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October 3, 2003

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: Ex Parte
CC Docket Nos. 96-262, 01-92

Dear Ms. Dortch:

In this letter, US LEC Corp. ("US LEC") responds to the September 11, 2003 *ex parte* letter from ITC^ΔDeltaCom ("ITCD") in the above-captioned proceedings. Apart from numerous irrelevant and spurious allegations, ITCD presents no new arguments. In its ad hominem attacks against US LEC, ITCD attempts to distract the Commission from the fact that this is an industry-wide policy issue. What is more important than the false allegations or the arguments ITCD repeats is the issues that it ignores. In this filing, US LEC briefly distinguishes ITCD's irrelevant arguments and then rebuts the few ITCD arguments that actually address the merits of US LEC's request for declaratory ruling.

The Issues In This Proceeding Concern Applicable Federal Law

While ITCD would have the Commission believe otherwise, the purpose of this proceeding is to affirm that federal law permits LECs (CLECs as well as ILECs) to charge IXCs for tariffed access services the IXCs use to reach wireless end users. By making wholly specious allegations concerning US LEC's "intent," or "schemes," or "fraud,"¹ ITCD merely is trying to deflect attention from the true issues.

¹ ITCD already has asserted these very same allegations against US LEC in an alternative forum and it is entirely inappropriate to try to poison these proceedings with its unsupported claims. Indeed, US LEC strongly disagrees with ITCD's allegations and believes that it will prevail in the U.S. District Court litigation ITCD has instituted.

Nevertheless, US LEC is compelled to respond to some of these allegations to set the record straight. The suggestion that US LEC is engaged in some type of new and “nefarious” scheme is simply untrue. ITCD already has admitted as much by withdrawing the unsupported allegations (at the heart of its U.S. District Court Complaint) that US LEC was stripping ANI and CPN. US LEC’s motion for sanctions under Rule 11 of the Federal Rules of Civil Procedure for that and other false ITCD allegations is pending in U.S. District Court. After withdrawing the stripping allegations, ITCD attempted to salvage its lawsuit by alleging that US LEC’s (and presumably all the CMRS carriers’) choice of signaling protocol (multi-frequency signaling or SS7 signaling) was an alternative method to hide the fact that US LEC was billing ITCD for wireless traffic. However, ITCD cannot explain away the undisputed fact that the CMRS carrier, not US LEC, chooses the signaling protocol. ITCD does not have the temerity to accuse Alltel or Verizon Wireless or AT&T Wireless of fraud, so it ignores this fact and attacks US LEC instead.

Moreover, after alleging that US LEC was stripping call identifying data from all wireless calls, ITCD ultimately admitted that its internal controls and systems were so woefully inadequate that it did not realize that the majority of the wireless traffic being sent by US LEC actually included **all** of the identifying wireless information. US LEC uses and provides the standard industry SS7 information that both shows US LEC participates in routing these wireless calls and identifies the call as a wireless call. In those situations when CMRS carriers choose to utilize MF trunking arrangements that do not pass call routing information, US LEC’s insertion of a BTN for billing purposes when ANI was not available does not violate any requirements or standard industry practices, as ITCD’s own witness admitted in the U.S. District Court litigation concerning this issue.² Indeed, by identifying the trunk group in the call data, the BTN signal highlights the volume of traffic passing over the trunk giving the IXC notice of the fact the traffic is from one source. Thus, the use of US LEC’s BTN does exactly the opposite of what ITCD alleges.

Whether or not a carrier uses SS7 signaling is not an issue in this proceeding.³ Rather, this proceeding deals only with the right of a carrier to bill for services rendered. In short, ITCD’s unproven signaling claims, are irrelevant to the question at issue in this proceeding.

The only issue in this proceeding concerns whether certain tariffed access charges are permitted under federal law. US LEC is confident that the Commission properly will ignore ITCD’s distortions of fact and law, and will instead apply relevant federal law and policy to determine that CLECs are, have been for the period at issue, and should continue to be, entitled to charge IXCs for tariffed access services used to reach wireless end users.

