January 23, 2004

Chairman Michael K. Powell
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Michael J. Copps
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kathleen Q. Abernathy
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Kevin J. Martin
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Commissioner Jonathan Adelstein
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: *Ex Parte* Communication in WC Docket No. 96-262

Dear Chairman Powell and Commissioners:

The Association for Local Telecommunications Services ("ALTS") and the undersigned carriers understand that the Commission is considering possible revisions to the rules it issued in 2001 in its *Seventh Report and Order and FNPRM* in CC Docket No. 96-262 (released April 27, 2001) concerning Competitive local exchange carrier ("CLEC") compensation for originating and terminating long distance traffic ("*CLEC Access Charge Order*"). That Order was intended as an interim measure to resolve numerous disputes that had arisen between interexchange carriers ("IXCs") and CLECs concerning the appropriate level of CLEC access charges, and also the IXCs' obligation to make timely payments therefor, until such time as the Commission had completed a comprehensive investigation into all forms of intercarrier compensation.

In the *CLEC Access Charge Order* the Commission struck a precarious balance between conflicting interests of disparate segments of the industry. As such, it was highly contentious, involving a reduction in CLEC interstate access revenues of 87% over three years, an amount equal to approximately 13.7% of total CLEC telecommunications revenues (see Attachment A). The Commission justified this reduction as a "bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable ..." (*CLEC Access Charge Order* at para. 4), and stated further that "[s]uch a bright line approach is particularly desirable given the current legal and practical difficulties involved with comparing CLEC rates to any objective standard of 'reasonableness'" (*id*. at para. 45).

Given that the current CLEC access charge rules were intended to function as "bright line" tests in order to escape the "legal and practical difficulties" involved in analyzing specific

CLEC access rates, we fail to understand why the Commission would now entertain challenges to CLEC access charges that are ultimately grounded on the same "objective reasonableness" test it expressly declined to apply three years ago. Whether or not the Commission could have adopted an objective reasonableness test *ab initio* back in 2001, it plainly declined to do so. Having declined to do so then, it cannot rationally reverse field now by adopting cost-oriented arguments, such as Qwest's attempt to allocate the CLEC access charge benchmark rate among various access cost components (determined with reference to the ILEC's legacy networks, without regard for any alternative technologies or structures) with the goal of reducing that rate by the amount allocated to particular access functions not performed by a CLEC. Such an approach is entirely inconsistent with the *CLEC Access Charge Order*, which acknowledged that interstate CLEC access rates need not be separated into discrete rate elements because the conclusive access rates were not founded on economic cost modeling.*

The institutional role of the Commission is also an important consideration here. By adopting a "bright line" test, the Commission thought it was ending numerous disputes and complaint proceedings. The repose and predictability created by the *CLEC Access Charge Order* will disappear if parties can now conjure up new theories as to why the bright lines created by the Commission are actually blurred or uncertain, and no longer require that IXCs pay CLECs' interstate access bills. In short, the industry crisis which the Commission sought to resolve would be reignited if the Commission forced CLECs to allocate rate ceilings among different access elements. Such revisions would once again open the door to endless contests, allegations, and second guessing over how much revenue a CLEC should be entitled to for originating and terminating long distance traffic. Thus, the only immediate result of the rumored changes will be IXC self-help, through unlawful withholding of access payments to CLECs and further destabilization of the facilities-based CLEC community. Indeed, the ability of some facilities-based CLECs to survive such a tsunami of litigation is doubtful.

As the Commission is aware, CLECs, by and large, do not break their access services down into discrete elements, nor should they now be compelled to do so. Indeed, the Commission expressly ruled in the *CLEC Access Charge Order* that: "We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates.... The *only* requirement is that the aggregate charges for these services, *however described in their tariffs*, cannot exceed our benchmark." (*id*. at para. 55 (emphasis supplied)).

