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

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| In the Matter of | ) | |
| | ) | |
| Petition of Core Communications, Inc. For Forbearance From Sections 251(g) and 254(g) of the Communications Act and Implementing Rules | ) | WC Docket No. 06-100 |

# OPPOSITION OF THE STATE OF HAWAII


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**SUMMARY**

The Commission should deny Core's petition to the extent that it seeks forbearance from Section 254(g) of the Communications Act and Section 64.1801 of the Commission's rules. The Commission has repeatedly considered and rejected the arguments raised in Core's petition. The existence of competition in the market for interexchange services does not justify forbearance from rate integration and geographic averaging. In fact, the interexchange industry was already fully competitive when Congress codified the Section 254(g) requirements in 1996 and when the Commission subsequently implemented the requirements in Section 64.1801 of the Commission's rules.

The Commission's long standing rate integration and geographic averaging requirements continue to be necessary to ensure that interexchange rates are just and reasonable and are not unreasonably discriminatory based on the geographic location of the user. The Section 254(g) requirements also remain necessary to protect consumers and to promote the public interest. Furthermore, forbearance from the Section 254(g) requirements will not increase competition for rural local exchange services. Finally, any consideration of Core's forbearance petition should examine whether the Commission has statutory authority to forbear from the rate integration requirements of Section 254(g) and whether the Commission has more than limited authority to forbear from the geographic averaging requirements of Section 254(g).

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**OPPOSITION OF**
**THE STATE OF HAWAII**

The State of Hawaii (the "State"), by its attorneys and pursuant to the Commission's Public Notice, dated May 5, 2006, opposes the Petition for Forbearance that was filed by Core Communications, Inc. ("Core") to the extent that it seeks forbearance from Section 254(g) of the Communications Act and Section 64.1801 of the Commission's rules.[1] Core's petition is based on a fundamental misunderstanding of the functions and purposes of the Section 254(g) requirements.

## I. SECTION 254(g) BENEFITS CONSUMERS, NOT RURAL LOCAL EXCHANGE CARRIERS

Core's petition repeatedly and incorrectly argues that the statutory Section 254(g) requirements result in an "implicit subsidy from interexchange carriers [("IXCs")] to [local exchange carriers] ("LECs")."[2] In reality, the benefits of Section 254(g) inure directly to consumers in rural, high cost and remote areas, without any payment or subsidy to rural LECs.

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[1] These Comments are submitted by the State of Hawaii acting through its Department of Commerce and Consumer Affairs. The State takes no position on Core's request for forbearance from Section 251(g).

[2] *Core Petition* at 9; *see also id.* at 4 and 20-21.

As Core correctly notes, Section 254(g) includes two requirements, which are based on long standing Commission policies.[3] First, Congress directed the Commission to require IXCs to maintain geographic rate averaging by charging rates in rural and high-cost areas that are no higher than the rates they charge in urban areas.[4] Second, Congress directed the Commission to require IXCs to maintain rate integration by providing services to their subscribers in each state at rates no higher than the rates charged to their subscribers in any other state.[5]

The underlying purposes of the Section 254(g) requirements have always been explicit[6] and have not changed during the more than three decades since the Commission developed its rate integration and geographic averaging policies.[7] As the Commission has repeatedly and recently reaffirmed, the Commission's rate integration policy of "integrating 'offshore points' such as Hawaii and Alaska into the mainland's interstate interexchange rate structure brings the

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[3] *See id.* at 8.

[4] *See* 47 U.S.C. § 254(g); 47 C.F.R. § 64.1801(a).

[5] *See* 47 U.S.C. § 254(g); 47 C.F.R. § 64.1801(b).

[6] *See, e.g.*, *Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Memorandum Opinion and Order, 19 FCC Rcd 6746, 6748 (2004) ("*IT&E Order*") (rejecting a rate integration plan that "would be directly contrary to the goals of rate integration for offshore points and would impermissibly allow carriers to charge excessive rates for calls to specific offshore points"); *Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers*, Second Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 19613, 19691 (2001) ("*MAG Second Order*") (stating that the Commission remains "committed to enforcing our long and well-established policy of geographic rate averaging and rate integration").

[7] Congressional attention to these issues dates to a Sense of the Senate Resolution calling on the FCC to take action to ensure the integration of interstate telecommunication services. *See* S. Res. 318, 94th Cong. (1975) (enacted).

benefits of growing competition to the entire nation."[8] In addition, "geographic rate averaging benefits rural areas by providing access to a nationwide telecommunications network at rates that do not reflect the disproportionate burdens that may be associated with recovery of common line costs in rural areas" and "ensures that rural customers will share in lower prices resulting from nationwide interexchange competition."[9] The explicit Congressional mandates in Section 254(g) are consistent with the general public policy goals expressed in Section 151 of the Commission's Act, which requires the Commission to make available "to *all* people of the United States . . . a rapid, efficient, *Nation-wide*, and world-wide wire and radio communication service with adequate facilities at *reasonable charges*."[10]

Despite this weight of authority, Core's petition claims that Section 254(g) subsidizes rural LECs, permitting them to "charge below-cost rates, precluding competition and innovation."[11] The Section 254(g) requirements, however, have no impact on the retail rates that rural LECs charge consumers or the access charges that rural LECs collect from IXCs. Instead, Section 254(g) is applicable solely to IXCs and requires that, when IXCs recover their costs from consumers (including the costs of LEC access charges), they must average this recovery by using the same rate structures for all consumers.

