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March 5, 2003

Mr. Jeffrey Dygert
Deputy Division Chief, Pricing Policy Division
Wireline Competition Bureau
Federal Communications Commission
445-12th Street, SW
Washington, DC 20554

WRITTEN EX PARTE PRESENTATION
of the Rural Independent Competitive Alliance in
CC Docket No. 96-262, *Seventh Report and Order*

Dear Mr. Dygert:

Attached for your review please find a February 5, 2003, Order of the North Carolina Utilities Commission¹ ("NCUC"). In the Order, the NCUC overruled exceptions raised by AT&T Communications of the Southern States, Inc. ("AT&T") to the NCUC's earlier Recommended Order.² In that Recommended Order, the NCUC had determined to penalize AT&T for resorting to "self-help" remedies to protest CLEC intrastate access service rates. We brought the Recommended Order to your attention in a written ex parte presentation filed with the Commission on November 6, 2002.

As you will recall, the NCUC in its Recommended Order relied, in part, on the reasoning of the FCC's Seventh Report and Order. The NCUC specifically indicated that the Seventh Report and Order "properly takes into account the importance of maintaining universal connectivity," and that when an IXC picks and chooses the CLECs with which it will do business, the public switched telephone network (PSTN) "becomes fragmented, and universal connectivity is lost." In its Recommended Order, the NCUC assessed a \$50,000 penalty against AT&T, which was reduced to \$25,000 in the Order.

The NCUC's decision is consistent with the position of the Rural Independent Competitive Alliance ("RICA"). As RICA has previously indicated, on reconsideration the

¹ State of North Carolina Utilities Commission, In the Matter of Unauthorized Reduction of Service, Unlawful Discrimination and Violations of FCC Regulations by AT&T Communications of the Southern States, Inc., Docket No. P-140, Sub 79, Order Overruling Exceptions and Reducing Penalty (rel. Feb. 5, 2003) ("Order").

² State of North Carolina Utilities Commission, In the Matter of Unauthorized Reduction of Service, Unlawful Discrimination and Violations of FCC Regulations by AT&T Communications of the Southern States, Inc., Docket No. P-140, Sub 79, Recommended Order Finding Violations and Imposing Penalty (rel. Oct. 24, 2002) ("Recommended Order").

Seventh Report and Order needs to address all the provisions of the law and Commission rules and policies violated by AT&T's illegal self-help practices.³ As you know, AT&T has sought to overturn the Seventh Report and Order on grounds similar to those endorsed by the D.C. Circuit in AT&T's successful appeal⁴ of the Commission's Declaratory Ruling on interstate access rates prior to June 20, 2001.⁵

The U.S. Court of Appeals for the District of Columbia Circuit recently reinforced the longstanding general prohibition on "self help" as a means of challenging tariffed rates. In *AT&T Corp. v. FCC*, the court stated that, "As a rule, grievances are to be raised ... via § 208 and not by resort to self-help."⁶ (emphasis added) The court acknowledged that a limited exception to the no-self-help rule exists where a sham entity is charging unreasonable rates, but that even so, the carrier resorting to self help (in this case AT&T as well) does so "at its peril." The Seventh Report and Order, of course, deals with conclusively presumed lawful rates, not with sham entities charging unreasonable rates. In this regard, a group of RICA members has asked the Commission to impose a Notice of Apparent Liability against AT&T for its continued willingness to flout the Commission's rules and fail to pay lawful access rates.⁷

In sum, the NCUC and D.C. Circuit decisions provide additional support by which the Commission can strengthen the conclusions of the Seventh Report and Order. An order on reconsideration that withstands AT&T's appeal is necessary to ensure the continued viability of the rural CLEC industry.

Please contact the undersigned for any questions related to this submission.

Respectfully submitted,

/s/ [original filed electronically]

David Cosson
Clifford C. Rohde
Counsel for RICA

Attachment

Cc: Jeffrey Carlisle, Senior Deputy Bureau Chief, WCB

³ In re Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition for Reconsideration and/or Clarification, CC Docket No. 96-262 (filed Jun. 20, 2001); RICA Written ex parte presentation, CC Docket No. 96-262 (Jul. 18, 2002)

⁴ *AT&T Corp. v. FCC*, Case No. No. 01-1467, <http://laws.findlaw.com/dc/011467a.html> (D.C. Cir. Jun. 14, 2002).

