Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	))	

SEVENTH REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING

Adopted: April 26, 2001 **Released:** April 27, 2001

Comment date: [30 days after publication in the Federal Register]
Reply Comment date: [60 days after publication in the Federal Register]

By the Commission: Commissioner Furchtgott-Roth concurring in part, dissenting in part, and issuing a separate statement.

Paragraph

I. INTRODUCTION

1. With this order, we continue our efforts to establish a "pro-competitive, deregulatory national policy framework" for the United States' telecommunications industry by addressing a number of interrelated issues concerning competitive local exchange carrier (CLEC) charges for interstate switched access services and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs.[1] Parties on both sides of these issues have requested Commission involvement in shaping a resolution to what the IXCs view as the CLECs' abuse of our tariff rules to impose excessive access charges and what the CLECs view as the IXCs' unreasonable demands for lower access charges and threats to reject CLEC access traffic.

2. By this order, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. Specifically, we limit the application of our tariff rules to CLEC access services[2] in order to prevent use of the regulatory process to impose excessive

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[1] In addressing these issues, the Commission has requested and received comments in several proceedings: *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order & Notice*); *Commission Asks Parties to Update and Refresh Record on Mandatory Detariffing of CLEC Interstate Access Services*, CC Docket Nos. 96-262 and 97-146, Public Notice, 15 FCC Rcd 10181 (Comm. Carr. Bur. 2000) (*Mandatory Detariffing Public Notice*); *Common Carrier Bureau Seeks Comment on the Request for Emergency Temporary Relief of the Minnesota CLEC Consortium and the Rural Independent Competitive Alliance Enjoining AT&T Corp. from Discontinuing Service Pending Final Decision*, CC Docket No. 96-262, Public Notice, DA-00-1067, 2000 WL 217601 (Comm. Carr. Bur., rel. May 15, 2000) (*Emergency Petition Public Notice*); *Common Carrier Bureau Seeks Comment on Issues Relating to CLEC Access Charge Reform*, CC Docket No. 96-262, Public Notice, 15 FCC Rcd 24102 (2000) (*Safe Harbor Public Notice*). Below, we refer to a comment or reply comment to the *Pricing Flexibility Order & Notice* as Comment or Reply Comment, respectively. A comment or reply comment to the *Mandatory Detariffing Public Notice* is identified as Detariffing Comment or Detariffing Reply Comment, respectively. We refer to a comment or reply comment to the *Emergency Petition Public Notice* as Emerg. Pet. Comment or Emerg. Pet. Reply Comment, respectively. A comment or reply comment to the *Safe Harbor Public Notice* is identified as Safe Harbor Comment or Safe Harbor Reply Comment, respectively. Appendix A includes a list of parties filing comments in each of these proceedings.

[2] In this order, we use the term "access services" to refer only to interstate switched access services, unless we specifically indicate to the contrary.

access charges on IXCs and their customers. Previously, certain CLECs have used the tariff system to set access rates that were subject neither to negotiation nor to regulation designed to ensure their reasonableness. These CLECs have then relied on their tariff to demand payment from IXCs for access services that the long distance carriers likely would have declined to purchase at the tariffed rate.

3. Our goal in this process is ultimately to eliminate regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. We accomplish this goal by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. During the pendency of negotiations, or if the parties cannot agree, the CLEC must charge the IXC the appropriate benchmark rate. We also adopt a rural exemption to our benchmark scheme, recognizing that a higher level of access charges is justified for certain CLECs serving truly rural areas.

4. To avoid too great a disruption for competitive carriers, we implement the benchmark in a way that will cause CLEC rates to decrease over time until they reach the rate charged by the incumbent LEC. This mechanism will mimic the operation of the marketplace as competitive LECs will no longer be operating in the access market with tariffed rates well above the prevailing market price. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering. In addition, this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate. Naturally, the CLECs also retain the option of recovering from their end users any additional costs that they may experience.

5. The regulatory forbearance that we undertake today continues our move to market-based solutions by encouraging CLECs to negotiate rates outside of the tariff safe harbor where they see fit. We also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor, when the IXC serves ILEC end users in the same area, generally constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

6. Our order today is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market currently taking root. We intend to allow CLECs a period of flexibility during which they can conform their business models to the market paradigm that we adopt herein. In addition, these rules should continue to ensure the ubiquity of a fully interconnected telecommunications network that consumers have come to expect. Finally, by ensuring that CLECs do not shift an unjust portion of their costs to interexchange carriers, our actions should help continue the downward trend in long-distance rates for end users.

7. We stress, however, that the mechanism set out below is a transitional one; it is not designed as a permanent solution to the issues surrounding CLEC access charges. Rather, we view the mechanism we adopt today as a means of moving the marketplace for access services closer to a competitive model. Because our tariff benchmark is tied to the incumbent LEC rate,

we will re-examine these rates at the close of the period specified in the *CALLS Order*.[3] Through a separate notice of proposed rulemaking that we issue today, we also evaluate the access charge scheme as part of a broader review of inter-carrier compensation.[4]

II. BACKGROUND

8. Competitive entrants into the exchange access market have historically been subject to our tariff rules, but have been largely free of the other regulations applicable to incumbent LECs.[5] Incumbent LECs, on the other hand, are closely regulated in their ratemaking to ensure that their interstate access charges are just and reasonable.[6] In recent years, the Commission has repeatedly examined access rates, attempting to make them more economically rational. Some of the overarching goals the Commission has pursued in this effort include the promotion of competition, aligning access rate structures more closely with the manner in which costs are incurred, the removal of subsidies from access rates and deregulation as competition develops.[7] The result of the Commission's efforts has been a steady reduction in access charges and in long distance rates which, in turn, has dramatically increased consumer usage of long distance service.

9. Although the access charge debate previously has focused primarily on dominant carriers, as CLEC market share has increased, a correspondingly greater interest in the rates of competitive carriers has developed. As a result, CLEC access charges recently have been the subject of several Commission proceedings and the filings of several parties.

10. The *Access Reform NPRM*: In the *Access Reform NPRM*, the Commission sought comment on whether CLECs can exercise market power with regard to terminating access services and whether and how the Commission should regulate those services.[8] The Commission noted the differences between the originating and terminating access markets. For example, with *originating* access, the Commission recognized that the calling party chooses the service provider

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[3] *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

[4] *Developing a Unified Intercarrier Compensation Regime*, Notice of Proposed Rulemaking, CC Dkt. Nos. 01-92, 99-68, 96-98, FCC 01-132 (rel. April 27, 2001) (*Intercarrier Compensation NPRM*).

[5] *See Tariff Filing Requirements for Non-Dominant Common Carriers*, CC Dkt. No. 93-36, Memorandum Opinion and Order, 8 FCC Rcd 6752, 6754 (1993) (CLECs are non-dominant carriers because they have not been previously declared dominant), *vacated and remanded in part on other grounds, Southwestern Bell Corp. v. FCC*, 43 F.3d 1515 (D.C. Cir. 1995); *on remand*, 10 FCC Rcd 13653 (1995).

[6] *See infra* note 93.

[7] *See Access Charge Reform*, CC Docket 96-262, First Report and Order, 12 FCC Rcd 15982 (*Access Charge Reform Order*), *aff'd sub. nom. Southwestern Bell v. FCC,* 153 F.3d 523 (8th Cir. 1998); *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221; *Access Charge Reform*, CC Docket No. 96-262, Sixth Report and Order, 15 FCC Rcd 12962 (2000) (*CALLS Order*).

[8] *Access Charge Reform*, CC Docket 96-262, Notice of Proposed Rulemaking, Third Report and Order, and Notice of Inquiry, 11 FCC Rcd 21354, 21476 (1996) (*Access Reform NPRM).*

and decides whether to place a call, and it has the ultimate obligation to pay for the call.[9] The calling party also is the customer of the IXC that purchases the originating access service.[10] The Commission tentatively concluded, that, as long as IXCs could influence the calling party's choice of the access provider, a LEC's ability to charge excessive originating access rates would be limited, because IXCs likely would create incentives for their end users to move to competing, less expensive access providers.[11] On the other hand, the Commission recognized that, with *terminating* access, the called party chooses the access service provider, while the decision to make the call and the ultimate responsibility to pay for the call reside with the calling party, and the calling party's IXC must pay for the terminating access service.[12] Because of this disjunction implicit in terminating access, neither the party placing a long distance call, nor that party's IXC, can easily influence the called party's choice of service provider.[13] The Commission noted that this may give CLECs the incentive to charge excessive rates for terminating access service.[14]

11. The Commission also noted an additional complication for an IXC faced with high CLEC access rates. Not only does the calling party not choose the terminating LEC, but section 254(g) requires IXCs to spread the cost of terminating access rates among all of its end users.[15] Accordingly, the Commission tentatively concluded in the *Access Reform NPRM* that terminating access may remain a bottleneck controlled by whichever LEC provides terminating access to a particular customer, even if competitors have entered the market.[16] The Commission also opined, however, that excessive terminating access charges might encourage IXCs to enter the access market themselves.[17]

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[9] *Id.* at 21472.

[10] *Id.*

[11] *Id.*

[12] *Id.* at 21476.

[13] *Id.*

[14] *Id.*

[15] *See* 47 U.S.C. § 254(g). *See also Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Report and Order, 11 FCC Rcd 9564 (1996) (requiring IXCs to integrate and average the rates they charge for service).

[16] *Access Reform NPRM*, 11 FCC Rcd at 21476.

[17] *See id. at* 21477. The Commission also sought comment on whether it should treat CLEC originating "open end" minutes, such as originating access for 800 service, as terminating minutes for access charge purposes. *Id.* "The term open end of a call describes the origination or termination of a call that utilizes exchange carrier common line plant (a call can have no, one, or two open ends.)" 47 C.F.R. § 69.105(b)(1)(ii). The Commission noted that, in some cases, such as 800 and 888 service, the called party, which pays for the call, is unable to influence the calling party's choice of provider for originating access services. *Access Reform NPRM*, 11 FCC Rcd at 21477.

12. The *Hyperion Order*: In the *Hyperion Order*, the Commission established permissive detariffing for non-incumbent LEC providers of interstate exchange access services.[18] The Commission also sought comment on mandatory detariffing for CLEC interstate access services.[19] The Commission did not take further action, however, because the District of Columbia Circuit Court of Appeals stayed the Commission's mandatory detariffing order for IXCs. Later, after the D.C. Circuit upheld the Commission's IXC mandatory detariffing order,[20] the Commission issued a public notice to refresh the record on the issue of mandatory detariffing for CLEC access services.[21]

13. The *Access Reform Order:* In the *Access Reform Order*, the Commission declined to adopt regulations governing CLEC terminating access charges, or to address the issue of CLEC originating access charges.[22] Based on the available record, the Commission decided to continue to refrain from regulating the rates charged by non-incumbent LECs for terminating access service.[23] Although an IXC must use the CLEC serving an end user to terminate a call, the Commission found that the record did not indicate that CLECs previously had charged excessive terminating access rates or that CLECs distinguished between originating and terminating access in their service offerings.[24] As a result, the Commission concluded that CLECs did not appear to have structured their service offerings in ways designed to exercise market power over terminating access.

14. The Commission further observed that, as CLECs attempted to expand their market presence, the rates of incumbent LECs or other potential competitors should constrain the CLECs' terminating access rates.[25] The Commission found that access customers likely would take competitive steps to avoid paying unreasonable terminating access charges.[26] Thus, it explained that a call recipient might switch to another local carrier in response to incentives offered by an IXC.[27]

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[18] *See Hyperion Telecommunications, Inc. Petition for Forbearance*, Memorandum Opinion and Order, 12 FCC Rcd 8596 (1997) (*Hyperion Order*) (granting petitions seeking permissive detariffing for provision of interstate exchange access services by providers other than the incumbent LEC).

[19] *Hyperion Order*, 12 FCC Rcd at 8613.

[20] *MCI WorldCom, Inc. v. Federal Communications Commission*, 209 F.3d 760 (D.C. Cir. 2000).

[21] *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181.

[22] *Access Charge Reform Order*, 12 FCC Rcd at 15982.

[23] *Id.* at 16140.

[24] *Id.*

[25] *Id.*

[26] *Id.* at 16140-41.

[27] *Id.* at 16141.

15. Although the Commission declined to adopt regulations governing the provision of CLEC terminating access, it noted that it could address the reasonableness of CLEC terminating access rates in individual instances through the section 208 process for the adjudication of complaints.[28] Moreover, the Commission stated that it would be sensitive to indications that the terminating access rates of CLECs were unreasonable, and it committed to revisit the issue of CLEC access rates if there were sufficient indications that CLECs were imposing unreasonable terminating access charges.[29]

16. Complaint Proceedings: The Commission addressed issues related to competitive carriers' access services in three different section 208 complaint proceedings.[30] On July 16, 1999, in *MGC v. AT&T*, the Commission ruled that AT&T was liable to MGC for originating access charges at MGC's tariffed rate because AT&T had failed to take the necessary steps to terminate its access service arrangement with MGC.[31] On June 9, 2000, in *Sprint v. MGC*, the Commission rejected the argument that a CLEC's access rates are *per se* unjust and unreasonable – and therefore violative of section 201(b) – because they exceed the rates charged by incumbent LECs in the CLEC's region.[32] Finally, on March 13, 2001, in *Total Tel. v. AT&T*,[33] the Commission ruled that a competitive access provider's rates for terminating access were the product of a sham arrangement to inflate its rates and to pass on a portion of the inflated rate to the carrier's single end user. Accordingly, we ruled in that proceeding that AT&T did not violate sections 201(a), 202(a), 214(a) or 251(a) of the Act[34] when it declined the access provider's terminating access service and blocked traffic bound for the access provider's single end-user customer.

17. *Pricing Flexibility Order and Further Notice of Proposed Rulemaking*: In August of 1999, the Commission issued its *Pricing Flexibility Order and Notice*, which, *inter alia*, denied AT&T's petition for a declaratory ruling that IXCs may refuse to purchase CLECs' tariffed switched access service.[35] The Commission noted that, in the *Access Charge Reform Order*, it may have overestimated the ability of the marketplace to constrain CLEC access rates.[36] In particular, the Commission noted that AT&T's Petition for Declaratory Ruling, the comments provided in support of it, and the decision in *MGC v. AT&T* suggested the need to revisit the issue of CLEC access rates.[37] Accordingly, the Commission initiated the current rulemaking

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[28] *Id. See generally* 47 C.F.R. §§ 1.720-1.735 (Commission rules governing formal complaints); 47 U.S.C. § 208.

[29] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[30] The Commission currently has before it several additional complaint proceedings. *See infra* note 56.

[31] *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

[32] *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000).

[33] *Total Tel. v. AT&T*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001) (*Total Tel. Order*).

[34] 47 U.S.C. §§ 201(a), 202(a), 214(a), 251(a).

[35] *Pricing Flexibility Order & Notice*, 14 FCC Rcd 14221.

[36] *Id.* at 14339.

[37] *Id.* at 14340.

proceeding to examine CLEC originating and terminating access rates, and it sought comment on regulatory and market-based solutions to ensure that CLEC rates for interstate access are just and reasonable.[38]

18. The Commission again invited comment on, *inter alia*, whether CLECs possess market power over IXCs that need to terminate long distance calls, whether mandatory detariffing of CLEC interstate access services would provide a market-based deterrent to excessive terminating access charges, and whether rates could be constrained by establishing a benchmark for CLEC access charges that would be presumed reasonable.[39] We acknowledged that CLEC access rates may, in fact, be higher due to the CLECs' high start-up costs for building new networks, their small geographical service areas, and the limited number of subscribers over which CLECs can distribute costs.[40] We also recognized, however, that IXCs currently spread their access costs among all their end users and that requiring IXCs to bear a CLEC's higher start-up costs may impose unfair burdens on IXC customers that pay rates reflecting these CLEC costs even though many of the IXC customers may not subscribe to those CLECs.[41]

19. The *CALLS Order*: During the course of the debate over CLEC access charges, the Commission adopted an integrated interstate access reform and universal service proposal put forth by the members of the Coalition for Affordable Local and Long Distance Service (CALLS).[42] The *CALLS Order* resolved major outstanding issues concerning access charges of price-cap ILECs by determining the appropriate level of interstate access charges and by converting implicit subsidies in interstate access charges into explicit, portable, and sufficient universal service support.[43] The adoption of the *CALLS Order* moved the Commission a step closer to its access charge reform goals for dominant carriers. The *CALLS Order* is interim in nature, covering a five-year period[44]; its reforms became effective on July 1, 2000.

20. Emergency Petitions: In February and May 2000, we received two declaratory ruling petitions asking that we prohibit AT&T from withdrawing its interexchange services from customers of CLECs pending the outcome of the rulemaking proceedings relating to CLEC access charges. We subsequently sought comment on these petitions.[45]

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[38] *Id.* at 14340.

[39] *Id.* at 14340-45.

[40] *Id.* at 14343.

[41] *Id.*

[42] *CALLS Order,* 15 FCC Rcd 12962.

[43] *Id.* at 12974-76.

[44] *Id.* at 12977.

[45] *Emergency Petition Public Notice*, DA-00-1067, 2000 WL 217601.

III. CLEC SWITCHED ACCESS SERVICES

A. Overview

21. Congress and the Commission have adopted policies designed to encourage competition for local exchange and exchange access services. Although competition for access services existed to some extent prior to 1996, the 1996 Act created new opportunities for competing access providers by opening the local exchange market to competition.[46] As a result, competition for local exchange and exchange access service is taking root: between 1996 and 1999, the number of competitive LECs increased from 94 to 349.[47] During their development, CLECs have been largely unregulated in the manner that they set their access rates. We note, however, that section 201 gives us the authority to ensure that CLEC rates are just and reasonable.[48]

22. Our review of the record reveals that CLEC access rates vary quite dramatically and, on the average, are well above the rates that ILECs charge for similar service. Sprint, WorldCom and AT&T have submitted information on the CLEC access charges for which they have been billed. These data sets reveal a strikingly broad range of rates. Some competitive LECs charge at or even below 1 cent per minute; indeed, it appears that many CLECs are charging approximately the ILEC access rate.[49] On the other hand, certain CLECs are charging above 9 cents per minute and the weighted average of CLEC access rates falls above 4 cents per minute.[50] AT&T estimates that approximately 100 CLECs have tariffed rates above 2.5 cents per minute and 60 have per-minute rates above 5.0 cents.[51] AT&T further asserts that, in 2000, it was billed for $106 million in CLEC access charges, representing a premium of $92 million over what the competing ILECs would have billed for the same number of minutes of service.[52] While we have questions about AT&T's calculation of this premium,[53] there can be little question that CLECs are adding dramatically to the overall level of access charges that IXCs are paying. We are concerned that the higher CLEC rates may shift an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance market in general.

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[46] *See, e.g.,* 47 U.S.C. § 251.

[47] Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 9.6 (Dec. 2000).

[48] *See generally Access Reform NPRM*, 11 FCC Rcd at 21474-76; *Policy and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorizations Therefor,* CC Docket No. 79-252, First Report & Order, 85 FCC 2d 1, ¶¶ 88-96 (1980).

[49] *See* AT&T Safe Harbor Comments at 7.

[50] *See infra* paragraphs 48-49

[51] *See* AT&T Safe Harbor Comments at 7.

[52] AT&T Safe Harbor Comments, Appendix A.

[53] For example, it is unclear whether AT&T's calculation of the competing ILEC rate includes certain flat-rated elements.

23. Reacting to what they perceive as excessive rate levels, the major IXCs have begun to try to force CLECs to reduce their rates. The IXCs' primary means of exerting pressure on CLEC access rates has been to refuse payment for the CLEC access services. Thus, Sprint has unilaterally recalculated and paid CLEC invoices for tariffed access charges based on what it believes constitutes a just and reasonable rate.[54] AT&T, on the other hand, has frequently declined altogether to pay CLEC access invoices that it views as unreasonable.[55] We see these developments as problematic for a variety of reasons. We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally, the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts.[56] And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute. This uncertainty, in turn, poses a significant threat to the continued development of local-service competition, and it may dampen CLEC innovation and the development of new product offerings.[57]

24. Additionally, IXCs have threatened to stop delivering traffic to, or accepting it from, certain CLECs that they view as over-priced. Thus, AT&T has notified a number of CLECs that it refused to exchange originating or terminating traffic.[58] In some instances, AT&T has terminated its relationship with CLECs and is blocking traffic, thus raising various consumer and service quality issues.[59] These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion.[60] Once one or more IXCs refuse to do business with a CLEC, it will become impossible for that CLEC's end users to reach, or receive calls from, some parties outside of the local calling area. If such refusals to exchange traffic were to become a routine bargaining tool,

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[54] Buckeye Comments at 3; Sprint Reply Comments at 28-30; Allegiance Comments at 18-19; MGC Comments at 7. In performing these calculations, Sprint appears typically to have used the rate of the competing ILEC as the just and reasonable rate.

