KELLEY DRYE & WARREN LLP
A LIMITED LIABILITY PARTNERSHIP

WASHINGTON HARBOUR, SUITE 400
3050 K STREET, NW
WASHINGTON, D.C. 20007-5108

(202) 342-8400

NEW YORK, NY
TYSONS CORNER, VA
CHICAGO, IL
STAMFORD, CT
PARSIPPANY, NJ

BRUSSELS, BELGIUM

AFFILIATE OFFICES
JAKARTA, INDONESIA
MUMBAI, INDIA

FACSIMILE
(202) 342-8451
www.kelleydrye.com

DIRECT LINE: (202) 342-8518
EMAIL: tcohen@kelleydrye.com

October 28, 2010

VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
The Portals
445 - 12th Street, SW
Washington, DC 20554

Re: *Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135; *Developing a Unified Inter-carrier Compensation Regime*, CC Docket 01-92

Dear Ms. Dortch:

Tekstar Communications, Inc. ("Tekstar"), a certificated Minnesota competitive local exchange carrier ("CLEC") and a rural CLEC under the Commission's access charge rules, has participated extensively in the above-referenced dockets. On August 31, 2010, USTelecom, on behalf of itself and several other parties, filed an *ex parte* presentation containing proposed rules and a suggested declaratory ruling to address alleged traffic stimulation concerns ("USTelecom Proposal").[1] More recently, on October 8, 2010, USTelecom and all but one of those same parties filed a letter discussing their so-called "consensus" proposal and providing some additional detail.[2] The purpose of this letter is to respond to both recent filings and to explain why the USTelecom proposal or any similar proposal should not be adopted. Tekstar

1 Letter from Glenn T. Reynolds, Vice President – Policy, USTelecom, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Aug. 31, 2010) ("*USTelecom Aug. 31st Ex Parte*"). The other parties endorsing USTelecom's submission were ZipDX, Level 3, Sprint, Verizon, AT&T, and Qwest.

2 Letter from Glenn T. Reynolds, Vice President – Policy, USTelecom, *et al.*, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135, CC Docket No. 01-92 (filed Oct. 8, 2010) ("*USTelecom Oct. 8th Ex Parte*"). Sprint, a participant in the August 31, 2010 filing, did not participate in the October 8, 2010 letter.

also responds to an October 11, 2010 *ex parte* letter by Verizon which purports to quantify the costs imposed on interexchange carriers ("IXCs") and consumers as a result of so-called traffic stimulation.[3]

I. The USTelecom Rate Change Trigger Has No Nexus to the Rates That Would Be Affected and Is Otherwise Unsupported by Any Evidence

The USTelecom Proposal is similar to a proposal filed approximately two years ago by AT&T Services, Inc. ("AT&T") and the Rural Independent Competitive Alliance ("RICA") ("AT&T/RICA Proposal").[4] Shortly after the AT&T/RICA Proposal was submitted, Verizon and Qwest filed in general support of the AT&T/RICA Proposal with modifications.[5] In the ensuing twenty-three months, the Commission has not seen fit to take any formal action to consider the AT&T/RICA Proposal, with or without the modifications suggested by Verizon and Qwest.

Tekstar submits that there still is no need to consider the AT&T/RICA Proposal or its progeny, the USTelecom Proposal. The central issue in this proceeding is what constitutes a reasonable access charge rate for rural CLECs with large traffic volumes and whether there is a mechanism by which such reasonable rates can be effectuated. As Tekstar has discussed with

---

3 Letter from Donna Epps, Vice President – Federal Regulatory, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Oct. 11, 2010) ("*Verizon Oct. 11th Ex Parte*").

