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

In the matter of	)	
	)	
AT&T and Sprint Petitions for Declaratory	)	
Ruling on CLEC Access Charge Issues	)	CCB/CPD No.01-02
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Declaratory Ruling

Adopted: October 19, 2001 **Released: October 22, 2001**

By the Commission: Commissioner Martin concurring and issuing a statement at a later date.

1. In this declaratory ruling, we respond to a primary jurisdiction referral from the U.S. District Court for the Eastern District of Virginia in an action styled *Advamtel LLC v. AT&T Corp*.[1] In its January 5, 2001 referral orders, the district court asked the Commission to determine (1) whether any statutory or regulatory constraints prevent an IXC from refusing access service, and (2) if not, what steps an IXC must take to effectuate such a refusal. The generally applicable rules that we promulgated in our recent *CLEC Access Reform Order*[2] provide the answers to these issues as they may arise in the future. However, because the same questions exist in connection with the parties' past dealings, we discuss below the requirements of the Communications Act as it applied in the past to the carriers currently before the district court. We stress, however, that the principles set forth in this declaratory ruling are exclusively retrospective in application: the parties' future dealings are subject to the recent rulemaking order.

I. BACKGROUND

2. According to the district court's findings, AT&T began receiving originating and terminating access service from the plaintiff CLECs in April 1997.[3] AT&T initially paid for

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[1] *Advamtel, LLC v. AT&T Corp*., Civil Action No. 00-643 (E.D. Va. complaint filed Jan. 5, 2000). This action was initially moving in tandem with one styled *Advamtel, LLC v. Sprint Communications Co., L.P.*, Civil Action No. 00-1074-A (E.D. Va. complaint filed Jan. 5, 2000). However, all of the parties to the Sprint action have settled.

[2] *Access Charge Reform*, Seventh Report and Order and Further Notice of Proposed Rulemaking, FCC No. 01-146, 2001 WL 431685 (rel. Apr. 27, 2001). *See infra* paragraphs 7 - 10.

[3] *Advamtel LLC v. AT&T Corp.*, 105 F. Supp. 2d 507, 510 (E.D. Va. 2000).

these services at the full tariffed rates. In November 1998, however, AT&T stopped payment, asserting that the tariffed rates were unreasonable and that AT&T had never ordered, or otherwise agreed to purchase, the services.[4] Since that time, it appears that AT&T has refused to pay for some of the access services that the plaintiff CLECs have continued to provide to it.[5] In April, 2000, the plaintiffs brought suit in the district court, seeking to enforce their tariffs, and requested as damages the difference between their tariffed charges and the amounts they had received from AT&T.[6]

3. This declaratory ruling responds to the second of two primary jurisdiction referrals from the district court. In the first, the court referred to the Commission, *inter alia*, the question, raised by the IXCs' counterclaim, of whether the plaintiffs' tariffed access rates violated section 201(b)'s prohibition against unjust and unreasonable rates. Sprint and AT&T brought this question before the Commission by section 208 complaints filed on January 16, 2001 against Business Telecom, Inc. (BTI).[7] We adjudicated these claims on May 30, 2001, ruling that BTI's access rates were unjust and unreasonable under section 201(b) of the Act.[8] In that decision, we examined the reasonableness of BTI's access rates by reviewing several different market factors, including: the access rates of incumbent local exchange carriers (ILECs) operating both within and outside of BTI's service areas; access rates charged by other CLECs; BTI's rates to its end-user customers for competitive services such as local exchange and long distance and how those rates compared with those of the competing ILEC; and the disparity between BTI's access and reciprocal compensation rates and how it compared with the disparity between those rates of the competing ILEC.[9] In order to determine a reasonable access rate for the period in question, we looked to the rate that we had recently found to be reasonable on a prospective basis, the downward trend of access rates during the relevant period, and the contemporaneous rates of low-band NECA carriers over the time relevant to the litigation. In deciding *BTI*, we explained that both the factors we examined to determine the reasonableness of the CLEC's rates and the analysis that led us to establish the level of a reasonable rate were based on the facts and record of the case.[10]