² *ITC^DeltaCom Communications, Inc. v. US LEC Corp., et. al.*, File No. 3:02-CV-116-JTC (N.D. Ga. filed Sept. 20, 2002), Memorandum of Law In Support of Defendants’ Motion for Summary Judgment, Ex. 14, Epperson Depo. pp. 48, 69 and 108 (May 5, 2003).

³ If it is to be addressed at all, it should be in a proceeding specifically focused on the signaling a carrier is required to send.

US LEC's Access Arrangements For CMRS Carriers Are The Status Quo

As US LEC explained in its August 25, 2003 *ex parte*, it has been providing access services that connect wireless end users to IXCs since 1997, five years prior to the *Sprint Declaratory Ruling*. Any new market entrant, whether a CLEC or any other provider, must look for opportunities to gain market share. One such opportunity CLECs sought out and developed over the past six years is providing services to CMRS carriers. CLECs offer to the CMRS carriers services such as network management, 800 database dips and call routing, transport, and access connections to ILECs and IXCs. To the extent CLECs have been successful in developing these offerings, the market-based model is working properly.

ITCD tries to ignore the fact that many CLECs provide access to wireless end users and bill IXCs for such services.⁴ ITCD likely fears that if wireless-related access charges are properly seen as an industry-wide issue involving all CLECs, wireless carriers, and IXCs, then the Commission is less likely to conclude that every carrier involved in providing the services—which all agree are necessary—has been wrongly billing IXCs for the past seven years. Nor is ITCD the only IXC who uses a CLEC's access services to reach wireless end users.⁵ The fact that these CLEC access charge arrangements represent the status quo shows the reasonableness of US LEC's interpretation of current federal law.

ITCD's vehement disagreement with this interpretation is completely disingenuous and is motivated less by policy concerns and more by financial considerations that have nothing to do with the access charges ITCD owes US LEC. Rather, ITCD initiated its complaint against US LEC because ITCD lost its largest customer – a CMRS provider – to US LEC. Of all the IXCs that rely upon US LEC to provide this type of access service, only ITCD, and recently one other IXC, have declined to pay US LEC's access charges for CMRS traffic. ITCD has used its unique interpretation of the *CLEC Benchmark Order*⁶ and *Sprint Declaratory Ruling*⁷ to justify the type of self-help non-payment that the Commission has repeatedly refused to sanction.⁸ By refusing to pay US LEC's conclusively reasonable access charges for both wireless and wireline originated calls, it is ITCD, not US LEC, that is in clear violation of federal law governing CLEC access charges. US LEC approached ITCD in September 2002, and proposed the proper

⁴ See, e.g., TelePacific Corp. *Ex Parte* in CC Docket Nos. 01-92 and 96-262 (Sept. 22, 2003) (TelePacific is entitled to compensation for access services it provides IXCs for the delivery of 8YY calls from CMRS carriers); see also, Comments of McLeodUSA Telecommunications Services, Inc., Focal Communications Corporation, and Cavalier Telephone on Petition for Declaratory Ruling of US LEC Corp. in CC Docket No. 01-92 (Oct. 18, 2002) (all three CLECs note that they provide IXCs access services to connect to CMRS end users).

⁵ See, e.g., CC Docket No. 01-92, Comments of WorldCom, Inc. at 8 (Oct. 18, 2002).

⁶ *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd. 9923 (2001) (“*CLEC Benchmark Order*”).

⁷ *Petitions of Sprint PCS & AT&T Corp. for Declaratory Ruling Regarding CMRS Access Charges*, Declaratory Ruling, 17 FCC Rcd. 13192 (2002) (“*Sprint Declaratory Ruling*”).

⁸ See *Total Telecommunications Services, Inc. and Atlas Telephone Company, Inc. v. AT&T Corporation*, 16 FCC Rcd 5726, 5741 (2001); *AT&T Corporation v. Federal Communications Commission*, 317 F.3d 227, 233-234 (DC Cir. Jan. 24, 2003).

alternative to ITCD's illegal self-help: that the parties jointly come to the Commission to resolve this issue. ITCD refused, so US LEC came alone.

