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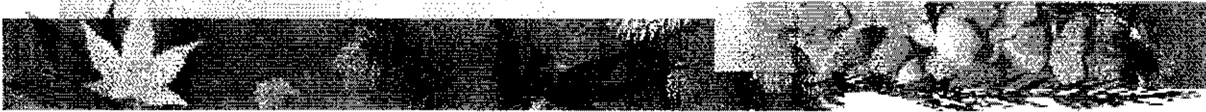
Sent: Monday, August 25, 2008 12:43 PM
To: Filings@psc.state.fl.us
Cc: David Christian; de.oroark@verizon.com; Adam Teitzman; David Dowds; Kimberly Caswell
Subject: Undocketed 08-0000 - CLEC Access Charges Workshop - Verizon's Reply Comments
Attachments: VZ FL Reply Comments CLEC Access Charges 8-25-08-REDACTED.pdf



The attached filing is submitted on behalf of Verizon by

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The attached .pdf document consists of a total of 24 pages (cover letter-1 page, Reply Comments-23 pages).

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August 25, 2008 – **VIA ELECTRONIC MAIL**

Ann Cole, Commission Clerk
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, FL 32399-0850

Re: Undocketed 08-0000
CLEC Intrastate Access Charges Workshop

Dear Ms. Cole:

Enclosed is a redacted version of Verizon's Reply Comments for filing in the above matter. Pursuant to Section 364.183(3), Florida Statutes, and Rule 25-22.006, Florida Administrative Code, Verizon hereby makes a claim of confidentiality for certain information contained in the Reply Comments. The confidential information shows the average access revenue per minute (ARPM) of several Florida CLECs per minute of use for one end of a call.

One highlighted copy along with two redacted copies of the confidential information will be hand-delivered to the Clerk's office. If you have any questions regarding this filing, please contact me.

Sincerely,

s/ Dulaney L. O'Roark III

Dulaney L. O'Roark III

Enclosure

c: Adam Teitzman, Staff Counsel (w/e via electronic mail)

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: CLEC Intrastate Access Charges Workshop) Undocketed 08-0000
) Filed: August 25, 2008
)

VERIZON'S REPLY COMMENTS

The Verizon companies certificated in Florida[1] respond to the post-workshop comments of CompSouth and Sprint Nextel Corporation ("Sprint"),[2] neither of which provides any information that is useful for the Commission's consideration of constraining the switched access rates of competitive local exchange carriers ("CLECs").

CompSouth argues that, theoretically, CLECs cannot have market power, so their rates are *per se* reasonable and there is no reason to constrain them. This theoretical argument ignores marketplace reality. Carriers have no choice but to use the CLEC's switched access services when they handle interexchange calls originating from or terminating to the CLEC's customers. Unlike the access rates of incumbent local carriers ("ILECs"), CLEC rates have never been scrutinized, let alone deemed just and reasonable. This absence of market and regulatory discipline has produced a range of some 800% among CLEC rates in Florida for a commodity service, with some CLECs charging rates as high as four to seven cents for one end of a call.

As the FCC and numerous states have found, there is no principled justification for allowing CLECs to charge rates that are multiples of the competing ILECs' rates.

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[1] These entities include Verizon Florida LLC, MCI Communications Services, Inc. d/b/a Verizon Business Services, MCImetro Access Transmission Services LLC d/b/a Verizon Access Transmission Services, Teleconnect Long Distance Services and Systems, Co. d/b/a Telecom*USA or Teleconnect TTI National, Inc. (collectively, "Verizon").

[2] The Florida Cable Telecommunications Association, Inc. ("FCTA") also filed brief comments, but it took no position on whether the Commission should impose a cap on CLEC access rates, so there is no need for Verizon to respond to FCTA's comments

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Excessive CLEC access rates distort the competitive market by forcing long-distance carriers, like Verizon, and their customers to help fund the retail service offerings of their direct competitors.

Verizon therefore urges the Commission to initiate a docketed proceeding to implement a requirement that a CLEC's intrastate access rate must not exceed the access rate charged by the competing ILEC in the same service area, similar to the policies already in place at the federal level and in other states.

The Commission should reject CompSouth's and Sprint's recommendations to transform this inquiry into a review of ILEC access rates. Sprint ignores the Staff's questions about CLEC rates and instead asks the Commission to reduce ILEC rates. CompSouth offers no opinion about ILEC rate levels, but urges the Commission to review them nonetheless-presumably to divert attention from high CLEC rates. Whatever the motivation for these suggestions, the Commission cannot investigate the rates of the large ILECs that are Sprint's primary targets, because the Commission has no jurisdiction to do so: Section 364.385(4) of the Florida Statutes plainly states that these ILECs' access rates "may not be changed."