[55] *See, e.g.*, *Advamtel, LLC v. AT&T Corp.*, 118 F. Supp. 2d 680, 682 (E.D. Va. 2000).

[56] *See Advamtel, LLC v. AT&T Corp.*, CIV. A. No. 00-643-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Advamtel, LLC v. Sprint Communications.*, CIV. A. No. 00-1074-A (E.D. Va., Alexandria Div., complaint filed Apr. 17, 2000); *Total Telecomm. Servs., Inc. v. AT&T Corp.*, FCC 01-84, File No. E-97-003 (rel. Mar. 13, 2001); *Time Warner Telecom, Inc. v. Sprint Communications Company, L.P.*, File No. EB-00-MD-004 (complaint filed Mar. 16, 2000); *U.S. TelePacific Corp. v. AT&T Corp.*, File No. EB-00-MD-010 (complaint filed June 16, 2000); *AT&T Corp. v. Business Telecom, Inc.*, File No. EB-01-MD-001 (complaint filed Jan. 16, 2001); *Sprint Communications Company, L.P. v. Business Telecom, Inc.*, File No. EB-01-MD-002 (complaint filed Jan. 16, 2001).

[57] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief, CC Dkt. No. 96-262, at 3 (filed May 5, 2000).

[58] *See* RICA Request for Emergency Relief, CC Dkt. No. 96-262, at 2-3 (filed Feb. 18, 2000); Minnesota CLEC Consortium Request for Emergency Relief at 2-3; Buckeye Emerg. Pet. Comments at 1-3; MTA Emerg. Pet. Comments at 3-4.

[59] *See Advamtel*, 118 F. Supp. 2d at 682; RICA Comments at 4-7, 12-13. *Cf.* Sprint Comments at 24-25; CCG Comments at 5.

[60] MTA Emerg. Pet. Comments at 4; Minnesota CLEC Consortium Request for Emergency Relief at 3.

callers might never be assured that their calls would go through. We are particularly concerned with preventing such a degradation of the country's telecommunications network. It is not difficult to foresee instances in which the failure of a call to go through would represent a serious problem, and, in certain circumstances, it could be life-threatening. Accordingly, the public interest demands a resolution to this set of problems.

25. 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. Previously, the Commission refrained from involving itself in a general examination of the reasonableness of CLEC access rates, ruling instead that any unreasonable rates could be addressed through the section 208 complaint process. However, this regime has often failed to keep CLEC access rates within a zone of reasonableness. It now appears that the best means of proceeding is to restructure and partially deregulate the environment in which CLECs provide access service, providing a bright-line rule that will facilitate effective enforcement. Additionally, the record indicates that numerous questions about the reasonableness of CLEC rates exist in the industry. Several parties have already filed with the Commission informal complaints raising this issue in order to preserve their claims from lapse.[61] We are concerned that a flood of unreasonable-rate complaints could overtax the Commission's resources to deal with such proceedings in a manner that is timely and efficient yet gives each complaint the attention it deserves.

B. The Structure of the Access Service Market

26. The commenters present two dramatically different views of the problem of CLEC access charges. IXC purchasers of CLEC access services contend that CLECs have tariffed switched access rates at unjust and unreasonable levels.[62] They assert that it is an anomaly for a "competitive" provider to enter a market by charging well in excess of the rate charged by the market's incumbent and that such entry could not be maintained in a competitive market.[63] The IXCs argue that high access charges allow CLECs unfairly to shift their operational expenses and their network build-out expenses to IXCs and, through them, to long distance ratepayers generally.[64] Moreover, IXC commenters complain that these unreasonable rates are unilaterally imposed through tariffs, rather than through negotiation with a willing purchaser.[65] Furthermore,

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[61] *See, e.g., AT&T v. CFW Communications Company*, File No. EB-01-MDIC-0003 (informal complaint filed Jan. 16, 2001); *AT&T v. Commonwealth Telephone*, File No. EB-01-MDIC-0004 (informal complaint filed Jan. 16, 2001); *Sprint v. e.spire Communications, Inc.*, File No. EB-01-MDIC-0015 (informal complaint filed Jan 12, 2001).

[62] AT&T Comments at 28 (numerous CLECs tariff rates at "supracompetitive" levels); Sprint Comments at 14-15; Cable & Wireless Comments at 2. *But see* MCI WorldCom Comments at 18 ("there is no evidence in the record to demonstrate that unreasonably high CLEC access charges are ubiquitous or even widespread").

[63] *See, e.g.,* Sprint Comments at 19 (CLECs "cannot expect to enter a market, of their own free will, as competitors and yet attempt to recover their start-up costs from customers").

[64] Sprint Comments at 16 ("The level of charges some CLECs are seeking to collect could easily undermine the basis for current long distance rates.").

[65] *See, e.g.,* AT&T Comments at 28.

the IXCs complain that many CLECs take the position that IXCs may not refuse CLEC access services.[66] Thus, the IXC commenters see themselves as unwilling consumers of the CLECs' access services.[67]

27. By contrast, CLECs assert that their rates are justified by their substantial network development costs and their significantly higher per-unit cost of providing service that arises from the smaller customer base over which they may spread their operational costs.[68] They argue that ILECs were for many years protected monopoly providers of local exchange and exchange access services; during that time, they funded the build-out of their networks through rates imposed on captive customers and through access rates that were dramatically higher than they are today.[69] Defending their filing of tariffs for access service, CLEC commenters assert that the section 208 complaint process provides IXCs an adequate remedy against unjust and unreasonable rates.[70]

28. Tariffs require IXCs to pay the published rate for tariffed CLEC access services, absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable.[71] It appears that certain CLECs have availed themselves of this rule and have refused to enter meaningful negotiations on access rates, choosing instead simply to file a tariff and bind IXCs receiving their access service to the rates therein.[72] CLEC use of this strategy raises questions about the extent to which CLECs truly are subject to competition in their provision of access service. The Commission has previously noted the unique difficulties presented by the case of terminating access, where the called party is the one that chooses the access provider, but it neither pays for terminating access service, nor does it pay for, or choose to place, the call.[73] It further complicates the case of terminating access that an IXC may have no

[66] *See* AT&T Reply Comments at 31 (noting CLEC "claims that IXCs are obligated to pay CLECs' exorbitant access charges simply by virtue of the fact that their networks receive traffic from, or terminate traffic to, the CLECs' end users"); AT&T Public Notice Comments at 6 (citing to *Advamtel* case).

[67] AT&T Reply Comments at 31 ("[I]t is not technically feasible without time-consuming and costly development … to identify and then selectively block calling over their networks from or to end users served by CLECs.").

[68] *See, e.g.,* ALTS Comments at 3-4; CCG Comments at 9 ("As brand new entities, CLECs have substantially higher costs and serve a smaller customer base than their ILEC counterparts."); Allegiance Comments at 13, 20; McLeod Comments at 3; RICA Comments at 15-16.

[69] *See, e.g.,* Focal Comments at 17 ("Incumbent LECs … benefit from their historical monopolies and decades of rate of return regulation, and thus already have ubiquitous telecommunications networks in place.").

[70] *See, e.g.,* Cox Comments at 3;

[71] *See Hyperion Order*, 12 FCC Rcd 8596, 8608-8611, ¶¶ 23-29 (1997). *Cf. Advamtel*, 118 F. Supp. 2d at 687 (concluding that parties are precluded from negotiating separate agreements that affect the rate for services once a tariff has been filed with the Commission).

[72] *See, e.g.* AT&T Safe Harbor Comments at 3; Allegiance Comments at 4 ("customers of a tariffed service are required to pay tariffed charges until they obtain a ruling in a Section 208 complaint proceeding that the tariffed charges are unlawful"); RCN Comments at 10-11.

[73] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338.

prior relationship with a CLEC, but may incur access charges simply for delivering a call to the access provider's customer.[74] In these circumstances, providers of terminating access may be particularly insulated from the effects of competition in the market for access services. The party that actually chooses the terminating access provider does not also pay the provider's access charges and therefore has no incentive to select a provider with low rates.[75] Indeed, end users may have the incentive to choose a CLEC with the highest access rates because greater access revenues likely permit CLECs to offer lower rates to their end users.[76]

29. The record does not indicate that a significant number of CLECs charge markedly higher rates for terminating than they do for originating access. It thus appears that CLEC originating access service may also be subject to little competitive pressure, notwithstanding the fact that the IXCs typically have a relationship with the local exchange provider in order to be included on the LEC's list of presubscribed IXCs.

30. Sprint and AT&T persuasively characterize both the terminating and the originating access markets as consisting of a series of bottleneck monopolies over access to each individual end user.[77] Thus, once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user.

31. On further consideration, it appears that the CLECs' ability to impose excessive access charges is attributable to two separate factors. First, although the end user chooses her access provider, she does not pay that provider's access charges. Rather, the access charges are paid by the caller's IXC, which has little practical means of affecting the caller's choice of access provider (and even less opportunity to affect the called party's choice of provider) and thus cannot easily avoid the expensive ones. Second, the Commission has interpreted section 254(g) to require IXCs geographically to average their rates and thereby to spread the cost of both originating and terminating access over all their end users. Consequently, IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges.[78] Since the IXCs are effectively unable either to pass through access charges to their end users or to create other incentives for end users to choose LECs with low access rates, the party causing the costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs.

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[74] Toll free calling and casual calling (dial around, credit card, etc.) may also result in an IXC paying access charges despite the fact that there is no pre-existing relationship between an IXC and the calling party's access provider.

[75] *See Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338. *Cf.* AT&T Safe Harbor Comments at 2 ("recipient of a traditional long distance call does not pay for the cost of that call; hence, end users are indifferent to the terminating access rates of the CLEC they select as a service provider, and that carrier can raise terminating access rates without impairing demand for its local service").

[76] *See, e.g.*, Sprint Comments at 17 (suggesting that some CLECs may provide local service free of charge to customers that generate significant access traffic).

[77] *See* Sprint Comments at 17-18; AT&T Safe Harbor Public Notice Comments at 2-3; NY PSC Comments at 2; Alaska Comments at 5; Wisconsin PSC Comments at 3-5; Sprint Reply Comments at 9-12.

[78] *See* AT&T Safe Harbor Comments at 2. *See also* 47 U.S.C. § 254(g).

Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider.

32. The Commission previously projected that, at least in the case of originating access service, IXCs would likely enter marketing alliances with LECs offering low-priced access service and would thereby be able to exert downward pressure on CLEC access rates.[79] The Commission even raised the prospect that IXCs would themselves choose to enter the local service market as a means of exerting downward pressure on terminating rates. However, neither of these eventualities has come to pass, at least not to an extent that has resulted in effective downward competitive pressure on CLEC access rates. We now acknowledge that the market for access services does not appear to be *structured* in a manner that allows competition to discipline rates.[80]

33. We are concerned that, in this environment, permitting CLECs to tariff any rate that they choose may allow some CLECs inappropriately to shift onto the long distance market in general a substantial portion of the CLECs' start-up and network build-out costs. Such cost shifting is inconsistent with the competitive market that we seek to encourage for access service.[81] Rather, it may promote economically inefficient entry into the local markets and may distort the long distance market. While we seek to promote competition among local-service providers, we also seek to eliminate from our rules opportunities for arbitrage and incentives for inefficient market entry.

34. We decline to conclude, in this order, that CLEC access rates, across the board, are unreasonable. Nevertheless, there is ample evidence that the combination of the market's failure to constrain CLEC access rates, our geographic rate averaging rules for IXCs, the absence of effective limits on CLEC rates and the tariff system create an arbitrage opportunity for CLECs to charge unreasonable access rates.[82] Thus, we conclude that some action is necessary to prevent CLECs from exploiting the market power in the rates that they tariff for switched access services.

C. Tariff Benchmark Mechanism

35. We have previously sought comment on a variety of solutions to the problems connected with CLEC access charges, including mandatory detariffing of CLEC switched access

[79] *Access Charge Reform Order*, 12 FCC Rcd at 16141.

[80] *See generally* J. Acton & S. Besen, *An Economic Analysis of CLEC Access Pricing*, Charles River Associates, Cambridge, MA, 1999; R. Crandall & L. Waverman, *Talk Is Cheap*, The Brookings Institution, Washington, DC 1995.

[81] Parenthetically, we note that the drafters of the 1996 Act anticipated the high costs associated with facilities-based entry into local markets and, thus, adopted market opening provisions, such as section 251's mandate that incumbent local exchange carriers make available access to unbundled network elements, that promote market entry by competitors. 47 U.S.C. § 251(c).

[82] For instance, in *Total Tel. v. AT&T*, the Commission recently addressed a case in which a purportedly competitive access provider had tariffed rates that were in excess of $0.05 per minute. *Total Tel.*, FCC 01-84, File No. E-97-003.

services and setting a benchmark to constrain CLEC switched access charges.[83] A substantial majority of commenters, including CLECs, IXCs, and ILECs, strongly oppose the mandatory detariffing option.[84] They urge that it would cause both CLECs and IXCs to incur substantial and unnecessary negotiation costs simply to exchange traffic.[85] They further contend that these costs would create a significant barrier to entry for competitors seeking to enter the local market and would at least marginally drive up end-user rates for both local and long distance service.[86]

36. Apart from their opposition to mandatory detariffing, however, the two sides of the debate have been largely unable to agree about how CLECs should set rates for their switched access services. Certain IXCs assert that the Commission should immediately set CLEC tariffed rates at or near the rates of the ILEC operating in the CLEC's service territory.[87] On the other hand, citing their high start-up costs and greater per-minute cost of providing service, many CLECs have argued that they should be permitted to tariff rates at whatever level, in their view, is necessary to recover their costs.[88]

37. We decline to immediately move CLEC access rates to the rate of the competing ILEC.[89] CLECs have, in the past, set their rates without having to conform to the regulatory standards imposed on ILECs, and this Commission has twice ruled, in essence, that a CLEC's rate is not per se unreasonable merely because it exceeds the ILEC rate.[90] Accordingly, we are reluctant to flash-cut CLEC access rates to the level of the competing ILEC; a more gradual transition is appropriate so that the affected carriers will have the opportunity to adjust their business models. On the other hand, we are equally reluctant to permit CLECs to continue to tariff the access rates they charge IXCs at the level they see fit, without any guidelines to ensure their reasonableness. We find persuasive IXC arguments that it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering.

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[83] *Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14338-49, ¶¶ 239-257; *Mandatory Detariffing Public Notice*, 15 FCC Rcd 10181; *Safe Harbor Public Notice*, 15 FCC Rcd 24102.

[84] *See, e.g.*, ALTS Comments at 35-36; RCN Comments at 12; AT&T Comments at 29-30; ALLTEL Comments at 7; USTA Comments at 24. *Accord* Sprint Comments at 25-27.

[85] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; CCG Comments at 6; USTA Comments at 24.

[86] *See, e.g.*, CCG Comments at 6; CTSI Comments at 16-18.

[87] Sprint Comments at 20. *See also* AT&T Safe Harbor Comments at 15 ("the Commission should mandatorily detariff all CLEC switched access rates that exceed the ILECs' rates in the same service area"). *Cf.* WorldCom Safe Harbor Comments at 3-5.

[88] *See, e.g.*, CCG Comments at 7-12; CoreComm Comments at 3-4; RCN Comments at 5 n.8.

[89] *See* Sprint Comments at 21 (advocating that we "set an absolute ceiling on what CLECs can charge IXCs"). *See also* WorldCom Safe Harbor Comments at 4-5; WorldCom Reply Comments at 20.

[90] *See Sprint Communications Co. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000); *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999).

38. In analyzing the problems surrounding CLEC access charges, it is important to recognize that, in their provision of access services, competitive carriers actually serve two distinct customer groups. The first is the IXCs, which purchase access service as an input for the long distance service that they provide to their end-user customers. As we discuss above, IXCs are subject to the monopoly power that CLECs wield over access to their end users. However, an equally important group of customers for access services is the end users who benefit from the ability, provided by access service, to place and receive long distance calls. In regulating ILEC access rates, this Commission has recognized the benefit that end users receive from access service and has concluded that it justifies the ILECs' imposition of the subscriber line charge (SLC) on end users.[91] The noteworthy aspect of this second group of access consumers, or beneficiaries, is that, unlike IXCs, they have competitive alternatives in the market in which they purchase CLEC access service: In any market where a CLEC operates, there is, by definition, at least one alternative provider – the ILEC.

39. The notion of these two, parallel markets for access service sheds light on the dilemma presented by CLEC access charges. It leads us to conclude that, in keeping with their competitive, unregulated character, CLECs should be permitted to set the combined level of their access charges, for all the consumers of the service, as they please. If, as they contend, their per-unit costs are higher than those of the ILECs, we will not stand in the way of their recovering those costs. Given the unique nature of the market in which the IXCs purchase CLEC access, however, we conclude that it is necessary to constrain the extent to which CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers – and, through them, the long distance market generally. On the other hand, we continue to abstain entirely from regulating the market in which end-user customers purchase access service. Accordingly, CLECs remain free to recover from their end users any greater costs that they incur in providing either originating or terminating access services. When a CLEC attempts to recover additional amounts from its own end user, that customer receives correct price signals and can decide whether he should find an alternative provider for access (and likely local exchange) service. This approach brings market discipline and accurate price signals to bear on the end user's choice of access providers.

40. Under the regime we adopt in this order, CLECs will be restricted only in the manner that they recover their costs from those access-service consumers that have no competitive alternative. We implement this restriction on the CLEC's exercise of their monopoly power by establishing a benchmark level at which CLEC access rates will be conclusively presumed to be just and reasonable and at (or below) which they may therefore be tariffed. Above the benchmark, CLECs will be mandatorily detariffed. CLECs that seek to charge to IXCs rates that are in excess of this benchmark may do so, but only outside of the regulated tariff process. A substantial number of commenters on both sides of the issue have suggested this safe harbor approach.[92] Given the historical disagreement among CLECs and IXCs on this issue, we

[91] *See, e.g., CALLS Order*, 15 FCC Rcd at 13000, ¶ 95.

[92] *See, e.g.*, WorldCom Safe Harbor Comments at 1-5; AT&T Safe Harbor Comments at 4-5; ALTS Safe Harbor Comments at 4-6; Minnesota CLEC Safe Harbor Comments at 2-6; CompTel Comments at 2-3; OPASTCO Safe Harbor Comments at 2. *But see* USTA Safe Harbor Comments at 4.

find their joint support for this solution to be particularly persuasive. In addition to enjoying their support, the benchmark approach has several virtues that recommend it.

41. First, a benchmark provides a bright line rule that permits a simple determination of whether a CLEC's access rates are just and reasonable. Such 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." Historically, ILEC access charges have been the product of an extensive regulatory process by which an incumbent's costs are subject to detailed accounting requirements, divided into regulated and non-regulated portions, and separated between the interstate and intrastate jurisdictions. Once the regulated, interstate portion of an ILEC's costs is identified, our access charge rules specify in detail the rate structure under which an incumbent may recover those costs.[93] This process has yielded presumptively just and reasonable access rates for ILECs. Recently, the Commission has attempted to move away from such extensive regulation of ILECs. With the *CALLS Order*, we solved some of the most vexing problems relating to ILEC access rates, reducing the subsidies implicit in access rates and establishing target rates to which the participating LECs will move over the five years following the order. Given our attempts to reduce the regulatory burden on ILECs, we are especially reluctant to impose similar legacy regulation on new competitive carriers. We note that no CLEC has suggested that we adopt such a heavily regulatory approach to setting their access rates.[94]

42. Second, by permitting CLECs to file access tariffs at or below a benchmark rate, our interim approach continues to allow the carriers on both sides of the access transaction to enjoy the convenience of a tariffed service. As noted above, both IXCs and CLECs assert that their transaction costs would rise substantially if they were required to negotiate the terms on which they exchange access traffic.[95] Moreover, several commenters argue that the failure of some of these negotiations likely would lead to disruptions in the exchange of access traffic,

[93] First, an incumbent LEC must keep its books in accordance with Uniform System of Accounts set forth in Part 32 of the Commission rules. *See* 47 C.F.R. §§ 32.1 - 32.9000. Second, Part 64 of the Commission's rules divides an incumbent's costs between those associated with regulated telecommunications services and those associated with non-regulated activities. *See* 47 C.F.R. §§ 64.901 - 64.904. Third, our Part 36 separations rules determine the fraction of the incumbent LEC's regulated costs, expenses and investment that should be allocated to the interstate jurisdiction. *See* 47 C.F.R. §§ 36.1 - 36.741. After the total amount of regulated, interstate cost is identified, the access charge and price cap rules translate these interstate costs into charges for the specific interstate access services and rate elements. Part 69 specifies in detail the rate structure for recovering these costs. *See* 47 C.F.R. §§ 69.1 - 69.731. These rules tell the incumbent LECs the precise manner in which they may assess interstate access charges on interexchange carriers and end users. Additionally, the Commission regulates the rate levels incumbents may charge for their access services, requiring them to comply with either the rate-of-return or the price-cap regulations. *Compare* 47 C.F.R. §§ 65.1 - 65.830 (relating to rate of return that certain non-price-cap ILECs may earn on interstate access service) *with CALLS Order*, 15 FCC Rcd at 12962, ¶¶ 151-84 (adopting rate level components for price-cap carriers). Finally, Part 61 requires incumbent LECs to publish their rates in tariffs, and the rules restrict how and when incumbents may change their rates. *See* 47 C.F.R. §§ 61.1 - 61.193.