ITCD's actions speak louder than its rhetoric. ITCD ultimately admits that it was, and is, planning to do the same thing as other CLECs in the marketplace. That is, ITCD, as a CLEC,⁹ has a tariff that requires it to impose access charges on IXCs for services used to connect to wireless end users. The fact that ITCD has not received access revenues from *CMRS carriers* is irrelevant. (ITCD at 5.) The question is whether ITCD has billed and received revenues from *IXCs* for providing them access connections to *CMRS carriers*, and ITCD does not deny that it has billed or received such charges under its tariff. If this CLEC access service was illegal, as ITCD so vigorously alleges, knowingly tariffing an illegal service would subject ITCD to the enforcement provisions of the Act.¹⁰ Since no carrier would knowingly subject itself, its agents, and employees to such liability, this confirms that ITCD does not truly believe this type of CLEC access arrangement is unlawful.

The FCC Should Resolve The Fundamental Issue Concerning The Propriety Of CLECs' Access Services That Connect IXCs To Wireless End Users

US LEC's right to charge access for the services it provides IXCs to connect them with wireless end users derives from numerous sources. Taken together, the Calling Party's Network Pays ("CPNP") regime, *Access Charge Reform* proceeding,¹¹ *CLEC Benchmark Order*, *Sprint Declaratory Ruling*, MECAB Guidelines, and filed rate doctrine all support US LEC's right to impose access charges on IXCs for these access services.¹² While Rule 69.5 may not expressly apply to CLEC access, ITCD cannot deny that the Commission has applied its Part 69 access concepts to CLECs by analogy and inference. While the Commission has routinely refused to impose Part 69 rate elements, structure, and price calculations on CLECs, it has nevertheless continuously affirmed CLECs' rights to impose access charges on IXCs, just as ILECs do under Part 69.

Two such instances in which the Commission affirmed a CLEC's right to impose access charges on IXCs (just as ILECs do) are the *LEC/CMRS Interconnection Order*¹³ and the *Sprint Declaratory Ruling* itself. ITCD tries mightily to distinguish the *LEC/CMRS Interconnection Order* by pointing to a paragraph in the *Sprint Declaratory Ruling* where the Commission refused to rely on the *LEC/CMRS Interconnection Order* as support for a *CMRS carrier's right* to impose access charges on IXCs. ITCD's efforts fail because US LEC did not rely on the

⁹ Indeed, US LEC understands that the same ITCD corporate entity acts as both a CLEC (with a tariffed access service for wireless end users) and an IXC (who refuses to pay US LEC's tariffed access rates for wireless end users), making ITCD's arguments in this proceeding even more disingenuous.

¹⁰ 47 U.S.C. §§ 416(c) & 502.

¹¹ See *Access Charge Reform*, CC Docket 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21476 (1996) (*Access Reform NPRM*).

¹² See US LEC Aug. 25 ex parte at 1-7.

¹³ *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers and Equal Access and Interconnection Obligations Pertaining to Commercial Radio Service Providers*, CC Docket Nos. 95-185 and 94-54, Notice of Proposed Rulemaking, FCC 95-505 (Jan. 11, 1996) (the "*LEC/CMRS Interconnection Order*").

LEC/CMRS Interconnection Order for that proposition. Rather, US LEC relied on the *LEC/CMRS Interconnection Order's* characterization of *current law*, namely, that both LECs (ILECs) and CAPs (CLECs) are entitled to recover access charges “when interstate interexchange traffic passes from CMRS customers to IXCs (or vice versa) via LEC networks.”¹⁴

The Commission affirmed this statement of current law twice in the *Sprint Declaratory Ruling*. First, it again noted that LECs and CAPs impose a charge paid by the IXC for the completion of interexchange wireless calls.¹⁵ Second, it promised to address in the *Inter-carrier Compensation* proceeding, “CMRS carriers’ requests to be placed on equal footing with wireline carriers,” *e.g.*, to be authorized by federal law to charge IXCs for access to wireless end users.¹⁶