Below, Verizon addresses the principal themes of CompSouth's Comments and rebuts Sprint's erroneous conclusion about the scope of the Commission's jurisdiction over ILEC access rates.

I. The Facts Prove CompSouth's Theories Wrong

CompSouth advises the Commission to refrain from regulating CLEC access rates "in the absence of a theoretically sound demonstration that CLECs have market power." (CompSouth Comments at 8.) In this regard, CompSouth argues that CLECs

cannot have market power in the provision of access services because there are no barriers to entry into local markets. CompSouth theorizes that if CLECs are earning "supernormal profits" on access, "it will induce competition for those profits and the CLEC will be disciplined by market forces." (CompSouth Comments at 1.) Therefore, CompSouth posits, a CLEC will not charge unreasonably high access rates because "a short-run abuse of market power is likely to generate devastating longer run demand and supply responses that could endanger the CLEC's entire business." (CompSouth Comments at 5.) CompSouth concludes that CLECs' rates are necessarily just and reasonable, because these companies operate in "presumptively competitive" markets. (CompSouth Comments at 15.)

The manifest flaw in CompSouth's theory is its failure to recognize that it is the nature of the service-not the absence of presence of entry barriers-that makes switched access subject to monopoly power. Carriers have no choice but to use a CLEC switched access services when they handle interexchange calls originating from CLEC customers and when they deliver interexchange calls for termination to CLEC customers.

A toll provider cannot refuse to deliver a call to a CLEC's end user-and thus cannot avoid that CLEC's terminating access charges. Verizon has no choice in the matter of which carrier can complete the call-it is wholly at the mercy of the carrier that the called party uses for her local exchange service. The payor of access charges can do nothing to influence the level of those charges. Moreover, for CompSouth's "entry barrier" argument to be sound, other carriers would have to acquire *all* of a CLEC's end user customers in order to avoid paying its switched access charges. So CompSouth is

relying on a scenario that would require a monopoly in end users in order to eliminate monopoly abuse in access charges. Clearly, a rate cap on CLEC access charges would be a better result.

CompSouth's *theoretical* arguments about how the market for CLEC access services *should* function is that they ignore the *actual* facts about how it *is* functioning. In 43 pages of comments (and over 3 hours of oral presentation at the workshop), CompSouth avoided discussing the most important factor in any evaluation of CLEC rate constraints: that is, the rates themselves. As Mr. Dowds observed at the workshop, the range of variability in Florida CLEC access rates is about 800%. (July 16 Workshop Tr. at 127.) Although some CLECs' rates are reasonable and in line with the ILECs' rates, other CLECs charge rates that are considerably higher. While Verizon's ILEC affiliate and other price-regulated carriers have substantially reduced their intrastate access rates to just and reasonable levels under Commission orders in accordance with legislative parameters, the market has not induced most CLECs to lower their rates commensurately.

Because different carriers have different rate structures, in order to understand CLEC rate levels and the striking disparity in CLEC rates, it is most useful to review the aggregate charges that result from applying the various switched access rate elements in the carriers' respective tariffs. Calculating their average access revenue per minute ("ARPM"), based on billings to Verizon, allows for a valid comparison of their access rates.[3] This analysis takes into account all of the relevant access rate elements that

[3] Because Verizon does not have complete visibility into other carriers' revenues, it used the amounts that each CLEC billed the Verizon companies for intrastate switched access as a surrogate for the CLECs' revenues, along with information about access minutes of use ("MOU"). Several months of recent billing data were reviewed to provide a reliable sample.

REDACTED

are billed on a per-minute-of-use basis, so it provides a more "apples-to-apples" comparison than a review of only a single rate element.

The following sample shows the ARPM of several Florida CLECs per minute of use for one end of a call.

CLEC	ARPM

[BEGIN PROPRIETARY]

[END PROPRIETARY]

In comparison, Verizon Florida's own ARPM for usage-based elements is **[BEGIN PROPRIETARY]** XXXXXXXX **[END PROPRIETARY]**, substantially lower than these CLECs' rates. Just as compelling is the magnitude of the disparity in the CLECs' own rates: while some CLECs charge an average of over seven cents a minute for access, many others charge half that or less.

There is no need for any "theoretical demonstration" of CLEC market power because the facts bear out its existence. The Commission should proceed with a cap based on the same basic facts that prompted the FCC[4] and more than a dozen other states[5] to regulate CLEC rates—that is, (1) many CLECs charge access rates that are

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[4] *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report & Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) ("*CLEC Rate Cap Order*").