4 *See* Letter of Brian Benison, Director – Federal Regulatory, AT&T Services, Inc. and Steve Kraskin, Legal Counsel, Rural Independent Competitive Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 07-135 (filed Nov. 25, 2008) ("*AT&T/RICA Ex Parte*"). The AT&T/RICA Proposal established a 1500 minutes of use ("MOU") per line threshold as the trigger for determining whether a local exchange carrier ("LEC") is engaged in traffic stimulation activities. *AT&T/RICA Ex Parte*, Attachment, at 1. In contrast, the more recent USTelecom proposal establishes a threshold of approximately 25% of that amount, or 406 MOU per line. *USTelecom Oct. 8th Ex Parte*, at 4. As discussed below, this significant discrepancy (especially given AT&T's support of both proposals) is obvious evidence that both proposals are arbitrary.

5 *See* Letter from Donna Epps, Vice President – Policy, Verizon, to Marlene H. Dortch, Secretary, Federal Communications Commission, CC Docket No. 01-92, WC Docket No. 07-135 (filed Jan. 14, 2009) ("*Verizon Ex Parte*"); Letter from Melissa E. Newman, Vice President – Federal Regulatory, Qwest Communications International, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Jan. 6, 2009) ("*Qwest Ex Parte*").

Commission staff in recent meetings and addressed in recent filings,[6] a market has evolved to address any concerns about the rates charged by rural CLECs with large traffic volumes. This market is best evidenced by the agreements entered into between Tekstar and IXCs over the past three years, where agreed-upon rates are substantially below the rate Tekstar, a rural CLEC, is entitled to charge under the Commission's rules. Moreover, these rates have decreased over the years as new agreements are entered into with IXCs, a sure indication that Tekstar does not have monopoly power as the terminating carrier and must respond to the marketplace. Indeed, Tekstar submits that the negotiated "market" agreements it has entered into, along with its related, recently-updated federal tariff rates, provide not only the best evidence of a reasonable rate level but, unlike the AT&T/RICA proposal and its recent, even more arbitrary and speculative progeny, constitute the sole concrete basis for any particular Commission determination.[7]

The Commission made clear in the *CLEC Access Charge Order*[8] and the reconsideration of that order[9] that the reasonableness of CLEC access service rates is to be judged based on market factors, not cost factors.[10] It is for this reason that market-based rates

---

6 *See* Letter from Edward A. Yorkgitis, Jr., Counsel for Tekstar Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Sept. 15, 2010); Letter from Edward A. Yorkgitis, Jr., Counsel for Tekstar Communications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Sept. 23, 2010) ("hereinafter referred to jointly as *Tekstar Ex Partes*").

7 The only other concrete evidence in the record as to market rates and conditions is the state tariff filed by Iowa CLEC OmniTel Telecommunications, Inc. in September 2008, which the Iowa Utilities Board ordered OmniTel to file to reflect the $0.014/MOU rate and other terms and conditions of a negotiated agreement with Verizon. *See* Letter from Thomas Cohen, Counsel for OmniTel Telecommunications, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Sept. 26, 2008).

8 *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Seventh Report and Order and Further Notice of Proposed Rulemaking*, 16 FCC Rcd 9923 (2001) ("*CLEC Access Charge Order*").

9 *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers, Petition of Z-Tel Communications, Inc. For Temporary Waiver of Commission Rule 61.26(d) to Facilitate Deployment of Competitive Service in Certain Metropolitan Statistical Areas,* CC Docket No. 96-262 and CCB/CPD File No. 01-19 (rel. May 18, 2004).

10 *Id.*, at ¶ 57. The Commission accomplished this goal by revising its tariff rules to more closely align tariffed CLEC access rates with those of ILECs. Under the tariffing regime it adopted in the *CLEC Access Charge Order*, CLEC access rates that are at or below the benchmark set by the Commission are presumed to be just and reasonable and CLECs

such as those reflected in Tekstar's tariff are appropriate. Under Tekstar's tariff, the marginal per-minute rates decline with the total volume of traffic exchanged monthly pursuant to a tiered rate structure.[11] Qwest and Sprint challenged Tekstar's tariff, seeking rejection or suspension and investigation, yet the Commission permitted the tariff to take effect on October 1, 2010.[12]

In contrast, the rates, terms, and conditions of the AT&T/RICA and USTelecom proposals do not reflect, or even purport to reflect, the market for interstate switched access services. Instead, the rates and terms proffered by the IXCs have been arbitrarily chosen and are devoid of any relevant factual foundation upon which the Commission can base rules regarding the level of rural CLEC access charges.