In addition to the logical inconsistency of now applying an objective reasonableness test that the Commission previously rejected in the *CLEC Access Charge Order*, we believe there are no sound policy reasons why the Commission should single out facilities-based CLECs for additional access revenue reductions. We understand that the Commission is expecting to receive shortly a proposal from one industry segment that will attempt to tie the disparate intercarrier relationships together in an effort to establish a unified intercarrier compensation regime. We cannot understand why the Commission would attempt to address a relatively small

* In particular, the *CLEC Access Charge Order* did not adjust the CLEC rate data it relied upon in formulating its conclusive ceilings to reflect any particular access functions that were not being performed by CLECs. *Id*. at paras. 47-49. Thus, any attempt to allocate the conclusive ceilings among access functions is fundamentally inconsistent with the manner in which the ceilings were formulated.

part of the overall intercarrier compensation universe when it has not yet determined how it intends to handle the broader, inter-related intercarrier compensation system affecting all carrier sectors.

It makes no sense for the Commission to piecepart issues that only affect one segment of the industry, especially when that segment already has absorbed more than its share of the costs of earlier revisions to the intercarrier compensation regime. Both the *CLEC Access Charge Order* and the *ISP Reciprocal Compensation Order* were intended as comprehensive interim resolutions in advance of a long-term solution, not as opportunities for ILECs and IXCs to invent yet more theories to chisel away at CLEC revenue streams. It would indeed be ironic if the facilities-based CLECs, who have made the capital and other commitments necessary to deploy their own switching facilities, became the only entities targeted by the Commission for additional near-term revenue reductions.

Further, we understand that the Commission might be embarking on a new theory to preclude CLECs from recouping access revenue, at least where the CLEC is serving as an aggregator of CMRS 8YY traffic, under the theory that the full benchmark access charge only applies where the CLEC serves an end user customer, rather than a carrier customer such as a CMRS provider. Again, we are confused as to why the Commission feels it necessary to single out the aggregator services that CLECs perform for CMRS providers as the only area of intercarrier compensation that should be subject to special, immediate reductions, with possibly devastating retroactive application. We think it is important to note that carriers were not put on notice by any prior Commission Orders that the Commission might view CLECs' pre-existing arrangements with CMRS providers for routing of 8YY traffic as improper. Other LECs have for years provided similar aggregator services for CMRS providers and do not appear to be at risk for access charge reductions, let alone the prospect of retroactive application which might compel carriers to pay back money they reasonably recoup for providing 8YY aggregator services for CMRS carriers.

CMRS carriers and CLECs legitimately believed that their 8YY arrangements were lawful. CMRS-CLEC arrangements for the routing of 8YY traffic have been commonplace in the industry for years – they exist between multiple, unaffiliated CLECs and multiple, unaffiliated CMRS carriers. CMRS-CLEC contracts for 8YY traffic predate by many years both the *CLEC Access Charge Order* and the *Sprint Order* (*Sprint v. AT&T*, 17 FCC Rcd 13192). They were not a response to, nor an "end-run" around, either order. In 1996, the FCC specifically considered LEC-CMRS joint access arrangements, acknowledged their existence, asked parties to describe them, and did not suggest that such arrangements were in any way improper. *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers,* Notice of Proposed Rulemaking, 11 FCC Rcd 5020, 5075 (1996). The *Sprint* decision simply did not address (or disturb the Commission's prior endorsement of) the type of joint provisioning or revenue-sharing arrangements at issue in the current proceeding.

The *CLEC Access Charge Order* did not indicate that the benchmark only applies when the CLEC serves an "end-user" customer. Rather, as noted above, the benchmark for CLEC access rates was intended to be a comprehensive solution to CLEC all access charge issues:

"Given the state of the marketplace for CLEC access services, and our judgment that more serious developments could loom in the future if we do not take action, we are persuaded of the need to revisit these issues in a global fashion…. It now appears that the best means of proceeding is to … provid[e] a bright-line rule that will facilitate effective enforcement." *CLEC Access Charge Order,* ¶ 25. There is no indication that the Commission was intending to address only a subset of CLEC access scenarios.