4. Our order today responds to a second primary jurisdiction referral. As noted above, AT&T has asserted that it did not order access service from most of the plaintiffs and thus could not be required to pay for such service. It has also argued that it attempted to cancel its order to the one plaintiff CLEC from which it had ordered service.[11] The plaintiff CLECs disputed these assertions, disagreeing over whether the IXC could refuse the plaintiffs' access services, and, if so, what actions would be necessary to effectuate such a refusal. Noting that this

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4 *Id.*

5 *Id.*

6 *Id.*

7 AT&T also filed numerous informal complaints against the remaining *Advamtel* plaintiffs.

8 *AT&T Corp. v. Business Telecom, Inc*; *Sprint Communications Company, L.P., v. Business Telecom, Inc.*, EB-01-MD-001, EB-01-MD-002, Memorandum Opinion and Order, FCC 01-185 (May 30, 2001) (*BTI Order*).

9 *BTI Order*, ¶¶ 23-44.

10 *BTI Order*, ¶ 59.

11 *Advamtel*, 105 F. Supp.2d at 510.

portion of the suit raised serious questions of communication policy and construction of the Act, the court referred two specific issues to the Commission:

> (1) whether any statutory or regulatory constraints prevent an IXC from declining access services, or from terminating access services previously ordered or constructively ordered; and, if not,
>
> (2) what steps must IXCs take either to avoid ordering access service or to cancel service after it has been ordered or constructively ordered?

On January 19, 2001, AT&T filed a petition for declaratory ruling presenting to the Commission the issues referred from the district court. On February 5, 2001, the Common Carrier Bureau issued a public notice seeking comment on the petition and the referred issues.[12]

5. During a hearing on September 7, 2001, the court indicated its intention to answer the first of these questions in the negative, concluding that no portion of the Act or the FCC's rules prohibited an IXC from declining a CLEC's tariffed access service.[13] The court set for trial the issues surrounding its second referred question. Although we regret not acting before the court took further action in the cases by denying motions for summary judgment, we believe that, even at this late juncture, the court and other parties will benefit from the Commission's declaratory ruling on this complicated issue.

II. RECENT DECISIONS

6. In responding to the court's referral, we are guided by several recent Commission orders addressing CLEC access charges.

7. *CLEC Access Reform Order*: In the *CLEC Access Reform Order*, the Commission comprehensively addressed, on a prospective basis, the problem of allegedly unreasonable CLEC access charges. Before the release of that order, the Commission had declined prospectively to regulate CLEC access rates, believing instead that competition and the possibility of a 201(b) challenge to the rates' reasonableness would prevent CLECs from imposing unreasonable rates in their access tariffs.[14] In the *CLEC Access Reform Order*, however, we concluded that the market for exchange access is not structured so that competition can discipline rates. Consequently, we found that some CLECs were able to tariff their access rates at unreasonable levels.[15]

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[12] AT&T and Sprint File Petitions for Declaratory Ruling on CLEC Access Charge Issues, CCB/CPD No. 01-02, Public Notice, DA 01-301, 2001 WL 92220 (rel. Feb. 5, 2001).

[13] *See* Transcript of September 7, 2001 Hearing at 19, *Advamtel v. AT&T*.

[14] *Access Charge Reform*, First Report and Order, 12 FCC Rcd 15982 (1997). Such rate-reasonableness complaints would be filed pursuant to sections 206-209 of the Act.

[15] The Commission found two flaws in the market structure that prevented competition from ensuring the reasonableness of CLEC access rates. First, although the end user chooses its access provider, it is the IXC that actually pays the access provider's rates. The IXC 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 requirement that IXCs geographically average their rates spreads the cost of originating (continued....)