Nothing elsewhere in the *Sprint Declaratory Ruling* repealed this status quo. US LEC strongly disagrees with ITCD’s view that the *Sprint Declaratory Ruling* expansively undermined, and explicitly prohibited charges for, every single access arrangement that involves calls originating from or terminating to wireless callers. (*See* ITCD at 4-5.) Contrary to ITCD’s arguments, the Commission found that under the rules in effect from 1998 to the date the *Sprint Declaratory Ruling* was issued, “Sprint PCS was not prohibited from charging AT&T access charges.”¹⁷ The Commission’s ruling was narrow in that it applied to one particular class of carriers, namely CMRS carriers, and addressed only the issue whether that class of carriers has a right directly to charge IXCs for access to wireless end users absent a tariff and absent an express contract. Although the Commission determined that AT&T was not required to pay such charges absent a contractual obligation to do so, the Commission refused to determine whether a contractual obligation actually existed.¹⁸ As such, the *Ruling* explicitly recognized that there may be other contractual arrangements under which a CMRS carrier would be entitled to charge IXCs for access services.

Nor did the *Sprint Declaratory Ruling* address or prohibit any access *routing* arrangements, as ITCD implies. (ITCD at 5.) As US LEC showed, whether a CLEC’s access arrangements are characterized as jointly or solely provided, a CLEC’s right to charge IXCs for access services is clearly established by its tariff and its right, *as a wireline LEC*, to impose access charges for interexchange traffic originating from or terminating to wireless end users.

Implicitly admitting that CLECs may impose access charges for services IXCs use to reach wireless end users,¹⁹ ITCD argues that the *CLEC Benchmark Order* “permits US LEC to tariff the full benchmark rate only when it performs all of the originating functions for a switched interstate telephone call.” (ITCD at 2.) Notably, ITCD does not cite a single paragraph or scrap of language in the *Order* to support its proposition that the full benchmark rate only applies when

¹⁴ *LEC/CMRS Interconnection Order* at ¶ 115.

¹⁵ *Sprint Declaratory Ruling* at ¶ 9.

¹⁶ *Id.* at ¶ 20.

¹⁷ *Id.* at ¶ 1.

¹⁸ *Id.* at ¶ 1.

¹⁹ If ITCD intends this benchmark limitation to apply to CLEC access services used to reach only wireline end users, this merely proves US LEC’s point that the benchmark limitation is properly addressed in any reconsideration of the *CLEC Benchmark Order*, and not in this docket.

the CLEC provides all of common line, local switching, and transport functions. While it tries to infer support for this hypothesis by referring without specifics to numerous paragraphs in the *Order* and Rule 61.26(a)(3), ITC^D does not, and cannot, point to anything in the *Order* or Rule that says what ITC^D alleges it does. In fact, ITC^D itself, when arguing as a CLEC and not an IXC (even though the same corporate entity is both) would argue that its has the right to tariff this service and has done so.

To the contrary, the only way to interpret the *Order* as ITC^D (as an IXC) would have the Commission do would be to ignore and contradict explicit statements in that *Order* to the contrary. First, the Commission sought to preserve CLECs' flexibility to set their access rates, and so refused to require any particular rate elements or rate structure, *e.g.*, three rate elements instead of one.²⁰ Second, the Commission stated that the "only requirement is that the *aggregate* charge for these services [common line, local switching and transport] cannot exceed" the benchmark.²¹ Dividing the benchmark rate in any fashion across any or all of these three functions would explicitly contradict these Commission statements. US LEC has examined the tariffed access rates of numerous CLECs to determine whether they include a single rate element at the benchmark rate or multiple rate elements that together equal the benchmark rate. With the exception of ITC^D's, whose elemental rates when added together *exceed* the benchmark,²² every CLEC tariff that US LEC has examined includes a single rate element at the benchmark rate. The fact that numerous CLECs have tariffed a single rate element for switched access at the benchmark rate²³ shows that US LEC's interpretation of the *CLEC Benchmark Order* is reasonable and generally accepted in the industry.²⁴

²⁰ *CLEC Benchmark Order* at ¶ 55.