If the Section 254(g) requirements ceased to exist, it would be the IXCs, and not the LECs, that would in a position to increase the retail rates that they charge consumers in rural and

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[8] *Developing a Unified Intercarrier Compensation Regime*, Further Notice of Proposed Rulemaking, 20 FCC Rcd 4685, 4724 (2005) (*citing Policy and Rules Concerning the Interstate, Interexchange Marketplace*, Report and Order, 11 FCC Rcd 9564, 9588 (1996) ("*Section 254(g) Implementation Order*")).

[9] *Id.* (*citing Section 254(g) Implementation Order* at 9567).

[10] 47 U.S.C. § 151 (*emphasis added*).

[11] *Core Petition* at 9.

remote areas. Thus, any forbearance from the Section 254(g) requirements would have no impact on the competitive conditions that exist in the market for rural local exchange services.

Not only is Core's petition incorrect in its economic analysis of the functions and purposes of the Section 254(g) requirements, but Core's petition fails to satisfy any of the three requirements for forbearance under Section 160(a) of the Communications Act. Furthermore, it is unclear whether the Commission's forbearance authority under Section 160(a) extends to the rate integration requirements of Section 254(g).

## II. CORE'S PETITION DOES NOT MEET THE STATUTORY REQUIREMENTS FOR FORBEARANCE FROM SECTION 254(g)

Section 160(a) of the Communications Act permits the Commission to forbear from applying portions of the Act if it determines that:

> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
>
> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
>
> (3) forbearance from applying such provision or regulation is consistent with the public interest.[12]

Section 160(b) further instructs that, in making the public interest determination required by Section 160(a)(3), consideration must be given to whether forbearance will enhance competition among providers of telecommunications services.[13]

As explained below, Core's petition satisfies none of these requirements.

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[12] 47 U.S.C. § 160(a).

[13] *See id.*

### A. Enforcement of Section 254(g) Remains Necessary to Ensure That Telecommunications Rates and Terms are Just and Reasonable and Not Unjustly or Unreasonably Discriminatory

The Commission has repeatedly concluded that enforcement of the Section 254(g) requirements remains necessary to ensure that the interexchange rates that are charged to consumers are just and reasonable and are not unreasonably discriminatory. As the Commission observed in its *Access Charge Order*, even partial forbearance from Section 254(g) would:

> create a substantial risk that many subscribers in rural and high-cost areas may be charged significantly more than subscribers in other areas. Accordingly, we cannot conclude that enforcing our rate averaging requirement is unnecessary to ensure that charges are just and reasonable.[14]

Despite the Commission's conclusion, the Core petition argues that the Section 254(g) requirements are no longer necessary because competitive forces in the interstate, interexchange market will prevent the imposition of unjust, unreasonable or discriminatory rates on consumers in high-cost or remote areas.[15] Core's argument has been repeatedly considered and rejected by the Commission. Furthermore, Congress had full knowledge of the competitive nature of the IXC industry when it codified the Section 254(g) requirements in the 1996 Telecommunications Act.

The interstate, interexchange market has been highly competitive in the United States for more than a decade. Prior to the enactment of the 1996 Act, the Commission had already determined that all IXCs were non-dominant in the domestic market. In October 1995, the Commission declared AT&T non-dominant because it found that "most major segments of the

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[14] *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing End User Common Line Charges*, First Report and Order, 12 FCC Rcd 15982, 16022 (1997) ("*Access Charge Order*").

[15] *See Core Petition* at 20.

interexchange market are subject to substantial competition today, and the vast majority of interexchange services and transactions are subject to substantial competition."[16]

When Congress subsequently adopted Section 254(g) of the Communications Act, it did so fully aware not only that competition already existed in the interexchange market, but that the level of competition would increase as major LECs started providing long distance services. In fact, a major component of the 1996 legislation was the establishment the terms for LEC entry into the long distance business.

Congress thus had every opportunity to consider whether Section 254(g) would be necessary or appropriate in a competitive market. The fact that Congress chose to adopt Section 254(g) indicates that Congress concluded that the public interest benefits of the geographic averaging and rate integration requirements would still be needed despite competitive growth in long distance services.