[94] *See, e.g.*, ALTS Reply Comments at 6 ("CLECs are unanimous in rejecting any need for further rate regulation of their industry"). *See also* Cox Safe Harbor Reply Comments at 6 (noting difficulty of applying traditional ILEC regulation to CLECs).

[95] *See, e.g.*, ALTS Comments at 35-36; AT&T Comments at 29-30; ASCENT Detariffing Comments at 1-7.

which would, in turn, threaten the ubiquity of the public switched network.[96] We question whether the consequences of mandatory detariffing would be as drastic as some of the commenters contend.[97] Nevertheless, we recognize the attraction of a tariffed regime because it permits CLECs to file the terms on which they will provide service and to know that, absent some contrary, negotiated agreement, any IXC that receives access service is bound to pay the tariffed rates.[98] Similarly, IXCs will know that, whatever the source or destination of their access traffic, they will be assured a rate that either is within the benchmark zone of reasonableness or is one to which they have agreed in negotiations.

43. Third, adopting a benchmark for tariffed rates allows CLECs the flexibility to obtain additional revenues from alternative sources. They may obtain higher rates through negotiation. If a particular CLEC provides a superior quality of access service, or if it has a particularly desirable subscriber base, one or more IXCs may be willing to pay rates above the benchmark in order to receive that CLEC's switched access service. Similarly, CLECs retain the flexibility to charge their end users higher rates for the access service to which they subscribe. Here again, if the CLEC provides a superior product, the end user likely will be willing to pay for it; however, if a CLEC attempts to impose an unreasonable surcharge on its customer, the customer receives accurate price signals and may be motivated to find an alternative provider.

44. We conclude that the benchmark we adopt will address persistent concern over the reasonableness of CLEC access charges and will provide critical stability for both the long distance and exchange access markets. In structuring the benchmark mechanism, we have taken into account a broad variety of competing factors, including: (1) the need to constrain access rates with an eye toward continuing the downward trend in long distance prices, (2) the importance of having new entrants' rates move toward and ultimately meet those of market incumbents, (3) the need to avoid too severe of a disruption in the CLEC sector of the industry, and (4) the extreme difficulty of establishing a "reasonable" CLEC access rate given the historical lack of regulation on the process of CLEC ratemaking. We conclude that our benchmark system, with its conclusive presumption of reasonableness, provides the best solution to the difficult problems associated with how CLECs set their access charges. We are optimistic that it will serve as a reasonable response, pending our more complete review of intercarrier compensation issues,[99] to the many competing pressures and priorities that surround CLEC access charges.

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[96] *See, e.g.*, Global Crossing Detariffing Comments at 7; Minnesota CLEC Detariffing Comments at 6; Time Warner Detariffing Comments at 7. *Cf*. Sprint Comments at 20.

[97] For example, we expect that stock contracts, broadly acceptable to both IXCs and CLECs, would quickly develop. Similarly, given all carriers' business incentives to maintain traffic flow, we question whether anything beyond minor customer inconvenience would develop. Moreover, the increased transaction costs of negotiation would likely be substantially offset by reduced regulatory and litigation costs associated with justifying tariffed rates.

[98] *See supra* note 71.

[99] *See Intercarrier Compensation NPRM*, FCC 01-132.

D. Level and Structure of the Tariff Benchmark

45. Our orders addressing ILEC access charges have consistently stated our preference to rely on market forces as a means of reducing access charges. Thus, in setting the level of our benchmark, we seek, to the extent possible, to mimic the actions of a competitive marketplace, in which new entrants typically price their product at or below the level of the incumbent provider. We conclude that the benchmark rate, above which a CLEC may not tariff, should eventually be equivalent to the switched access rate of the incumbent provider operating in the CLEC's service area.[100] We do not, however, immediately set the benchmark rate at the competing ILEC rate because such a flash cut likely would be unduly detrimental to the competitive carriers that have not previously been held to the regulatory standards imposed on ILECs. Our benchmark mechanism, with certain exceptions, will permit CLECs initially to tariff rates for their switched access service of up to 2.5 cents per minute, or the rate charged by the competing incumbent LEC, whichever is higher.[101] For those carriers competing with ILECs that have tariffed rates below the benchmark (generally, the Bell operating companies), the benchmark rate will decline over the course of three years until it reaches the competing ILEC's rate. For at least one additional year, CLECs will be permitted to continue to tariff this rate, even if we decide to move other access traffic to a bill-and-keep regime. We also adopt rules to ensure that no CLEC avails itself of our benchmark scheme to *increase* its access rates,[102] and we adopt a separate benchmark for certain firms operating in rural areas.[103]

46. In determining the initial level for the safe harbor rates which may be imposed by tariff, we use current CLEC rates as a starting point for analysis because, as noted above, we lack an established framework for translating CLEC costs into access rates.[104] Current CLEC rates provide a useful analytical tool since, in most instances, they were set unilaterally by the individual CLECs. Thus, there should be no concern that the current rates provide an inadequate return to the carrier that tariffed them. Additionally, we note that precedent exists for setting rates by some means other than reviewing the costs of each individual industry participant.[105]

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[100] We refer to this rate as the "competing ILEC rate."

[101] Appendix B sets out the new rule 61.46 that we adopt to effectuate the benchmark for CLEC access rates.

[102] *See infra* paragraph 57.

[103] *See infra* paragraphs 64-87.

[104] Moreover, CLEC commenters have not submitted, in this proceeding, any data to justify their rates. Rather, these commenters have relied upon generalized assertions that their rates are justified by higher costs.

[105] In the *Permian Basin Area Rate Cases*, 390 U.S. 747, 769 (1968), the Court noted that "administrative agencies may calculate rates for a regulated class without first evaluating the separate financial position of each member of the class; it has been thought to be sufficient if the agency has before it representative evidence, ample in quantity to measure with appropriate precision the financial and other requirements of the pertinent parties." Recognizing the need for "more expeditious administrative methods," the Court further stated that "rate-making agencies are not bound to the service of any single regulatory formula; they are permitted . . . 'to make the pragmatic adjustments which may be called for by particular circumstances.'" *Id.* at 776-77 (quoting *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 586 (1942)). *See also FERC v. Pennzoil Producing Co.*, 439 U.S. 508, 517 (1979) (agency is not required "to adhere rigidly to a cost-based determination of rates, much less to one that bases each producer's rates on his own costs" (internal quotation omitted)); *Farmers Union Central Exchange*, (continued….)

47. Our understanding of current CLEC access rates is based on several sources. We have anecdotal information about a few CLECs' access charges through the complaint proceedings initiated at the Commission. At the time it filed its complaint against AT&T, MGC was charging slightly in excess of 8.5 cents per minute.[106] Similarly, in *U.S. TelePacific v. AT&T*[107] the CLEC was charging approximately 7.45 cents per minute for switched access. In addition, AT&T, WorldCom and Sprint submitted information regarding what they have been charged for CLEC access service and how many minutes of service this represents. The Association for Local Telecommunications Services (ALTS) also filed summary statistics on CLEC access rates based on a survey of its members. Each of these data sources has its limitations[108]; nonetheless, we believe that the information submitted by AT&T, WorldCom, and Sprint, provides the best, most comprehensive information available on CLEC access rates. In particular, we believe that by analyzing the IXC data on actual amounts billed and actual minutes of use, we can calculate composite access rates and largely avoid the problems that arise from the fact that CLEC rate structures vary widely and that many rely, in part, on flat-rated, or distance-sensitive, charges.[109]

48. Taken together, the IXC submissions include usable data on switched access rates for over 70 CLECs. The carriers' submissions show a range of 0.4 cents to 9.5 cents per minute for CLEC-provided switched access service.[110] From the underlying, individual CLEC data, we are able to determine the average, weighted by minutes of use, for tariffed access rates.[111] Table 1 indicates that, while there is minor variation between the weighted averages for each IXC's data, they are notably similar. Indeed, given the wide *range* of tariffed CLEC rates, we conclude that these averages are similar enough to give us an accurate view of current tariffed CLEC access rates.

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Inc. v. FERC, 734 F.2d 1486, 1501 (D.C. Cir. 1984); *Wisconsin v. Federal Power Commission*, 373 U.S. 294, 309 (1963) ("Court has never held that the individual company cost-of-service method is a *sine qua non*" of rate regulation); *American Public Gas Association v. Federal Power Commission*, 576 F.2d 1016, 1037 (D.C. Cir. 1977) (approving economic modeling as basis for ratemaking). As noted elsewhere, we do not set rates in this order. We only limit the rates that CLECs may impose through the tariff system.

[106] *MGC v. AT&T*, 14 FCC Rcd at 11647, n.4.

[107] File No. EB-00-MD-010.

[108] For example, Sprint does not provide minute-of-use data for those CLECs that charge less than or equal to the corresponding ILEC rate. Similarly, AT&T and WorldCom appear not to have submitted *any* data for CLECs that charge less than or equal to the corresponding ILEC rate. Finally, the estimates submitted by ALTS are of questionable value, because they have not submitted the underlying data, they have not indicated whether they calculated a weighted or unweighted average, nor have they indicated how they selected the 32 CLECs in their sample from among their approximately 200 CLEC members.

[109] We consider the "composite rate" to be the amount billed for a given period divided by the minutes of use. Thus, flat rated elements or per mile charges are translated into a per minute rate for purposes of this analysis.

[110] Estimates for this range exclude outlying observations that appear to be clearly inaccurate. For example, certain data points yielded a composite per-minute access rate in excess of 25 cents.

[111] The averages are weighted by overall minutes of use. We were able to calculate weighted averages based on the data filed by AT&T, WorldCom, and Sprint.

Table 1

DATA SOURCE	WEIGHTED AVERAGE
AT&T	4.33 cents/min
Sprint	3.48 cents/min
WorldCom	4.16 cents/min

49. This data provides some guidance for our choice of an initial benchmark level. It is important that the benchmark, though within this range, also move CLEC access charges appreciably closer to the competing ILEC rate. The record indicates that many CLECs have tariffed rates that are less than or equal to the competing ILEC rate, although these rates are not reflected in the usable data submitted by AT&T, WorldCom, and Sprint.[112] Indeed, AT&T asserts that over 80% of the CLECs from which it receives access bills charge rates at or below those of the competing ILEC.[113] Accordingly, setting the initial benchmark toward the lower end of the range appears to be justified. Based on our review of the universe and concentration of tariffed access rates being charged to these three IXCs, we conclude that – again, subject to certain exceptions that we discuss below – our safe harbor for CLEC tariffed access rates will begin at 2.5 cents. This rate is within the current range of rates, but represents an appreciable reduction in the tariffed rate for many CLECs.

50. We draw additional support for this initial benchmark level from a consensus solution submitted by parties on both sides of the present dispute. In comments to the *Safe Harbor Public Notice*, the Association for Local Telecommunications Services (ALTS) filed a proposed resolution, negotiated with WorldCom, suggesting, in relevant part, that a benchmark of 2.5 cents per minute for CLEC tariffed access rates would be a reasonable one in at least some markets.[114] WorldCom described the parties' proposal as a "good faith attempt to reach a compromise among competing interests" and stated that it was "consistent with sound public policy and merits serious consideration."[115] ALTS's web site states that it represents over "200

[112] We note, for example, that Sprint submitted data on the amounts billed by CLECs that, according to Sprint, charge less than or equal to the ILEC rate. Sprint Safe Harbor Comments at Appendix 1. However, because Sprint has not provided the Commission with corresponding actual minutes of use data, it is impossible to calculate composite rates for these carriers, let alone confirm Sprint's contention that these carriers charge less than or equal to the ILEC rate.

[113] *See* AT&T Safe Harbor Comments at 7.

[114] ALTS Safe Harbor Comments at 4. *See also* ASCENT Safe Harbor Comments at 5 (ALTS proposal has "significant merit" and "may well form a viable basis for Commission action").

[115] WorldCom Safe Harbor Comments at 5. We note that the only portion of the ALTS proposal with which WorldCom specifically disagreed in its comments to the *Safe Harbor Public Notice* was the implementation schedule. *See id.* n.5. It is also noteworthy that ALTS and WorldCom personnel jointly met with Commission staff to discuss their proposal. *See* October 30, 2000 letter of Jonathan Canis, counsel for ALTS, to Magalie (continued….)

companies that build, own, and operate" competitive, facilities-based networks.[116] We note that many of the CLECs participating in this proceeding are listed as members on ALTS's web site. Accordingly, it appears that this rate is acceptable to a substantial number of CLECs, although it represents a significant reduction in access rates. While ALTS suggests a different timeframe for reducing the safe harbor limit over time, we find its support for the initial rate to be a fair indicator of its reasonableness. Similarly, we note that this rate is significantly below the average tariffed CLEC access rate, as reported by the IXC commenters. We conclude that this joint proposal offers a workable starting point for our benchmark, when combined with the rule that will prevent any CLEC from *increasing* its rates to the benchmark level and from entering new markets above the prevailing ILEC rate.[117]

51. On the effective date of the rules we promulgate today, CLECs will be permitted (subject to a rural exemption discussed below) to tariff their access rates, for those areas where they have previously offered service,[118] at either the benchmark of 2.5 cents per minute, or the rate of the corresponding incumbent carrier in the study area of the relevant end-user customer, whichever is higher. By permitting CLECs to tariff their rates up to the level of the carrier with which they compete, we recognize that some competitive carriers may operate in areas served by incumbent LECs – often rural ones – that our rules already permit to charge access rates above those of the large price-cap ILECs.[119] If operation in these areas justifies higher access rates for the regulated incumbents, we conclude that it justifies equivalent rates for any competitor operating in the area.

52. Over time, our benchmark figure will decrease until it reaches the rate of the ILEC with which a CLEC competes. One year after the effective date of these rules, the benchmark rate will drop from 2.5 to 1.8 cents per minute, or the ILEC rate, whichever is higher. On the second anniversary of the rules' effective date, the rate will drop to 1.2 cents per minute, or the ILEC rate, whichever is higher.[120] Finally, three years after the rules become effective, the

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Salas, Secretary, FCC, CC Dkt. No. 96-262. Subsequently, WorldCom has also expressed support for a lower benchmark figure proposed by AT&T and NewSouth Communications. *See* March 22, 2001 letter of Donna Sorgi, WorldCom, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[116] Association for Local Telecommunications Services, http://www.alts.org/frames/aboutalts.htm (visited Mar. 2, 2001).

[117] *See infra* paragraph 57. As additional support for the benchmark framework and the transition mechanism, if not the precise figure, that we adopt, we note that NewSouth Communications and AT&T have both recently expressed support for an initial benchmark figure of 1.2 cents per minute, transitioning to the ILEC rate within one year. *See* March 15, 2001 of Jake Jennings, NewSouth Communications, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262; March 16, 2001 letter of Patrick Merrick, AT&T, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

[118] *See infra* paragraph 58.

[119] *See Multi-Association Group (MAG) Plan For Regulation of Interstate Services of Non-Price Incumbent Local Exchange Carriers and Interexchange Carriers,* CC Dkt. No. 00-256, Notice of Proposed Rulemaking, FCC 00-448, ¶ 5 (rel. Jan. 5, 2001).

[120] We note that this is the level that AT&T and NewSouth propose as the starting point for the benchmark. *See supra* note 117.

benchmark figure will drop to the switched access rate of the competing ILEC. It will remain at that level through the rule's fourth year. We conclude that such a transition period is appropriate because, as discussed above, we are concerned about the effects of a flash-cut to the ILEC rate.[121] Instead, we are persuaded that CLECs should be allowed an opportunity to adapt to the less tariff-dependent regulatory environment to which we move with this order. We adopt a three-year transition to the ILEC rate both because it appears to allow sufficient time for CLECs to adjust their business models and because it is consistent with several other Commission reform initiatives relating to inter-carrier compensation that are currently under way.[122]

53. In order further to ease CLEC transition to the market paradigm that we adopt today, our rules permit CLECs to tariff, through the fourth year of the rule's effectiveness, a rate equivalent to the benchmark level established three years after the effective date of this order. As previously noted, the Commission is conducting a more general examination of inter-carrier compensation by way of a notice of proposed rulemaking. One of the options under serious consideration in that proceeding is a move to a bill-and-keep regime, under which carriers would recover their costs from end users, rather than from interconnecting carriers. Even if we choose that route in the inter-carrier compensation proceeding, the rules we adopt today would not mandate bill-and-keep for CLEC access tariffs until a full four years after the effective date of this order.

54. By moving CLEC tariffs to the "rate of the competing ILEC" we do not intend to restrict CLECs to tariffing solely the per-minute rate that a particular ILEC charges for its switched, interstate access service. As WorldCom notes, CLECs should not be "deprived of revenue streams available to the incumbent monopolists with which they compete."[123] Rather, by moving CLEC access tariffs to the competing ILEC rate, we intend to permit CLECs to receive revenues equivalent to those the ILECs receive *from IXCs*, whether they are expressed as per-minute or flat-rate charges. For example, CLECs shall be permitted to set their tariffed rates so that they receive revenues equivalent to those that the ILECs receive through the presubscribed interexchange carrier charge (PICC), to the extent that it survives in the wake of our *CALLS Order*.[124] This does not entitle CLECs to build into their tariffed per-minute access rates a component representing the subscriber line charge (SLC) that ILECs impose on their end users,

[121] *See supra* paragraph 37.

[122] We have chosen a three-year ramp-down period in the recently adopted order governing reciprocal compensation payments for traffic bound for internet service providers. *See Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Dkt No. 96-98, *Intercarrier Compensation for ISP-Bound Traffic*, CC Dkt. No. 99-68, Order on Remand and Report and Order, FCC 01-131 (rel. Apr. 27, 2001). The transition period in this item should also bring CLEC rates down to the ILEC rate one year before ILEC rates are set to be reexamined in the *CALLS Order*. *See CALLS Order*, 15 FCC Rcd at 12977, ¶ 35. Lastly, the ramp-down period that we adopt today is consistent with the likely timeframe for the more far-reaching and general examination of inter-carrier compensation mechanisms that we initiated through another recent notice of proposed rulemaking. *See Intercarrier Compensation NPRM*, FCC 01-132 .

[123] WorldCom Safe Harbor Comments at 2.

[124] In the *CALLS Order*, we eliminated the PICC for residential and single-line business users. *See CALLS Order* 15 FCC Rcd at 12991-13004, ¶¶76-104. For multi-line business users, we initially set it at $4.31 per line, subject to additional reductions that will ultimately eliminate it as well. *See id.* at 13004-07, ¶¶ 105-112.

or any other charges that ILECs recover from parties other than the IXCs to which they provide access service.

55. A number of CLEC commenters urge the Commission not to set the benchmark at "the ILEC rate" because they claim that CLECs structure their service offerings differently than ILECs.[125] We seek to preserve the flexibility which CLECs currently enjoy in setting their access rates. Thus, in contrast to our regulation of incumbent LECs, our benchmark rate for CLEC switched access does not require any particular rate elements or rate structure; for example, it does not dictate whether a CLEC must use flat-rate charges or per-minute charges, so long as the composite rate does not exceed the benchmark. Rather it is based on a per-minute cap for all interstate switched access service charges. In this regard, there are certain basic services that make up interstate switched access service offered by most carriers. Switched access service typically entails: (1) a connection between the caller and the local switch, (2) a connection between the LEC switch and the serving wire center (often referred to as "interoffice transport"), and (3) an entrance facility which connects the serving wire center and the long distance company's point of presence. Using traditional ILEC nomenclature, it appears that most CLECs seek compensation for the same basic elements, however precisely named: (1) common line charges; (2) local switching; and (3) transport.[126] The only requirement is that the aggregate charge for these services, however described in their tariffs, cannot exceed our benchmark. In addition, by permitting CLECs to decide whether to tariff within the safe harbor or to negotiate terms for their services, we allow CLECs additional flexibility in setting their rates and the amount that they receive for their access services.