²¹ *Id.* (emphasis added).

²² ITC^D DeltaCom Communications, Inc., Tariff FCC No. 4, §§ 3.7.3.1 (Local Switching – 0.0066); 3.7.3.2 (Facility Termination – 0.00046; Tandem Switching – 0.000676; Interconnection – 0.001939); 3.7.3.3 (Information Surcharge – 0.0003217); 4.4 (Carrier Common Line – 0.00821). These elements added together produce a per minute rate of 0.0182067.

²³ See Allegiance Telecom, Inc. Tariff FCC No. 2, § 3.9.3.A.; Cavalier Telephone Tariff FCC No. 1, § 5.4.2.; The KMC Telecom Operating Companies Tariff FCC No. 3, § 4.1.1.; PaeTec Communications, Inc., FCC Tariff No. 3, Rate Attachment, § 4; Pac-West Telecomm, Inc., Tariff FCC No. 3, § 3.0.C.; U.S. TelePacific Corp. Tariff FCC No. 1, §§ 7.1-7.2; Winstar Communications, LLC, Tariff FCC No. 3, § 5.4.2.

²⁴ At best, the Commission can only characterize CLECs' provision of access services to reach wireless end users as "regulatory arbitrage" (although US LEC strongly disagrees with any such characterization) that, although it predated both the *CLEC Benchmark Order* and the *Sprint Declaratory Ruling*, the Commission failed to prohibit in either the *Order* or the *Ruling*. As the FCC often has recognized, some arbitrage will always exist in a regulated environment, particularly in a market evolving towards competition. See *Access Charge Reform NPRM*, ¶ 9 (noting that "competition also allows entrants to arbitrage between different pricing systems"); *CLEC Benchmark Order*, ¶¶ 108, 121 (balancing goal of minimizing arbitrage opportunities while protecting nascent competition and minimizing burdens on carriers.) While the word "arbitrage" can carry a bad connotation—as ITC^D no doubt intends—and is sometimes viewed as undesirable, the FCC has recognized that "regulatory arbitrage" is often a catalyst that promotes needed change in the regulatory structure, and may be an important component in stimulating competition. See, *Southern New England Telephone Company Petition for Review of Accounting Orders Imposed in Tariff Investigations, American Telephone and Telegraph Company Charges for Interstate Telephone Service, Revision of WATS Tariff*, CC Docket No. 80-765, Phase I, Memorandum Opinion and Order, 4 FCC Rcd. 8542, ¶ 15 (1989) ("arbitrage from WATS resale has substantially reduced the possibility of price discrimination, and [] the competitive pressures of resale and competition have encouraged the development of many new services and options

ITCD's reading of the *CLEC Benchmark Order* turns the *Order* on its head. The use of the term "all services" in the *CLEC Benchmark Order* has nothing to do with an unstated requirement that the CLEC must provide "all" services in order to charge the full benchmark rate. The *Order* uses that inclusive language solely to prevent surcharges for additional services. Indeed, no one in the industry could possibly have believed that CLECs were providing "all" services at the time the *Order* was released, because -- as this Commission well knows -- most CLECs were (and still are) connected to IXCs through ILECs.²⁵ The Commission was well aware of this fact when it adopted the benchmark rate and nothing in the *Order* restricts the full benchmark rate to instances in which CLECs are connected directly to IXCs.

ITCD also ignores the transition rates set up in the *CLEC Benchmark Order*. The rate structure (composite versus elemental), the step-down rate calendar, and the rates themselves were all compromises struck by the Commission among the competing interests expressed by all of the parties involved. Nowhere does ITCD address this fact. Nowhere does ITCD address the fact that what it really seeks is a flash cut of the rates for these calls to zero. The Commission has already rejected such flash cuts and it should affirm that its rejection applies equally to this case.