[5] *See, e.g., Order Instituting Rulemaking to Review Policies Concerning Intrastate Carrier Access Charges*, **California** D. 07-12-020 in Rulemaking 03-08-018, Final Opinion Modifying Intrastate Access Charges (Dec. 6, 2007) (capping CLEC rates at no higher than Verizon's or SBC's rate, plus 10%); *Investigation of Intrastate Carrier Access Charges*, Decision, **Connecticut** D.P.U. Docket No. 02-05-17 (2004), 2004 Conn. PUC Lexis 15, at *45 (capping CLEC rates at SBC's then-current rate) ("*Connecticut Rate Cap Order*"); **Delaware** Code, Title 26, § 707(e) (capping all service providers' switched access

unreasonably high; and (2) toll providers cannot avoid these unreasonably high rates because they must handle calls originating from and terminating to the CLECs' end users. Neither the industry mergers in recent years nor any other red herrings CompSouth raises have changed these easily observed facts.

At the workshop, Mr. Starkey correctly observed that: "The only people that can discipline the marketplace are the customers, the people that ultimately pay the bills." (July 16 Workshop Tr. at 98.) But CompSouth's argument that marketplace discipline will, at least in the long run, emerge to constrain CLEC access prices fails to recognize that "the people that ultimately pay the bills"—the CLECs' end users--do *not* pay the CLEC's terminating access charges. Indeed, these people have no idea what the

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rates at the level of the largest ILEC in the state); Arbitration Decision, *TDS Metrocom, Inc. Petition for Arbitration,* **Illinois** Comm. Comm'n Docket No. 01-0338, at 48-50 (Aug. 8, 2001) and Arbitration Decision, *Arbitration Between AT&T Comm. of Illinois, Inc. and Ameritech*, Illinois Comm. Comm'n Docket No. 03-0239, at 149-51 (Aug. 26, 2003) (a CLEC may not charge an ILEC more for terminating switched access than the ILEC charges the CLEC); 199 **Iowa** Admin. Code 22.14(2)(d)(1)(2) (prohibiting CLECs from charging a carrier common line charge if it would render the CLEC's rate higher than the competing ILEC's rate); **Louisiana** PSC General Order No. U-17949-TT, App.B, Section 301 (k)(4) (May 3, 1996) (CLECs must charge non-discriminatory switched access rates that do not exceed the competing ILEC's rates); Code of **Maryland** Regulations § 20.45.09.03(b) (capping CLECs' switched access rates at the level of the largest LEC in Maryland); Report and Order, *Access Rates to Be Charged by Competitive Local Exchange Telecommunications Companies in the State of Missouri*, **Missouri** P.S.C. Case No. TO-99-596, 2000 Mo. PSC Lexis 996, at *28-31 (June 1, 2001) (capping CLEC access rates at the competing ILEC's level) ("*Missouri Rate Cap Order*"); **New Hampshire** PUC § 431.07 (CLECs cannot charge higher rates for access than the ILEC does); Order, **New York** P.U.C. Case 94-C-0095, at 16-17 (Sept. 27, 1995), N.Y. P.U.C. Opinion 96-13, at 26-27 (May 22, 1996), and N.Y. P.S.C. Opinion 98-10, 1998 N.Y. PUC Lexis 325, at 26-27 (June 2, 1998) (benchmarking CLEC access charges to the level of the largest carrier in the LATA); Entry on Rehearing, *Establishment of Carrier-to-Carrier Rules*, **Ohio** P.U.C. Case No. 06-1344-TP-ORD, at 16-18 (Oct. 17, 2007) (capping CLECs' switched access rates at the level of the competing ILEC); 66 **Pennsylvania** Consolidated Statutes § 3017 (c) (prohibiting CLEC access rates higher than those charged by the incumbent in the same service territory, absent cost justification); **Texas** P.U.C. Subst. Rule § 26.223 (a CLEC may not charge a higher rate for intrastate switched access than the ILEC in the area served or the statewide average composite rates published by the Texas P.U.C.); Final Order, *Amendment of Rules Governing the Certification and Regulation of CLECs*, **Virginia** State Corp. Comm. Case No. PUC-2007-00033 (Sept. 28, 2007) (a CLEC's switched access rate cannot exceed the higher of its interstate rate or the rate of the competing ILEC). A proposal to cap CLEC rates at the level of the competing ILEC's rate is also under consideration in **Massachusetts** Docket D.T.C. 07-9, *Petition for Investigation under Chapter 159, Section 14 of the Intrastate Access Rates of Competitive Local Exchange Carriers* and **West Virginia** Case No. 08-0656-T-PC, *Petition by Verizon West Virginia Inc. et al. Requesting that Commission Initiate a General Investigation of the Intrastate Switched Access Charges of Competitive Local Exchange Carriers Operating in West Virginia.*

CLEC charges for access. Therefore, as the FCC has explained, "the party causing the costs-the end user that chooses the high-priced LEC-has no incentive to minimize costs" and "CLECs can impose high access rates without creating the incentive for the end user to shop for a lower-priced access provider." (*CLEC Rate Cap Order*, ¶ 31.) Indeed, the market distortions caused by high CLEC access charges may even *encourage* customers to seek out CLECs with high access charges:

> 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. 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.

