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

In the Matter of	)	
	)	
Section 272(f)(1) Sunset of the BOC Separate Affiliate and Related Requirements	)	WC Docket No. 02-112
	)	
2000 Biennial Regulatory Review Separate Affiliate Requirements of Section 64.1903 of The Commission's Rules	)	CC Docket No. 00-175

REPLY COMMENTS OF GENERAL COMMUNICATION, INC.

General Communication, Inc. ("GCI") hereby submits these reply comments in the captioned proceeding. The Commission properly imposed separate affiliate requirements on independent local exchange carriers ("LECs") when they provide in-region interstate services.[1] These carriers maintain monopoly control over the facilities necessary for interexchange carriers ("IXCs") to originate and terminate calls, and separation through regulation still remains necessary to guard against the independent LECs ability to raise rivals wholesale input costs (access service) while at the same time competing for the provision of the retail service (interstate long distance). No commenter has demonstrated that the independent LECs have lost market control over these bottleneck facilities, and therefore, no basis exists for eliminating or relaxing the requirements. In fact, continuing instances of earnings violations by rate-of-return regulated carriers demonstrates that these carriers continue to hold and exercise market power, requiring continued regulatory oversight.

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[1] The issues raised in the FNPRM apply both to the BOCs and independent LECs. These reply comments address the separate affiliate requirements for independent LECs only.

I. INDEPENDENT LECS CONTINUE TO CONTROL BOTTLENECK FACILITIES.

The Commission considers two independent factors when determining if dominant carrier regulation should be imposed on a carrier: can the carrier unilaterally raise and sustain prices above competitive levels and thereby exercise market power by restricting output or by its control of an essential input.[2] As for control of an essential input, the Commission has found that "[a] carrier may be able to unilaterally raise prices by increasing its rivals' costs or by restricting its rivals' output through the carrier's control of an essential input, such as access to bottleneck facilities, which its rivals need to offer their services."[3] Because independent LECs maintain control over bottleneck facilities necessary to provide IXC access to their customers and parties called by their customers, existing separate affiliate requirements must remain in place to guard against cost misallocation, unlawful discrimination, or a price squeeze.

A. Proponents of Eliminating the Separate Affiliate Requirements Fail to Assess the Market Power in the Relevant Market: the Access Market.

The Commission asked in the FNPRM if it needed to analyze separately the wholesale and retail markets as separate relevant service markets.[4] Given the framework for determining whether to apply dominant carrier regulation, the answer is indisputably yes. That there are multiple carriers in the retail market for interstate interexchange service does not answer the question of whether those carriers have multiple (or even just more than one) sources for the essential wholesale input for the retail service, exchange access.

While proponents of eliminating the separate affiliate requirements go to great lengths to tout competition in the interstate interexchange market, they provide very little analysis of the

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[2] FNPRM at para. 5.
[3] Id., n.10 (citations omitted).
[4] FNPRM at para. 10.

interstate access market.[5] This incomplete analysis completely glosses over continued independent LEC control of bottleneck facilities. For example, ITTA states that interstate access minutes continue to fall "as *consumers* increasingly use CMRS services" (at 5). Of course, use of CMRS service by consumers as a substitute for interstate interexchange service (the retail service) does not mean that an IXC can utilize CMRS service as a substitute for access service (the wholesale service). No one has or could allege that CMRS is a substitute for independent LEC exchange access service, which the Commission previously stated would be a prerequisite for relaxation of the regulatory requirements.[6] Bypass of LEC facilities by wireless technology is wholly distinct from the ability of an IXC to have access to an alternative facilities-based provider of exchange access. Only in the rarest of occurrences does such an alternative exist, particularly for the delivery of mass-market services.

USTA similarly declares that "competition from wireless carriers, CLECs, cable providers, and other companies providing services over the Internet eliminates the ability of BOCs or Independent ILECs to exercise market power in the local and exchange access markets."[7] There simply is no support for USTA's assumption that competition in the provision of retail interexchange or comparable services would lead an independent LEC to refrain from raising its prices to rivals for bottleneck facilities. Indeed, it may have even more incentive to seek to maximize profits in this market if being forced to compete with new competitors that do not require access to its facilities. Finally, even if such intermodal retail competition somehow leads to restraint in the wholesale market (which is a questionable proposition at best), USTA has

[5] See ITTA Comments at 4-6; USTA Comments at 5-8..
[6] "Only the emergence of competition in the local exchange and exchange access markets will eliminate independent LECs' ability and incentive to engage in anticompetitive activity." LEC Reclassification Order, 12 FCC Rcd 15,756, 15866 (1997); Second Reconsideration Order, 14 FCC Rcd 10,771, 10782 (1999).
[7] USTA Comments at 8.

offered no evidence that such intermodal competition has developed in markets served by independent LECs.