56. We will apply the benchmark for both originating and terminating access charges. That is, it will apply to tariffs for both categories of service, including to toll-free, 8YY traffic, and will decline toward the rate of the competing ILEC for each category of service. We note, however, that shortly before the issuance of this order, AT&T raised questions regarding the application of our benchmark to originating 8YY traffic generated by CLEC customers.[127] Because these issues arose so late in the proceeding, and because of the sparse record on them, we decline to do as AT&T suggests and immediately detariff this category of CLEC services above the rate of the competing ILEC. Instead, in this order, we solicit comment on the issues AT&T has raised so that we may decide them on an adequately developed record.[128]

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[125] CLECs contend that they are using different technologies, different network architectures and different pricing plans that make comparison between CLEC and ILEC rates difficult. *See* BayRing Safe Harbor Comments at 3; Focal & Winstar Safe Harbor Reply Comments at 8.

[126] Thus, the safe harbor rate applies, but is not necessarily limited, to the following specific rate elements and their equivalents: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.

[127] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262; April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262.

[128] *See infra* paragraphs 98-104. Late in this proceeding, Sprint argued that CLEC toll-free database query charges should also be subject to a tariff benchmark or should be detariffed above the rate of the competing ILEC. *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications (continued….)

57. Our benchmark mechanism may create the possibility for carriers with lower rates to raise their rates to the benchmark. We seek to avoid this result, which could have the consequence of *increasing* the amount that IXCs pay for some CLECs' access service. This, in turn, would again allow these CLECs to shift a portion of their costs onto the long distance market generally. Accordingly, we further restrict the tariff benchmark that may be charged to a particular IXC by tariff to the lower of: (1) the 2.5 figure, declining as discussed above, or (2) the lowest rate that a CLEC has tariffed for access, during the 6 months immediately preceding the effective date of these rules. Any rate above this level (unless it is still below the competing ILEC's rate) will be conclusively deemed to be unreasonable in any proceeding challenging the rate.[129] By restricting CLECs to no more than the access rates they previously have chosen to tariff, we minimize the opportunities for arbitrage that grow out of the rule we adopt today. Additionally, we expect that our benchmark rule will have no effect on negotiated contracts, under which CLECs have chosen to charge even more favorable access rates to particular IXCs.[130] Rather, these contracts will remain in place and the participating IXCs will continue to be entitled to any lower access rates for which they provide.

58. We also find that it is prudent to permit CLECs 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. As we note above, the historical ability of CLECs to tariff access rates well above the prevailing ILEC rate may have contributed to economically inefficient market entry by certain CLECs. We intend the declining benchmark scheme to wean competitive carriers off of their dependence on tariffed, supra-ILEC access rates without the disruption of a flash-cut to the prevailing market rate. We therefore think it important to ensure that this transitional mechanism serves that purpose, rather than presenting CLECs with the opportunity to enter additional markets in a potentially inefficient manner through reliance on tariffed access rates above those of the competing ILEC. Accordingly, we restrict the availability

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Commission, CC Dkt. No. 96-262. Sprint also mentioned this issue, but only in passing, in its comments to our *Safe Harbor Public Notice*. *See* Sprint Safe Harbor Reply Comments at 5. Given the dearth of record evidence on this issue, we decline at this time to impose by rule the limit on database query charges that Sprint proposes. We expect, however, that CLECs will not look to this category of tariffed charges to make up for access revenues that the benchmark system denies them.

[129] As set out in the regulations accompanying this order (*see* Appendix B), CLECs may thus tariff rates for switched access service that do not exceed the greater of:

A. The rate of the competing ILEC, or

B. The lower of:

1. The presumptively reasonable benchmark of 2.5 cents per minute, declining as described in paragraph 52 above, or

2. The CLEC's lowest tariffed rate during the six months preceding the effective date of these rules.

[130] *See, e.g.*, *Federal Power Commission v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *MCI Telecommunications Corp. v. FCC*, 665 F.2d 1300, 1301 (D.C. Cir. 1981) ("The *Sierra-Mobile* doctrine restricts federal agencies from permitting regulatees to unilaterally abrogate their private contracts by filing tariffs altering the terms of those contracts.").

of the transitional benchmark rate to those metropolitan statistical areas (MSAs) in which CLECs are actually serving end users on the effective date of these rules. In MSAs where they begin serving end users *after* the effective date of these rules, we permit CLECs to tariff rates only equivalent to those of the competing ILEC; they will have to achieve rates above this level by negotiation.

59. We recognize that the benchmark we adopt may dramatically reduce the tariffed access rates and revenues of many CLECs, particularly as the benchmark levels transition down over time. We conclude, however, that this reduction is warranted. As discussed above, we are concerned that numerous CLECs have been entering the access-service market at rates well above the prevailing rate charged by the incumbent.[131] Moreover, we are troubled by indications that CLECs are using these high access rates to shift a substantial portion of their start-up costs onto the long distance market and thus onto many subscribers who have chosen an access provider with lower rates. As the CLEC industry's market share continues to grow, this burden would only increase, absent some constraint on rates. We have noted that CLECs' ability to charge rates above the incumbent's appears to be due largely to the configuration of the access-service market and the geographical rate averaging required of the IXCs, both of which prevent market forces from disciplining rates. Our benchmark system will drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price. In so doing, the rules we adopt today reduce the opportunity for strategic use of the tariff system to impose unreasonable rates that are not subject to effective competition.

60. At the same time, we believe that our benchmark mechanism may actually result in increased access revenues for many CLECs. Many IXCs disputing the reasonableness of CLEC access rates have either been paying only the ILEC rate or have refused payment altogether. For these CLECs, our approach should provide greater certainty, and a more reliable stream of revenue, because we conclude that CLEC access rates will be conclusively deemed reasonable if they fall within the safe harbor that we have established. Accordingly, an IXC that refused payment of tariffed rates within the safe harbor would be subject to suit on the tariff in the appropriate federal district court, without the impediment of a primary jurisdiction referral to this Commission to determine the reasonableness of the rate. Similarly, because of the conclusive presumption of reasonableness that we will accord to tariffed rates at or below the benchmark, a CLEC with qualifying rates will not be subject to a section 208 complaint challenging its rates.

61. We expect that some IXC participants in this proceeding will find fault with our ruling because it does not immediately reduce CLEC access charges to the rates charged by incumbent LECs. It is true that, for the three-year phase-in period, many tariffed CLEC access rates will continue to exceed the prevailing market price charged by the ILEC. However, by limiting tariffed rates to our benchmark, we have immediately provided IXCs with relief from the substantially higher rates that many CLECs have been tariffing. In addition to the immediate relief on access charges that the benchmark mechanism affords IXCs, it also ensures that CLEC access rates will continue to decline until they reach the level of the ILEC rates. In setting the

[131] We do not decide, in this order, whether those rates were reasonable at the time they were being charged. Rather, we conclude, on a prospective basis, that CLEC access rates will be deemed to be reasonable if they fall within the declining safe harbor that we have established.

benchmark, we have adopted, on a prospective basis and over the long run, the IXCs' argument that the reasonable rate for CLEC access service is the rate that the ILECs are charging for similar service in the market. We decline, however, immediately to drop the CLEC rate to that point.

62. This type of transitional mechanism is vitally important to avoid too great of a dislocation in the CLEC segment of the industry. As noted above, the Commission has taken a broad variety of steps to ensure the development of local competition in keeping with the explicit goals of the 1996 Act. Avoiding unnecessary damage to this growing competition, as likely would result from an immediate transition to the ILEC rate, is consistent with our approach in other proceedings, such as the reform of reciprocal compensation that we recently adopted, in which we have sought to reduce the opportunity for regulatory arbitrage but have nevertheless provided a transition mechanism to prevent too great of a revenue shock to a particular group of carriers.[132] This transition period is necessary to permit CLECs to adjust their business plans and obtain alternative sources for the substantial revenues of which the benchmark will deprive them – revenues on which they have previously relied in formulating their business plans because they were not held to the regulatory standards imposed on ILECs.

63. Again, we emphasize that we adopt this benchmark approach on an *interim* basis. Concurrent with our adoption of this order, we initiate a proceeding in which we will broadly examine various categories of existing intercarrier compensation regimes and seek comment on whether these existing rules lead to efficient usage of, and investment in, network infrastructure, or to the efficient development of competition.[133] In that proceeding, we seek comment on whether alternative rules for access charges might limit the ability of LECs, including CLECs, to exercise market power in their provision of access service.

E. Safe Harbor Rates for Rural CLECs

64. Limiting CLECs to the higher of the benchmark rate or the access rate of its ILEC competitor could prove rather harsh for some of the small number of CLECs that operate in rural areas.[134] The difficulty would likely arise for those CLECs that operate in a rural area served by a price-cap incumbent with state-wide operations. Our rules require such ILECs to geographically average their access rates.[135] This regulatory requirement causes these "non-rural ILECs" effectively to use their low-cost, urban and suburban operations to subsidize their higher cost,

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[132] *See Intercarrier Compensation for ISP-Bound Traffic*, FCC 01-131. *See also Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15,982, 16002, FCC 97-158, para. 46 (1997) ("we are concerned that any attempt to move immediately to competitive prices for [certain ILEC access] services would require dramatic cuts in access charges for some carriers. Such an action could result in a substantial decrease in revenue for incumbent LECs, which could prove highly disruptive to business operations, even when new explicit universal support mechanisms are taken into account.").

[133] *See Intercarrier Compensation NPRM*, FCC 01-132.

[134] *See, e.g.*, ALTS Safe Harbor Comments at 5; CTSI Safe Harbor Comments at 9-11; Minnesota CLEC Safe Harbor Comments at 2-7; RICA Safe Harbor Comments at 4-9.

[135] *See Policy and Rules Concerning Rates for Dominant Carriers*, CC Docket No. 87-313, Second Report & Order, 5 FCC Rcd 6786, 6788 (1990); *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Second Further Notice of Proposed Rulemaking, 11 FCC Rcd 858, 866 (1995).

rural operations, with the effect that their state-wide averaged access rates recover only a portion of the ILEC's regulated costs for providing access service to the rural portions of its study area. During the course of this proceeding, we became concerned that tying the access rates of rural CLECs to those of such non-rural ILECs could unfairly disadvantage CLECs that lacked urban operations with which they could similarly subsidize their service to rural areas. Accordingly, we sought comment on whether the phenomenon of the non-rural ILEC justified the creation of a "rural exemption" to our benchmark scheme and, if so, how that exemption should be structured.[136]

1. Whether to Create a Rural Exemption

65. We conclude that the record supports the creation of a rural exemption to permit rural CLECs competing with non-rural ILECs to charge access rates above those charged by the competing ILEC. First, we note that such a device is consistent with the Commission's obligations, under section 254(d)(3) of the Act and section 706 of the 1996 Act, to encourage the deployment to rural areas of the infrastructure necessary to support advanced telecommunications services and of the services themselves.[137] The record indicates that CLECs often are more likely to deploy in rural areas the new facilities capable of supporting advanced calling features and advanced telecommunications services than are non-rural ILECs, which are more likely first to deploy such facilities in their more concentrated, urban markets.[138] Given the role that CLECs appear likely to play in bringing the benefits of new technologies to rural areas, we are reluctant to limit unnecessarily their spread by restricting them to the access rates of non-rural ILECs.

66. We are persuaded by the CLEC comments indicating that they experience much higher costs, particularly loop costs, when serving a rural area with a diffuse customer base than they do when serving a more concentrated urban or suburban area.[139] The CLECs argue that, lacking the lower-cost urban operations that non-rural ILECs can use to subsidize their rural operations, the CLECs should be permitted to charge more for access service, as do the small rural incumbents that charge the National Exchange Carrier Association (NECA) schedule rates.[140] We note in this regard that a rural exemption will also create parity between the rural CLECs competing with NECA carriers and those competing with non-rural ILECs.

[136] *Safe Harbor Public Notice*, 15 FCC Rcd 24102, ¶¶ 5-7.

[137] *See* 47 U.S.C. § 254(d)(3); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 153, (1996) (reproduced in the notes under 47 U.S.C. § 157).

[138] *See e.g.*, RICA Safe Harbor Comments at 2.

[139] *Cf.* RICA Safe Harbor Reply Comments at 7.

[140] *See* Minnesota CLEC Safe Harbor Reply Comments at 2; NTCA Safe Harbor Comments at 4-5; BayRing Safe Harbor Comments at 23; BayRing Safe Harbor Reply Comments at 3-4. The National Exchange Carrier Association is a non-stock, not-for-profit association that the FCC established in 1983, *inter alia*, to administer its Access Charge Plan and the associated pools and tariffs. *See* 47 C.F.R. §§ 69.601, *et seq.* NECA files interstate access tariffs for primarily small, rural and high-cost ILECs that participate in its common line or traffic-sensitive pools. NECA has over one thousand members that are either "cost" or "average schedule" companies. Cost companies submit cost studies to NECA; these studies form the basis for the cost companies' settlements with the NECA pools. For average schedule companies, NECA collects cost information from (continued….)

67. In adopting the rural exemption, we reject the characterization of the exemption as an implicit subsidy of rural CLEC operations.[141] It is true that an exemption scheme will permit rural CLECs to charge IXCs more for access to their end-user customers than was charged by the non-rural ILECs from whom the CLECs captured their customers. But that does not necessarily justify limiting the rural CLEC to the access rates of the non-rural ILEC. The same increase in access rates would occur if, rather than entering an area as a competitive carrier, a small local-service provider were to purchase a rural exchange and thus become the rural ILEC serving the end users in that exchange.[142] In that event, the IXC's cost for access to the exchange's end users would also increase, as the new ILEC likely would charge either NECA schedule rates or conduct a cost study to support its own access rates, and our rules would permit either outcome. This analysis leads us to conclude that the exemption we adopt today is not properly viewed as an implicit subsidy of rural CLEC operations. Instead, it merely deprives IXCs of the implicit subsidy for access to certain rural customers that has arisen from the fact that non-rural ILECs average their access rates across their state-wide study areas.

68. Our level of comfort in creating a rural exemption is markedly increased by the fact that the record indicates it likely will apply to a small number of carriers serving a tiny portion of the nation's access lines. The Rural Independent Competitive Alliance (RICA) asserts that, fewer than 100,000 access lines are served by carriers falling in the definition that it proffers for a rural CLEC.[143] This number is entirely overwhelmed by the approximately 192 million access lines reported by the Commission in its last report on local telephone competition.[144] Indeed, this figure for rural CLECs' customers amounts to substantially less than one percent of the 12.7 million lines served by CLECs.[145] We acknowledge that the definition for a rural CLEC that we adopt below is somewhat broader than that proposed by RICA.[146] It nevertheless appears likely to encompass only a small number of the overall total of CLEC end users.

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selected representative members on a periodic basis. It uses this information to generate average schedule rates. These rates, rather than the actual costs of the individual average schedule companies, govern the settlements of these average schedule companies with the NECA pools. The data from the cost companies and the average schedule companies together provide the support for the development of the NECA tariffs.

[141] *See* AT&T Safe Harbor Reply Comments at 12-13.

[142] *Cf.* RICA Safe Harbor Reply Comments at 7. *See also* OPASTCO Safe Harbor Comments at 4 (many rural ILECs pursue an "edge-out" strategy, moving into territory of adjacent ILEC as competitor; arguing that, since these carriers charge NECA rates in their home territories, they should also be permitted to do so in areas they enter competitively).

[143] RICA Safe Harbor Comments at 17.

[144] *See* Industry Analysis Division, FCC, *Local Telephone Competition: Status as of June 30, 2000* at 1 (rel. Dec. 4, 2000) (*Local Telephone Competition*).

[145] *See id.*

[146] Below, we define rural areas as those falling outside of (1) any incorporated place of 50,000 inhabitants or more or (2) an urbanized area defined by the Census Bureau. *See infra* paragraph 76. RICA, on the other hand, proposes to include within the first portion of the definition only incorporated places of 20,000 inhabitants or more. *See* RICA Safe Harbor Comments at 6.

69. We reject AT&T's argument that CLECs must rely solely on the *CALLS Order*'s interstate access support when entering the territories of non-rural ILECs. The *CALLS Order*'s $650 million portable universal service support mechanism represented the amount necessary to compensate participating ILECs for the subsidies that the order removed from their access revenues. This interstate access support mechanism is portable, but that does not necessarily indicate that it fully reflects the costs (above those recovered through ILEC access rates) that a rural CLEC would encounter in serving customers in the high-cost areas for which the subsidy is available. For example, we note that a CLEC entering the territory of a non-rural ILEC likely would not enjoy the economies of scope and scale that the ILEC does in the same territory.

70. We are also skeptical of AT&T's assertions about the incentives that would flow from a rural exemption. First, AT&T argues that the exemption would "create perverse incentives for uneconomic competitive entry by CLECs in any 'rural' areas in which it might be applicable."[147] It appears from the record that both AT&T and Sprint have routinely been paying for CLEC access billed at the rate charged by the competing incumbent. If AT&T were accurate in its projection about higher access rates spurring a rash of uneconomic market entry in rural areas, such uneconomic entry should already have occurred in the territories of the rural incumbent carriers that charge the higher NECA rates. However, the record fails to indicate such a trend. Additionally, we note WorldCom's assertion that geographically variable rates will create the incentive for CLECs to make it appear, through "foreign exchange type offerings," as if their end users were located in rural areas when they are not.[148] Here again, it appears that this incentive already has existed for any CLECs that choose to compete with NECA carriers and that consequently would receive the equivalent of NECA rates from Sprint and AT&T. However, the record discloses no significant attempt by CLECs to collect high charges for access to end users that are actually located outside of the NECA carriers' territory.

71. We are similarly unpersuaded by AT&T's argument that a rural exemption will cause a proliferation of chat line providers in the territories served by rural CLECs. We recognize that AT&T has alleged that, in certain circumstances, it violates the Act for a LEC with relatively high access rates (such as a NECA carrier) to serve a chat line provider as a means of increasing the LEC's access traffic.[149] It appears that the conduct that AT&T challenges in these proceedings grows out of the arbitrage opportunity created by the higher access rates charged by rural NECA carriers. However, we are skeptical that the rural exemption that we create today will add markedly to AT&T's problem in this regard. The FCC recently reported that non-price cap incumbent carriers served in excess of 12 million lines in the U.S.[150] The bulk of these carriers either charge NECA access rates or something similar. Adding less than one percent to the

[147] AT&T Safe Harbor Comments at 13.

[148] WorldCom Safe Harbor Reply Comments at 4.

[149] *See* AT&T Safe Harbor Reply Comments at 16. AT&T has raised these allegations in complaint proceedings that remain pending at the Commission. Our discussion of the issue presented in these proceedings should not be interpreted as prejudging them in any way.

[150] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. Table 8.2 (Dec. 2000).

number of rural lines eligible for higher access rates seems highly unlikely to increase dramatically the arbitrage opportunities involving chat line providers.

72. Furthermore, as we have noted previously, the mechanism that we implement today serves as only a transitional solution to a portion of the much larger question of inter-carrier compensation. We are examining the broader questions of inter-carrier compensation through a notice of proposed rulemaking. Additionally, the Commission currently has before it the Multi-Association Group (MAG) Plan, which has as one of its goals the reduction of rural ILECs' access charges.[151] Below, we tie the rates for rural CLECs to the NECA rates charged by rural ILECs. Accordingly, as our access reform efforts for rate-of-return carriers and our other efforts on inter-carrier compensation bring down the access rates of rural ILECs, any opportunities for arbitrage growing out of the exemption for rural CLECs will also diminish.

73. We thus conclude that the record supports the creation of a rural exemption to the benchmark scheme that we adopt for CLEC access charges. Under this exemption, a CLEC that is operating in a rural area, as defined below, and that is competing against a non-rural ILEC may tariff access rates equivalent to those of NECA carriers. Below we discuss more precisely the CLECs to which this exemption will be available and the access rates that they may impose by tariff.