CLEC Rate Cap Order, ¶ 28 (footnote omitted).

CompSouth admits that a significant portion of CLEC revenues come from access charges. (CompSouth Comments at 2.) Because the Verizon companies are significant payors of the access charges that support an outsized share of the CLECs' operations, Verizon and its customers effectively are forced to help fund the retail service offerings of its direct competitors. Allowing CLECs to shift too much of their costs to switched access purchasers like Verizon (and ultimately Verizon's own customers) places those competitors at an artificial competitive disadvantage. Competitors cannot profitably enter local markets where they bear operation costs higher than the subsidized rates they must meet in order to compete. In addition, reducing the price of a necessary input (that is, access services) to other carriers will enhance efficiency in the toll services those carriers provide, which will benefit consumers.

The FCC has confirmed that more efficient competition and the consumer benefits it yields cannot be achieved as long as CLECs seek to recover a disproportionate share of their costs from other carriers, rather than from their own end users; high CLEC rates "shift an inappropriate share of the carriers' costs onto the IXCs and, through them, the long distance market in general." (*CLEC Rate Cap Order*, ¶ 22.) "Such cost shifting is inconsistent with the competitive market that we seek to encourage for access service. Rather, it may promote inefficient entry into the local markets and may distort the long distance market." (*Id.*, ¶ 33.)

State Commissions have made similar findings. In fact, Verizon is not aware of any instance where a state commission has started a proceeding to consider constraints on CLEC access rates and then rejected them. For example, the Missouri Public Service Commission found that capping CLEC access rates "is reasonably necessary to protect the public interest" in promoting competition and ensuring reasonable charges for telecommunications services. (*Missouri Rate Cap Order* at 15.) The Connecticut Department of Public Utility Control concluded that a CLEC access rate cap was necessary to "protect long distance carriers from unreasonable access rates." (*Connecticut Rate Cap Order* at 14.) The Iowa Utilities Board decided to limit CLEC rates after finding that the market would not do so: "If the access market were competitive, the CLECs could never charge for access at levels that are multiples of the ILEC rates."[6]

[6] *FiberComm, L.C., et al. v. AT&T Comm. of the Midwest, Inc.*, Final Decision and Order, Docket No. FCU-00-3, at 20 (Oct. 25, 2001). *See also Intrastate Access Service Charges, Order Adopting Amendments*, Docket No. RMU-03-11, at 5-6 (March 18, 2004). ("each CLEC has market power with respect to access to its own local exchange customers").

CompSouth's speculation that consumers will see no benefit from reduced CLEC access rates contradicts the findings of policymakers across the country, as well as its own observations. CompSouth states that advocates of a CLEC rate cap are seeking to use the regulatory process to "achieve cost savings for their own long distance products." (CompSouth Comments at 8.) That is exactly what toll providers are trying to do and that is what they should so, because cost reductions will be beneficial in competitive markets (like the toll market). And there is nothing unfair about using the regulatory process to obtain access cost reductions when it is clear that market forces have not disciplined and will not discipline CLECs' excessive access rates.

CompSouth's only "evidence" that carriers will likely pocket access cost savings, rather than pass them onto customers, is downright misleading. CompSouth argues that the FCC's 2007 reference book of telecommunications rates[7] shows a "recent reversal in the established trend of decreasing toll prices" over the past decade. (CompSouth Comments, Att. at 20.) That is certainly not how the FCC interprets its own data. The FCC instead emphasized the continuing, overall downward trend in toll rates and carriers' "impressive array of discount and promotional plans" for toll services. CompSouth's contrarian view of the toll market rests on one piece of data in a chart listing upward and downward movements in the consumer price indices for intrastate toll and other services since 1980—specifically, an inflation-adjusted upward tick of 0.7% in the consumer price index for toll services in 2006. (FCC Rate Report, Table 3.1.) On this slim reed, CompSouth, and CompSouth alone, detects a troublesome trend that

[7] Reference Book of Rates, Price Indices, and Household Expenditures for Telephone Service, P. Almoguera, Industry Analysis and Technology Division, FCC Wireline Competition Bureau (2007) ("FCC Rate Report").

justifies a Commission investigation of toll providers' rates. (CompSouth Comments, Att. at 20)

If, as CompSouth suggests, industry consolidation were causing toll prices to trend upward, this trend would affect both interstate and intrastate toll markets. Instead, as the FCC emphasizes, the average revenue per minute for interstate toll services has remained the same for the past three years, and carriers' per-minute ARPM for interstate toll services has dropped, not risen, since the FCC adopted its CLEC rate cap in 2001. (FCC Rate Report at iv and Table 1.15.)