Under the USTelecom proposal, a rural CLEC would not be permitted to benchmark its rates to the NECA Band 8 rates if it terminates more than 406 MOU of interstate exchange access traffic per working loop per month, the assumption being that any such CLEC is engaged in unlawful traffic stimulation.[13] AT&T and RICA had proposed that a rural CLEC would lose its ability to benchmark to the NECA Band 8 rates if it terminates more than 1500 MOU of interstate switched access traffic per working loop per month.[14] These volumes of traffic are the trigger, under their proposals, for the application of a rate lower than the rates allowed under the current rural CLEC benchmarking rule. However, neither USTelecom nor AT&T/RICA provides any evidence to support their proffered thresholds for application of a

---

may impose them by tariff. Above the benchmark, CLEC access services are mandatorily detariffed, and CLECs must negotiate higher access rates with IXCs. *CLEC Access Charge Order*, at ¶ 3.

11 Tekstar Communications, Inc.'s Tariff FCC No. 2, its revised interstate switched access services tariff, was submitted September 16, 2010 with an effective date of October 1, 2010. *See* Transmittal No. 3, Tekstar Communications Services, Inc. Tariff FCC No. 2 Access Service (filed Sept. 16, 2010).

12 For additional discussion of Tekstar's federal access charge tariff, see Section IV, *infra*.

13 *USTelecom Oct. 8th Ex Parte*, at 4.

14 *AT&T/RICA Ex Parte*, Attachment, at 1. Both USTelecom and AT&T/RICA borrow the term "working loop" from the universal service and Part 36 Accounts contexts (*see* 47 C.F.R. § 54.307(b)). Tekstar maintains that "working loop" does not precisely define or account for all possible loop facilities used when a LEC terminates traffic to its end user customers. The more accurate term would be "access line," which should be defined as a working voice-grade DS0 line or the equivalent facility.

lower rate than currently provided for by the Commission's rules.[15] Thus, the Commission should view these proposed thresholds skeptically and reject them.

USTelecom attempts to justify its cap of 406 MOU/line by reference to the monthly MOU/line reportedly experienced by the 99th percentile of NECA Band 8 carriers.[16] No explanation is given why this is the appropriate threshold to impose on rural CLECs cross-referencing to NECA Band 8 rates. USTelecom states that its purpose is "to ensure that tariffed rural CLEC rates remain within the bounds of reasonableness, as is commanded by the Communications Act."[17] Yet USTelecom offers no evidence as to why charging NECA Band 8 rates for minutes which exceed the 406 MOU/line cap – conceivably by as little as 1 MOU/line – necessarily would result in those rates falling outside the parameters of reasonableness.

Moreover, the principal access rates at issue are local switching, interoffice transport, and tandem switching. No usage-based rate for loops is at issue because LECs do not assess an access charge for loops, principally because end users themselves pay a flat monthly rate for the loops. Nevertheless, the USTelecom proposal unjustifiably would use an MOU/month/loop test to determine when a carrier's rates for local switching, interoffice transport, and tandem switching must be subjected to a different benchmarking standard. This allows for extremely anomalous results. For example, under the proposal, a rural CLEC that serves a call center in a small town and has 200 lines but an average of 450 MOUs/month per line (or 90,000 total MOUs/month) can no longer benchmark to NECA Band 8 rates, whereas a rural CLEC with 25,000 lines and 250 MOUs/month/line (or a total of 6,250,000 MOUs/month) – almost *seventy times* as much traffic – could continue to benchmark to NECA band 8 rates.[18] These anomalous results illustrate the absence of a rational factual basis for USTelecom's proposal and the perils of adopting it.[19]

---

15 Notably, in earlier filings in this docket, AT&T proposed that the threshold should be 2000 MOU per working line per month and RICA proposed a threshold of 3000 MOU per line per month. *See* Comments of AT&T, Inc., WC Docket No. 07-135 (filed Dec. 17, 2007) ("*AT&T Comments*"), at 30; Letter from Steven G. Kraskin, Counsel to Rural Independent Competitive Alliance, to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 07-135 (filed Apr. 24, 2008), Attachment at 3.