2. Carriers Eligible for Rural Exemption

74. In response to our public notice inquiring about the potential of the rural exemption from our benchmark scheme, we received a variety of suggested structures. CTSI and BayRing assert that the exemption's higher access rates should be available on an end-user-by-end-user basis for all customers living outside of density zone 1 of the nation's top 50 metropolitan statistical areas (MSAs), a standard that would open the exemption to a far broader range of carriers than we think is necessary to promote competitive entrants in truly rural areas.[152] As Sprint notes, this definition of rural would "include metropolitan areas having populations of up to 958,000, and would include such sizable cities as Honolulu, Tucson, Tulsa, Omaha, and Albuquerque."[153] At the other extreme, Sprint argues that the exemption should be available to a CLEC that serves both business and residential customers and that operates exclusively outside of any MSA.[154] As some commenters assert, this definition may be overly exclusive because MSAs typically include the full area of the counties contiguous with the central population center, and,

[151] *See Multi-Association Group (MAG) Plan for Regulation of Interstate Services of Non-Price Cap Incumbent Local Exchange Carriers and Interexchange Carriers,* CC Docket No. 00-256, Notice of Proposed Rulemaking, FCC 00-448 (rel. Jan. 5, 2001).

[152] BayRing Safe Harbor Comments at 21-22; CTXI Safe Harbor Comments at 11-14. The Office of Management and Budget defines metropolitan statistical areas. Essentially, they encompass cities with a population of more than 50,000 and all of the adjoining counties. *See* Alternative Approaches to Defining Metropolitan and Nonmetropolitan Areas, 63 Fed. Reg. 70525, 70526 (OMB 1998). Currently, there are 258 MSAs in the country.

[153] Sprint Safe Harbor Reply Comments at 7.

[154] *See* October 11, 2000 letter of Richard Juhnke, Sprint Corp., to Magalie Salas, Secretary, FCC, CC Dkt. No. 96-262.

especially in the case of larger counties, may therefore include substantial areas that are undeniably rural.

75. Administrative simplicity is an important consideration in our choice of a way to define rural CLECs. Thus, we conclude that the availability of the exemption (and the higher access rates that come with it) should be determined based on the CLEC's entire service area, not on a subscriber-by-subscriber basis. Similarly, we are concerned that the definition rely on objectively available information that will not require extensive calculation or analysis by either carriers or this Commission. For example, many comments suggest that, at bottom, density is the factor that should determine whether an area qualifies as rural; it is the factor that reflects a LEC's loop lengths and, not surprisingly, the number of potential subscribers in an area. The factors of longer loop length and lower concentration of potential subscribers are, in turn, what motivate us to permit higher access rates in rural areas. However, our concern with objectivity leads us to conclude that rural CLECs should not be defined explicitly by the population density in their service areas because density figures for the irregular areas likely to be served by CLECs – areas that typically will not correspond to state or municipal boundaries or to Census Bureau divisions – are not readily available.

76. We conclude that the rural exemption to our benchmark limitation on access charges will be available for a CLEC competing with a non-rural ILEC, where no portion of the CLEC's service area falls within: (1) any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or (2) an urbanized area, as defined by the Census Bureau.[155] Thus, if any portion of a CLEC's access traffic originates from or terminates to end users located within either of these two types of areas, the carrier will be ineligible for the rural exemption to our benchmark rule. Relying on information that is readily and publicly available, this definition excludes from the exemption those CLECs operating within reasonably dense areas that are not typically considered to be rural. It does not, however, exclude from eligibility entire counties that border high population areas, as would a definition based on MSAs.

77. Sprint has raised the issue of how best to ensure that the rural exemption does not create the potential for abuse and that it is restricted to CLECs that are serving rural end users.[156] Thus, Sprint is concerned about the potential for competitive carriers, with some qualifying end users, creating two separate operating entities so that the one serving rural end users could tariff the higher access rate permitted under the exemption. While we want to forestall that strategy for exploiting our rule, we also realize that certain incumbents with urban (or non-rural) operations may choose to enter adjacent rural markets as a competitive carrier. To the extent that such carriers provide the benefit of competition in rural markets, their non-qualifying incumbent

[155] An urbanized area "is a continuously built-up area with a population of 50,000 or more. It comprises one or more places – central place(s) – and the adjacent densely settled surrounding area – urban fringe – consisting of other places and nonplace territory." U.S. Bureau of the Census, GEOGRAPHIC AREAS REFERENCE MANUAL at 12-1; available at http://www.census.gov/ftp/pub/geo/www/GARM/Ch12GARM.pdf (visited February 7, 2001). *See also id.* at 12-7 to 12-8 (further discussion of criteria for defining urbanized areas). 405 urbanized areas were defined by the time of the 1990 census. *Id.* at 12-5.

[156] *See* April 6, 2001 letter of Richard Juhnke, Sprint, to Magalie Salas, Secretary, Federal Communications Commission, CC Dkt. No. 96-262.

operations should not operate entirely to deny them the benefit of the rural exemption. Accordingly, we decline Sprint's invitation to examine all of the subsidiary operations of a holding company in order to determine the applicability of the rural exemption. We expect that we will be able to address, on a case-by-case basis, the improper exploitation of our rule – such as a competitive carrier's splitting itself into two subsidiaries to qualify, in part, for the exemption rates where it would not otherwise do so.

78. Our definition for rural CLECs closely resembles the first major division of the Act's definition for rural telephone companies.[157] It departs from the remaining three major divisions of the definition either because they would be administratively burdensome, or because they would be overly inclusive or irrational when applied solely to CLECs.[158] Our definition adopts 50,000, rather than 10,000, as the population cut-off for incorporated places because we are concerned that, without the statute's remaining three portions of the definition as a way for a company to attain rural status, the 10,000-person threshold would be unduly restrictive and deny the exemption to companies operating in areas that would generally be viewed as rural.

79. It is also necessary to discuss briefly the type of carrier with which a CLEC must be competing in order to qualify for the rural exemption. Our intent is that this exemption will permit a CLEC to tariff access rates above the competing ILEC's only when the competing ILEC has broad-based operations that include concentrated, urban areas that allow it to subsidize its rural operations and therefore charge an artificially low rate for access to its rural customers. We conclude that the most effective and objective means of accomplishing this is to allow the rural exemption only to those CLECs that are competing with price-cap ILECs that do not qualify as "rural telephone companies" under the Act's definition.[159] Those CLECs competing with carriers that qualify as rural under the Act's definition are excluded from the rural exemption and are therefore limited, under the rule we announce above, to tariffing access rates equal only to those of the competing ILEC.

3. Rate for Exemption Carriers

80. The final question with respect to the rural exemption is what the access service benchmark is for those carriers that qualify. We adopt the NECA tariff for switched access service as the standard that is the most appropriately reflective of the considerations that should go into pricing the access service of rural CLECs. Accordingly, qualifying rural CLECs may tariff rates at the level of those in the NECA access tariff, assuming the highest rate band for local

[157] *See* 47 U.S.C. § 153(37)(A).

[158] We do not adopt the portion of the Act's definition that classifies as rural those companies providing service to "fewer than 50,000 access lines," 47 U.S.C. §153(37)(B), because it would permit a CLEC serving 45,000 access lines in downtown Manhattan or Los Angeles to qualify as rural. Because CLECs may not have assigned geographic areas in which they must offer service to all subscribers, the portion of the definition relating to carriers serving study areas with fewer than 100,000 access lines, *id.* § 153(37)(C), simply does not apply to CLECs. Finally, because we decline, for reasons of administrative simplicity, to get into a subscriber-by-subscriber analysis of where a CLEC's end-user customers are located, we decline to adopt that portion of the Act's definition that defines as rural those companies with less than 15 percent of their access lines within a community of more than 50,000 people. *Id.* § 153(37)(D).

[159] 47 U.S.C. § 153(37).

switching and the transport interconnection charge, *minus* the tariff's carrier common line (CCL) charge if the competing ILEC is subject to our *CALLS Order*. Above this benchmark, rural CLECs will be mandatorily detariffed in their provision of access services.

81. We adopt the NECA access rate because it is tariffed on a regular basis and is routinely updated to reflect factors relevant to pricing rural carriers' access service. We choose the highest rate bands for the two variable rate elements because the opportunity to tariff those rates will most effectively spur the development of local-service competition in the nation's rural markets and because the burden created by choosing the highest rate will be relatively minor, owing to the small number of carriers involved. We deny rural CLECs the NECA tariff's CCL charge when they compete with a *CALLS* ILEC because the price-cap LECs' CCL charge has been largely eliminated through implementation of higher subscriber line charge (SLC) caps and the multi-line business PICC. CLECs competing with *CALLS* ILECs are free to build into their end-user rates a component approximately equivalent to (or slightly below) the ILEC's SLC, as well as assessing IXCs a multi-line business PICC. These potential revenue sources obviate the need for a CCL charge, which NECA carriers use to recover loop costs that cannot be recovered because of their lower SLC caps and the absence of PICCs.

F. Forbearance Analysis for Rates Above the Benchmark

82. As previously indicated, we conclude that a CLEC must negotiate with an IXC to reach a contractual agreement before it can charge that IXC access rates above the benchmark. During the pendency of these negotiations, or to the extent the parties cannot agree, the CLEC may charge the IXC only the benchmark rate. In order to implement this approach, we adopt mandatory detariffing for access rates in excess of the benchmark. That is, we exercise our statutory authority to forbear from the enforcement of our tariff rules and the Act's tariff requirements for CLEC access services priced above our benchmark.[160]

83. Section 10 of the Act requires, *inter alia*, that the Commission forbear from applying any regulation or provision of the Act to telecommunications carriers or telecommunications services, or classes thereof, if the Commission determines that certain statutory conditions are satisfied.[161] Because section 10 permits us to exercise our forbearance

[160] *See* 47 U.S.C. § 160 (forbearance authority); 47 C.F.R. Part 61 (tariff regulations). As modified by the *Hyperion Order*, our tariff rules currently subject CLECs to permissive detariffing and set no pre-determined limits on the level of charges that CLECs may establish by tariff. *See supra* paragraph 12 (discussing *Hyperion Order*). We note that the law is somewhat unclear on which section of the Act requires or permits the filing of interstate access tariffs. In *Lincoln Telephone & Telegraph Co. v. FCC*, 659 F.2d 1092, 1108-09 (D.C. Cir. 1981), the Court of Appeals for the D.C. Circuit stated in dicta that access providers qualified as "connecting carriers" and were therefore exempt from the tariff-filing requirements of section 203(a). Rather, the court opined, the Commission could "exercise the residual authority" of section 4(i) to require tariffing of access services. *Id.* at 1109. In contrast, the court in *Advamtel v. AT&T* appears to have assumed that section 203 supported the tariffing of interstate access services. *See* 118 F. Supp. 2d at 683-84, 688.

[161] 47 U.S.C. § 160. Section 10(a) provides that:

> (a) REGULATORY FLEXIBILITY. – Notwithstanding section 332(c)(1)(A) of this Act, the Commission shall forbear from applying any regulation or any provision of this Act to a telecommunications carrier or telecommunications service, or class of telecommunications carriers

(continued….)

authority with respect to classes of services, we conduct a forbearance analysis only for those CLEC interstate access services for which the aggregate charges exceed our benchmark. For this class of services, we conclude that the section 10 forbearance criteria are satisfied; accordingly, we must take action pursuant to the terms of this statute.

84. Under the first criterion for forbearance, we examine whether our tariff filing requirements for CLEC interstate access services priced above the benchmark are necessary to ensure that rates for these services are just and reasonable and not unreasonably discriminatory.[162] We conclude they are not. As noted above, CLECs are positioned to wield market power with respect to access service. Requiring CLECs to negotiate with their IXC customers in order to obtain access rates above the benchmark will limit the CLECs' ability to exercise this market power and unilaterally impose rates above the level that we have found to be presumptively reasonable.

85. We are not persuaded by CLEC commenters that contend they will be unable to negotiate agreements with IXCs because IXCs wield significant market power in the purchase of access services. We find these claims of IXC monopsony power unsupported in the record. We note that three major IXCs are purchasers in the market for access services, and numerous smaller players also purchase LEC access services. Moreover, we note that our tariff rules were historically intended to protect purchasers of services from monopoly providers, not to protect sellers from monopsony purchasing power. We conclude that other remedies, like those under the

(Continued from previous page)

> or telecommunications services, in any or some of its geographic markets, if the Commission determines that –
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> (1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, form or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory;
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> (2) enforcement of such regulation or provision is not necessary for the protection of consumers; and
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> (3) forbearance from applying such provision or regulation is consistent with the public interest."

47 U.S.C. § 160(a). Section 10(b) further provides:

> (b) COMPETITIVE EFFECT TO BE WEIGHED. -- In making the determination under subsection (a)(3), the Commission shall consider whether forbearance from enforcing the provision or regulation will promote competitive market conditions, including the extent to such forbearance will enhance competition among providers of telecommunications services. If the Commission determines that such forbearance will promote competition among providers of telecommunications services, that determination may be the basis for a Commission finding that forbearance is in the public interest.

47 U.S.C. § 160(b).

[162] 47 U.S.C. § 160(a)(1).

antitrust laws, are available to protect CLECs from the exploitation of any monopsony power that IXCs may possess.[163]

86. Under the second forbearance criterion, we must determine whether tariffing of CLEC access charges above the benchmark is necessary to protect consumers.[164] Such tariffing is not necessary to ensure that consumer rates are just and reasonable. To the contrary, requiring negotiation of access rates above the benchmark will provide greater assurance that the rates are just and reasonable and will likely prevent CLECs from using long distance ratepayers to subsidize their operational and build-out expenses. It is possible that the reduction of CLEC access revenue caused by the benchmark scheme will increase the rates CLECs charge their end users. However, all CLEC end users have competitive alternative service providers, in the form of regulated incumbents. We are therefore not concerned that any increase in CLEC end-user rates will unduly harm consumers. To the extent that this provision requires us to examine the effect on the IXC consumers of CLEC access services, mandatory detariffing likely will protect that group by removing the CLEC's ability unilaterally to impose excessive rates through the tariff process.

87. The third forbearance criterion requires that we determine whether mandatory detariffing of CLEC access services priced above the benchmark is consistent with the public interest and, in particular, whether it will promote competitive market conditions.[165] We conclude, as discussed above, that adopting mandatory detariffing for access rates in excess of the safe harbor limit will subject to negotiation between two willing parties any access services offered at a rate above the benchmark. The negotiation-driven approach that we adopt will provide a better mechanism for IXCs to control costs, since they will not be subject to tariffs with unilaterally established rates at excessive levels. In addition, our benchmark system, with its presumption that qualifying rates are reasonable, will provide greater certainty for CLECs that they will receive full compensation for the access services that they provide. By limiting a CLEC's ability to shift its start-up costs onto the long-distance market, our benchmark approach will restrict market entry to the efficient providers. Accordingly, mandatory detariffing of CLEC access services above the benchmark fulfills all three of the criteria for forbearance.

IV. INTERCONNECTION OBLIGATIONS

88. Although we have created a safe harbor for CLEC access rates, within which they will be presumed to be just and reasonable, the question remains of whether and under what circumstances an IXC can decline to provide service to the end users of a CLEC. In this proceeding, we sought comment on whether either section 201(a) or section 251(a) prohibit an IXC from declining to serve the customers of a CLEC because the IXC believes that the CLEC's access rates are too high. We also sought comment on whether an IXC must first obtain section 214 approval from the Commission before terminating service to CLEC customers.

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[163] *See, e.g., United States v. Griffith*, 334 U.S. 100, 108 (1948); *Sunshine Cellular v. Vanguard Cellular Sys.*, 810 F. Supp. 486, 493-94 (S.D.N.Y. 1992) (denying motion to dismiss monopsony claim with respect to cellular phone roaming services).

[164] 47 U.S.C. § 160(a)(2).

[165] 47 U.S.C. § 160(b).

89. Below, we conclude that section 201(a)'s requirement that a carrier provide communications service upon reasonable request obligates IXCs to serve the end users of a CLEC that is charging rates at or below the benchmark when the IXC is also serving the customers of other LECs in the same geographic area. We are optimistic that our conclusions in this regard will maintain the benefits of a seamless, interconnected public telephone network. Given the structure of the rules that we adopt, we need not address the applicability of section 214.

A. Interconnection and Sections 201 and 251

90. Section 201(a) of the Communications Act states that it is "the duty of every common carrier engaged in interstate or foreign communication . . . to furnish such communication service upon reasonable request therefor."[166] It also requires that common carriers establish physical connection with other carriers where, after the opportunity for a hearing, the Commission has found such action "necessary or desirable in the public interest."[167] Similarly, section 251(a)(1) of the Communications Act requires all telecommunications carriers to interconnect directly or indirectly with each other.[168]

91. CLECs contend that sections 201(a) and 251(a)(1) require IXCs to accept all originating, and deliver all terminating, access traffic and to comply with all reasonable requests for interconnection.[169] IXCs, on the other hand, contend that a carrier's decision whether to interconnect is a matter of business judgment that is not subject to section 201(a).[170] They further argue that section 251(a)(1) only obligates a carrier physically to interconnect with the facilities of other carriers and does not require the acceptance or delivery of access traffic.[171]

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[166] 47 U.S.C. § 201(a).

[167] Section 201(a) states –

> It shall be the duty of every common carrier engaged in interstate or foreign communication by wire or radio to furnish such communication service upon reasonable request therefore; and in accordance with the orders of the Commission, in cases where the Commission, after opportunity for hearing, finds such action necessary or desirable in the public interest, to establish physical connections with other carriers, to establish through routes and charges applicable thereto and the divisions of such charges, and to establish and provide facilities and regulations for operating such through routes.

47 U.S.C. § 201(a).

[168] Section 251(a)(1) states that "[e]ach telecommunications carrier has the duty . . . to interconnect directly or indirectly with the facilities and equipment of other telecommunications carriers." 47 U.S.C. §251(a).

[169] Teligent Comments at 3-5; Allegiance Comments at 6; ALTS Comments at 25; Alltel Comments at 5; RCN Comments at 6-8; MGC Comments at 17; Minnesota CLEC Comments at 3-5; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22.

[170] AT&T Reply Comments at 29-30; Sprint Comments at 24-25; WorldCom Comments at 19.

[171] Sprint Reply Comments at 22-24.

92. We are generally persuaded by the IXCs' arguments. Sections 201(a) and 251(a)(1) do not expressly require IXCs to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates. In the *Local Competition Order*, the Commission found that a section 251(a)(1) duty to interconnect, directly or indirectly, is central to the Communications Act and achieves important policy objectives.[172] However, the Commission construed the statute to require only the physical linking of networks, not to impose obligations relating to the transport and termination of traffic.[173] Section 201 empowers the Commission, after a hearing and a determination of the public interest, to order the physical connection of networks and to establish routes and charges for certain communications. This also falls short of creating the blanket duty that the CLECs seek to impose on the IXCs to accept all access service, regardless of the rate at which it is offered. Certainly, we have made no finding that the public interest dictates such broad acceptance of access service, whatever its price. Nevertheless, we conclude that section 201(a) places certain limitations on an IXC's ability to refuse CLEC access service.

93. We agree that universal connectivity is an important policy goal that our rules should continue to promote. The public has come to value and expect the ubiquity of the nation's telecommunications network. Accordingly, any solution to the current problem that allows IXCs unilaterally and without restriction to refuse to terminate calls or indiscriminately to pick and choose which traffic they will deliver would result in substantial confusion for consumers, would fundamentally disrupt the workings of the public switched telephone network, and would harm universal service.[174]

94. We therefore conclude that an IXC that refuses to provide service to an end user of a CLEC charging rates within the safe harbor, while serving the customers of other LECs within the same geographic area, would violate section 201(a). That section imposes on common carriers the obligation to furnish communication service "upon reasonable request therefor." As set out above, we will conclusively presume that a CLEC's access rates are reasonable if they fall

[172] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499, 15988-15991 (1996) (*Local Competition Order*). MGC Comments at 17-18.

[173] The Commission's rules implementing section 251(a)(1) define "interconnection" as the "linking of two networks for the mutual exchange of traffic" and state that it "does not include the transport and termination of traffic." 47 C.F.R. § 51.5.

[174] Winstar Comments at 5; OPASTCO Comments at 2-3; Allegiance Comments at 8; MGC Comments at 16-17; Minnesota CLEC Comments at 3-5; RCN Comments at 8; Winstar Comments at 6-7; RICA Comments at 7-9; USTA Comments at 21-22; WorldCom Reply Comments at 14. *See also* ITC Reply Comments at 6-7 (regulatory intervention is necessary when market forces fail to ensure customer expectations of call completion). Even Sprint acknowledges that an IXC's refusal to exchange traffic is undesirable. *See* Sprint Comments at 24.