CompSouth's recommendation for a plainly pointless diversion into a toll rate inquiry just highlights the lack of substance in CompSouth's entire presentation. CompSouth has failed to show that market forces have controlled or will, in some undefined long run, control excessive CLEC switched access rates. The Commission, therefore, has an obligation to address the anticompetitive, anti-consumer effects of those rates.

II. CompSouth's Monopsony Power Argument Is Nonsense

CompSouth argues that "the largest IXCs are actively exercising their monopsony power to avail themselves of subsidized switched access rates substantially lower in most cases than costs." (CompSouth Comments at 15.) As CompSouth's story goes, CLECs are merely access price-takers at the mercy of the large interexchange carriers that account for most access traffic. CompSouth describes a "scenario that has played out countless times going back 6 or more years," in which large carriers like Verizon simply stop paying the CLECs' tariffed access rates: "Several months may pass as the CLEC weighs its options and undertakes the cost-benefit

analysis related to multiple complaints, bristling all the while at its complete inability to exercise self-help in the form of disconnecting its delinquent switched access customers. Finally, with so much revenue at stake, the CLEC succumbs to the pressure and accepts pennies on the dollar for its prior receivable." (CompSouth Comments at 13.) CompSouth claims that this is such a common problem that the Commission should "investigate the extent to which AT&T and Verizon are exerting undue market power in their relationships with smaller suppliers, such as the CLECs." (*Id.* at 15.)

CompSouth's attempt to shift the focus away from the CLECs' own anticompetitive behavior is unavailing. Like its theory that CLECs' rates are disciplined by the market, its account of CLECs as mere access price-takers is at odds with observed facts. If Verizon could set the CLECs' rates, as CompSouth claims it can and does, Verizon certainly wouldn't be paying six or seven cents a minute for one end of a call, as it is in some cases, and there would be no need for Verizon to urge the Commission to limit CLEC rates. If interexchange carriers were setting CLECs' rates, those rates would not display an 800% range, but would be closer to the ILECs' own rates. Moreover, it defies reason to believe that Florida carriers are and have been for years routinely refusing to pay CLECs' tariffed rates for months at a time, without the Commission having been called upon to address this situation.

CompSouth cannot back up its hyperbole with facts. Contrary to CompSouth's account, Verizon has no policy of refusing to pay tariffed CLEC rates in order to extract below-cost rates from CLECs. (*See* July 16 Workshop Tr. at 83-84.) Indeed, the only support CompSouth offered for its tale of longstanding, widespread extortion of below-

cost access rates was one vague anecdote at the workshop (but not in its Comments) about AT&T allegedly refusing to pay the access invoices of Florida Digital Network ("FDN") at some point in the past. (*Id.* at 46-47.) FDN apparently contacted a Staff member about this situation, but lodged no challenge to AT&T's conduct with the Commission, instead negotiating a settlement with AT&T that may or may not have led to FDN reducing its tariffed rates. (July 16 Workshop Tr. at 157 (Mr. Feil, who related the anecdote, declined to discuss the resolution, citing confidentiality of the settlement agreement).) In any event, Mr. Feil did *not* contend that FDN's dispute with AT&T forced FDN to charge below-cost access rates—which is the evil CompSouth claims the Commission must address through an investigation of the interexchange carriers' exercise of alleged monopsony power. (CompSouth Comments at 14.) Just like all the other new investigations CompSouth recommends, there is no reason to launch this one. The Commission should dismiss CompSouth's monopsony power argument out of hand, as the FCC did. (*CLEC Rate Cap Order*, ¶ 85.) If any CLEC truly believes interexchange carriers are exerting monopsony power in the access market, it may file an antitrust complaint in court. (*Id.*)

III. ILEC Rates Are an Appropriate Benchmark for CLEC Rates

To address the market distortions caused by unreasonably high CLEC switched access rates, Verizon and AT&T have recommended placing a ceiling on those rates. Specifically, the Commission should cap each CLEC's intrastate switched access rate at the rate of the ILEC in whose area the CLEC operates. The benchmark rate would be the composite, per-minute rate for the service, including all applicable rate elements, so CLECs would not need to mirror the ILEC's rate structures. If a CLEC operates in

more than one ILEC's service area, it should be permitted to establish a single blended rate for switched access service that the CLEC would charge statewide. No evaluation of individual CLEC costs is necessary before setting a rate ceiling at the ILEC level, although a CLEC may be permitted to demonstrate that its costs justify a rate higher than the ILEC rate.

CompSouth contends that "to benchmark the CLECs' exchange access rates against the giant ILECs' is to set a standard no CLEC can meet, no matter how efficient." (CompSouth Comments at 20.) Again, the facts do not support CompSouth's hyperbole. Numerous Florida CLECs of all sizes-not just the largest carriers-already do charge access rates at or below Verizon's rates. As the FCC found, the fact that some CLECs can and do charge rates similar to the ILECs' rates justifies establishing the benchmark "toward the lower end of the range" of CLEC rates. (*See FCC Rate Cap Order*, ¶ 49.)

