

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

In the Matter of)
)
Presubscribed Interexchange Carrier Change Charges) CC Docket No. 02-53
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AT&T FURTHER COMMENTS

Pursuant to Section 1.415 of the Commission’s Rules, 47 C.F.R. § 1.415, AT&T Corp. (“AT&T”) submits these comments in response to the Commission’s *Further NPRM* in this proceeding regarding the Commission’s regulation of presubscribed interexchange carrier (“PIC”) change charges assessed by local exchange carriers (“LECs”).¹

When it initiated this proceeding more than two years ago, the Commission found that reexamination of the current \$5.00 “safe harbor” for LEC PIC change charges is called for in order to preserve “the fiercely competitive nature of the long distance market to ensure reasonable prices for consumers”² With the predictable exception of the LECs themselves, the commenters in the initial round of this proceeding agreed with AT&T’s showing that the current non-cost based safe harbor seriously disservices the interests of consumers and the Commission’s pro-competitive policy objectives, and that the safe harbor should be eliminated to create appropriate

¹ *Presubscribed Interexchange Carrier Change Charges*, CC Docket No. 02-53, Further Notice of Proposed Rulemaking, FCC 04-96 (rel. April 23, 2004), 60 FR 29,913 (May 26, 2004)(“*Further NPRM*”) ¶ 12.

² *Presubscribed Interexchange Carrier Change Charges*, CC Docket No. 02-53,CCB/CPD File No. 01-12 and RM-1031, Order and Notice of Proposed Rulemaking, FCC 04-96 (rel. March 20 2002), 67 FR 34,665 (May 15, 2004)(“*NPRM*”).

incentives for LECs to perform PIC changes in an efficient manner.³ As AT&T also showed then, the safe harbor inherently creates opportunities for LECs to use those non-cost based charges for the anticompetitive purpose of collecting subsidies from the interexchange carriers with which they compete in local and long distance markets.⁴

The *NPRM* was adopted “with the goal of establishing a reasonable PIC change charge under current conditions.”⁵ The Commission sought to determine “whether the PIC-change charge should be a regulated cost-based charge,” and sought comment both on the specific types of costs that should be recovered through the change charge and detailed information from LECs on the actual costs of performing functions necessary for implementing PIC changes.⁶

It is therefore both astonishing and profoundly disappointing that the principal thrust of the *Further NPRM* now appears directed to the establishment of new safe harbor rate levels for PIC change charges. In addition to the serious adverse effects of the safe harbor mechanism described above and amply supported in the record already compiled in this docket, such a new safe harbor is irreconcilable on its face with the

³ See AT&T at 6-10; AT&T Reply at 2-7; ASCENT at 1 and n.1; WorldCom at 1-2; NASUCA at 2-3; Texas AG at 1-2; ACUTA at 1, 3.

⁴ See AT&T at 7.

⁵ *NPRM* ¶ 14.

⁶ *Id.* ¶¶ 15-19. The Commission also sought comment (*id.* ¶¶ 14-15) on whether competitive market forces may be relied on to assure the reasonableness of LEC PIC change charges. As AT&T showed, however (at 5 n.5 and Reply at 5-6), the nascent competition in local markets does not offer an effective constraint on PIC change charge levels because the change of carrier can only be effected by the customer’s current local carrier. Moreover, as other commenters observed, to the extent that there is now competition in local exchange markets these charges are “hardly a prominent feature of a local carrier’s rates” and thus are unlikely to figure in customers’ choice of a LEC. See, e.g., NASUCA at 6. For this reason, any limitations on PIC change charges that the Commission adopts in this proceeding should apply to *all* LECs, and not solely to incumbent local carriers.

Commission's underlying objective in this proceeding "to establish a standard [for PIC change charges] that does not require continuous revision as technology evolves."⁷ Although a safe harbor mechanism does not have the legal force and effect of a rate prescription,⁸ the Commission has held that a PIC change charge within the safe harbor range cannot be displaced through resort to the Commission's formal complaint process under Section 208 of the Communications Act.⁹

In effect, this mechanism confers complete immunity from redress for LEC charges that fall within the safe harbor. The necessary result of the Commission's new objective implicitly adopted in the *Further NPRM* will be to adopt a revised PIC change charge safe harbor that reflects current technologies and marketplace relationships among carriers and customers, thereby necessitating a new proceeding like the present rulemaking to accommodate future developments in those arrangements.¹⁰ Adopting a new safe harbor that carries with it the need to conduct such future proceedings, and committing additional scarce administrative resources in the process, is clearly inadvisable as a matter of sound regulatory policy.

⁷ *NPRM* ¶ 16.