Moreover, Congress codified the rate integration and geographic averaging requirements in the same provision of the Act that addressed universal service because it realized that competition, by bringing rates closer to cost, could make rate disparities between geographic regions worse, rather than better. The very purpose of geographic rate averaging and rate integration is to promote universal service by, if necessary, covering a portion of the high costs of providing long distance telephone services in rural and high-cost areas with revenues from low-cost areas. Congress enacted Section 254(g) specifically to protect consumers in high-cost areas from such rate disparities.

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[16] *Motion of AT&T Corp. to be Reclassified as a Non-Dominant Carrier*, 11 FCC Rcd 3271, 3288 (1995).

The Commission has repeatedly rejected attempts by IXCs to avoid the rate integration requirements of Section 254(g) through Commission forbearance. The Commission made these decisions fully aware that the market for interexchange services was competitive. For example, in implementing the Section 254(g) requirements, the Commission expressly did not forbear from the rate integration principle for any service, stating that:

> We are not persuaded that we must forbear from requiring carriers to comply with rate integration, either generally *or in competitive conditions*, for the same reasons discussed with respect to geographic rate averaging. Our rate integration policy has integrated offshore points into the domestic interstate interexchange rate structure so that the benefits of growing competition for interstate interexchange services . . . are available throughout the nation.[17]

The Commission should reject Core's petition on the same basis. Core's petition is incorrect in claiming that rate integration and geographic averaging are unnecessary to protect consumers from unjust, unreasonable and discriminatory rates in a competitive interexchange market. Instead, as Congress and the Commission have concluded, the Section 254(g) requirements remain just as important to the public interest as they were when they were first created more than three decades ago.

### B. Section 254(g) Enforcement Remains Necessary for the Protection of Consumers

Before the Commission can forbear from applying any portion of the Communications Act, the Commission must conclude, *inter alia*, that "enforcement of such regulation or provision is not necessary for the protection of consumers."[18] The Commission has previously considered this issue and concluded that Section 254(g) remains necessary to protect consumers. The

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[17] *Section 254(g) Implementation Order* at 9588 (*emphasis added*); *see also id.* at 9597 ("[W]e do not view rate integration as inconsistent with flexibility and competitive responses by carriers.").

[18] 47 U.S.C. § 160(a)(2).

Commission noted in its *Access Charge Order* that, because of the risk of significantly higher rates for subscribers in high-cost areas, "we find no basis in this record to conclude that it is unnecessary to enforce section 254(g) to ensure protection of consumers or to protect the public interest."[19]

In claiming that Section 254(g) is no longer necessary to protect consumers, Core once again claims that competition in the interexchange market will ensure that consumers will not be treated unfairly by IXCs.[20] As explained in the previous section, however, both Congress and the Commission considered and rejected such arguments. As the Commission explained in its *Second MAG Order*, "we remain committed to enforcing our long and well-established policy of geographic rate averaging and rate integration."[21] More recently, the Commission explained that permitting IXCs to refrain from integrating rates "would be directly contrary to the goals of rate integration for offshore points and would impermissibly allow carriers to charge excessive rates for calls to specific offshore points."[22]

The rate integration and geographic averaging requirements of Section 254(g) remain necessary to protect consumers by helping to ensure that all Americans have access to nationwide telecommunications services at reasonable rates and terms regardless of their location. Therefore, the Commission should deny Core's petition for forbearance.

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[19] *Access Charge Order* at 16022.

[20] *See Core Petition* at 20.

[21] *Second MAG Order* at 19691.

[22] *IT&E Order* at 6748 (rejecting a rate integration plan of an IXC serving U.S. pacific territories).

### C. Forbearance From Applying the Section 254(g) Requirements Would Not be Consistent With the Public Interest

Section 160(a)(3) prohibits the Commission from forbearing from applying any portion of the Communications Act unless the Commission first determines that, *inter alia*, "forbearance from applying such provision or regulation is consistent with the public interest."[23] Section 160(b) further instructs that, in making this public interest determination, consideration must be given to whether forbearance will enhance competition among providers of telecommunications services.[24]

Core claims that forbearance from the Section 254(g) requirements will enhance competition among rural LECs by forcing incumbent rural LECs to increase the retail rates they charge customers for local services.[25] As explained above in the first section of the State's opposition, however, the Section 254(g) requirements have no impact on the retail rates charged by LECs in rural areas because Section 254(g) does not result in an implicit or explicit subsidy to rural LECs. Thus, forbearance from Section 254(g) would not force rural LECs to increase their retail prices.

At the same time, forbearance from Section 254(g) would not increase competition between IXCs, an industry that Core observes is already "notoriously competition."[26] Even if Section 254(g) forbearance could increase IXC competition, the Commission has already concluded that any increased regional competition that forbearance from Section 254(g) could promote would not "outweigh the benefits of the national policy of geographic averaging embodied

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[23] 47 U.S.C. § 160(a)(2).