Incumbent LECs also are generally supportive of the approach we adopt in this Order. For example, SBC argues that an IXC that chooses to serve a geographic area as a common carrier should serve all users inside that area, and should not be allowed to refuse or discontinue service to those served by any LEC with whom the IXC cannot agree upon access rates. *See* SBC Reply Comments at 6. It further contends that all section 201 interconnection obligations must be correspondingly limited if the Commission determines that an IXC has the power to discontinue service. *Id.* *See also* US West Comments at 26.

at or below the benchmark that we establish herein. When an IXC's end-user customer attempts to place a call either from or to a local access line, that customer makes a request for communication service – from the originating LEC, the IXC and the terminating LEC. When that customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a).[175] This obligation may be enforced through a section 208 complaint before the Commission.[176]

B. Section 214 and Discontinuance of Service

95. Section 214 of the Communications Act and section 63.71 of the Commission's rules govern an IXC's withdrawal of service. Section 214 of the Communications Act provides, in relevant part, that "[n]o carrier shall discontinue, reduce, or impair service to a community, or part of a community, unless and until there shall first have been obtained from the Commission a certificate that neither the present nor future public convenience and necessity will be adversely affected thereby."[177] In light of the solution we adopt herein, we need not address the application of either section 214 or our rule 63.17.

96. Above, we conclude that it would be a violation of section 201(a) for an IXC to refuse CLEC access service, either terminating or originating, where the CLEC has tariffed access rates within our safe harbor and, in the case of originating access, where the IXC is already providing service to other members in the same geographical area. Since section 201(a) already prohibits such a withdrawal of service, we need not address the question of whether section 214 applies to an IXC that finds itself in that position.

97. The remaining possible scenario to which section 214 might apply is that in which a CLEC wishes to charge access rates above our benchmark and an IXC will not agree to pay them. Under the rules we adopt today, a CLEC must charge the benchmark rate during the pendency of negotiations or if the parties cannot agree to a rate in excess of the benchmark. In either case, since the benchmark rate is conclusively presumed reasonable, an IXC cannot refuse to provide service to an end user served by the CLEC without violating section 201. Here again, we need not address the applicability of section 214.

V. FURTHER NOTICE OF PROPOSED RULEMAKING

98. Shortly before we issued this item, AT&T asserted, for the first time in this proceeding, that CLEC originating 8YY, toll-free traffic should be subject to a different

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[175] Naturally, our decision in this regard does not mean that an IXC would be amenable to suit under section 201(a) if it received a request for service to or from an area of the country that it does not otherwise serve. Thus, for example, this order does not place a section 201(a) obligation on a Bell operating company to accept originating access traffic from one of its in-region states for which it has not yet received section 271 authority to carry interLATA traffic.

[176] 47 U.S.C. 208(a). This section of the statute explicitly states that "[n]o complaint shall . . . be dismissed because of the absence of direct damage to the complainant." *Id.*

[177] 47 U.S.C. § 214.

benchmark scheme than other categories of switched access traffic.[178] AT&T argues that the benchmark for CLEC 8YY traffic should immediately move to the access rate of the competing ILEC and that CLECs should be mandatorily detariffed above that point.[179] In support of this position, AT&T asserts that certain CLECs with higher access charges attempt to obtain as customers end users that typically generate high volumes of 8YY traffic, such as hotels and universities. AT&T further asserts that some CLECs then "install limited, high-capacity facilities designed only to handle 8YY traffic" and "share their access revenues with the customers generating the [8YY] traffic" through agreements that provide for payments to the end user based on the level of 8YY traffic it generates.[180] AT&T contends that such arrangements do not promote the development of local exchange competition. Rather, it argues that these arrangements merely create the incentive for end users artificially to generate heavy 8YY traffic loads, which, in turn generate revenues for CLECs and their end-user customers.[181]

99. Given the paucity of record evidence on this issue, we seek comment generally on AT&T's proposal immediately to benchmark CLEC 8YY access services to the ILEC rate. Is the generation of 8YY traffic in order to collect greater access charges, as AT&T complains, something that the Commission should attempt to address through a rulemaking, or should the IXCs be left to address specific instances of abuse directly with the relevant CLEC, with the aid of the Commission's complaint process where appropriate?[182] In this regard, we note AT&T's assertion that one recent case of apparent abuse, confirmed by WorldCom, arose from the sequential dialing of over 800,000 8YY calls by a single end user.[183] It appears that, even without the rule it now requests, AT&T may, through discussions with the relevant CLEC, have been able to act to prevent payment for improperly generated 8YY access minutes.

100. We seek comment on the magnitude of the potential problem with 8YY traffic that AT&T identifies. AT&T estimates that approximately 30% of its CLEC access traffic is generated by 8YY aggregators that, it speculates, have revenue-sharing agreements with their end-user subscribers.[184] Is this an accurate figure across the industry? How many minutes and what premium over the competing ILEC rate does this represent? More generally, what

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[178] *See* March 29, 2001 letter of Robert Quinn, AT&T, to Dorothy Attwood, Chief, Common Carrier Bureau, CC Dkt. No. 96-262 (AT&T March 29, 2001 letter); April 3, 2001 letter of Robert Quinn, AT&T, to Jeff Dygert, Assistant Chief, Common Carrier Bureau, CC Dkt. No. 96-262 (AT&T April 3, 2001 letter).

[179] *See* AT&T March 29, 2001 letter at 1-2.

[180] *Id.* at 2.

[181] AT&T April 3, 2001 letter at 2.

[182] As AT&T indicates, the question of the propriety of a CLEC's revenue-sharing agreement is before the Commission in the complaint proceeding styled *U.S. TelePacific Corp v. AT&T*, File No. EB-00-MD-010 (complaint filed June 16, 2000).

[183] *See* Declaration of William J. Taggart III, paragraphs 3-4 (appended to AT&T April 3, 2001 letter).

[184] AT&T April 3, 2001 letter at 2. AT&T estimates that this translates into a premium of approximately $38 million above what it would have paid for similar services at the ILEC rate. *Id.*

proportion of CLEC access traffic is composed of originating 8YY service? What proportion of CLEC end users have 8YY revenue-sharing agreements with their carrier?

101. Are CLECs continuing to offer 8YY revenue-sharing agreements to their new end users, or are they currently available only to end users that negotiated them at some point in the past? Do CLECs notice a difference in the 8YY traffic patterns generated by end users with revenue-sharing agreements, compared to those end users without such agreements? What are the typical terms of a revenue-sharing agreement? Do they provide for payment of a per-minute fee for 8YY traffic, a per-call fee or some other arrangement? What is the magnitude of the fee paid? How, if at all, will the Commission's imposition of the switched-access benchmark affect CLECs' existing revenue-sharing agreements?

102. We are concerned that AT&T's proposed solution to the problem it identifies may paint with too broad of a brush. Does the existence of some CLECs' revenue-sharing agreements justify immediately limiting CLEC tariffed access rates for all 8YY traffic to the rate of the competing ILEC? Should the Commission instead impose such a limitation only on those CLECs that actually offer revenue-sharing agreements to their end users?

103. Additionally, we seek comment on AT&T's assertion that it promotes neither appropriate policy goals nor the development of local exchange competition when a CLEC carries an end user's 8YY traffic without also providing that end user with local exchange service or other types of access service.[185] Would we be justified in immediately tying 8YY access tariffs to the ILEC rate for all CLECs, regardless of the services that they provide to their end users? Or would such a rule be appropriate, if at all, only for those CLECs that carry exclusively their end users' 8YY traffic? How does the presence or absence of revenue-sharing agreements, discussed above, fit into the analysis of whether a CLEC's service offerings support restricting their tariffed 8YY access rates to the competing ILEC's rate?

104. We question whether, at bottom, CLEC 8YY traffic is inherently worthy of lower access charges than are other types of access traffic. A CLEC provides a closely similar service and uses similar or identical facilities, regardless of whether it provides originating 8YY access service, or terminating or originating access service for conventional 1+ calls. Accordingly, we seek comment on whether the presence of certain incentives to generate artificially high levels of 8YY traffic necessarily justifies reducing the tariffed rate for all such traffic immediately to the ILEC rate. Should we instead presume that there exists some "legitimate" level of CLEC 8YY traffic that should be treated as other categories of access traffic and subject to a lower benchmark only the traffic that exceeds this "legitimate" level? If this is an appropriate alternative, how should we define the level at or below which 8YY access traffic may be subject to the higher tariff benchmark that we permit for other categories of CLEC access service? Additionally, we seek comment on any other reasons that CLEC 8YY traffic should be subjected to a different tariff benchmark than are other categories of CLEC access traffic. We also seek comment on whether, if we adopt a different benchmark for 8YY access services, there are any different tariff filing requirements or timetables that we might adopt to account for the resources available to small entities. Commenters should indicate whether and how such provisions would

[185] AT&T April 3, 2001 letter at 2.

be consistent with our goals in this proceeding, including our obligation to ensure just and reasonable rates for interstate access services.

VI. PROCEDURAL MATTERS

A. Paperwork Reduction Act

105. The action contained herein has been analyzed with respect to the Paperwork Reduction Act of 1995 (PRA) and found to impose new or modified reporting and/or recordkeeping requirements or burdens on the public. Implementation of these new or modified reporting and/or recordkeeping requirements will be subject to approval by the Office of Management and Budget (OMB) as prescribed by the PRA, and will go into effect upon announcement in the Federal Register of OMB approval.

B. Final Regulatory Flexibility Analysis

106. As required by the Regulatory Flexibility Act (RFA),[186] an Initial Regulatory Flexibility Analysis (IRFA) was incorporated in the *Pricing Flexibility Order and Further Notice*.[187] The Commission sought written comments on the proposals in the *Pricing Flexibility Order and Further Notice*, including the IRFA. The Commission's Final Regulatory Flexibility Analysis (FRFA) in this order conforms to the RFA, as amended.[188]

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[186] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[187] *Access Charge Reform*, CC Docket No. 96-262, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order and Further Notice*).

[188] *See* 5 U.S.C. § 604. To the extent that any statement contained in this FRFA is perceived as creating ambiguity with respect to our rules or statements made in preceding sections of this Order, the rules and statements set forth in those preceding sections shall be controlling.

Although we conduct a final regulatory flexibility analysis in this order, we note that we could also certify the rules we adopt will not "have a significant economic impact on a substantial number of small entities." 5 U.S.C. § 605(b). CLECs have historically been subject to the just and reasonable rate requirement under section 201(b). However, in the past, the Commission has not adopted specific rules to guide CLECs in tariffing their access rates. In this order, we adopt a rules that will remove any uncertainty regarding the justness and reasonableness of CLECs' tariffed rates. In doing so, we relieve CLECs of the burdens previously associated with challenges to the justness and reasonableness of their tariffed access rates. Furthermore, as we have noted above, many CLECs with tariffed rates above the benchmark have been receiving at most partial payment for their access services. *See supra* paragraph 60. This order's creation of a presumption that rates at or below the tariff benchmark are just and reasonable will facilitate CLECs' attempts to collect their access charges through an action in the appropriate court. This will have a positive economic impact on the CLECs.

Similarly, all IXCs, including small entities, will benefit from reductions, both immediate and over time, in the tariffed access rates charged by CLECs. Moreover, IXCs, including any small businesses, will benefit from increased regulatory certainty about CLEC access rates as a result of this order. We expect that this will reduce the need for these IXCs to take other actions to ensure just and reasonable rates, such as initiating complaint proceedings. Accordingly, we conclude that there will be a positive impact for small IXCs.

1. Need for, and Objectives of, the Proposed Action

107. With this order, we address a number of interrelated issues concerning charges for interstate switched access services provided by competitive local exchange carriers (CLECs) and the obligations of interexchange carriers (IXCs) to exchange access traffic with CLECs. In so doing, we seek to ensure, by the least intrusive means possible, that CLEC access charges are just and reasonable. We also seek to reduce regulatory arbitrage opportunities that previously have existed with respect to tariffed CLEC access services. This order is designed to spur more efficient local competition and to avoid disrupting the development of competition in the local telecommunications market.

108. We accomplish these goals by revising our tariff rules more closely to align tariffed CLEC access rates with those of the incumbent LECs. Under the detariffing regime we adopt, CLEC access rates that are at or below the benchmark that we set will be presumed to be just and reasonable and CLECs may impose them by tariff. Above the benchmark, CLEC access services will be mandatorily detariffed, so CLECs must negotiate higher rates with the IXCs. However, to avoid too great a disruption for competitive carriers (many of which may fall within the SBA's definition of a small entity), we implement this approach in a way that will cause CLEC tariffs to ramp down over time until they reach the level tariffed by the incumbent LEC. This mechanism will mimic the operation of the marketplace, as competitive LECs ultimately will have tariffed rates at or below the prevailing market price. At the same time, this approach maintains the ability of CLECs to negotiate access service arrangements with IXCs at any mutually agreed upon rate. In this order, we also make clear that an IXC's refusal to serve the customers of a CLEC that tariffs access rates within our safe harbor constitutes a violation of the duty of all common carriers to provide service upon reasonable request.

2. Summary of Significant Issues Raised by Public Comment in Response to the IRFA

109. In the *Pricing Flexibility Order and Further Notice*, we sought comment on various, alternative proposals to prevent CLECs from charging unreasonable rates for their switched access services. In the IRFA, we tentatively concluded that the proposed rule changes would have no effect on the administrative burdens of competitive LECs because they would have no additional filing requirement.[189] In response to the Notice, we received comments from more than 40 parties and held a series of ex parte meetings addressing these issues. Among those parties, only ALLTEL and the Rural Independent Competitive Alliance (RICA) commented specifically on the IRFA.[190]

110. We disagree with ALLTEL's contention that the Commission's IRFA was incomplete.[191] ALLTEL argues that the Commission, in the IRFA, did not adequately address: 1)

[189] *See also Safe Harbor Public Notice*, ¶ 11 (inviting further comment on the IRFA that was included in the *Pricing Flexibility Order and Further Notice*). We note that no parties addressed the IRFA in their comments to the *Safe Harbor Public Notice*.

[190] ALLTEL Comments at 3-4; RICA Comments at 18.

[191] ALLTEL Comments at 3-4.

proposals in the Notice that might affect originating access and "open-end" access services; 2) the potential burden on CLECs to modify their tariffs or to eliminate those tariffs and negotiate individual contracts;[192] and 3) potential burdens on other carriers, such as ILECs (which, ALLTEL asserts, might have to modify their tariffs and perform cost studies). To the contrary, for several different reasons, we conclude that the IRFA gave adequate notice of our proposals to address CLEC access service. First, we chose to discuss, in the IRFA, the primary proposals set out in the Notice, though we sought comment in the Notice on a number of variations to those primary proposals. Thus, while the IRFA only expressly mentions proposals to address terminating access, it includes cross-references to the text of the Notice, which discusses all variations of the Commission's proposals.[193] Moreover, we observe that the Notice and the IRFA were sufficient to generate a very sizable record, including comments from many competitive LECs that likely would be considered small businesses under the closest applicable SBA definition. The IRFA provided sufficient information so that the public could react to the Commission's proposals in an informed manner.[194]

111. Second, with respect to the administrative burdens associated with our proposals in the Notice, we have reconsidered our tentative conclusion to adopt mandatory detariffing.[195] We note that many commenters, large and small, oppose the Commission's proposal to adopt mandatory detariffing for all CLEC access services. These commenters, like ALLTEL, argue that while mandatory detariffing would reduce burdens associated with filing tariffs, it would increase administrative burdens overall by imposing greater transaction costs on CLECs and IXCs.[196] Having received these almost unanimous comments, we conclude that we should not adopt our proposal to implement mandatory detariffing, at this time. Rather, we only adopt mandatory detariffing to the extent that a CLEC chooses to charge a rate that exceeds our defined benchmark. Under this approach, CLECs and IXCs – both large and small – will be able to continue to enjoy the benefits of a tariffed service.

112. Similarly, we take into account RICA's assertion that mandatory detariffing, as proposed, might cause particular hardship for CLECs operating in rural areas.[197] Again, we have factored these comments into our decision to adopt a benchmark system, pursuant to which CLECs will continue to be permitted to file tariffs for their switched access services. Thus, we

[192] *See also* RICA Comments at 18 (arguing that the IRFA does not adequately assess the impact of the proposals on small CLECs).

[193] *Pricing Flexibility Order and Notice*, 14 FCC Rcd at 14353.

[194] In considering ALLTEL's argument, we note that many commenters in the proceeding addressed the administrative burdens associated with our proposals. We have taken the opportunity to reconsider our initial conclusions in this order and FRFA. *See infra* paragraphs 119 through 127.

[195] Parenthetically, we believe that our tentative conclusion, in the IRFA, that there would be no effect on CLEC administrative burdens was reasonable, given that the Commission proposed to reduce, not increase, tariff filings. We have, nevertheless, taken ALLTEL's arguments into account, in reconsidering our proposal to adopt mandatory detariffing for all CLEC switched access services.

[196] ALLTEL Comments at 3-4;

[197] RICA Comments at 18-19.

believe that our approach adequately addresses the concerns of these CLEC commenters. Moreover, we restate that our decision to detariff rates above the benchmark was motivated by our conclusion that rates above that level would be excessive (absent an agreement between the parties) and would place an inappropriate burden on IXCs and long distance customers.[198] In this regard, we note that even the small CLECs covered by our RFA analysis are clearly prohibited by the Act and our rules from charging unjust or unreasonable rates.[199] This order is designed to prevent such unjust or unreasonable rates.

113. Finally, we reject ALLTEL's assertion that the proposals in the Notice would place additional regulatory burden on ILECs. The proposals applied solely to CLECs and IXCs and we find ALLTEL's arguments to be unsupported in the record.[200]

114. Although not responding specifically to the IRFA, many parties commented generally on the potential regulatory burdens associated with the Commission's various proposals. In brief, IXC commenters typically sought a mechanism to constrain CLEC access charges.[201] In contrast, CLEC commenters typically sought to preserve their freedom to set access rates as they choose.[202] We note that there are small entities on both sides of this debate. We encourage readers of this FRFA also to consult the complete text of this order, which describes in detail our analysis of the issues.[203]

3. Description and Estimate of the Number of Small Entities to Which the Rules Apply

115. The RFA directs agencies to provide a description of and, where feasible, an estimate of the number of small entities that may be affected by the proposed rules, if adopted.[204] To estimate the number of small entities that may be affected by the proposed rules, we first consider the statutory definition of "small entity" under the RFA. The RFA generally defines "small entity" as having the same meaning as the term "small business," "small organization," and "small governmental jurisdiction."[205] In addition, the term "small business" has the same meaning as the term "small business concern" under the Small Business Act, unless the Commission has developed one or more definitions that are appropriate to its activities.[206] Under the Small

[198] *See supra* paragraphs 37 - 39.

[199] 47 U.S.C. §§ 201, 202.

[200] *See, e.g.*, *Pricing Flexibility Order and Notice*, 14 FCC Rcd 14221, 14338-49.

[201] *See, e.g.*, Sprint Safe Harbor Comments at 1.

[202] *See, e.g.*, CoreComm Comments at 1.

[203] *See also infra*, paragraphs 119 - 127 (discussing steps taken to minimize significant economic impact on small entities, and significant alternatives considered).

[204] 5 U.S.C. § 603(b)(3).

[205] 5 U.S.C. § 601(6).

[206] 5 U.S.C. § 601(3) (incorporating by reference the definition of "small business concern" in 15 U.S.C. § 632). Pursuant to 5 U.S.C. § 601(3), the statutory definition of a small business applies "unless an agency after consultation (continued….)

Business Act, a "small business concern" is one that: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) meets any additional criteria established by the SBA.[207] The SBA has defined a small business for Standard Industrial Classification (SIC) categories 4812 (Radiotelephone Communications) and 4813 (Telephone Communications, Except Radiotelephone) to be small entities when they have no more than 1,500 employees.[208]

116. The rules adopted in this order apply to CLECs and IXCs. Neither the Commission nor the SBA has developed a definition of small CLECs or small IXCs. The closest applicable definition for these carrier-types under SBA rules is for telephone communications companies other than radiotelephone (wireless) companies.[209] The most reliable source of information regarding the number of these carriers nationwide of which we are aware appears to be the data that telecommunications carriers file annually in connection with the Commission's universal services requirements.[210] According to our most recent data, 349 companies reported that they were engaged in the provision of either competitive access services or competitive local exchange services (referred to collectively as CLECs) and 204 companies reported that they were engaged in the provision of interexchange services.[211] Among these companies, we estimate that approximately 297 of the CLECs have 1500 or fewer employees and that approximately 163 of the IXCs have 1500 or fewer employees. Although it seems certain that some of these carriers are not independently owned and operated, we are unable at this time to estimate with greater precision the number of these carriers that would qualify as small business concerns under SBA's definition. Consequently, we estimate that there are 297 or fewer small CLECs, and 163 or fewer small IXCs that may be affected by the decisions and rules adopted in this order.