16 *USTelecom Oct. 8th Ex Parte*, at 4.

17 *Id.*

18 Notably, the juxtaposition of the Commission's rural CLEC criteria and the USTelecom proposal would allow for CLECs with traffic volumes several times greater than the larger rural CLEC in the foregoing example to continue to benchmark to NECA Band 8 rates.

19 Adoption of the USTelecom proposal would not be a panacea for ending disputes and litigation between LECs and IXCs. Rather, it would engender new rounds of litigation as

II. The USTelecom Proposal Imposes Disproportionate and Unjustified Burdens on Carriers and the Commission

The lack of justification for the threshold in the USTelecom proposal is especially problematic in the additional and disproportionate burdens it would impose on rural CLECs. Notably, a rural CLEC that exceeds the cap – even by as little as an average of 1 MOU/line in a given quarter – must file a revised tariff within thirty days lowering its terminating access rate to no higher than the rate charged by the Bell Operating Company ("BOC") serving that CLEC's state or, if there is no BOC in that state, the largest ILEC in the state and that tariff must remain in effect for a minimum of one year.[20] Thus, under USTelecom's proposal, a rural CLEC with modest traffic volumes that exceeds the per-line cap (even by the smallest possible increment) for other reasons unrelated to so-called traffic stimulation would be unjustifiably penalized. USTelecom fails to take into account that its proposal could – and likely would – severely punish rural CLECs arbitrarily relative to CLECs with similar, or even larger, traffic volumes and would require that they operate under a new BOC-benchmarked tariff for at least a year even if their traffic volumes fall below the proposal's threshold right after triggering it by a hair. This aspect of USTelecom's proposal constitutes disproportionate and unjustified "punishment."

Moreover, the IXCs' proposals lack probative value regarding what an appropriate rural CLEC rate should be when volumes exceed their proffered thresholds. As noted above, USTelecom proposes that if a rural CLEC engages in traffic stimulation (by exceeding the MOU/month levels USTelecom suggests), the CLEC shall be required to file a revised tariff within thirty days that reduces its terminating switched access rate to the level charged by the relevant BOC. AT&T/RICA proposed a nearly-identical tariff filing requirement.[21] However, neither USTelecom nor AT&T/RICA show why it would be appropriate to force CLECs in all cases to adopt the relevant BOC rate, rather than some other rate.[22] Moreover, the net result of the proposal would be a precipitous drop in a rural CLEC's

---

parties would challenge the new requirements in court as the product of factually unsupported and, thus, legally arbitrary and capricious, rulemaking.

20 *See USTelecom Oct. 8th Ex Parte*, Attachment at 2.

21 *See AT&T/RICA Ex Parte*, Attachment, at 2.

22 It bears noting that AT&T and RICA previously filed very different rate proposals in this docket. *See AT&T Comments*, at 31; Reply Comments of AT&T, Inc., WC Docket No. 07-135 (filed Jan. 16, 2008), at 22. *See also* Comments of the Rural Independent Competitive Alliance, WC Docket No. 07-135 (filed Dec. 17, 2007) ("*RICA Comments*"). AT&T proposed that a rural CLEC engaged in what AT&T terms "excessive traffic stimulation" be required to benchmark either to the NECA Band 1 rate if it was competing with a rural ILEC or the competing ILEC's rate if it was competing with a non-rural ILEC. RICA stated that "[i]f rural CLECs were allowed to file cost based rates, any question of 'traffic pumping kickback schemes' could be readily addressed in the

access revenues if it crosses the threshold even by the smallest amount. Given two rural CLECs, one at 410 MOUs/month/line, and the other at 407 MOUs/month/line, the rural CLEC with more traffic per line would collect only a small fraction of the revenues as the rural CLEC that has remained below the threshold even though it has, presumably, incurred the same or even greater costs.