For its part, ITTA claims that "competitors no longer need to use the ILEC local exchange facilities to access interexchange customers and, in fact, many completely bypass the local exchange."[8] Specifically referring to CMRS and cable providers, it is clear that ITTA cannot cite any IXC alternative for access to their interexchange customers.[9] Indeed, even where CLECs have entered independent LEC markets, they remain largely tied to the bottleneck facilities controlled by the independent LEC in the provisions of local and exchange access services. At bottom, the separate affiliate requirements must remain in place because there has been no significant change in independent LEC control of bottleneck facilities that comprise the wholesale input to retail interexchange services.

B. The Relative Size of the Independent LEC Service Area is Irrelevant to Market Power Analysis.

Sprint states that "due to the independent ILECs' limited size and scope of service areas, as well as dispersion of their service areas, independent ILECs do not have the same ability as a BOC to adversely impact in-region interstate and international services."[10] However, the assessment of a carrier's ability to engage in anticompetitive activity is not limited to its relative size, but must be assessed in connection with the conditions under which a specific carrier operates. Indeed, this Commission imposed regulations on CLEC access rates when it determined that some CLECs were charging unreasonable terminating access charge rates, because there was no competition for this service. Under Sprint's theory, however, no such

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[8] ITTA Comments at 9.
[9] Cf. Sprint Comments at 4 ("it is the BOC dominance in local and exchange access, which wireless platforms have not supplanted or impacted appreciably yet, that requires safeguards to be in place in order for the BOC to maintain the non-dominant classification of the long distance service.").
[10] Sprint Comments at 14.

regulation would have been called for because CLECs do not have the same ability as larger carriers to raise total costs. That this rationale has been rejected is demonstrated by the fact that the Commission nonetheless established requirements in connection with CLEC access rates because it determined that CLECs had the ability to charge unreasonable rates for terminating access, for which there was no competition. By the same token, regulatory oversight remains necessary where an independent LEC has control over bottleneck facilities and offers competitive retail services for which the bottleneck services are a necessary input. Moreover, to the extent that the relative size the independent LECs is a factor, the Commission has already taken it into account by establishing the separate affiliate requirements *in lieu of* imposing dominant carrier regulation on the provision by independent LECs of in-region long distance services.

ITTA also claims that "independent LECs do not typically enjoy the economies of scope or scale that their larger interexchange competitors do, meaning that they have fewer customers and services over which to spread overhead and other costs."[11] This generic size comparison between non-overlapping service providers has nothing to do with assessing whether or not the IXC has any alternative access provider in the independent LEC's service territory. Where there is no such competition, the independent LEC has the motive and opportunity to engage in cost misallocation, unlawful discrimination, or a price squeeze, and the separate affiliate requirements must continue to apply.

[11] ITTA Comments at 7.

II. PERSISTENT INTERSTATE ACCESS OVEREARNINGS DEMONSTRATE THE NEED FOR CONTINUED REGULATORY OVERSIGHT.

USTA further claims that rate-of-return access charge reform efforts have reduced the potential for a price squeeze to succeed.[12] While this claim may have merit in theory, it has no validity based on the facts. Today, rate-of-return carriers, which are predominantly independent LECs, are overearning on interstate access at a significant rate. AT&T has recently reported that many of the rate-of-return carriers have at least a six-year string of earnings violations, and total overearnings amounts have grown significantly, from $92 million for the 1999-2000 monitoring period to $198 million for the 2001-2002 monitoring period.[13] Changes in the access charge regime plainly have had no impact on the ability of independent LECs to engage in cost misallocation, unlawful discrimination, or a price squeeze.

In addition, the Commission's ability to take enforcement action against such violations appears to have been substantially curbed by the interpretation of the streamlined tariff filing terms of Section 204(a)(3). Last year, the court relied on the Commission's <u>Streamlined Tariff Order</u> to conclude that no retroactive refund liability would be imposed in connection with a tariff that has been "deemed lawful" due to a failure to suspend upon initial filing.[14] Under this regime, only prospective relief may be ordered for any provisions in the tariff that are subsequently found to be unlawful. As a result, independent LECs that control bottleneck facilities are subject to virtually no earnings enforcement in connection with exchange access rates. To the extent that the potential for refund liability may have previously imposed some discipline on the ability of independent LECs to raise prices for exchange access services, that

[12] ITTA Comments at 9.
[13] AT&T <u>ex parte</u>, CC Docket Nos. 00-256, 96-45, 98-77, 98-166 (May 9, 2003).
[14] <u>See</u> <u>ACS v. FCC</u>, 290 F.3d 403 (D.C. Cir. 2002).

discipline has been largely eliminated. Against this background, it is even more important to retain the separate affiliate requirements.

III. CONCLUSION

Based on the foregoing, GCI respectfully requests that the Commission retain its separate affiliate requirements for independent LECs. Such regulation remains necessary to guard against the ability of independent LECs to use control of bottleneck facilities to engage in cost misallocation, unlawful discrimination, or a price squeeze.

Respectfully submitted,

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