4. Description of Reporting, Recordkeeping, and Other Compliance Requirements

117. ALLTEL asserts that the Commission's proposals in the Notice "could require CLECs to modify their tariffs or to eliminate those tariffs and negotiate individual contracts."[212] This argument was echoed by other commenters who assert that the Commission's proposal to adopt mandatory detariffing would increase carriers' transaction costs, even though tariff filing

(Continued from previous page)
with the Office of Advocacy of the Small Business Administration and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition in the Federal Register."

[207] 15 U.S.C. § 632. *See, e.g., Brown Transport Truckload, Inc. v. Southern Wipers, Inc.*, 176 B.R. 82 (N.D. Ga. 1994).

[208] 13 C.F.R. § 121.201.

[209] 13 C.F.R. § 121.210, SIC Code 4813.

[210] *See* Industry Analysis Division, Federal Communications Commission, TRENDS IN TELEPHONE SERVICE, Tbl. 5.3 (Dec. 2000) (*Trends in Telephone Service*); 47 C.F.R. § 54.711 *et seq.*

[211] *Trends in Telephone Service*, Table 5.3

[212] ALLTEL Comments at 4.

requirements would be eliminated.[213] We acknowledge these concerns and have decided not to adopt mandatory detariffing for all CLEC switched access services, at this time.[214]

118. Thus, pursuant to this order, we allow competitive LECs to continue to file tariffs, as long as the rates for those services are within the defined safe harbor. We recognize that many CLECs -- we estimate between 100-150 CLECs -- may be required to re-file their tariffs in order to comply with this order. Given that ALTS, an organization which represents many CLECs, has supported this proposal, we believe that any increased burden will be outweighed by the benefits associated with resolving these issues. Further, we conclude that it is a burden that is justified by the Act's requirement that all rates be just and reasonable. We are optimistic that this approach will provide a bright line rule that permits a simple determination as to whether CLEC access charges are just and reasonable and, at the same time, will enable both sellers and purchasers of CLEC access services to avail themselves of the convenience of a tariffed service offering. Thus, we believe that this approach should minimize reporting and recordkeeping requirements on IXCs and CLECs, including any small entities, while also providing carriers with considerable flexibility.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

119. Through this order, we seek to resolve contentious issues that have arisen with respect to CLEC switched access services. Because there are both small entity IXCs and small entity CLECs – often with conflicting interests in this proceeding -- we expect that small entities will be affected by any approach that we adopt. As discussed below, we conclude that our approach best balances these goals by removing opportunities for regulatory arbitrage and minimizing the burdens placed on carriers.

120. In this order, we adopt a benchmark approach to CLEC access charges. We find that this approach will minimize the impact of the rules on small entities in several ways. First, it allows small business CLECs to continue to enjoy the convenience of offering a tariffed service, an advantage sought by CLECs, many of which may be relatively new and small businesses. Second, it will enable small IXCs to purchase most access services via tariff, rather than having to negotiate agreements with every CLEC. Finally, our approach ensures that IXCs will continue to accept and pay for CLEC switched access services, as long as the CLEC tariffs rates within the Commission's benchmarks.[215] Many CLECs argued that such an outcome was essential for new, relatively small CLECs to continue to offer services.[216]

121. In this order, we consider and reject several alternatives to the benchmark approach. In particular, we also considered: 1) continuing to rely on market forces to constrain CLEC switched access charges; 2) adopting a mandatory detariffing policy, which would prohibit

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[213] *See, e.g.,* ALTS Comments at 35 ("mandatory detariffing could be very costly for CLECs").

[214] *See supra* paragraph 42.

[215] We note that many CLECs sought action from the Commission precisely because IXCs threatened to cut off traffic and had stopped paying for CLEC switched access services. *See* RICA Comments at 21.

[216] *See, e.g.,* RICA Comments 18-20.

CLECs from filing any tariffs for their switched access services; and, 3) subjecting CLECs to the panoply of regulation with which incumbents must comply.

122. Although many CLECs contend that the Commission need not take any particular action with respect to CLEC switched access charges, we disagree.[217] We conclude that our action is compelled by several factors, including: 1) our desire to reduce regulatory arbitrage opportunities and to revise our rules to allow competitive market forces to constrain CLEC access charges; 2) growing evidence that CLEC switched access charges do not appear to be constrained by market forces; 3) significant concerns that allowing IXCs to refuse to exchange traffic without restriction may lead to a decline in the universal connectivity upon which telephone users have come to rely.

123. On the other hand, we do not impose mandatory detariffing for all CLEC switched access services because we believe that our benchmark approach will provide a less drastic alternative for carriers, including small entity CLECs and small entity IXCs.[218] For example, by enabling CLECs to continue to file tariffs within a safe harbor range, we respond to concerns expressed by many CLECs that complete detariffing of CLEC services would cause significantly increased transaction costs. We note, as well, that many IXC commenters supported this solution.[219]

124. We also conclude that our benchmark approach is more desirable than subjecting CLECs to the panoply of ILEC regulation. The Commission has long stated its desire to allow competitive forces to constrain access charges. By adopting a benchmark approach, we continue to allow CLECs to tariff their services, while ensuring IXCs and long distance customers, generally, that CLEC rates will be just and reasonable. We note that no commenter favors subjecting CLECs to dominant carrier regulation.[220]

125. We also adopted a transition mechanism that should minimize the impact of the decision on all carriers, including small entities.[221] While we considered adopting a benchmark that would immediately drop CLEC access rates to that level charged by the competing incumbent LEC, we instead implement the benchmark through a three-year transition. This will allow CLECs, including any small businesses, a period of flexibility during which they can conform their business models to the new market paradigm that we adopt, herein. At the same time, by effecting significant reductions in switched access charges immediately, we will minimize the impact that excessive access rates might have on IXCs, including any small businesses. We believe that this transition should significantly reduce the impact of this order on small businesses.

126. In addition, by clarifying rules for the transport and origination of traffic between CLECs and IXCs, this order should continue to ensure the ubiquity of a fully interconnected

[217] *See, e.g.,* CoreComm Comments at 1.

[218] *See supra* paragraphs 35 - 44.

[219] *See, e.g.,* WorldCom Safe Harbor Comments at 3-6.

[220] *See, e.g.,* ALTS Reply Comments at 6.

[221] *See supra* paragraph 52.

telecommunications network that consumers have come to expect.[222] We considered counter-proposals from some carriers that there should be no obligation to exchange traffic;[223] however, we believe that our approach will best satisfy the expectations of end users who have come to rely on a seamless, fully-interconnected telephone network. Further, these rules should provide considerable assurance to CLECs, many of which may be small businesses, that seek to offer their customers access to the broadest range of IXCs possible. Many of these CLECs asserted that, without such a rule, larger, more established IXCs likely would refuse to exchange traffic with them, essentially driving them out of business.[224] Our rules should address this concern by requiring IXCs to exchange traffic with CLECs that tariff rates within the benchmark, where IXCs already exchange traffic with other carriers in the same geographic area.

127. Overall, we believe that this order best balances the competing goals that we have for our rules governing CLEC switched access charges. We have not identified any additional alternatives that would have further limited the impact on small entities across-the-board while remaining consistent with Congress' pro-competitive objectives set out in the 1996 Act.

128. <u>Report to Congress</u>: The Commission will send a copy of the *CLEC Access Charge Reform Order*, including this FRFA, in a report to be sent to Congress pursuant to the Congressional Review Act. *See* 5 U.S.C. § 801(a)(1)(A). In addition, the Commission will send a copy of this *CLEC Access Charge Reform Order*, including FRFA, to the Chief Counsel for Advocacy of the Small Business Administration. A copy of the *CLEC Access Charge Reform Order* and FRFA (or summaries thereof) will also be published in the Federal Register. *See* 5 U.S.C. § 604(b).

C. Initial Regulatory Flexibility Analysis

129. As required by the Regulatory Flexibility Act (RFA),[225] the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on small entities by the policies and rules proposed in this *CLEC Access Order and Further Notice* (Further Notice). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on this Notice, which are set out in Section VI of this Order. The Commission will send a copy of this Further Notice, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA).[226] In addition, this Notice and IRFA (or summaries thereof) will be published in the Federal Register.[227]

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[222] *See supra* paragraphs 90 - 94.

[223] *See, e.g.,* AT&T Comments at 27.

[224] *See, e.g.,* Minnesota CLEC Comments at 12.

[225] *See* 5 U.S.C. § 603. The RFA, *see* 5 U.S.C. § 601 *et. seq.*, has been amended by the Contract With America Advancement Act of 1996, Pub. L. No. 104-121, 110 Stat. 847 (1996) (CWAAA). Title II of the CWAAA is the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA).

[226] *See* 5 U.S.C. § 603(a).

[227] *See id.*

1. Need for, and Objectives of, the Proposed Action

130. In this *CLEC Access Order and Further Notice*, the Commission sets a benchmark for CLEC interstate switched access services that declines over time to the competing ILEC rate.[228] In the Further Notice, the Commission seeks comment on a proposal offered by AT&T to move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and to mandatorily detariff CLEC interstate access rates for such 8YY traffic above that point.[229] The Commission seeks comment on the nature and extent of the problem alleged by AT&T and on various means of addressing CLEC 8YY access service rates. Through the Further Notice, the Commission seeks to ensure that CLEC rates for 8YY access services are just and reasonable.

2. Legal Basis

131. The legal basis for the action as proposed for this rulemaking is contained in sections 1-5, 201-205, 208, 251-271, 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 208, 251-271, 403, 502, and 503.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Action May Apply

132. We discuss above at paragraphs 115 to 116 the small entities to which this proposed action may apply. We incorporate that discussion here by reference.

4. Description of Proposed Reporting, Recordkeeping, and Other Compliance Requirements

133. In the *CLEC Access Order*, the Commission sets a benchmark for CLEC interstate switched access services that declines over time to the competing ILEC rate. Through the Further Notice, the Commission seeks comment on whether it should move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and mandatorily detariff CLEC interstate access rates for such 8YY access services above that point. Adopting this proposal may require CLECs to refile tariffs with the Commission or to negotiate contracts with IXCs, rather than filing tariffs.

5. Steps Taken to Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

134. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives: (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use

[228] *See supra* paragraphs 35 - 44 (discussing tariff benchmark mechanism).

[229] *See* AT&T March 29, 2001 letter at 1-2.

of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.[230]

135. As mentioned above, through the Further Notice, the Commission seeks to ensure that CLEC rates for 8YY access services are just and reasonable. Our proposals may affect CLECs, by altering the rates that they may tariff for 8YY access services. At the same time, our proposals might affect indirectly IXCs that must pay access charges for 8YY traffic. Because there are both small entity IXCs and small entity CLECs – with conflicting interests in this proceeding -- we expect that small entities may be affected by any approach that we adopt. We seek an approach that both reduces opportunities for regulatory arbitrage and minimizes the burdens placed on carriers.

136. Among the alternatives proposed, the Commission seeks comment whether it should move immediately the benchmark for CLEC 8YY access services to the competing ILEC rate and mandatorily detariff CLEC interstate access rates for such 8YY access services above that point. The Commission seeks comment, to the extent that it finds that a separate benchmark is appropriate for 8YY access rates, on whether it should instead impose such a limitation only on those CLECs that offer revenue-sharing agreements to their end users or only on those CLECs that do not offer local exchange services in addition to their 8YY access services. Alternatively, the Commission seeks comment on whether the Commission should take no additional action and whether IXCs should be left to address specific instances of abuse directly with the relevant CLEC, with the aid of the Commission's complaint process where appropriate.

137. We also seek comment on whether, if we adopt a different benchmark for 8YY access services, there are any different tariff filing requirements or timetables that we might adopt to account for the resources available to small entities.[231] We ask commenters to indicate whether and how such provisions would be consistent with our goals in this proceeding, including our obligation to ensure just and reasonable rates for interstate access services.

6. Federal Rules that May Duplicate, Overlap, or Conflict With the Proposed Rules

138. None.

D. Comment Filing Procedures

139. Pursuant to sections 1.415, 1.419, and 1.430 of the Commission's rules, 47 C.F.R. §§ 1.415, 1.419, 1.430, interested parties may file comments within 30 days after publication in the Federal Register, and reply comments within 60 days after publication in the Federal Register. All filings should refer to CC Docket No. 96-262. Comments may be filed using the Commission's Electronic Comment Filing System (ECFS) or by filing paper copies.[232] Comments filed through the ECFS can be sent as an electronic file via the Internet to <http://www.fcc.gov/e-

[230] 5 U.S.C. § 603(c).

[231] *See supra* paragraphs 98 - 104.

[232] *See Electronic Filing of Documents in Rulemaking Proceedings*, 63 Fed. Reg. 24121 (1998).

file/ecfs.html>. Generally, only one copy of an electronic submission must be filed. In completing the transmittal screen, commenters should include their full name, Postal Service mailing address, and the applicable docket number, CC Docket No. 96-262. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions for e-mail comments, commenters should send an e-mail to <ecfs@fcc.gov>, and should include the following words in the body of the message: "get form <your e-mail address>." A sample form and directions will be sent in reply.

140. Parties that choose to file by paper must file an original and four copies of each filing. All filings must be sent to the Commission's Secretary, Magalie Roman Salas, Office of the Secretary, Federal Communications Commission, Room TW-B204, 445 12th Street, S.W., Washington, D.C. 20554. Regardless of whether parties choose to file electronically or by paper, parties should also serve: (1) Jane Jackson, Common Carrier Bureau, 445 12th Street, S.W., Room 5-A225, Washington, D.C. 20554; and (2) the Commission's copy contractor, International Transcription Service, Inc. (ITS), 445 12th Street, S.W., Room CY-B402, Washington, D.C. 20554, (202) 857-3800, with copies of any documents filed in this proceeding. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room CY-A257, 445 12th Street, S.W., Washington, D.C. 20554.

141. Parties that choose to file by paper should also submit their comments on diskette to the Commission's copy contractor, International Transcription Service, Inc., 1231 20th Street, N.W., Washington, D.C. 20036. These submissions should be on a 3.5-inch diskette formatted in a Windows-compatible format using Microsoft Word or compatible software. The diskette should be accompanied by a cover letter and should be submitted in "read only" mode. The diskette should be clearly labeled with the commenter's name, proceeding (including the docket number, CC Docket No. 96-262), type of pleading (comment or reply comment), date of submission, and the name of the electronic file on the diskette. The label should also include the following phrase: "Disk Copy—Not an Original." Each diskette should contain only one party's pleadings, preferably in a single electronic file.

142. Comments and reply comments must comply with section 1.49 and all other applicable sections of the Commission's rules.[233] We also direct all interested parties to include the name of the filing party and the date of the filing on each page of their comments and reply comments.

143. This proceeding will continue to be governed by "permit-but-disclose" *ex parte* procedures that are applicable to non-restricted proceedings under 47 C.F.R. § 1.1206. This will provide an opportunity for all interested parties to receive notice of the various issues raised in *ex parte* presentations made to the Commission in this proceeding; it will also allow interested parties to file responses or rebuttals to proposals made on the record in this proceeding. We find that it is in the public interest to continue this proceeding's designation as "permit-but-disclose."

144. Alternative formats (computer diskette, large print, audio recording, and Braille) are available to persons with disabilities by contacting Brian Millin at (202) 418-7426 voice, (202)

[233] *See* 47 C.F.R. § 1.49.

418-7365 TTY, or <bmillin@fcc.gov>. This further notice of proposed rulemaking can also be downloaded in Microsoft Word and ASCII formats at <http://www.fcc.gov/ccb/cpd>.

VII. ORDERING CLAUSES

145. Accordingly, IT IS ORDERED that, pursuant to sections 1-5, 201-205, 303(r), 403, 502, and 503 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 151-155, 201-205, 303(r), 403, 502, and 503, this REPORT AND ORDER AND FURTHER NOTICE OF PROPOSED RULEMAKING, with all attachments, including revisions to Part 61 of the Commission's rules, 47 C.F.R Part 61, is hereby ADOPTED.

146. IT IS FURTHER ORDERED that the rule revisions adopted in this Order SHALL BECOME EFFECTIVE upon approval by OMB of the modified information collection requirements adopted herein, but no sooner than thirty days after publication in the Federal Register. The Commission shall place a notice in the Federal Register announcing the effective date of the requirements and regulations adopted herein.

147. IT IS FURTHER ORDERED that the Commission's Consumer Information Bureau, Reference Information Center, SHALL SEND a copy of this CLEC Access Charge Order and Further Notice, including the Final and Initial Regulatory Flexibility Analyses, to the Chief Counsel for Advocacy of the Small Business Administration.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary

APPENDIX A
Parties Filing Pleadings

I. *PRICING FLEXIBILITY ORDER & NOTICE*

A. Comments

1. Ad Hoc Telecommunications Users Committee (Ad Hoc)
2. State of Alaska (Alaska)
3. Allegiance Telecom, Inc. (Allegiance)
4. ALLTEL Communications, Inc. (ALLTEL)
5. Association for Local Telecommunications Services (ALTS)
6. American Public Communications Council (APCC)
7. AT&T Corp. (AT&T)
8. Bell Atlantic Telephone Companies (Bell Atlantic)
9. BellSouth Corporation (BellSouth)
10. Cable & Wireless USA, Inc. (Cable & Wireless)
11. Competitive Communications Group (CCG)
12. Competitive Telecommunications Association (CTA)
13. CoreComm, Limited (CoreComm)
14. Cox Communications, Inc. (Cox)
15. CTSI, Inc. (CTSI)
16. Focal Communications Corporation, Hyperion Telecommunications, Inc. d/b/a Adelphia Business Solutions (Focal/Hyperion)
17. General Services Administration (GSA)
18. GTE Service Corporation (GTE)
19. State of Hawaii (Hawaii)
20. MCI WorldCom, Inc. (WorldCom)
21. McLeodUSA Telecommunications Services, Inc. (McLeodUSA)
22. MediaOne Group, Inc. (MediaOne) **(ex parte/late filing)**
23. MGC Communications, Inc. (MGC)
24. Minnesota CLEC Consortium
25. National Rural Telecom Association (NRTA)
26. National Telephone Cooperative Association (NTCA)
27. New York Department of Public Service (NYDPS)
28. Organization for the Promotion and Advancement of Small Telecommunications Cos. (OPASTCO)
29. Ranier Cable, Inc. (RCI)
30. RCN Telecom Services, Inc. (RCN)
31. Rural Independent Competitive Alliance (RICA)
32. SBC Communications, Inc. (SBC)
33. Sprint Corporation (Sprint)
34. Telecommunications Resellers Association (TRA)
35. Teligent, Inc. (Teligent)
36. Time Warner Telecom (Time Warner)
37. Total Telecommunications Services (TTS)
38. U S West, Inc. (US West)
39. United States Telephone Association (USTA)

40. Winstar Communications, Inc. (Winstar)
41. Public Service Commission of Wisconsin (Wisconsin PSC)

B. Reply Comments

1. Allegiance
2. ALTS
3. Ad Hoc
4. AT&T
5. Bell Atlantic
6. BellSouth
7. CTSI, Inc.
8. State of Florida Public Service Commission (Fla. PSC)
9. Focal/Hyperion
10. GVNW Consulting, Inc. (GVNW)
11. GSA
12. GTE
13. ITCs, Inc. (ITCs)
14. WorldCom
15. Minnesota CLEC Consortium
16. MGC
17. RICA
18. SBC
19. Sprint
20. Time Warner
21. TRA
22. USTA
23. US West

II. *EMERGENCY PETITION PUBLIC NOTICE*

A. Comments

1. Allegiance **(ex parte/late filing)**
2. Association of Communications Enterprises (ASCENT)
3. AT&T
4. Buckeye Telesystem, Inc. (Buckeye)
5. Haxtun Telephone Company (Haxtun)
6. Montana Telecommunications Association (MTA)
7. NTCA
8. Sprint
9. Time Warner
10. TTS
11. U S West
12. USTA
13. WorldCom

B. Reply Comments

1. Allegiance
2. ASCENT
3. AT&T
4. Minnesota CLEC Consortium
5. Sprint
6. RICA
7. USTA

III. *MANDATORY DETARIFFING PUBLIC NOTICE*

A. Comments

1. Ad Hoc
2. Allegiance
3. ASCENT
4. ALTS
5. AT&T
6. CTSI, RCN Telecom Services, Inc. and Telergy, Inc. (CTSI Joint Commenters)
7. e.spire Communications, Fairpoint Communications Solutions Corp., Intermedia Communications Inc., Newsouth Communications Corp., Nextlink Communications, Inc. and Talk.com, Inc. (collectively Joint CLEC Commenters)
8. Fairpoint Communications Solutions Corp. (Fairpoint)
9. Focal Communications Corporation (Focal)
10. GSA
11. Global Crossing North America, Inc. (Global Crossing)
12. MGC Communications, Inc. d/b/a Mpower Communications Corp., ITC^DeltaCom, Inc. and Broadstreet Communications, Inc. (MGC Joint Commenters)
13. Minnesota CLEC Consortium
14. Prism Communications Services, Inc. (Prism)
15. RICA
16. Sprint
17. Teligent
18. Time Warner
19. Verizon Companies (Verizon)
20. Winstar
21. WorldCom
22. Z-Tel Communications, Inc. (Z-Tel)

B. Reply Comments

1. Ad Hoc
2. Allegiance
3. ALTS

4. ASCENT
5. AT&T
6. Cable & Wireless
7. Centennial Communications Corp. (Centennial)
8. Joint CTSI Commenters
9. Joint CLEC Commenters
10. Focal
11. GSA
12. MGC
13. Minnesota CLEC Consortium
14. RICA
15. Sprint
16. U.S. TelePacific Corp. (US TelePacific)
17. WorldCom

IV. *SAFE HARBOR PUBLIC NOTICE*

A. Comments

1. ALTS
2. ASCENT
3. AT&T
4. BayRing Communications and Lightship Telecom, LLC (collectively BayRing)
5. CTSI, Inc. and Madison River Communications
6. Eschelon Telecom, Inc. (Eschelon)
7. e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp. and XO Communications, Inc.
8. FairPoint Communications Solutions Corp. (FairPoint)
9. Focal Communicaitons Corporation, RCN Telecom Services, Inc. and Winstar Communications, Inc.
10. McLeodUSA Telecommunications Services, Inc.
11. Minnesota CLEC Consortium
12. NTCA
13. OPASTCO
14. RICA
15. Sprint
16. TDS Metrocom, Inc. (TDS)
17. USTA
18. WorldCom
19. Z-Tel

B. Reply Comments

1. AT&T
2. Ad Hoc
3. BayRing
4. CTSI, Inc.
5. Cox

6. e.spire Communications, Inc., KMC Telecom, Inc., Talk.com Holding Corp. and XO Communications, Inc.
7. Eschelon
8. FairPoint
9. Focal and Winstar
10. Minnesota CLEC Consortium
11. RICA
12. Sprint
13. Z-Tel

APPENDIX B – Final Rules

AMENDMENTS TO THE CODE OF FEDERAL REGULATIONS

Part 61, Subpart C, of Title 47 of the Code of Federal Regulations (C.F.R.) is amended by adding section 61.26 as follows:

61.26 Tariffing of competitive interstate switched exchange access services.

(a) *Definitions*. For purposes of this section 61.26, the following definitions shall apply:

(1) “CLEC” shall mean a provider of interstate exchange access services that does not fall within the definition of “incumbent local exchange carrier” in 47 U.S.C. § 251(h).

