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July 18, 2002

Ms. Marlene H Dortch, Secretary
Office of the Secretary
Federal Communications Commission
445-12th Street, SW
Washington, DC 20554

Re: Written Ex Parte Presentation of the
Rural Independent Competitive Alliance in
CC Docket No. 96-262, *Seventh Report and Order*

Dear Ms. Dortch:

Attached please find a written Ex Parte Presentation—a letter dated today to Jeffrey Dygert from the Rural Independent Competitive Alliance (RICA), with copies to Dorothy Attwood and Jeffrey Carlisle, relating to the above-referenced proceeding. This transmittal letter and the *ex parte* are being filed electronically pursuant to Commission rules 1.1206 and 1.49(f).

Should you have any questions, please do not hesitate to contact our office.

Respectfully submitted,

Clifford C. Rohde
Counsel for RICA

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July 18, 2002

Jeffrey Dygert
Deputy Division Chief
Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445 12th St., S.W.
Washington, D.C. 20554

Re: CC Docket No. 96-262, *Seventh Report and Order*

Dear Mr. Dygert:

As you are aware, on June 14, 2002 the U.S. Court of Appeals for the District of Columbia Circuit vacated the Commission's October 2001 *Declaratory Ruling* which was issued pursuant to a primary jurisdiction referral from a civil action brought by a group of CLECs to recover unpaid access charges by AT&T and Sprint. The court found that the Commission could not require AT&T to purchase access services from CLECs when an end user requested AT&T long distance service on the basis of the "reasonable request" provisions of Section 201(a), but must also follow the procedures specified in the second clause of that section. Because this decision has substantial relevance to the pending reconsideration of the *Seventh Report and Order* in CC Docket No. 96-262 ("*CLEC Access Reform Order*"), which AT&T has also appealed, the Rural Independent Competitive Alliance ("RICA") provides these additional comments for the Commission's consideration.

The *Declaratory Ruling* held that IXCs were required by the "reasonable request" clause of Section 201(a) to originate or terminate traffic at presumptively lawful access rates. The Commission explicitly found that this conclusion was consistent with the *CLEC Access Reform Order*. That order, in paragraphs 88 to 97, addressed directly the question of "whether and under what circumstances an IXC can decline to provide service to end users of a CLEC," the same question raised by the *Advantel* court. The Commission's conclusion that IXCs are required to serve the end users of a CLEC that is charging rates at or below the benchmark was based entirely on the "reasonable request" clause of Section 201(a). The Commission explicitly declined to address the applicability of Section 214(a), and did not mention other provisions of Title II.

In view of this situation, RICA recommends that on reconsideration of the *Seventh Report and Order*, the Commission:

- (1) Explain that although the D.C. Circuit refused to consider the argument on appeal of the *Declaratory Ruling*, the entire record in that proceeding, as well as AT&T's earlier request for a ruling and the record in CC Docket 96-262, demonstrate that AT&T was already interconnected with the CLECs, was exchanging *both* originating and terminating traffic with them, and that there was no through route established because AT&T charged its customers for the entire end-to-end communication for calls either originating or terminating at a CLEC customer. The very existence of the *Advantel* civil suit for recovery of charges for access provided, which led to both the *BTI* decision and the *Declaratory Ruling* of the Commission, demonstrates that interconnection exists and there was no reason for the Commission to proceed under the second clause of Section 201(a).¹
- (2) Explain that even if, *arguendo*, an order under the second clause of Section 201(a) is/was required in order to find that IXCs have a duty to serve the end user customers of CLECs in areas where they serve ILEC customers, the extensive proceedings before the Commission constituted the hearing required, and that the Commission necessarily made a public interest finding. Specifically, in paragraph 93 the Commission stated "universal connectivity is an important policy goal that our rules should continue to promote" and "...any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service." These conclusions necessarily constitute a finding that the interconnection required is "necessary or desirable in the public interest."
- (3) In *MGC v. AT&T*, the Bureau stated quite clearly that "AT&T remains subject to a broad variety of statutory and regulatory constraints...which include, without limitation, sections 201, 202, 203 and 214 of the Act and section 63.71 of the Commission's rules."² The Commission should, on reconsideration, address and conclude, consistent with the information and arguments on the record set forth by RICA and others, that AT&T's refusal to serve CLEC customers also violates each

¹ See, e.g. Reply Comments of RICA, et al., CC Doc. No. 96-262, June 29, 2000, which demonstrated that AT&T either explicitly or constructively ordered access service from CLECs, actively marketed its originating service to CLEC customers, and billed and collected for its service. This set of facts bears no resemblance to the scenario analyzed by the court.