8. To address this problem, we adopted a safe-harbor approach, establishing a benchmark level at which CLEC access rates are conclusively presumed to be just and reasonable and at (or below) which they may therefore be tariffed. CLECs that seek to charge to IXCs rates in excess of this benchmark may do so, but only outside of the regulated tariff process with agreement from the relevant IXC. Additionally, during the pendency of any such negotiations, or if the parties cannot agree, the CLEC must continue to provide access to the IXC at the applicable benchmark rate in order to maintain connectivity within the network.[16]

9. In the *CLEC Access Reform Order*, the Commission also concluded that section 201(a) prohibits an IXC from refusing to serve the end user of a CLEC charging safe-harbor rates, while serving the customers of other LECs within the same geographic area. We reasoned that, when an IXC's end-user customer attempts to place a long-distance call, 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).

10. In adopting this approach, the Commission sought to avoid disruptions within the nation's telecommunications network. We recognized that, previously, some IXCs had blocked or threatened to block access traffic to and from CLECs charging rates that the IXCs considered too high. As the Commission stated, "These practices threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network and could result in consumer confusion."[17] The Commission was "particularly concerned with preventing such a degradation of the country's telecommunications network."[18]

11. Complaint Proceedings: The Commission has addressed issues related to competitive carriers' access services in several complaint proceedings in addition to the *BTI* case discussed above.[19] In July 1999, in *MGC v. AT&T*, the Common Carrier Bureau 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.[20] The Bureau and the Commission, which later affirmed the order, assumed, without deciding, that an IXC may refuse to accept originating access traffic from a CLEC because MGC's tariff

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and terminating access across all of the IXCs end users. This prevents IXCs from creating incentives for their customers to choose CLECs with low access charges. 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 access costs – the end user that chooses the high-priced LEC – has no incentive to minimize costs. Accordingly, CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider. *See CLEC Access Reform Order*, 2001 WL 431685 at ¶ 31.

16 *CLEC Access Reform Order*, 2001 WL 431685, at ¶¶ 3, 97.

17 *Id.* at ¶ 24.

18 *Id.*

19 *AT&T Corp. v. Business Telecom, Inc*; *Sprint Communications Company, L.P., v. Business Telecom, Inc.*, Memorandum Opinion and Order, FCC 01-185 (May 30, 2001).

20 *MGC Communications, Inc. v. AT&T Corp.*, 14 FCC Rcd 11647 (1999), *recon. denied*, 15 FCC Rcd 308 (2000).

permitted such a refusal, and because MGC identified no provision of the Act that prevented such a refusal.[21] The Bureau made clear, however, that its analysis was restricted to the issues that MGC had presented and that other portions of the Act, including sections 201, 202, and 214, might operate to prohibit such refusal of service by AT&T.[22]

12. In March 2001, the Commission ruled, in *Total Tel. v. AT&T*,[23] that a competitive access provider's rates for terminating access were the product of a sham arrangement between an ILEC and the access provider to inflate the access charges incurred by AT&T and to pass on a portion of the revenues generated by those inflated charges to the carrier's single end-user customer. We concluded that AT&T did not violate sections 201(a), 202(a), 214(a) or 251(a) of the Act when it declined the access provider's terminating access service and blocked traffic bound for the access provider's single end-user customer. However, the Commission made clear that its holding was limited to "the unique circumstances of this case" involving a sham competitive access provider that an incumbent LEC appeared to have created for the sole purpose of imposing higher access charges than are permitted to incumbent LECs.[24] The Commission further stressed that its "ruling should not be construed to address the broader question of what other circumstances might permit an IXC to refuse to purchase, or discontinue purchasing, access service from a competitive LEC."[25]

III. DISCUSSION

A. IXC Obligations to Accept Access Service

13. After reviewing the language of section 201(a), the district court ruled at least tentatively that there are no regulatory or statutory constraints to prevent an IXC from declining access services ordered or constructively ordered. As a threshold matter, we agree with the court that section 201(a) does not expressly require an IXC to accept traffic from, and terminate traffic to, all CLECs, regardless of their access rates.[26] Section 201(a) does, however, impose a duty on common carriers to accept a "reasonable request" for service. Because the statute does not provide any guidance on what constitutes a "reasonable request," we interpret the phrase in light of the overall context of our access charge regime and the policy goals we have set forth.

