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VIA ELECTRONIC FILING

Chairman Kevin J. Martin
Commissioner Michael J. Copps
Commissioner Jonathan S. Adelstein
Commissioner Deborah Taylor Tate
Commission Robert M. McDowell
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92; Petition of AT&T Inc. for Interim Declaratory Ruling and Limited Waivers Regarding Access Charges and the "ESP" Exemption, WC Docket No. 08-152; Establishing Just and Reasonable Rates for Local Exchange Carriers, WC Docket No. 07-135

Reform of Originating Access Charges for Toll Free Traffic

Dear Chairman Martin and Commissioners Copps, Adelstein, Tate, and McDowell:

DeltaCom, Inc. is concerned that the Commission will hastily adopt what is intended to be a comprehensive plan for intercarrier compensation reform that does not address a significant shortcoming of the current intercarrier compensation regime – access charges for the *origination* of toll free (or 8YY) traffic. As a threshold matter, there has been no formal release of the specifics of the Report and Order, Order on Remand, and Further Notice of Proposed Rulemaking on intercarrier compensation ("ICC Reform Order") tentatively scheduled to be on the Commission's agenda for the November 4, 2008 open meeting. While the impetus for the timing of the Commission's ICC Reform Order may be driven by the need to respond to the decision of the U.S. Court of Appeals for the D.C. Circuit in the *In re Core Communications, Inc.*[1] case by November 4, 2008, the only requirement is for the FCC to issue a supportable legal rationale for its existing rules regarding the termination of ISP-bound traffic. The Commission does not need to rush to adopt final rules on other intercarrier compensation issues, and indeed, the FCC must fully develop the record to support the adoption of the sweeping reform measures currently being circulated on the Eighth Floor. DeltaCom believes the Commission should first publish the details of any comprehensive reform plan and solicit comment from interested parties. Those parties should not have to guess at the contents of sweeping and imminent reform.

[1] *In re Core Communications, Inc.*, 531 F.3d 849 (D.C. Cir. 2008).

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If the Commission nevertheless forges ahead with a plan to reform the current intercarrier compensation regime, it must do so equitably. To the extent the Commission reforms access charges at all, DeltaCom urges the Commission to modify its plan to move to a uniform termination rate to also include similar implementation arrangements and timelines for *originating* access rates for toll free traffic. As discussed more fully below, the rationale for reforming the terminating access rates that local exchange carriers ("LECs") can charge to interexchange carriers applies with equal force to the rates charged for 8YY originating access. Moreover, by linking terminating access rates to 8YY originating access rates, the Commission would reduce a form of regulatory arbitrage that it has combated before.[2]

By way of background, DeltaCom is a facilities-based CLEC headquartered in Huntsville, Alabama, that provides integrated telecommunications and technology services to businesses and consumers in the southeastern United States. In conjunction with its affiliates, DeltaCom has a fiber optic network spanning approximately 14,500 route miles, including more than 11,000 route miles of owned-fiber, and offers a comprehensive suite of voice and data communications services, including local, long distance, broadband data communications, Internet connectivity, and customer premise equipment to end-user customers. DeltaCom is one of the largest competitive telecommunications providers in its primary eight-state region, situated in the legacy BellSouth territory.

An important part of DeltaCom's business is the provision of toll free 8YY service to companies that receive calls from their own customers, or members of the public that have reason to dial the companies' toll free numbers. Toll free service generally involves both originating and terminating access in order to complete a call. The calling path for a typical toll free call is as follows: (1) the calling party dials an 8YY number; (2) the originating local exchange carrier ("LEC") for the calling party hands the call off to the 8YY service provider, and assesses an originating access charge on the 8YY provider; and (3) the 8YY provider transmits the call to the called party's LEC for termination, which bills a terminating access charge to the 8YY provider. In situations where DeltaCom provides 8YY service, it is generally both the LEC and the interexchange carrier for the toll free subscriber. Thus, for these in-bound toll free calls on the terminating side of the call, because DeltaCom is both the 8YY provider and