Until mid-December 2003, no party had ever argued in either of these proceedings that references to "end-user customers" in the *CLEC Access Charge Order* limit the scope of the availability of the benchmark. Every reference to "end-user customers" in the *CLEC Access Charge Order* is for some other purpose. There is no indication that these references were intended to narrow the application of the benchmark as a comprehensive solution to CLEC access rate issues. Paragraph 58 states that CLECs are permitted "to tariff the benchmark rate for their access services only in the markets where they have operations that are actually serving end-user customers on the effective date of these rules." This paragraph solely describes the "new markets rule" -- restricting CLECs' use of the glide path down to the ILEC rate (rather than the target ILEC rate itself) in markets where they were already serving customers on the date of the Order. It cannot be read as a broad limit on the scope of the *CLEC Access Charge Order*. Nowhere does the *CLEC Access Charge Order* state that the CLEC must be providing service directly to the end user for the benchmark to apply. We must also stress that finding that CLECs were not permitted to tariff the benchmark rate for CMRS-originated 8YY traffic would effectively invalidate these CLECs' benchmark tariffs in contravention of the Filed Rate Doctrine which precludes the FCC from retroactively invalidating tariffs. 47 USC §§ 203-205.

Assuming that the Commission believes it is necessary to adjust the access charge rules, a critical issue becomes the effective date of any order. It seems clear that the proposed changes to the *CLEC Access Order* were not part of the original *CLEC Access Charge Order*. Any revision would not, and could not, be retroactive. To the extent that the Commission, for some reason, feels compelled to further address CLEC access charge issues before addressing the intercarrier compensation issues that affect other industry segments, it is essential that any revisions be applied prospectively only. It would be manifestly unfair and unlawful to apply a new rule, with further CLEC access charge reductions, retroactively. To the extent a CLEC tariffed a switched access rate at the benchmark level and an IXC obtained switched access service from that CLEC, the Commission must continue to hold that that rate was a just, reasonable, and lawful rate, or else risk allowing every IXC to second guess every CLEC access charge and unlawfully withhold payment.

For these reasons, we ask that the Commission not further destabilize the already fragile, facilities-based competitive local exchange industry by singling out facilities-based CLECs as the only carriers to take an additional immediate financial injury prior to the Commission's adoption of a unified intercarrier compensation regime. To the extent the Commission takes any action at this time, it need only reaffirm that a CLEC may tariff at the Commission's benchmark rate for switched access when it provides such service utilizing its own facilities or in conjunction with the use of another carrier's facilities. Such a reaffirmation should lessen the unlawful practice of IXCs engaging in self help by refusing to pay CLECs' tariffed rates.

Respectfully submitted,

/s/ Jonathan Askin
Jonathan Askin
Association for Local Telecommunications Services
888 17th Street, NW
Suite 1200
Washington, D.C. 20006
(202) 969-2587
jaskin@alts.org

/s/ Julia O Strow
Julia O Strow
Vice President - Regulatory
Cbeyond Communications
320 Interstate Parkway North
Suite 300
Atlanta, GA 30339
(678) 424-2429
Julia Strow
Julia.Strow@cbeyond.net

/s/ N. Eric Jorgensen
N. Eric Jorgensen
President
Cellular XL Associates, L.P. (d/b/a Megagate Broadband)
6184 U.S. Highway 98 West
Hattiesburg, MS. 39402
(601) 450-2000
r.jorgensen@megagate.com

/s/ Scott Sawyer
Scott Sawyer
Vice President of Regulatory Affairs
Conversent Communications, LLC
222 Richmond St., Suite 301
Providence, RI 02903
(401) 490-6377
ssawyer@conversent.com

/s/ Richard J. Metzger
Richard J. Metzger
Senior Vice President and General Counsel
Focal Communications
1120 Vermont Ave, NW
Terrace Level
Washington, DC 20005
(202) 256-6377
dmetzger@focal.com

/s/ Marva Brown Johnson
Marva Brown Johnson
Senior Counsel – Legal and Regulatory
KMC Telecom
1755 North Brown Road
Lawrenceville, Georgia 30043
(678) 985-6220
marva.johnson@kmctelecom.com

/s/ James E. Thompson
James E. Thompson
Group Vice President, General Counsel and Secretary
McLeodUSA
6400 C Street SW, PO Box 3177
Cedar Rapids, IA 52406-3177
(319) 790-7775
jethompson@mcleodusa.com

/s/ Edward J. Cadieux
Edward J. Cadieux
Vice President, Regulatory & Public Affairs
NuVox, Inc.
16090 Swingley Ridge Road, Suite 500
Chesterfield, Missouri 63017
(636) 537-5743
ecadieux@nuvox.com