Both the USTelecom and the AT&T/RICA proposals also raise serious administrative and resource allocation issues. First, the proposals require *all* rural CLECs – most, if not all, of whom are small carriers with very limited resources – to file quarterly certifications with the Commission that they either fall below or exceed the proposed per-line caps.[23] Rural CLECs are required to retain the documentation necessary to support their certifications for at least three years.[24] These new filing and record-keeping requirements would constitute a significant burden on small carriers, especially in today's challenging economic environment. Moreover, rural CLECs' certifications presumably would be subject to Commission auditing rules which would potentially impose a significant additional monetary and resource burden on already-overtaxed rural CLEC operations. Further, the certification process contemplated by USTelecom and AT&T/RICA would place significant additional administrative burdens on the Commission. The Commission would be obligated to find the resources to implement and administer the quarterly certification process. And the Commission likely would be forced to institute an auditing process to ensure that the certification requirement is followed.

III. No Revenue Sharing Rule is Required if Rates are Reasonable

USTelecom and AT&T/RICA both propose an additional rule that is entirely unnecessary and inappropriate for a number of reasons. Specifically, USTelecom and AT&T/RICA propose that the Commission adopt a rule stating that "it shall be an unjust and unreasonable practice for any LEC to assess intercarrier compensation – including, for example, access charges, reciprocal compensation charges, or charges assessed under 47 C.F.R. § 20.11 arrangements – on traffic that is subject to a revenue sharing arrangement."[25] First and foremost, this proposed "revenue sharing" rule should be rejected because it is not needed to

---

tariff review or complaint process." *RICA Comments*, at 13. AT&T and RICA are free to revise their proposals based on new evidence or analysis. However, as noted above, they have submitted no evidence to explain their change in approach and their most recent proposals.

23 *USTelecom Oct. 8th Ex Parte*, Attachment at 2; *AT&T/RICA Ex Parte*, Attachment, at 2.

24 *Id.*

25 *USTelecom Oct. 8th Ex Parte*, Attachment at 3. *See also AT&T/RICA Ex Parte*, Attachment, at 2.

address the traffic stimulation issue. The core issue before the Commission in the instant docket is the determination of whether the rate charged by a rural CLEC that originates and terminates large volumes of traffic is just and reasonable.[26] Once that issue has been resolved, the Commission's work is done. Tekstar maintains that its agreements with IXCs and its recently-filed tariff containing rates that are substantially below the rate rural CLECs are entitled to charge under the Commission's rules provide sufficient basis for the Commission to determine what constitutes a proper rate level.

USTelecom and AT&T/RICA fail to explain why it is unjust or unreasonable for a rural CLEC to enter into a revenue sharing or similar arrangement with a customer that offers an information service, or makes or receives large volumes of calls (*e.g.*, a call center), if the rate assessed by the CLEC complies with the Commission's rate level requirements. USTelecom and AT&T/RICA simply assume that the practice of revenue sharing in this context is *per se* unjust and unreasonable or conclusive evidence of other unlawful activity even if the rates charged are just and reasonable. It is not surprising that the IXCs cannot point to how such arrangements harm them if the rate they are assessed is at a reasonable level. In reality, once the Commission satisfies itself that rural CLEC rates are reasonable if set at or below certain levels, revenue sharing by rural CLECs that comply with those rate level requirements would not cause any party harm. Thus, the Commission would set a troubling and unjustified precedent if it were to effectively outlaw revenue sharing by rural CLECs that are otherwise in compliance with its access charge rules.

The proposed revenue sharing limitation also should be dismissed because it is potentially harmful to carriers of all types. Since the proscription against revenue sharing would presumably be independent of any rate issues and would be grounded on the obligation of all carriers under Section 201(b) of the Act[27] not to act in an unjust and unreasonable manner, any anti-revenue sharing rule would have to be applied to all carriers and could not justifiably be limited to rural CLECs. Further, to be effective, the rule could not be limited to a narrow definition of revenue sharing. Consequently, notwithstanding USTelecom's representation that its purpose is not to "constrain legitimate business arrangements,"[28] the rule necessarily would be overbroad, unnecessarily (and unfairly) encompassing carriers and carrier-customer

---

26 *See In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers*, WC Docket No. 07-135, Notice of Proposed Rulemaking, FCC 07-176 (Rel. Oct. 2, 2007), at ¶ 1 ("In this Notice, we initiate a rulemaking proceeding to consider whether the current rules governing the tariffing of traffic-sensitive switched access services by local exchange carriers (LECs) are ensuring that rates remain just and reasonable…").