² *MGC Comm. Inc. v. AT&T Corp.*, 14 FCC Rcd 11647, aff'd 15 FCC Rcd 308 (1999)

of the following substantive provisions of the Act. The violations of these specific provisions of the Act are in addition to the violation of AT&T's obligation as a common carrier to serve all persons indifferently.

- (a) Refusal to serve CLEC customers is an unjust and unreasonable practice in violation of Section 201(b). As RICA has previously argued, action by IXCs which results in denial of access by rural subscribers to the modern, reliable and advanced services which the rural CLECs have made available is an unjust and unreasonable practice;³

Refusal by an IXC to provide service on the basis of its belief that access rates of the end user's local carrier are too high is also unjust and unreasonable because it violates the Commission's frequently expressed prohibition on "self help";⁴ and

Refusal to provide service to the customers of some CLECs is also unjust and unreasonable in the context of an IXC, such as AT&T, which as a CLEC itself stands to gain a competitive advantage by driving other CLECs out of business. This is particularly true where the AT&T CLEC itself has access charges which equal or exceed many of the CLECs about which AT&T complains.

- (b) Refusal to serve CLEC customers is an unjust and unreasonable discrimination in the provision of like communications service, and creates an unreasonable preference favoring customers of other carriers and subjects the customers of CLECs to undue and unreasonable prejudice and disadvantage in violation of Section 202(a)
- (c) Refusal to serve CLEC customers where access is available from the CLEC violates Section 203(c) of the Act, at least through July 31, 2001 because its tariff offered service wherever access was available;⁵ and that the refusal

³ RICA Comments, AT&T and Sprint Petitions for Declaratory Ruling Regarding the Legality of Terminating or Declining Access Services Order of Constructively Ordered, and the Requirements for Effecting Such Termination, CCBCPD No.01-02, Feb. 20, 2001 at 10. ("RICA Declaratory Ruling Comments")

⁴ See, e.g., *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647, *aff'd.*, 15 FCC Rcd 308 (1999).

⁵ AT&T's tariff stated: "Service is furnished subject to the availability of the service components required. In the absence of access arrangements between the company and the access

thereafter was and is contrary to the holding out described on AT&T's website, in violation of Section 201(b).

- (d) Cancellation of service to CLEC subscribers, whether explicitly, or constructively by refusing to pay for access, without having obtained certification of the public interest, convenience and necessity violates Section 214(a) of the Act. AT&T's contention that certification is not required is contrary to express holdings of the Commission which RICA previously has cited at length.⁶
- (e) If IXCs are permitted to pick and choose which customers they will serve based on the access rates of the customer's local exchange carrier, they will effectively be able to avoid their obligations imposed by Section 254(g) to provide uniform toll rates. The principle advocated by AT&T that it can discontinue service at its choice without Commission permission because it does not like the access rates charged would, if accepted by the Commission, be applicable equally to the customers of rural ILECs and CLECs. Section 254(g) was adopted by Congress in recognition of the fact that access costs are higher in some areas than others and thus represents a deliberate policy choice to require IXCs to charge rates which cover their average access costs, not just their lowest costs.

RICA would be pleased to discuss the foregoing points with you in detail.

Sincerely yours,

David Cosson
Attorney for Rural Independent Competitive Alliance

cc: Secretary
Dorothy Attwood
Jeffrey Carlisle

provider at a particular station, a Customer may be unable to place calls from or to the affected Station." As RICA has pointed out, these words are at best ambiguous and must be construed in favor of a customer requesting service. No customer can reasonably be expected to understand that this wording could be legally construed to reject the access arrangements available to it from the customer's LEC. The Commission has also found that a tariff that is not clear and explicit violates Section 201(b). *Halprin, Temple, Goodman & Sugrue v. MCI*, 13 FCC Rcd 22568, 22576 (1999).

⁶ RICA Declaratory Ruling Comments at 6-8 (citing *Chastain v. AT&T*, 43 FCC 2d 1079, 1085 (1973), *recon. denied*, 49 FCC 2d 749 (1974).