(2) “Competing ILEC” shall mean the incumbent local exchange carrier, as defined in 47 U.S.C. § 251(h), that would provide interstate exchange access service to a particular end user if that end user were not served by the CLEC.

(3) “Interstate switched exchange access services” shall include the functional equivalent of the ILEC interstate exchange access services typically associated with following rate elements: carrier common line (originating); carrier common line (terminating); local end office switching; interconnection charge; information surcharge; tandem switched transport termination (fixed); tandem switched transport facility (per mile); tandem switching.

(4) “Non-rural ILEC” shall mean an incumbent local exchange carrier that is not a “rural telephone company” under 47 U.S.C. § 153(37).

(5) The “rate” for interstate switched exchange access services shall mean the composite, per-minute rate for these services, including all applicable fixed and traffic-sensitive charges.

(6) “Rural CLEC” shall mean a CLEC that does not serve (i.e., terminate traffic to or originate traffic from) any end users located within either:

(i) Any incorporated place of 50,000 inhabitants or more, based on the most recently available population statistics of the Census Bureau or

(ii) An urbanized area, as defined by the Census Bureau.

(b) Except as provided in paragraphs (c) and (e) of this section, a CLEC shall not file a tariff for its interstate switched exchange access services that prices those services above the higher of:

(1) The rate charged for such services by the competing ILEC or

(2) The lower of:

(i) The benchmark rate described in paragraph (c) of this section or

(ii) The lowest rate that the CLEC has tariffed for its interstate exchange access services, within the six months preceding [insert date 30 days after publication in the Federal Register].

(c) From [insert date 30 days after publication in the Federal Register] until [insert date one year and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.025 per minute. From [insert date one year and 30 days after publication in the Federal Register] until [insert date two years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.018 per minute. From [insert date two years and 30 days after publication in the Federal Register] until [insert date three years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be $0.012 per minute. After [insert date three years and 30 days after publication in the Federal Register], the benchmark rate for a CLEC's interstate switched exchange access services will be the rate charged for similar services by the competing ILEC, *provided, however*, that the benchmark rate for a CLEC's interstate switched exchange access services will not move to bill-and-keep, if at all, until [insert date four years and 30 days after publication in the Federal Register].

(d) Notwithstanding paragraphs (b) and (c) of this section, in the event that, after [insert date 30 days after publication in the Federal Register], a CLEC begins serving end users in a metropolitan statistical area (MSA) where it has not previously served end users, the CLEC shall not file a tariff for its interstate exchange access services in that MSA that prices those services above the rate charged for such services by the competing ILEC.

(e) Rural exemption: Notwithstanding paragraphs (b) through (c) of this section, a rural CLEC competing with a non-rural ILEC shall not file a tariff for its interstate exchange access services that prices those services above the rate prescribed in the NECA access tariff, assuming the highest rate band for local switching and the transport interconnection charge. If the competing ILEC is subject to the Commission's *CALLS Order*, 65 Fed. Reg. 38684 (June 21, 2000), this rate shall be reduced by the NECA tariff's carrier common line charge.

**STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH,
CONCURRING IN PART, DISSENTING IN PART**

Re: *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, CC Docket No. 96-262.

Until today, competitive carriers could freely enter into contracts and adopt tariffs for exchange access on terms and conditions as determined by the market. Now, as a result of this order, the tariffs and contracts that competitive carriers may offer are substantially circumscribed. Specifically, the order creates a "safe harbor" range for CLEC access charge tariffs, which, over time, coincides with the regulated tariffs of the ILECs. Although the order permits carriers to contract for access charges above the safe harbor, it is difficult to imagine the circumstances under which such contracts will be adopted. Buyers are entitled to insist on the safe harbor rate, and they have no incentive to agree to higher rates. Indeed, in most markets, buyers seek to contract a price *lower* than the posted tariff rate. The Commission's safe harbor rule is thus a kinder, gentler term for price regulation.

The majority finds this course of action necessary, because, as a result of our myriad regulations that limit separable contracts and markets for exchange access services, the parties that consume exchange access services rarely receive accurate price signals. Rather than remove the regulations that limit the clarity of price signals, the majority resorts to the opiate for regulators – price regulation.

Two wrongs do not make a right. We should correct the regulations that interfere with price signals, not enshrine price regulation forever while doing nothing to remove the regulatory barriers to exchange access services. To be sure, the Commission's adoption of price regulation in this context is probably lawful, and I do not ordinarily dissent from items that I believe are merely unwise. However, restraint in the face of unwise decisions has its limits. Here, the Commission's decision to initiate price regulation runs counter to basic economic principles as well as the deregulatory mandate of the Telecommunications Act of 1996. Accordingly, I dissent from this order with the exception of Section IV.

I concur with respect to Section IV, which clarifies the circumstances under which carriers may refuse to accept or deliver access traffic. That section reinforces the importance of contractual relationships, rather than regulatory compulsion, in setting access charges.

I. Government, Markets, Consumer Welfare, And The Public Interest

Modern economics is laid upon two foundations: first, individuals can better protect their own interests than can others; and second, a higher social welfare – under almost any measure – is obtained by individuals making decisions in their own interest rather than by a single individual or government making decisions on behalf of others. This is the basis of market economics. While there are some situations (externalities) in which government intervention may be helpful, these are merely exceptions, not rules.

Individuals look after their own interests best when they are free to enter into whatever arrangements they choose with other individuals or businesses. When government limits the types of arrangements that individuals or businesses can make, the individuals, businesses, and society at large are no better off, and, quite likely, are worse off.

For example, individuals can purchase a loaf of bread from one of countless shops and bakeries. Or individuals can buy flour, yeast, water, and an oven from many different providers and bake their own bread. An interventionist government might issue an edict that requires millers to sell flour only to bakers and not to consumers. Such an edict would likely harm not only millers and bakers, but the bread-consuming public as well.

Governments are often confronted with petitions pleading for such intervention. Given the harm that comes from limiting freedom in the market, a wise government must be extremely careful in considering such action. A wise government must be able to distinguish between problems that warrant *attention* and those that do not and between those that warrant *intervention* and those that do not.

In the above example, bread prices might be high, and the government may receive a petition to regulate the price of bread or the price of flour that millers sell to bakers. It may be that some suppliers of flour, or yeast, or baking facilities exercise some degree of market power in some local markets. Prices of these wares may exceed those that some believe to be competitive. What should the government do for the market where undue market power may be present?

Before answering the question of what the government can do for a market, the government should ask what the market can do for itself. Nothing stimulates the imagination of an entrepreneur more than observing a price that seems too high. A "high" price is an invitation to an entrepreneur for at least a momentary profit. The profit may prove transitory, ephemeral, even elusive. But the entrepreneur's struggle, investment, and efforts to capture that profit are real. The greatest threat to "high" prices from the exercise of market power is the zeal of an entrepreneur. Indeed, without the efforts to enter a market by entrepreneurs thirsting for profits, the conditions creating the market power that led to high prices in the first instance will remain in place.

Price signals are essential to entrepreneurs (as well as to consumers). Price regulation discourages entrepreneurs by destroying the hope of ever observing "high" prices. Why struggle, invest, and enter a market where profits are proscribed?

And exactly when are prices too *high* or too *low*? Prices, like beauty, are in the eye of the beholder. Different entrepreneurs and different consumers will respond differently to different price signals. The beauty of markets is that they beckon for buyers and sellers to respond to price signals. Through the responses of buyers and sellers, through the interest they exhibit and the investments they make, markets become stronger and more resilient. Price signals are the very oxygen that makes markets viable.

Price regulation is a harmful, addictive hallucinogen. It deludes those who administer it into believing that they are helping markets. Once price regulation begins, regulators seem to want more, not less, intervention as markets perform ever more poorly. Yet price regulation enervates markets by depriving them of the very oxygen that sustains them. To the outside observer, a market under price regulation is the subject of pity: listless and slowly sinking into the abyss of dysfunction. Entrepreneurship and investment wane. Problems of quality of service wax.

Perhaps there are some examples where price regulation has unambiguously succeeded. A wise government must be able to distinguish between the successes and the failures and to identify the circumstances that will lead to one and not the other. The prescription for the narcotic of price regulation that can guarantee that it does not lead to side effects more harmful than the symptoms has yet to be written.

Moreover, even where intervention may be warranted, a wise government must be able to distinguish between instances in which the harm sought to be remedied is the result of too little government intervention and instances in which the harm is caused by too much. Price regulation is rarely the first government-created wrong in a market. More often, other forms of government intervention have distorted markets leading to requests for yet more government intervention such as price regulation. In the above example, high bread prices are most likely not the result of a market externality but instead the result of excessive government intervention, which has prohibited consumers from purchasing flour directly from millers.

Two wrongs do not make a right. Price regulation should not be the solution to market failures caused by excessive regulation. Instead, the barriers to consumer transactions should be removed. Long-distance markets are a case in point.

II. Long-Distance Service, Insurance, And Moral Hazard

This order concerns federal regulation of compensation arrangements among different, specialized providers of the component services that comprise a long-distance call. A long-distance call can be divided into five discreet, separately regulated, services: local exchange service for origination, exchange access for origination, transport, exchange access for termination, and local exchange service for termination. For each of these five services, billing and collection are also separable services.

In practice, originating local exchange service and exchange access are usually provided by a single carrier, as are terminating exchange access and local exchange service. A call involving five or more different services in five different markets is usually provided by, at most, three companies.

The consumer – the party originating the call– perceives just one market and is billed by just one company for the long-distance call, usually the IXC, which provides some, but not all, of the other services. The IXC then compensates all of the other companies providing the other services.

The actual charges associated with each of the five services in each long-distance call can vary substantially from call to call and from customer to customer. However, the customer's bill does not reflect the actual charges incurred by the carriers providing these services. Instead, the customer generally receives a bill for all long-distance calls based on the same per-minute rate, regardless of actual cost incurred. With respect to access charges, the customer's bill incorporates only an average cost, as the Commission's rules require IXCs to spread the cost of both originating and terminating access among all their end users. *See* Order ¶ 31.

The IXC thus typically acts as an insurer. By charging a flat rate regardless of the actual costs of a particular call, the IXC insures against losses from the distribution of unknown charges, as well as against losses from the distribution of uncollectibles – instances where consumers fail to pay their bills. The IXC charges customers a premium for this insurance, which is more than the expected value of losses.

This system has led to four broad "problems," which are explicitly or implicitly raised in this order:

(1) Consumers are largely limited to purchasing long-distance services in packages that bundle all five regulated services, plus insurance, billing, and collection.

(2) No one, including the company bundling the long-distance services, can choose the lowest cost and highest quality providers of local exchange service and exchange access. Providers of these services are assigned independently by the originating party and the terminating party.

(3) Entry into all of the regulated services except for transport, billing, and collection is difficult. Entry into exchange access without being bundled with local exchange service is rare.

(4) Given (1), (2) and (3), providers of exchange access face a moral hazard in pricing their services. Parties consuming their services do not have a direct contractual relationship with them, and a third party insures all expenses. Under these circumstances, there are substantial economic incentives to engage in monopoly pricing. Moreover, with extremely inelastic demand over a wide range of prices resulting from the insurance scheme, the monopoly price is higher than it would be if exchange access providers contracted directly with the end users.

III. The Regulatory Solution

The majority's solution to these problems is to engage in more government regulation – specifically, to regulate the rates that exchange access providers may charge. It is a regulatory solution, not a market solution. It does not address the root problems in either (1), (2), or (3). Consumers will still suffer from a lack of contracting options for long-distance services. No one will have the authority or incentive to seek out the lowest cost and highest quality providers of local exchange service and exchange access for long-distance calls. Market entry, particularly in exchange access, will still be difficult. Moreover, the moral hazard associated with the insurance scheme will only be limited, not cured.

Resorting to price regulation for access charges based exclusively on Section 201 jurisdiction, while perhaps lawful, is a giant step backwards for those who believe in the power of markets to allocate resources and services in society. Price regulation not required by law is a declaration of defeat by those entrusted with implementing a law dedicated to removing regulatory barriers and promoting competition in telecommunications markets. Practically every introductory economics text book describes the ills of price regulation: either prices are set too low, and supplies wither despite excess demand, or prices are set too high, and demand withers despite ample supply.

Section 201, which requires that rates be "just and reasonable," should never be invoked to require price regulation where multiple competitors are present. There is simply no better approximation of "just and reasonable" rates than those that exist in a market with multiple competitors. Where multiple competitors are present in a market, limitations on consumers' ability to perceive price competition are almost always the result of government regulation. That is certainly the problem in this order, where providers are not permitted to compete separately for transport, exchange access, and local exchange service, nor are packagers even allowed to bill separately for those services. Removing those barriers is the proper solution, not price regulation.

IV. The Deregulatory Solution

A far different solution from that adopted in this order would be to deregulate entirely the market for long-distance services. It would allow any and all contractual arrangements to be made available to consumers. It would encourage entry into all elements of long-distance service, including separate entry into exchange access. Carriers could offer any combination of the five components of long-distance service as well as any combination of the peripheral services such as billing, collection, and insurance for variability in the range of charges. Under this market solution, all of the four problems identified above, including moral hazard in the pricing of exchange access, would be largely resolved. Exchange access providers – whether ILECs, CLECs, or competitive access providers – would have no ability, much less incentive, to subsidize other services with revenue from exchange access. Consumers could contract directly or as part of a larger package for all services, including exchange access services – presumably at the lowest price and highest quality – and be billed directly for those services. The consumer, not the regulator, would be sovereign.

Practically all markets for complex services work well without substantial government interference to set prices or prevent transactions. For example, housing, clothing, and food can be purchased on a bundled or unbundled basis through both explicit and implicit contractual arrangements. Except where government has intervened to prohibit certain explicit or implicit contractual arrangements, consumers can choose to purchase goods and services with embedded insurance against the distribution of underlying costs for components, or the consumer can purchase the components separately. Consumer welfare is enhanced with a variety of contractual options for services with varying degrees of bundling. Depriving consumers of some or all options only harms them.

According to the majority, 47 U.S.C. § 254(g), which requires the Commission to adopt rules governing interexchange services, presents a substantial impediment to adopting a similar market-based approach for long-distance service. *See* Order ¶ 31. Under section 254(g), the Commission's rules must "require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas." 47 U.S.C. § 254(g). In addition, these rules must "require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State." *Id.* The Commission has previously determined that section 254(g) mandates that IXCs spread the cost of exchange access among all of their end users. *See* Order ¶ 11 & n.15; *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of § Section 254(g) of the Communications Act of 1934, as amended*, Report and Order, 11 FCC Rcd 9564, ¶ 9 (1996). As a result, IXCs billing their end users cannot pass through the actual cost of exchange access and thus cannot send their end users accurate price signals.

However, the Commission's interpretation of section 254(g) – while not unreasonable – is by no means compelled. To the contrary, the language of the statute merely requires "providers of interexchange telecommunications services" – IXCs – to provide "interexchange telecommunications services" at the same rates in different geographic areas. It says nothing about the rates for exchange access, which are generally imposed by local exchange carriers and for which IXCs act merely as billing agents. From the IXCs' perspective, these charges are no different than state-specific gross receipts taxes, which the Commission already allows IXCs to pass through to end users on a deaveraged basis. *See Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of § Section 254(g) of the Communications Act of 1934, as amended*, 11 FCC Rcd 9564 at ¶ 12. Section 254(g) thus need not prohibit IXCs from passing through the actual costs of exchange access to their end users. Moreover, the statute is no bar to allowing local exchange carriers and special access providers to bill the actual costs of exchange access directly to end users.

If the Commission abandoned its broad reading of section 254(g) and removed the other regulatory barriers in the long-distance markets, companies could compete for business by offering differing packages of services. Some would offer to provide all billing and collection services as well as insurance for the risk associated with the distribution of access charges. Others would offer different types of insurance, and still others would offer no insurance, instead passing all charges directly to the consumer.

Indeed, despite the Commission's restrictive regulations, some companies have already begun to offer such differentiated services. For example, some carriers, such as iPhonebill, implicitly pass access charges on to customers. Rates for their long-distance service vary by the combination of the originating and terminating area code and carrier-specific three-digit exchanges. The IXC iPhonebill charges more for calls with higher access charges and less for those with lower access charges. Because customers, rather than the IXC, bear the risk associated with the distribution of access charges, iPhonebill does not charge an insurance premium for bearing that risk. Consequently, iPhonebill's rates are among the lowest of any IXC.

Other IXCs, such as OPEX and Unitel, offer originating service only to ILEC customers with low originating access charges. In this way, the risk associated with the distribution of originating access charges is reduced, and the insurance premium that these carriers charge is less than that of major IXCs offering ubiquitous service.

Removing regulatory barriers would promote the development of more services like these and would resolve the problems identified by the majority. Unfortunately, however, the majority has not chosen this course of action.

V. CONCLUSION

The proper role of government in a free society is to protect property, enforce contracts, and tear down barriers to markets. Yet vestiges of ill-conceived government remain from the days when contracts were restricted by government fiat, when property was limited by government restrictions, and when opportunities to deploy, manipulate, and engage in the trade of property, services, and contracts, were severely curtailed.

A government of a free society should be the champion of free markets and unfettered competition. It should intercede where market barriers prevent entry but turn a cold shoulder to those who petition for price regulation or other government action noxious to a free market.

If wisely interpreted, the Telecommunications Act of 1996 would serve as a basis for the proper government role in a free society. For more than five years, however, the Act has not been interpreted wisely. Indeed, it has served as a vehicle to support the ideas of those more comfortable with the opiate of regulation than with the nourishment of competition. Such regulation is no less harmful when, as here, it is masked in pro-competitive rhetoric.

Today's order is a profound disappointment to those who seek competitive markets rather than the oxymoron of managed competition. It may be a lawful order, but it is unwise. An order that is both lawful and wise would tear down market barriers rather than erect new ones, enforce contracts rather than effectively outlaw them, and protect property rights rather than limit them.