA and the Minnesota CLEC Consortium specifically request the Commission to permit CLECs to charge different access

alternative would be for the CLEC to charge the access rate of the competing ILEC with the lowest access rate, since the Commission's new CLEC benchmark rules establish only the *maximum* rate that the CLECs may tariff for providing access to a particular customer, and there is nothing in those rules that would preclude a CLEC from charging an access rate below the maximum for some customers.

The other alternatives suggested by TelePacific should also be rejected. Permitting the CLEC to choose the highest of the competing ILEC access rates (TelePacific Petition at 5) would be a clear violation of the Commission's rules for those customers whose ILEC charges a lower rate. Likewise, a simple average of the ILEC rates would create the very "opportunity for strategic use of the tariff system" by the CLEC to impose unreasonable rates for access services that the Commission's new CLEC access rate rules are designed to eliminate.<sup>23</sup> CLECs wishing to increase their access rates would simply extend their service areas until they encompassed some portion of an adjacent ILEC service territory with a higher access rate. While a weighted average of the ILEC access rates based on the number of CLEC end users in the various ILEC territories or on the relative volume of ILEC traffic in the state (TelePacific Petition at 7-9) might reduce the potential for CLEC gaming of the system, only a weighted average of the ILEC access rates based on the number of minutes of use generated by the CLEC's end-user customers in different ILEC territories would truly avoid the opportunity for CLEC abuse. However, there is no reason to prefer such an elaborate computation to the simple and clear rule already established by the Commission. Moreover, a weighted average based on minutes of use would have to be constantly updated to maintain its accuracy, a task that would be burdensome.

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rates in rural and non-rural areas served by the same CLEC. *See* RICA Petition at 10-11; Minnesota CLEC Consortium Petition at 2-8.

<sup>23</sup> *See CLEC Access Charge Reform Order* at ¶ 59.

**V. TO THE EXTENT NECESSARY OR APPROPRIATE, THE COMMISSION SHOULD GRANT THE CLARIFICATIONS REQUESTED BY QWEST.**

Qwest also requests clarification of the Commission's Order with respect to two narrow issues. Although AT&T disagrees with Qwest that the Commission's Order is ambiguous in either of those areas, AT&T agrees that the clarifications requested by Qwest are appropriate and that, to the extent that the Commission deems any clarification to be necessary or appropriate, the Commission should grant the clarifications requested by Qwest.

**A. The Commission Should Clarify That CLECs May Charge The Competing ILEC Rate Only For Access Services That A CLEC Actually Provides.**

In its *CLEC Access Charge Reform Order*, the Commission ordered that within three years CLECs will be permitted to tariff rates for switched access services at a level no higher than the access rate charged by the competing ILEC serving the same local market.<sup>24</sup> As Qwest points out, however, CLECs frequently provide only some of the functions involved in the provision of originating and terminating switched access services, and they rely on the ILECs to perform other functions. See Qwest Petition at 3. For example, CLECs often install their local switches behind an ILEC tandem switch so that all traffic between the CLEC and the IXCs goes through the ILEC tandem switch. In this situation, the IXC is billed directly by the ILEC for the tandem switching and transport performed by the ILEC in addition to the CLEC's access charges. The IXC should not be charged twice for the tandem switching and transport functions. To avoid such a result, the CLEC benchmark rate in this situation should be no more than the rate charged by the competing ILEC for the functions actually performed by the CLEC. Thus, in the example above, the CLEC should be permitted to charge only the access rate of the competing ILEC reduced by the amount of the ILEC tandem switching and transport charges.

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<sup>24</sup> See, e.g., *CLEC Access Charge Reform Order* at ¶¶ 45, 54, 59, 61.

The overall access rate paid by the IXC will then be equal to the access rate charged by the competing ILEC if the competing ILEC had provided the complete switched access service – in other words, equal to the prevailing market price established by the ILEC.

Insofar as the Commission deems it appropriate to provide additional clarification regarding the competing ILEC rate, the Commission should confirm that a CLEC may tariff its access services at the total switched access rate of the competing ILEC only to the extent that the CLEC itself provides the complete switched access service. Where, on the other hand, the CLEC relies on the ILEC to provide a portion of the complete switched access service, the CLEC's access rate should be benchmarked at the rate charged by the competing ILEC for those access service functions that are actually provided by the CLEC.

**B. The Commission Should Clarify That An IXC Is Not Required To Accept Traffic From A CLEC That Fails To Provide The IXC With Sufficient Information To Bill The CLEC's End-User Customer.**

In its *CLEC Access Charge Reform Order*, the Commission found that an IXC is not ordinarily required to accept CLEC access services regardless of the level of the CLEC's access rates. *See CLEC Access Charge Reform Order* at ¶ 92. However, on a going forward basis, the Commission ruled that if the CLEC's access rates are within the prospective "safe harbor" established in the Commission's Order (that is, at or below the benchmark rates), the CLEC's access rates will be conclusively presumed to be reasonable, and a request by the CLEC's end-user customers for service at those rates will constitute a "reasonable request" for service under Section 201(a) of the Communications Act. *See id.* at ¶ 94. As Qwest correctly points out, however, there are other legitimate bases for an IXC to decline to accept traffic from a CLEC besides the price of the service. *See Qwest Petition* at 4. In particular, an IXC may decline to accept traffic from a CLEC that has failed to provide the information required by the IXC to bill the CLEC's end users for long distance calls made over the IXC's network. *Id.* In this situation,

the IXC must retain the ability to decline to accept traffic from the CLEC unless and until the CLEC provides the necessary end-user billing information to the IXC. Accordingly, to the extent that any clarification is deemed appropriate, the Commission should make clear that, regardless of the access rate tariffed by the ILEC, an IXC is not required under Section 201(a) to accept traffic from a CLEC that fails to provide the IXC with sufficient information to bill the CLEC's end user customer for long distance calls carried over the IXC's network.

## VI. CONCLUSION

For the foregoing reasons, the Commission should deny the petitions for reconsideration or clarification of the *CLEC Access Charge Reform Order* except that, to the extent that clarification is deemed necessary or appropriate, the Commission should make clear that (1) CLECs may charge the competing ILEC rate only for access services that the CLEC actually provides, and (2) an IXC is not required to accept traffic from a CLEC that fails to provide the IXC with sufficient information to enable the IXC bill the CLEC's end-user customer for long distance calls carried over the IXC's network.

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July 23, 2001