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[2] For example, in the *CLEC Access Reform Order*, *Eighth Report and Order*, the Commission addressed AT&T's claim that abuses surrounding CLEC-originated 8YY traffic justified immediately capping the 8YY originating access rate. *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Eighth Report and Order and Fifth Order on Reconsideration, 19 FCC Rcd 9108, ¶ 64 (2004) ("*CLEC Access Reform Order, Eighth Report and Order*"). The Commission determined in that order that the declining benchmark rates for both terminating and originating access charges established by the FCC would sufficiently protect AT&T from 8YY originating access arbitrage. *Id.* ¶¶ 69-72. Here, the Commission does not propose to have termination and origination rates fall in tandem, and the failure to similarly reduce 8YY originating access rates concurrently with terminating access rates would lead to arbitrage opportunities for Bell Operating Companies, including AT&T, to maximize revenues, while at the same time, leverage their control over bottleneck facilities to harm competitive carriers through higher 8YY access charges.

the terminating LEC, terminating access charges are neither assessed nor collected. However, for the out-bound originating side of the call, DeltaCom is generally not the originating LEC. The originating LEC bills DeltaCom an originating access charge for the 8YY call, which is a significant cost for 8YY providers such as DeltaCom.[3]

It is DeltaCom's understanding that the Commission's proposal currently under consideration involves a transition to uniform termination rates for all carriers, with the ultimate goal of reducing terminating rates for all traffic, including exchange access and local exchange, to a default rate of up to $0.0007 per minute. Although the transition for termination rates would occur over a 10-year period, there are no provisions to address origination rates until the end of that transition period. In fact, under AT&T's plan, it proposes to *increase* the rates for originating access.[4] DeltaCom submits that the Commission should not preserve the current 8YY originating access regime during the interim transition period for termination rates (of both interstate and intrastate exchange access traffic). Rather, the Commission should concurrently transition originating access rates for 8YY originating access to lower and uniform rates (for both interstate and intrastate exchange access traffic). The dichotomy of maintaining the outdated access charge regime for the originating side of the call, while, at the same time, transitioning to a new intercarrier compensation system for the terminating end of the call, will have a substantial and adverse effect on toll free service providers. It would greatly decrease revenue and increase costs for carriers, like DeltaCom, who offer toll free services to their end-users and are "net payers" of originating access.

The main reasons that the Commission feels the need to address rates for terminating access are that the interexchange carriers handling these call have little choice but to pay the tariffed rates of the LECs to whom the called party subscribes and that the Commission believes these rates have become excessive. Significantly, the same concerns about the rates that "captive" interexchange carriers pay for "1+"[5] traffic apply to toll free traffic. As the Commission is aware, interexchange and toll free carriers do not have the option of "shopping around" for the least cost provider of originating access service. The party calling a toll free number is presubscribed to a particular LEC (usually one of the Bell Operating Companies ("BOC")), and the 8YY provider is obligated to accept originating access service provided by the calling party's LEC.[6] The FCC has recognized that BOCs possess exclusionary market power

[3] Ordinarily, DeltaCom would also be assessed a charge by the originating LEC to query the 800/SMS database (a "dip" charge) to obtain information necessary to route a toll free call. When undertaking comprehensive reform, the Commission might consider examining dip charges as well.

[4] *See, Petition of AT&T for Declaratory Ruling and Limited Waivers*, Petition of AT&T, WC Docket No. 08-152.

[5] "1+" refers to the ability to make a direct long distance call by dialing the number "1 plus" the ten-digit long distance number. *See, e.g., Thorpe v. GTE Corp.*, 23 FCC Rcd 6371, 6376 n.39 (2008).

[6] *See, e.g. Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923, 9932-33 ¶ 24 (2001); *In re Establishing Just and Reasonable Rates for Local Exchange Carriers, Call Blocking by Carriers*, Declaratory Ruling and Order, 22 FCC Rcd 11629, 11631 ¶ 5 (2007).

over bottleneck access facilities.[7] As such, BOCs will disproportionately benefit from a reduction in terminating access rates that do not include a corresponding decrease in originating access rates, and CLECs that provide 8YY service will be the ones that are irreparably damaged by the FCC's change in compensation methodology. Absent this critical component of reform, the Commission would exacerbate the problems of the current intercarrier compensation regime at the federal and state levels.