14. We conclude that a "reasonable request" means a request to carry traffic that is tariffed at a presumptively reasonable rate. As we stated in paragraph 94 of the *CLEC Access*

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[21] *Id*. ¶¶ 8, 12.

[22] *Id*. In June 2000, in *Sprint v. MGC*, the Commission also addressed the argument that a CLEC's access rates are *per se* unjust and unreasonable – and therefore violative of section 201(b) – solely because they exceed the rates charged by incumbent LECs in the CLEC's region. *Sprint Communications Company, L.P. v. MGC Communications, Inc.*, 15 FCC Rcd 14027 (2000). The Commission denied Sprint's complaint, holding that Sprint had failed to meet its burden of showing that the challenged rates were unreasonable.

[23] *Total Telecommunications, Services, Inc. and Atlas Telephone Company, Inc. v. AT&T*, 16 FCC Rcd 5726 (2001).

[24] *See id.* ¶ 35.

[25] *Id*. ¶ 21 & n 50.

[26] *See also, CLEC Access Reform Order*, 2001 WL 431685, at ¶ 24 As we have held in the past, certain circumstances may warrant termination and blocking of access service. *See Total Tel.*, 16 FCC Rcd 5726.

Reform Order, when a customer "attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for a communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a)." This interpretation of the language in 201(a) is consistent with other sections of the Act and our past orders, and it also achieves an important policy goal of ensuring that all end users, regardless of the LEC that they have chosen, have available to them rapid, efficient and nationwide communications services.

15. In light of this interpretation, and in order to resolve the questions raised by the court, we must address whether the tariffed CLEC access rates that AT&T now contests were "presumptively reasonable." We answer that question in the affirmative. We emphasize that this does not mean that an IXC is unable to challenge those rates by appropriate mechanisms and to be awarded damages if we should later determine that those "presumptively reasonable" rates were, in fact, excessive. But, where rates charged for an access service are presumptively reasonable at the time the service is offered, an IXC cannot refuse to exchange originating or terminating traffic with the CLEC, because such a practice would "threaten to compromise the ubiquity and seamlessness of the nation's telecommunications network" with serious adverse consequences for consumers.[27]

16. During the period at issue in the pending litigation, which preceded our decision in the *CLEC Access Charge Order*, CLECs were subject to the regulations and rules applicable to tariff filing requirements for non-dominant carriers.[28] Under established law during that time period, tariffs filed by non-dominant carriers were considered "presumptively lawful."[29] Thus, where CLECs sought to originate or terminate traffic with an IXC at access rates that were presumptively lawful *at that time*, we find that the IXCs were required to exchange traffic with the CLEC. In sum, the request to carry traffic tariffed at a presumptively lawful rate was a "reasonable request" within the meaning of section 201(a). Accordingly, until there has been an affirmative finding that a particular tariffed rate was unreasonable, the presumption of lawfulness accorded to non-dominant carrier tariffs applied.

17. The statutory interpretation and conclusions we reach here are also consistent with our *CLEC Access Reform Order*. As we said in that order, and as the district court correctly acknowledged, section 201(a) does not expressly require an IXC to accept traffic from and terminate traffic to, all CLECs without regard to their access rates. But our application of this principle to the facts differs from the ruling, at least as tentatively articulated by the court, at the conclusion of its hearing. Section 201(a) does impose a duty on common carriers to accept "reasonable requests" for service, and under our interpretation and precedent, the request to

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[27] *See CLEC Access Reform Order*, 2001 WL 431685, at ¶ 24.

[28] Under Commission precedent, competitive LECs "are nondominant carriers." *See Tariff Filing Requirements Order*, 8 FCC Rcd at 6752, 6754, ¶ 13 (1993).