/s/ Brent Johnson
Brent Johnson
Executive Vice President and COO
OneEighty Communications
206 No. 29th Street
Billings. MT 59101
406-294-4007 (DID)
bjohnson@oneeighty.com

/s/ J.T. Ambrosi
J.T. Ambrosi
Vice President, Carrier and Gov't Relations
PAETEC Communications, Inc.
1 PAETEC Plaza
600 Willowbrook Office Park
Fairport, NY 14450
(585) 340-2528
jt.ambrosi@PAETEC.com

/s/ Dave Stahly
Dave Stahly, Director, Business Affairs
Supra Telecom
2620 SW 27th Ave.
Miami, FL 33133
dave.stahly@stis.com
(913) 814-8819

/s/ Mark Jenn
Mark Jenn, Manager – CLEC Federal Affairs
TDS METROCOM
525 Junction Road, Suite 6000
Madison, WI 53717
(608) 664-4196
mark.jenn@tdstelecom.com

/s/ Kelsi Reeves
Kelsi Reeves
VP Federal Government Relations
Time Warner Telecom
830 South Royal Street
Alexandria, VA 22314
(703) 549-5565
kelsi.reeves@twtelecom.com

/s/ Wanda Montano
Wanda Montano
Vice President, Regulatory & Industry Affairs
US LEC Corp.
6801 Morrison Blvd.
Charlotte, NC 28211
(704) 319-1074
wmontano@uslec.com

/s/ Richard A. Jalkut
Richard A. Jalkut
U.S. TelePacific Corp. d/b/a TelePacific Communications
515 S. Flower Street, 47th Floor
Los Angeles, CA 90071
djalkut@telepacific.com

cc: Christopher Libertelli
Matthew Brill
Jessica Rosenworcel
Dan Gonzalez
Lisa Zaina
Bill Maher
Carol Mattey
Jane Jackson

Rich Lerner
Scott Bergmann
Tamara Preiss
Steven Morris
Victoria Schlesinger

ATTACHMENT A

A Comparison of Three Transition Plans

	CALLS	Recip Comp	Access Charges
Rate element	Local switching	Local switching	Local switching
Original rate	1.100¢/MOU [1]	0.275¢/MOU [2]	4.270¢/MOU [3]
Target rate	0.550¢/MOU [4]	0.070¢/MOU	0.550¢/MOU [4]
Percentage rate reduction	**50%**	**74.5%**	**87.1%**
Duration	5 years [5]	3 years	3 years
Total reduction	$2.1B [6]	$1.5B [7]	$1.3B [8]
Total revenues	$100B [9]	$9.5B [10]	$9.5B [10]
Reduction as % of total	**2.1%**	**15.8%**	**13.7%**
Change in stock prices since 01/01/01	- 3.4% [11]	- 33.3% [11]	- 33.3% [11]
Average debt ratings	AA	B2/B – Caa1/B- [11]	B2/B - Caa1/B [11]

1. *Access Charge Reform*, Sixth Report and Order ("*CALLS*"), CC Docket No. 96-262, released May 31, 2000, at para. 176.
2. October 12, 2000, *ex parte* of BellSouth, Verizon, SBC and Qwest. *See also* the October 20, 2000, ex parte filed by Allegiance, Focal, Intermedia, Time Warner Telecom, and XO at Attachment A (average recip comp rate of .27 cents/MOU, weighted by access lines).
3. ALTS comments in CC No. 96-262 filed January 11, 2001, Att. 1-7, pp. iii, 7.
4. *CALLS* at para. 176.
5. Id.
6. Id. at para. 151. Actual ILEC impact was reduced by $650M in universal service payments and higher end user payments (para. 146).
7. March 23, 2001, ex parte of ALTS and CompTel, Scenario 5.
8. Estimated access revenues are 20% of $7.5B total CLEC local revenues.
9. As of year-end 1999, Credit Suisse First Boston, Telecom Services – CLECs, March 2001, pp. 7-9.
10. *State of Local Competition*. ALTS, February 2001, p. 26 ($7.5B), plus $2.0B in recip comp (BellSouth, et al., ex parte filed December 22, 2000) = $9.5B.
11. Morgan Stanley Dean Witter, CLEC Industry Research, April 3, 2001, pp.5,10.