Moreover, many of the CLECs operating in Florida are subject to the same benchmarking requirement Verizon proposes here in other states in which they operate. In Florida itself, all CLECs already must comply with a similar FCC rule constraining their interstate switched access rates. Therefore, CompSouth's prediction of ruin for the CLEC industry if the Commission sets their rates at ILEC levels is demonstrably false.

There is no legitimate reason for some CLECs to continue to charge intrastate access rates that are much higher than ILEC rates for the same intrastate switched access services. In a competitive market, a new entrant could not charge above the prevailing (that is, ILEC) access rate. Benchmarking to ILEC rates is, therefore, appropriate because it "mimic[s] the actions of a competitive marketplace, in which new

entrants typically price their product at or below the level of the incumbent provider." (*CLEC Rate Cap Order*, ¶¶ 45, 58, 87 ("our benchmark approach will restrict market entry to the efficient providers").

CLECs rates are not now and never have been subject to any pricing rules, so there have been no checks on them as there have been with traditionally regulated carriers. In contrast, the Commission has repeatedly scrutinized the large ILECs' intrastate rates and they have been set at levels confirmed as just and reasonable by the Florida Legislature. (*See supra*, section V.) Absent cost justification, substantially higher CLEC intrastate access rates cannot be considered just and reasonable and thus are anti-competitive.

It is not only ILECs that are disadvantaged by excessive CLEC access rates. CLECs that charge rates in line with ILEC rates suffer, as well. For instance, in Massachusetts, Comcast supports the same CLEC cap proposal Verizon has made here. The economist testifying there for Comcast agreed "that the current intrastate switched access charges of many Massachusetts CLECs are excessive and distort the competitive market in Massachusetts. This is harmful to Comcast as well as Verizon and should be remedied by imposing a ceiling on access fees charged by the CLECs."[8]

All of the harms CompSouth conjures as a result of benchmarking to ILEC rates assume that the ILEC rates will not cover the CLECs' costs. But no CLEC has contended that the proposed rate cap will deny it cost recovery. CompSouth simply invites the Commission to make that assumption for the CLEC industry as a whole,

[8] Prefiled Testimony of Dr. Michael D. Pelcovits on Behalf of Comcast, *Petition of Verizon for Investigation into the Intrastate Access Rates of Competitive Local Exchange Carriers*, D.T.C. 07-9, filed Aug. 20, 2008 ("Pelcovits Testimony"), at 3.

because of the differences in scope and scale between ILEC and CLEC operations. (CompSouth Comments, Att. at 7.)

In an effort to lend an empirical gloss to its assumption about CLEC costs, CompSouth presents a purported CLEC/ILEC customer density comparison, arguing that "customer density is a major cost driver in cost studies." (CompSouth Comments, Att. at 12.) Although CompSouth admits that empirical evidence about relative customer density "is difficult to come by" (*id.*, Att. at 8), it nevertheless claims to have compared the customer density of an undisclosed number of mystery CLECs in unidentified states to the customer density of two unnamed regional Bell operating companies.

CompSouth's "analysis" provides no useful information for the Commission. Aside from the fact that it is impossible to verify the supporting data, or even know whether any of it pertains to any Florida CLECs, CompSouth's conclusion that lower customer density means higher costs does not support a finding that CLECs' costs are higher than ILECs' costs. Even if a large ILEC enjoys certain scope and scale economies that a particular CLEC may lack, CLECs have their own, countervailing cost advantages. For example, these newer market entrants have no obligation to serve residential customers, let alone residential customers in rural or other high-cost areas and do not bear the historical legacy of having to maintain low retail prices for residential consumers throughout their service areas. CLECs also have the opportunity to use the most efficient mix of technologies and network configurations possible, and should be able to operate at least as efficiently as the incumbent carriers with their legacy networks. Incumbent LECs' networks have been constructed incrementally over

the course of decades, and thus generally incorporate outdated legacy technologies, which is not the situation for facilities-based CLECs. (*See, e.g.*, *Triennial Review Order*, 18 FCC Rcd 16978, ¶ 70 n.233 ("Facilities-based competition also increases the likelihood that new entrants will find and implement more efficient technologies, thus benefiting consumers."))