27 47 U.S.C. § 201(b).

28 *USTelecom Oct. 8th Ex Parte*, at 5.

arrangements far beyond the specific context of the USTelecom and AT&T/RICA proposals. In addition, any anti-revenue sharing rule would be extremely difficult to administer and enforce in an even-handed fashion given the nearly infinite variety of incentive arrangements routinely entered into by LECs and their customers.[29] And any attempt at enforcement of the rule would necessitate the dedication of significant resources by the Commission – resources that the Commission can ill afford to devote to any new administrative enforcement effort.

Finally, a rule proscribing revenue sharing would likely do nothing to mitigate the excessive costly and burdensome litigation that has plagued the industry for the past several years. Instead, the rule would become just another excuse for IXCs to unilaterally withhold proper access charge payments to rural CLECs, *i.e.*, to continue in the unlawful practice, which many IXCs have routinely engaged in often over the past few years, thus leading to further litigation.

IV. Verizon's Claims of Harm are Undocumented and Unsubstantiated

Tekstar also wishes to comment briefly on two points raised by Verizon in its October 11, 2010 *ex parte* letter. As an initial matter, Verizon, using "internal and external data," estimates that "traffic pumping currently is a $300-$440 million annual problem."[30] Tekstar submits that the Commission should not give any credence to this estimate for a number of reasons.

1. The sources of Verizon's data are not documented.
2. Verizon does not define the scope of what it considers "traffic pumping" activities.
3. It is not clear whether Verizon includes charges for traffic covered by agreements between IXCs and LECs which establish rates for exchanging such traffic or whether Verizon only includes charges for traffic currently in dispute between IXCs and LECs where the IXCs are withholding payment.
4. Verizon does not separate wireline from wireless traffic, an important distinction to understand the source and intensity of any potential concern.

---

29 *See, e.g.*, Joint Reply Comments of PAETEC, Citynet, Granite, RCN Telecom, and US TelePacific, WC Docket No. 07-135 (filed Dec. 22, 2008), at 34-40 (revenue sharing proscriptions would create anticompetitive burdens on all carriers and would be virtually impossible to administer fairly given the wide plethora of arrangements and incentives used by incumbent and competitive carriers with their customers).

30 *Verizon Oct. 11th Ex Parte*, at 1.

5. To the extent Verizon includes charges that remain in dispute between IXCs and LECs, it is unclear whether Verizon includes the charges in their entirety or backs out what Verizon considers to be reasonable charges for such traffic.

6. It is unclear whether Verizon has included all charges from LECs that IXCs allege are engaged in so-called traffic stimulation, or only those allegedly charges attributable to alleged traffic stimulation activities.

7. Verizon does not separate wireline from wireless traffic, an important distinction to make to understand the source and intensity of any potential concern.

8. Verizon apparently does not offset the revenues IXCs receive from end users for the interexchange calling enabled by the access services provided by so-called traffic stimulating LECs.

9. Verizon seems to include charges that IXCs have not paid and contend they do not owe, undermining any complaint that IXCs are being harmed and any ability to measure the harm until an accommodation is reached between an IXC and a LEC or adjudication between them is initiated and resolved.