[29] In the case of nondominant carriers, "the Commission considers their tariff filings to be presumptively lawful." *Tariff Filing Requirements for Nondominant Common Carriers*, 10 FCC Rcd 13653, 13654, ¶ 3 n. 13 (1995). Thus, for example, the Commission has expressly stated that tariffs filed on one day's notice pursuant to the non-dominant carrier tariff filing procedures "shall be presumed lawful." *Tariff Filing Requirements Order*, 8 FCC Rcd at ¶ 23; *see also*, section 1.773(a)(ii) of the Commission's Rules stating that "tariff filings by non-dominant carriers will be considered prima facie lawful."

complete a call using CLEC access service that is tariffed at presumptively reasonable rates satisfies that requirement.

18. By requiring carriers to bring to the Commission (under section 208) any challenges to the reasonableness of rates already presumed reasonable, rather than attempting to unilaterally interrupt the flow of communications traffic, we seek to facilitate to the maximum extent the goal of network ubiquity that is a prominent and clearly articulated goal of the Communications Act. We note that Section 1 of the Communications Act sets out the goal of making available "to all the people of the United States . . . a rapid, efficient, Nation-wide . . . communication service with adequate facilities at reasonable charges."[30] We view section 1 as guidance for the construction of section 201 that we adopted in the *CLEC Access Reform Order* and again today. Under that construction, an IXC may not decline to complete a call that entails the use of access service from a CLEC with rates that are presumptively reasonable. Furthermore, such IXCs remain under a continuing obligation to accept that service at the tariffed rates until another rate has been established through negotiation or litigation. In short, traffic continues to move while the involved carriers seek a determination of the reasonableness of the CLEC's rates. This interpretation of the Act gives meaning to the language of section 201(a) that "reasonable requests" be honored, while ensuring, through the operation of section 201(b), that the CLEC may not retain, at the end of the day, an unreasonable rate for the access service involved.

19. We recognize that the lack of explicit guidance in section 201(a) as to what constitutes a "reasonable request" renders that provision ambiguous. The interpretation we adopt today, however, is one that is informed by our prior orders and the goals articulated in the Communications Act itself.[31] This interpretation does mean that during the period in question, when the CLEC could determine for itself the level of its presumptively lawful rates, an IXC had a duty to accept the service at that rate and could not decline service based upon its perception of reasonableness. The IXCs have suggested that this results in excessive unilateral rate control by CLECs, at least during the limited period before our safe harbor rates took effect. But alternative interpretations of section 201(a) as suggested by the IXCs would also trigger a unilateral determination of reasonableness - - except that these determinations would be made by the IXCs. In other words, the IXCs would reserve to themselves the right to decline service upon unilaterally finding a request unreasonable. Given these conflicting perspectives, we have adopted a statutory interpretation that we believe furthers best the goals of the Act while minimizing service cut-offs. At the same time, we emphasize that IXCs are not without adequate remedies; those IXCs that contest the CLEC tariffed rates during this period may continue to avail themselves of their legal remedies under the Act.

20. AT&T suggests that our interpretation of section 201(a) is unreasonable because, it argues, we must read the second clause of section 201(a) as an express limitation on the obligations imposed on carriers by the first clause.[32] AT&T argues that it could satisfy its

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30 47 U.S.C. § 151.

31 The Commission has sought to fashion a reasonable and permissible interpretation of this ambiguous provision, guided by the text of the statute, the structure and history of relevant portions of the Act, and policy considerations, particularly those elucidated in section 1 of the Communications Act.

32 *See* October 15, 2001 *ex parte* submission of AT&T.

obligations to comply with a customer's "reasonable request" for service under section 201(a) by an agreement to provide long distance service using access of *some carrier*, though not necessarily the local exchange carrier that the customer has requested. Under its textual reading, a carrier is obligated to provide service using a *specific* access carrier only after the opportunity to contest a customer's request under the second clause of section 201(a). Such an interpretation, which is not compelled by the plain text of this provision, would essentially permit "reasonable requests" under the first clause of section 201(a) to be dishonored pending an opportunity for hearing under the second clause. We decline to adopt such a statutory interpretation.