However, the best rebuttal to CompSouth's argument that the ILEC rate is not a compensatory benchmark for CLEC rates is the fact that ILEC rates are not set at their costs. CompSouth's argument relies on the notion that ILECs' rates are cost-based—that is, because ILECs' costs are (allegedly) lower than CLECs' costs, ILECs' rates won't cover the CLECs' costs. But, as CompSouth itself acknowledges, ILECs' rates are not set at cost, but were instead established to promote social policy objectives related to ILECs' status as carriers of last resort. (*See* CompSouth Comments at 18.) While ILEC rates have moved toward cost in recent years, they still include contribution above costs based on policymakers' balancing of public policy goals. (*Id.*) The existence of this margin above costs precludes any assumption that ILEC rates would necessarily deny CLECs recovery of their network costs.[9]

CompSouth complains that it is unfair to expect CLECs to reduce their access rates in the absence of the kind of "goodies," such as "increased USF subsidies," that ILECs purportedly received in return for access reductions. (CompSouth Comments at 9.) This argument makes no sense, because the CLECs have never operated under the regulatory constraints that ILECs have. In Florida, Verizon and other price-regulated ILECs obtained limited local rate increases in return for access reductions in

[9] Indeed, even in Massachusetts, where Verizon's intrastate switched access rates must mirror its interstate switched access rates, Comcast's witness testified that those rates are enough above cost to "serve as a generous upper-bound for allowable CLEC access charges." Pelcovits Testimony, at 14.

accordance with price-regulation provisions (they did not receive USF support). CLECs, of course, have always been free to set their retail rates as they like and to recover their costs as they like; there is no need for the Commission to grant them the right that they already have to recover any lost access revenues or to award them funding to serve high-cost customers they need not and do not serve.

Finally CompSouth argues that large ILEC rates are themselves "all over the board" (CompSouth Comments at 20), so they cannot serve as a rational benchmark for CLEC access rates. Although the largest carriers' access rates are not strictly uniform here (or in most other states), the differences among them are much smaller than the range of CLEC rates in Florida, and no large ILEC rate approaches the four-to-seven-cent-a-minute level that a number of CLECs' rates here do. In any event, differences in ILEC rates have never been an obstacle to benchmarking CLEC rates to ILEC rates at the federal level or in other states.

IV. Equalizing Terminating and Originating Rates Would Not Effectively Constrain CLEC Access Rates.

At the workshop, Staff asked whether requiring CLECs' originating and terminating switched access rates to be the same might be an effective alternative to capping CLEC access rates. (July 16 Workshop Tr. at 146-47.) In its Comments, CompSouth states that such a regulation would likely be acceptable to most CLECs. (CompSouth Comments at 12.) CompSouth's willingness to go along with this option is not surprising, because it would not meaningfully constrain CLEC rates.

A rate equalization approach presumes that CLEC originating access rates are subject to greater market discipline than terminating access rates. A long-distance carrier cannot avoid a CLEC's terminating access charges, because it must complete

calls to the CLEC's retail customer. But on the originating access side, a long-distance carrier could theoretically drop or not compete for retail customers served by CLECs whose originating access rates are unreasonably high. The resulting loss of access customers, as well as end users who are dissatisfied with the reduced choice of interexchange carriers, should compel the CLEC to set reasonable originating access charges—and, in turn, reasonable terminating access charges under a rate equalization requirements.

This theory, however, has turned out not to be true. As the FCC concluded, both the terminating and originating access markets "consist[] of a series of bottleneck monopolies over access to each individual user." (*CLEC Rate Cap Order*, ¶ 30.) The FCC explained:

> 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.

CLEC Rate Cap Order, ¶ 29.

States have, likewise, found equal policy justification for directly regulating both originating and terminating access rates.

Another factor that might explain a CLEC's willingness to agree to a rate equalization requirement would be an imbalance in terminating to originating minutes, possibly as a function of a relatively smaller retail customer base (or, less benignly, a business plan built on traffic pumping). In this scenario, any business lost from excessive originating charges may be more than made up by gains on the terminating side.

In short, the theory that originating access is more competitive than terminating access is not consistent with the facts. This is why the CLECs see little risk in agreeing to charge no more for terminating access than they do for originating access, and this is why the Commission should reject the rate equalization approach in favor of the tested, effective approach of benchmarking to the competing ILEC's rates.

V. The Commission Must Reject Recommendations to Review ILEC Access Rates

Sprint disregards the purpose of this inquiry into capping CLEC rates and instead urges the Commission to change course and immediately reduce ILEC rates to interstate levels. Although CompSouth does not claim ILEC rates are too high, it nevertheless urges the Commission to review ILEC rates if it decides to review CLEC rates, no doubt in the hope that a complex, protracted generic review would shift the focus away from CLEC rates.

The Commission cannot seriously consider these efforts to derail this inquiry into CLEC rates, because it has no jurisdiction to change the access rates of the large, price-regulated ILECs (including Verizon) that are Sprint's primary targets.

Sprint claims that the Commission has the authority to reduce ILEC rates under section 364.01(4), which lists regulatory objectives including promoting competition, preventing anticompetitive behavior, and acting as a surrogate for competition for monopoly services. As an additional basis for jurisdiction, Sprint mentions section 364.3381, which addresses the Commission's authority to protect against cross-subsidization of non-basic services by basic services.