DeltaCom and other CLECs that provide 8YY service obviously incur certain carrier-costs associated with the provision of such service, including originating and terminating access charges. Because DeltaCom is both the terminating LEC and the interexchange carrier for its toll free customers, a reduction in terminating access charges will not result in a reduction in its costs for that service. However, the reduction in terminating access will adversely affect CLECs because terminating access charges for 1+ calls represent a significant source of revenues that are used for, among other things, continued network improvement and expansion efforts, and the provision of innovative high-quality service to their subscribers.

CLEC revenue losses would be further exacerbated if AT&T and other carriers are permitted to recover intrastate access revenue shortfalls resulting from the reduction in their intrastate access rates to interstate levels through increases in their subscriber line charges ("SLC") and originating access charges.[8] CLECs' access revenues will be adversely affected as a result of the reduction of terminating access rates to a near-zero level, and their costs for providing 8YY service will increase if BOCs and others are permitted to increase originating access charges to make up for lost intrastate access revenues. CLECs cannot readily offset revenue losses resulting from a reduction in terminating access rates through an increase in the SLC or local service rates because their customers would move to other carriers – likely, the competing incumbent local exchange carrier. Consequently, even after the adoption of any reform plan contemplated to date, LECs would retain their ability and incentive to raise originating access charges for 8YY traffic – perpetuating the problems of the current intercarrier compensation regime.

The Commission's proposal to decrease terminating access rates while allowing for an increased 8YY originating access rates is a deadly mix for CLECs in the toll free business. At best, this will result in an "artificial" increase in both the retail and wholesale cost of toll free service and will make it far more expensive for CLECs to offer toll free service to their business customers. In order to ensure that robust competition continues during the transition to uniform termination rates, and to avoid crippling the CLEC industry, the Commission should require

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[7] *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, CC Docket Nos. 96-149, 96-61, Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, 12 FCC Rcd 15756, 15812-33, ¶¶ 98-130 (1997).

[8] *See, Petition of AT&T for Declaratory Ruling and Limited Waivers*, Petition of AT&T, WC Docket No. 08-152; Reply Comments of NECA, OPASTCO, and WTA, WC Docket No. 08-152.

8YY originating access rates to be reduced in the same manner and in similar time frames. If the FCC does not reduce originating access rates at the same time that it does terminating access, this will result in a boon for BOCs because they will be able to increase 8YY originating access rates for CLECs to make up for intrastate access revenue shortfalls, while making reduced access payments to CLECs because of the lower terminating access rates.

Whereas the amount of intercarrier compensation exchanged for originating access may be relatively small industry-wide compared to that exchanged for terminating access, for companies like DeltaCom with a sizable base of toll free customers, the failure of the Commission to address access charges comprehensively would have a debilitating effect. It is important to note that to date the Commission's existing regulations and decisions essentially pertain to *interstate* access charges. As the Commission prepares to reform intrastate terminating access rates, it should also require that intrastate 8YY originating access charges be reduced in parallel with intrastate terminating rates.

The categorization of access service as either originating or terminating for disparate treatment is an artificial distinction that provides additional opportunities for regulatory arbitrage. The Commission should not move forward with across-the-board terminating rate reductions without further consideration of whether the non-symmetrical treatment of terminating versus originating access will adversely affect CLECs providing toll free service that will harm competition. This is particularly true when, unlike the deadline for the issuance of a decision on the termination of ISP-bound traffic, there is no deadline for the consideration of issues involving 8YY originating access, and the public has not been given the opportunity to comment on the all aspects of the Commission's sweeping reform measures.

DeltaCom urges the Commission to seek comment on contemplated reform in order to promote transparency and an informed decision-making process. To do otherwise would not be in the public interest and risks irreparable harm to the telecommunications industry and consumers during a period of unprecedented financial uncertainty. Finally, to the extent the Commission takes action, now or after an appropriate comment period, it is crucial that any changes imposed on terminating access rates be applied to 8YY originating rates. This parity-approach best protects consumers of this service, and is equitable to the carriers who provide it.

Should you have any questions with respect to this matter, please feel free to contact the undersigned.

Respectfully submitted,

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