21. On the facts presented here, we have found reasonable the *entirety* of the request made to AT&T by the end-user and held that a reasonable request is made when the end-user is asking AT&T to provide its long distance service through an interstate access provider (a CLEC) with presumptively lawful rates. We have determined that such a reasonable request should be honored promptly and in its entirety. In contrast, AT&T's interpretation would permit IXCs to decline such requests in the first instance, and force potential customers to find a different local exchange carrier *before* IXCs provide the requested service. Thus, AT&T's statutory interpretation would undermine a customer's right to have reasonable requests honored under the first clause of section 201(a). A customer who has made a "reasonable request" for service should not be forced to choose between its preferred local exchange carrier and its preferred interexchange carrier where, as here, the preferred local exchange carrier is charging rates that are presumptively lawful. Accordingly, we find AT&T's interpretation unreasonable.

22. Our conclusion that requests for service using an access carrier with "presumptively reasonable" rates constitute "reasonable requests" under section 201(a) is not absolute. In *Total Tel v. AT&T* we held that where rates were the product of a "sham arrangement" by a CLEC, the customer's request for service was not a "reasonable request" within the meaning of section 201(a).[33] We reaffirm that holding today. Further, we disavow any construction of that order that would read that case too broadly, i.e., as holding that a customer's request for access service using a CLEC with presumptively reasonable rates may be refused *whenever* such rates are later found unreasonable, without regard to whether or not the CLEC's rates were the result of a "sham arrangement." That case has precedential effect only to the extent that a customer's request for service would involve access lines for which rates are the product of a "sham arrangement." Simply put, we concluded in *Total Tel* that a patently unlawful arrangement did not produce a rate entitled to a "presumption of reasonableness."

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[33] *Total Tel.*, 16 FCC Rcd 5726, ¶ 35. *Total Tel* involved a company that purported to be a *bona fide* carrier but which instead was simply a sham creation, designed to facilitate an arrangement among several entities to capture access revenues that could not otherwise be obtained by lawful tariffs. Total provided no local exchange service, and it paid its so-called "customer" Audiobridge commissions of up to 50 or 60 percent of Total's terminating access revenues. Audiobridge, a chat line service, obtained no revenues other than these commissions, and it was Total's sole "customer." Total's operations were also closely intertwined with that of another entity, Atlas, with which it had a commonality of management and office space, and from which it leased all its transmission. Atlas was the local exchange carrier for Audiobridge. The Commission concluded in paragraph 18 of the Order that "the arrangement between Total and Atlas serve[d] only to create a superficial distinction intended to enable Atlas to increase its fees for interexchange access for calls to Audiobridge … through a sham arrangement."

B. Factors Affecting CLEC Rate Reasonableness

23. Given our discussion above of section 201(b)'s continuing viability as a limitation of CLEC access rates, we discuss briefly some of the factors that the Commission likely would examine in future cases challenging the reasonableness of a CLEC's access rates. First, our *BTI* decision would serve as precedent in future complaint cases. We thus would look to the factors we examined there, including the rates of arguably similar NECA carriers, possibly determining the similarity of the NECA carrier, and consequently the applicable NECA band, by examining the number and type of the CLEC's subscribers and the density and geographic characteristics of the markets in which the CLEC operates. However, we must decide each complaint on the record before us. We might well examine additional factors beyond those enumerated in *BTI* in determining the reasonableness of a CLEC's rates.

IV. CONCLUSION

24. For the reasons discussed above, we conclude that, when a customer attempts to call from and/or to an access line served by a CLEC with presumptively reasonable rates, that request for a communications service is a reasonable one that the IXC may not refuse without running afoul of section 201(a). An IXC's protection against unreasonable rates arises from section 201(b) of the Act, which prevents a CLEC from charging an unjust or unreasonable rate for its services. Accordingly, the proper course for an IXC faced with what it views as excessive access rates is to challenge the rate as violative of section 201(b). In light of our ruling on the first question referred by the district court, we need not reach its second question.

V. ORDERING CLAUSE

25. Accordingly, IT IS ORDERED that, pursuant to section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and section 1.2 of the Commission's rules, 47 C.F.R. § 1.2, this Declaratory Ruling IS ADOPTED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas
Secretary