Moreover, US LEC disputes ITCD's statement that US LEC does not perform all three functions. As explained in its August 25 *ex parte*, US LEC transports and switches wireless traffic that it hands off either directly to IXCs or to ILECs for transit to IXCs.²⁶ Further, to the extent US LEC's arrangement is characterized as solely provisioned, US LEC also performs the common line function. And, even if US LEC's arrangement is characterized as jointly provisioned, the fact that US LEC does not perform the common line function has no impact on the amount it may charge. (ITCD at 3.) With the exception of some of the former GTE states,²⁷ in the wake of the *CALLS Order*,²⁸ none of the RBOCs charge IXCs for a common line rate

available to smaller customers . . ."); *Policy Statement on International Accounting Rate Reform*, Policy Statement, FCC 96-37, 11 FCC Rcd. 3146 (1996) (new market entrants in international services market take advantage of price arbitrage opportunities to offer new, innovative services to consumers.) If the FCC believes that CLEC provision of access services for connections to wireless end users is "regulatory arbitrage" and wants to foreclose competition in this type of access service by closing this "loophole" it may do so, but only prospectively.

²⁵ Although ITCD claims the sample rates examined by the Commission in the *CLEC Benchmark Order* reflected rates charged by CLECs providing "all" services (ITCD at 3), the record shows otherwise. AT&T, Sprint, and WorldCom all provided data concerning CLEC access rates but none of them conducted a breakdown by the type of service provided (*i.e.*, whether it was via direct connection to the IXC or via the ILEC). Instead they took the dollar amounts billed by CLECs, divided it by minutes of use, and derived a per minute rate for CLECs from that.

²⁶ US LEC reiterates that ITCD is in control of whether it avoids two switching charges, one from the ILEC and another from the CLEC. If ITCD wishes to avoid paying both the ILEC and US LEC for the switching and transport functions each performs, it need only connect directly with US LEC as other IXCs have done.

²⁷ See Verizon Telephone Companies FCC Tariff No. 16, § 3.7.1 (listing carrier common line charge rates of greater than zero for North Carolina and Texas).

²⁸ *Access Charge Reform*, CC Docket Nos. 96-262, Sixth Report and Order, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Sixth Report and Order, *Low-Volume Long-Distance Users*, CC Docket No. 99-249, Report and Order, Federal-State Joint Board on Universal Service, CC Docket No. 96-45, 11th Report and Order, FCC 00-193, 15 FCC Rcd 12962, ¶ 68 (2000) ("*CALLS Order*")

element either. If, as ITCD alleges, a CLEC must actually divide the benchmark rate among the three functions in the same manner as ILECs do—an argument that is not supported by any current Commission Order—then CLECs would be justified in allocating the benchmark solely to switching and transport.

ITCD argues that US LEC inserts itself gratuitously into a call. This, too, is a false ad hominem argument to distract the Commission from the reality. As an initial matter, US LEC is directly connected to certain IXCs and for those IXCs that chose to connect directly, US LEC, not the ILEC tandem, performs the valuable function of connecting an IXC to the CMRS carrier. Even where a CLEC's access traffic transits through an ILEC, however, no CLEC can unilaterally insert itself into a call stream. Any CLEC billing access for wireless originated traffic is in a call's flow because the CMRS carrier believes that the CLEC is providing a valuable function. The CMRS carrier has the exclusive power to decide whether a CLEC will or will not connect that carrier's calls to an IXC. The CMRS carrier is making a market business decision. It is exactly this kind of market-driven decision-making among carriers that the *CLEC Benchmark Order* is designed to foster.

Finally, US LEC is not aware of any instance in which multiple CLECs have charged an IXC multiple benchmark rates for a single call, and ITCD can point to none. ITCD's oft-repeated, sky-is-falling "daisy chain" mantra is nothing more than a red herring—just one more example of ITCD crying wolf in an attempt to prop up its erroneous interpretation of existing law. The Commission should decline an invitation to reinterpret its *CLEC Benchmark Order* to stop a practice which has not been shown to exist, but if there is any concern about the possibility of such practices in the future, it may prohibit any such practice as part of its Order granting US LEC's request for declaratory ruling.