Verizon asserts that Tekstar's claim that Commission action is unwarranted at this time because a market is evolving for the exchange of traffic with high volumes is "absurd."[31] Yet, just a couple of paragraphs later, Verizon refers to "amicably resolv[ing]" its dispute with a South Dakota LEC with "an appropriate market-based approach."[32] Although Tekstar is not privy to the details of that settlement, Tekstar submits that Verizon's characterization of the South Dakota settlement is the more accurate one, as it reflects Tekstar's own negotiating experience and results with Verizon and other IXCs. The simple fact is that while LECs may have a terminating monopoly in theory, they do not in practice, since any effort to contest a dispute where the IXC withholds payment is very expensive, distracts from business operations, and takes many years to resolve, if at all.[33] While the IXC withholds payments it receives from its end users, the LEC receives no revenue for terminating those calls.[34] In many instances, this situation has led to negotiations between IXCs and LECs, and settlements have occurred where

31 *Id.*, at 3.

32 *Id.*, at 4.

33 Tekstar knows of no collection action initiated over the past several years by a LEC with high traffic volumes that has been finally resolved by a decision of a court resulting in payment to the LEC.

34 In light of the fact that IXCs routinely receive payment from their end users but do not pay the LEC for originating or terminating their traffic, Verizon's claim that it settles access charge disputes to "stop the bleeding" is puzzling if not outright fallacious.

the rates paid by the IXCs to exchange traffic with a LEC are a fraction of the rate the LEC is permitted to charge under the Commission's rules.

Tekstar has already informed the Commission that currently 80% of its interstate conference calling traffic is covered by settlement agreements with IXCs where rates are far below the rates it is entitled to charge under the Commission's rural CLEC benchmarking rules. Moreover, each time it renegotiates one of these agreements, the rates have tended to decline further, attesting to the fact that IXCs have far greater bargaining leverage.[35] Recently, to reduce disputes and transactional costs incurred by IXCs and Tekstar, Tekstar filed a revised federal tariff generally reflecting the rates being discussed during settlement negotiations. The rates in this tariff are tiered, declining at the margin as traffic volumes increase and cross new tier thresholds. The rate in the initial tier is 50% of the rate Tekstar is entitled to charge as a rural CLEC, and the rate for minutes in excess of the final tier threshold is approximately 10% of the rate it is entitled to charge. As noted, these rates track Tekstar's market negotiations, and they reflect proper cost causation principles – Tekstar's costs decrease with higher overall traffic volumes irrespective of average monthly MOUs per line. Moreover, the IXCs that are responsible for increasing the efficiency of Tekstar's network by sending larger amounts of traffic to Tekstar are charged lower rates.

While no market works perfectly, the market here certainly is working. IXCs have far greater leverage in the market than do the LECs by virtue of the fact that they (the IXCs) are able to – and often do – withhold payment until a dispute is finally settled. This reality confirms the inescapable conclusion that a working market is in place, and it continues to evolve. The issue is not whether the market is perfect; it is whether the market works better than imposed regulations can be expected to operate. In light of the fact that the USTelecom and AT&T/RICA proposals, as shown above, are demonstrably arbitrary and onerous and that a substantial portion of the traffic at issue is under contract, it is clear that the current market environment is far preferable to the approach that the IXCs seek to compel through new regulations that would depart substantially from current rules and create a host of uncertainties and anomalies without a rational or adequate factual basis.

35 Tekstar is hardly the only LEC that has entered into settlement agreements with IXCs that contain rates below the rates entitled to be charged under the Commission's rules in order to obtain some payment for the terminating access services rendered. For example, OmniTel Telecommunications, Inc., an Iowa-based rural CLEC, has entered into access charge agreements with various IXCs.

We request that this letter, which is being filed electronically, be placed in the record for the above-captioned proceedings.

Sincerely,

Tekstar Communications, Inc.

By: Thomas Cohen (gm)

Thomas Cohen
Genevieve Morelli
Edward A. Yorkgitis, Jr.
KELLEY DRYE & WARREN LLP
WASHINGTON HARBOUR
3050 K STREET, NW, SUITE 400
WASHINGTON, DC 20007
202-342-8400 (PHONE)
202-342-8451 (FACSIMILE)

Its Attorneys

cc: Sharon Gillett
Marcus Maher
Rebekah Goodheart
Jennifer Prime
Albert Lewis
John Hunter
Lynne Engledow
Douglas Slotten