⁵ In re AT&T and Sprint Petitions for Declaratory Ruling on CLEC Access Charge Issues, CCB/CPD No.01-02, Declaratory Ruling, FCC No. 01-313, 16 F.C.C.R. 19158 (2001).

⁶ Case No. 01-1188, <http://laws.lp.findlaw.com/dc/011188.html> (D.C. Cir. Jan. 24, 2003).

⁷ See, Letter of RICA members to Anthony Dale and Dana Leavitt of the FCC Enforcement Bureau, Investigations and Hearings Division (Oct. 15, 2002).

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. P-140, SUB 79

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of		
Unauthorized Reduction of Service, Unlawful)	ORDER OVERRULING
Discrimination and Violations of FCC)	EXCEPTIONS AND
Regulations by AT&T Communications of the)	REDUCING PENALTY
Southern States, Inc.)	

BY THE COMMISSION: On October 24, 2002, a Recommended Order Finding Violations and Imposing Penalty (\$50,000) was issued in this docket. On November 8, 2002, AT&T Communications of the Southern States, Inc. (AT&T) filed exceptions. An oral argument on these exceptions was held on December 10, 2002.

After careful consideration, the Commission concludes that good cause exists to overrule the exceptions filed by AT&T for the reasons as set forth in our original Recommended Order. While it is apparent to the Commission that this is a close case, about which reasonable persons can disagree, it is worthwhile to recall these words in the Recommended Order:

The Commission does not mean to imply that MRC was completely blameless in this matter and that it would not have been more desirable for direct evidences of motivations and intentions to have been presented such as from Mr. Trey Judy of MRC, who was at the hearing but was not called. The Commission is saying, however, that the Public Staff was able to prove by the preponderance of the evidence and reasonable inferences from the evidence that AT&T was legally responsible for using MRC as its instrumentality to block access by AT&T's customers to AT&T's own long distance network.

In any event, MRC's sins were not the issue, inasmuch as MRC had been dismissed as a party on December 28, 2001, on the motion of the Public Staff and without objection from AT&T. The issue is about AT&T's responsibility for this affair. . . . (Recommended Order at 8)

Nevertheless, after due regard for the totality of the circumstances, the Commission concludes that Finding of Fact No. 15 should be amended to substitute the amount of "\$50,000" by "\$25,000". This would represent a further proportionate reduction of the recommended penalty to \$11,500 for violations of G.S. 62-131(b), \$11,500 for violations of G.S. 62-140(a), and \$2,000 for violations of G.S. 62-118(a).

IT IS, THEREFORE, SO ORDERED.

ISSUED BY ORDER OF THE COMMISSION.

This the 5th day of February, 2003.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in cursive script that reads "Patricia Swenson".

Patricia Swenson, Deputy Clerk

pb020403.10

Commissioner Sam J. Ervin, IV, and Commissioner James Y. Kerr, II, dissent.

DOCKET NO. P-140, SUB 79

COMMISSIONERS SAM J. ERVIN, IV, AND JAMES Y. KERR, II, DISSENT: We respectfully dissent from the majority's decision to impose a \$25,000.00 penalty upon AT&T in this proceeding. We reach this conclusion for the same reasons set out in Commissioner's Ervin's dissent from the Recommended Order entered by the panel on October 24, 2002. As a result, we would conclude that the Public Staff has failed to meet its burden of proving that AT&T has violated G.S. 62-118(a), G.S. 62- 131(b), G.S. 62-140, and the Commission's August 6, 1990, Order Revising Capped Rate Plan And Denying Request For Phase II Proceeding in Docket No. P-100, Sub 72 and that AT&T's exceptions should be sustained to the extent that they challenge the adequacy of the Public Staff's showing in support of its request for relief.

\s\Sam J. Ervin
Commissioner Sam J. Ervin, IV

\s\ James Y. Kerr, II
Commissioner James Y. Kerr, II