Any Change In Federal Law Must Be Prospective

Unlike the record in the *Sprint Declaratory Ruling*, which showed that CMRS carriers had not routinely received access charges from IXCs, the record in this proceeding shows that CLECs have routinely received access charges from IXCs for providing access connections to CMRS end users. Thus, any change in Commission policy would dramatically alter the status quo. Given that these arrangements represent the status quo, and given CLECs' reasonable reliance on what is manifestly a sensible interpretation of current law, any change in CLEC's access arrangements for connections to wireless end users must be prospective.

ITCD contends that US LEC has a "high hurdle" to clear before it can argue that the Commission is prohibited from applying retroactively a ruling that a CLEC's recovery of access charges from IXCs for CMRS-originated traffic is unlawful. (ITCD at 8.) To the contrary, as US LEC showed in its August 25 *ex parte*, it is ITCD and, by inference, the Commission that faces significant hurdles in trying to apply such a ruling retroactively.²⁹ As the Supreme Court has held, "retroactivity is not favored in the law."³⁰

²⁹ US LEC Aug. 25th *ex parte* at 9.

³⁰ *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 209 (1988).

The cases that ITCB invokes, far from deviating from this principle, support the proposition that retroactive application of administrative regulation is not easily countenanced. The Seventh Circuit in *First National Bank of Chicago* noted that if the rule is a legislative rule, *i.e.*, one that changes the law, it can have no retroactive effect.³¹ While the law does give agencies discretion to clarify or interpret a rule, the agency is only allowed to “explain ambiguous language, or remind parties of existing duties – not create new law.”³² An agency may only clarify a rule so long as the “rule represents the agency explanation of a statutory or regulatory provision and the rule is not intended to substantively change existing rights and duties.”³³ The clarification exception was designed to apply only when “substantive rights are not at stake,” and the exception is narrowly construed and “only reluctantly countenanced.”³⁴ While courts will accord weight to the agency’s determination of whether it is clarifying or substantively changing existing law, they will not “allow an agency to make substantive changes to rules retroactively under the guise of clarifications, which is clearly prohibited.”³⁵

Under the existing CPNP and benchmark regime, IXCs are bound by CLECs’ tariffs to pay access charges for traffic originating from all end users, including wireless.³⁶ The Commission may not now issue a “clarifying” ruling that the CPNP regime did not previously apply to wireline LECs’ access services used to complete wireless interexchange traffic. This ruling would be in plain conflict with all representations the Commission has heretofore made concerning the rights of wireline LECs to receive compensation for access charges for wireless traffic. Such a ruling, which would effect a substantive change in the law affecting the existing rights and duties of parties, can only be given prospective effect after notice, comment and rulemaking.

Any retroactive application of ITCB’s position likely would also result in a flood of complaints and enforcement actions before the FCC. Pending final resolution of any likely appeals, IXCs no doubt would attempt to recover refunds for CLECs’ access services for which IXCs had already paid. The Commission would be faced with disputes concerning the applicable statute of limitations, the amount of charges attributable to such access, and numerous other issues. And, if ITCB’s self-help is any indication, IXCs likely would unilaterally withhold payment of current, properly billed, wireline access charges in order to obtain leverage over the CLECs when disputing access charges for wireless end users. Thus the Commission’s attempt, through the *CLEC Benchmark Order*, to put a stop to CLEC/IXC access disputes and provide certainty for the industry would be for naught.

³¹ *First National Bank of Chicago v. Standard Bank & Trust*, 172 F.3d 472, 478, n. 6 (7th Cir. 1999).

³² *Sentara-Hampton General Hospital v. Sullivan*, 980 F.2d 749, 759 (1992).

³³ *Id.*

³⁴ *Id.*

³⁵ *First National Bank*, 172 F.3d at 478.

³⁶ See US LEC Aug. 25 ex parte at 9-13.

In short, current federal law supports US LEC's right to charge its tariffed rates for access services it provides to connect IXCs to wireless end users. Therefore, the Commission should grant US LEC's request for declaratory ruling.

Respectfully submitted,



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