⁸ Section 205(a) of the Communications Act, 47 U.S.C. § 205(a), permits the Commission to prescribe rates and further provides that thereafter a carrier subject to that ruling "shall not publish, demand or collect any charge" other than the prescribed rate. By contrast, under the safe harbor mechanism carriers may initiate rate changes through tariff filings so long as they fall at or below the upper limit of the safe harbor range.

⁹ See *MCI Telecommunications Corp. v. U S WEST Communications, Inc.*, 15 FCC Rcd 9328 (2000).

¹⁰ In this respect the safe harbor mechanism provides the LEC PIC change charges with even greater protection from prospective displacement than applies even to unsuspended streamlined tariff filings that are deemed lawful under Section 204(a)(3) of the Communications Act (47 U.S.C. § 204(a)(3)).

Wholly apart from the imprudence of an approach that readopts the safe harbor mechanism, however, the *Further NPRM* also appears to be largely focused on an inappropriate benchmark for the safe harbor rate level. Specifically, the Commission notes that in 1990 BellSouth Telecommunications, Inc. (“BellSouth”) implemented a PIC change charge of \$1.49 -- a charge that was well below the current \$5.00 safe harbor and considerably below the charge for the same service function then charged by virtually all LECs.¹¹ However, in 2003 BellSouth filed tariff revisions increasing its PIC change charge to \$3.07, and that increase more than doubling the charge was allowed to take effect by the Commission.¹² The *Further NPRM* (§§ 3, 9) requests comment on whether the cost study that supported BellSouth’s significantly increased PIC change charge should be used to establish new safe harbor rate levels.

As a threshold matter, there is no basis in the current record for the Commission to conclude *a priori* that increased BellSouth’s 2003 rate is based on costs that typify those of other local carriers. As AT&T showed in the earlier phase of this proceeding,¹³ the LECs have thus far failed to come forward with virtually any cost support for their PIC change charges within the current safe harbor, despite the Commission’s express solicitation of such information in the *NPRM*.¹⁴ Moreover, to the limited extent that any cost support was provided by the LECs in the prior round of

¹¹. *Further NPRM*, § 2.

¹² See BellSouth Transmittal No. 746 (filed Oct. 14, 2003), and BellSouth Transmittal No. 756 (filed Nov. 4, 2003); *Protested Tariff Transmittals Actions Taken*, 18 FCC Rcd 23137 (2003).

¹³ See AT&T Reply at 9-10.

¹⁴ *NPRM* §16 (stating “[w]e ask that commenters be as specific as possible” with respect to such cost information).

comments two years ago, the LEC filings were not based on a forward looking, incremental cost methodology employing the most efficient available technology.¹⁵ Finally, nothing in the LECs' prior scanty cost data submitted in this proceeding has satisfactorily resolved whether costs recouped through their tariffed PIC change charges are also being recovered through the Customer Account Records Exchange ("CARE") data that LECs provide to other carriers under contract. The Commission should satisfy itself in this proceeding that no such double recovery is occurring before allowing the LECs to impose PIC change charges under revised regulation.

Because complete cost information is exclusively in the hands of the LECs that assess the PIC change charges, it is imperative that those parties come forward with those data in their filings, both to provide an adequate record for decision and to allow other affected parties -- including consumers and other public agencies, as well as interexchange carriers -- a meaningful opportunity to comment in this further round of the proceeding. But even without the submission of cost data from other LECs, there is already substantial basis to contest whether BellSouth's cost support for its current PIC change charge could serve as an adequate proxy for a reasonable PIC change charge safe harbor.

Both AT&T and MCI filed petitions addressed to BellSouth's tariff filing proposing that dramatic increase in the PIC change charge, in which they demonstrated that the tariff support raised numerous serious questions regarding the permissibility of

¹⁵ See AT&T Reply at 9-10; NASUCA at 5; WorldCom at 7. Reliance on the most technologically efficient is critical here not only to satisfy the Commission's overall standards governing appropriate ratesetting procedures but also to conform to the Commission's specific objective in this docket of establishing PIC change charges that reflect ongoing technological innovation. See *NPRM* ¶ 16.

that new higher rate.¹⁶ In particular, as AT&T pointed out in its petition (at 4), BellSouth's rate increase was predicated on large increases in the proportion of PIC changes that it stated require manual processing, rather than use of mechanized systems. Whereas the proportion of manual PIC changes was approximately 25 percent in 1990, those changes had increased to 34 percent in 2001 and to 43 percent in 2002. Moreover, for 2003, BellSouth projected at the time of its tariff filing that manual changes would comprise 54 percent of its PIC changes.¹⁷ BellSouth did not explain why it had assertedly experienced such a marked increase in manual PIC changes, which diverged substantially from AT&T's own experience at that time.¹⁸ And, absent production by other LECs in this docket of detailed information regarding their own operations, there is likewise no basis for the Commission to conclude that BellSouth's ratio of manual to mechanized processing is representative of LECs as a whole.