[24] *See* 47 U.S.C. § 160(b).

[25] *See Core Petition* at 9 and 21.

[26] *Id.* at 20.

in section 254(g) of the Act and our implementing regulations."[27] Therefore, the Commission should conclude that Core's petition satisfies none of the statutory requirements for forbearance from Section 254(g) and its request for forbearance should be rejected.

## III. THE COMMISSION'S FORBEARANCE AUTHORITY MAY NOT EXTEND TO RATE INTEGRATION AND HAS ONLY LIMITED APPLICATION TO GEOGRAPHIC AVERAGING

In assessing Core's petition for forbearance, the Commission should consider whether it has the statutory authority to forbear from the rate integration requirement of Section 254(g) and whether it has more than limited authority to forbear from portions of the geographic averaging requirements of Section 254(g). As discussed above, the Commission's forbearance authority stems from Section 160(a) of the Communications Act, which forbids forbearance where doing so would result in "charges, practices, classifications, or regulations" that are "unjustly or unreasonably discriminatory."[28] At the same time, the Commission's rate integration policy was originally based on Section 202(a) of the Communications Act, which prohibits unreasonable discrimination based on a customer's location.[29]

Rate integration is a necessary corollary of Section 202(a) because it ensures against location-specific discrimination in the methodology of calculating prices. Just as Section 202(a)

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[27] *Interstate, Interexchange Marketplace Implementation of Section 254(g) of the Communications Act of 1934, as amended; AT&T Corp.'s Petition for Waiver and Request for Expedited Consideration*, 12 FCC Rcd 934, 939 (1997) (rejecting AT&T's request for a waiver of the geographic averaging requirement in order to match Bell Atlantic's rates in the New York/New Jersey corridor).

[28] 47 U.S.C. § 160(a).

[29] *See, e.g., Policy and Rules Concerning the Interstate Interexchange Marketplace; Implementation of Section 254(g) of the Communications Act of 1934, as Amended; Petitions for Forbearance*, Memorandum Opinion and Order, 14 FCC Rcd 391, 398, 400 & 407 (1998) (noting that the rate integration policy codified in section 254(g) has its origins in Section 202(a) and its requirement that rates not be unreasonably discriminatory).

forbids common carriers from engaging in unreasonable discrimination, Section 160(a) forbids the Commission from forbearing from regulations that are necessary to prevent unreasonable discrimination.

The Commission has long understood non-integrated rates to violate the Section 202(a) prohibition against unreasonable discrimination. It therefore follows that the Commission cannot forbear from the rate integration requirement. By doing so, the Commission would be condoning the use of rate methodologies that discriminate based on location, in clear violation of the Act's Section 202(a) requirement.

A conclusion that the Commission does not have statutory authority to forbear from the rate integration requirement of Section 254(g) is consistent with the legislative history of the 1996 Act. In its Joint Conference Committee Report, Congress made no suggestion that the Commission had authority to forbear from its rate integration mandate. In contrast, the Report indicated that the Commission did have authority, albeit very limited authority, to forbear from aspects of the geographic averaging requirement, stating:

> The conferees are aware that the Commission has permitted interexchange providers to offer non-averaged rates for specific services in limited circumstances (such as services offered under Tariff 12 contracts), and intend that the Commission, where appropriate, could continue to authorize *limited exceptions* to the general geographic rate averaging policy using the authority provided by new section 10 [47 U.S.C. § 160] of the Commissions Act.[30]

Taking Congress' instruction into account, it would be inappropriate for the Commission to forbear in any manner from the rate integration requirement. It would also be inappropriate to adopt a wholesale forbearance from the geographic averaging requirement, as advocated by

[30] H.R. Rep. No. 458, 104th Cong., 2d Sess. 132 (1996) (*emphasis added*).

Core's petition. Instead, Congress clearly intended for any exception to the geographic averaging portion of Section 254(g) to remain limited and applicable solely to specific services involving specific conditions and usually for very limited periods of time.

## IV. CONCLUSION

The Commission should reject Core's petition to the extent that it seeks forbearance from Section 254(g) of the Communications Act and Section 64.1801 of the Commission's rules. Core's petition does not satisfy any of the necessary requirements for forbearance indicated in Section 160(a) of the Communications Act. Instead, the Commission's long standing rate integration and geographic averaging requirements continue to be necessary to ensure that interexchange rates are just and reasonable and are not unreasonably discriminatory. The Section 254(g) requirements also remain necessary to protect consumers and to promote the public interest. Furthermore, forbearance from the Section 254(g) requirements will not increase competition for rural local exchange services. Therefore, the Commission should conclude that forbearance from Section 254(g) and Section 64.1801 is not warranted or appropriate.

Respectfully submitted,

**THE STATE OF HAWAII**

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