BellSouth's filing however confirms the indications in the record already developed in this proceeding that the costs of manual and mechanized processing of PIC changes differ substantially. This cost differential is primarily due to the fact that LECs must take additional steps to implement PIC changes for customers who have availed

¹⁶ See AT&T Petition to Suspend and Investigate, filed October 21, 2003; MCI Petition to Reject or, In the Alternative, Suspend and Investigate, filed October 21, 2003. BellSouth's PIC change charge proposed in Transmittal No. 746 was \$3.10. Following the interventions filed by AT&T and MCI, BellSouth reduced the proposed rate to \$3.07. As noted above, the Commission allowed the revised rate to take effect without issuing any order. Thus, the questions regarding the tariff support that AT&T and MCI raised in their petitions remain unaddressed, and should be resolved by the Commission before it evaluates the utility of BellSouth's rate as a basis for any PIC change charge safe harbor.

¹⁷ BellSouth Transmittal No. 746, Description and Justification, p. 3.

¹⁸ PIC freezes on customers' lines principally account for manual PIC changes. From July through September, 2003, AT&T received PIC change rejections ranging from 6 percent to 9 percent monthly for business customers. AT&T Petition at 4. These data are facially inconsistent with the manual processing levels described in BellSouth's tariff filing.

themselves of the PIC freeze option to obtain additional protection against exposure to slamming. For this reason, whether the Commission adopts a safe harbor mechanism or requires LECs to implement cost-based PIC change charges, the Commission should at a minimum mandate that the charge be unbundled into separate rates for manual and mechanized PIC changes.¹⁹ Additionally, the Commission should require LECs that offer PIC freeze options which account for many -- although by no means all -- manually processed PIC changes to recover those costs through a separate PIC freeze recovery charge, rather than offering PIC freezes as a nonchargeable feature.

As MCI noted in its petition addressed to BellSouth's 2003 tariff filing,²⁰ the costs of soliciting and implementing a PIC freeze are separate from the far less extensive costly work functions entailed in implementing a PIC change, and cannot accurately be characterized as unbundled costs of a presubscription change that should be recoverable through the PIC change charge. Mandating a separate charge for the PIC freeze option will more accurately reflect the nature of the costs LECs incur when manually processing PIC changes for a host of reasons unrelated to PIC freezes (including, for example, non-electronic submission of PIC changes by smaller carriers).

¹⁹ Moreover, the Commission should preclude LECs that do not offer mechanized PIC change charges from charging for manually-processed PIC changes at rates higher than the safe harbor or average LEC cost-based rate for mechanized changes. Absent such a cap on their manual processing charges, LECs that currently rely solely on manual processing will have no incentive to implement more efficient processes for implementing PIC changes. This limitation on LEC rates is fully consistent with the Commission's longstanding policy to require that carriers executing PIC changes "using the most technologically efficient means available to implement changes to subscribers' telecommunications services." *Implementation of the Subscriber Carrier Selection Change Procedures of the Telecommunications Act of 1996; Policies and Rules Concerning Unauthorized Changes of Consumers Long Distance Carriers*, 14 FCC Rcd 1508, 1572 (1998) ¶ 105.

²⁰ See MCI Pet. at 4-5.

Moreover, such a rate structure will assure that PIC change charges reflect the Commission's longstanding access charge policy that cost causative customers -- here, customers who have opted for PIC freezes -- should bear the burden of the additional expenses that they impose, rather than customers who do not make use of the freeze feature.²¹

Finally, the *Further NPRM* (§ 5) also seeks comment on whether PIC change charges should be assessed on end users, as in the current practice, or directly on interexchange carriers that submit PIC changes to LECs. As shown above and in AT&T's prior submissions in this proceeding, PIC change charges -- especially when implemented under a safe harbor mechanism -- create potential additional sources of subsidies for LECs that face only nascent competition in local exchange markets and that have now entered competitive long distance markets. There is all the less justification for allowing the LECs to impose these subsidies directly on the carriers with which they compete. Permitting these charges to be assessed directly on submitting carriers that compete with the LECs will also only further detract from any incentives for LECs to improve the efficiency of their PIC change process, and should not be adopted by the Commission.

²¹ See, e.g., *Investigation of Access and Divestiture Related Tariffs*, 97 F.C.C.2d 1082 (1984); *MTS and WATS Market Structure*, CC Docket No. 78-72, Phase I, Third Report and Order, FCC 82-579 (rel. Feb. 28, 1983).

Respectfully submitted,

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