Sprint acknowledges that section 364.163 caps ILEC access rates at levels in effect as of July 1, 2007, but argues that nothing in that section or the current price-

regulation scheme in section 364.051 prohibits the Commission from exercising its general jurisdiction, under section 364.01(4), to reduce those rates. (Sprint Comments at 10, 11-12.) Sprint discusses the 1997 MCI/GTE complaint case that was referenced in the workshop, and in which the Commission ruled that the statutory price-regulation regime left it no authority to reduce a price-regulated carrier's access rates.[10] Sprint points to legislative changes since then, concluding that "[t]here are no longer any specific provisions with respect to reducing switched access rates that prevail over the general authority conveyed in Section 364.01(4) Florida Statutes or elsewhere, including the authority to investigate potential cross subsidization pursuant to Section 364.3381(3);" and that "there are no specific provisions remaining that prescribe a particular limited role in overseeing access reductions." [11] (Sprint Comments at 10-11.)

Sprint is wrong. Although the price-regulation scheme has changed since the Commission issued its *MCI/GTE Order*, the current law does, in fact, include a provision that specifically limits the Commission's jurisdiction to reduce the access rates of the largest ILECs and that prevails over the general jurisdictional grant in section 364.01(4).

The savings clause in section 364.385(4), which Sprint does not mention. states:

> The rates and charges for basic local telecommunications service and network access service approved by the commission in accordance with the decisions set forth in Order Nos. PSC-03-1469-FOF-TL and PSC 04-0456-FOF-TL, and which are in effect immediately prior to July 1, 2007, shall remain in effect and *such rates and charges may not be changed*

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[10] Sprint Comments at 6-11, *citing In re: Complaint by MCI Telecomm. Corp. Against GTE Florida Inc.*, Final Order Granting Motion to Dismiss, Order No. PSC-97-1370-FOF-TP (Oct. 29, 1997) ("*MCI/GTE Order*").

[11] Sprint Comments at 10-11. In addition to its jurisdiction argument, Sprint claims that Verizon (as well as AT&T, Embarq, the Commission, and the Florida Legislature) all agree with Sprint's conclusion that ILEC access rates must be reduced. (CompSouth Comments at 3-4.) Verizon has *not* agreed with Sprint that Verizon Florida's rates should be reduced and has explained that the different regulatory treatment of CLECs and the level of their access rates in comparison to ILEC rates justify focusing on CLEC rates in Florida. Sprint's purported policy discussion with respect to ILEC rates is, in any event, moot because the Commission has no authority to reduce Verizon's intrastate switched access rates.

after the effective date of this act, except in accordance with the provisions of ss. 364.051 and 364.163. (Emphasis added.)

The two orders referenced in this provision approved rate rebalancing plans by Verizon, Embarq, and AT&T that, among other things, reduced their access rates and increased basic local service rates. As section 364.385(4) indicates, those orders produced the carriers' access and basic local rates that were "in effect immediately prior to July 1, 2007." Under the explicit terms of the statute, Verizon's access rates in place as of July 1, 2007-and which remain in effect for Verizon today-"may not be changed," except in accordance with sections 364.051 and 364.163.

Section 364.051 is the price-regulation statute, and it includes no provisions authorizing reductions in, or even mentioning, network access rates, so it provides no exception to the access rate freeze in the savings clause. Section 364.163 defines "network access services" and, as noted, imposes a cap on all ILECs' access rates at their levels as of July 1, 2007. This provision, likewise, does not prescribe any process for changing the particular price-regulated carriers' access rates established by section 364.385(4). There is, therefore, nothing in the statutes that authorizes the Commission to force Verizon to reduce its access rates.

Consistent with the principles of statutory construction the Commission relied upon in the *MCI/GTE Order*, the general jurisdictional grant in section 364.01 cannot override the specific direction the legislature gave in section 364.385: "a special statute covering a particular subject matter is controlling over a general statutory provision covering the same and other subjects in general terms." (*MCI/GTE Order*, at 16.) It is also "well established that administrative agencies only have the power conferred upon them by statute and must exercise their authority in accordance with the controlling

law." (*Id.* at 17, *citing* Fla. Jur. § 71, at 289.) "A commission may not assert the general power given it and at the same time disregard the essential conditions imposed upon its exercise."[12] If there is reasonable doubt as to the scope of a power, it should be resolved against the exercise of that power."[13]

There is no doubt that section 364.385(4) means exactly what it says—the Commission cannot change the existing access rates the Commission approved for Verizon in Order Nos. PSC-03-1469-FOF-TL and PSC 04-0456-FOF-TL. The Commission may not take Sprint's erroneous advice to assert its general regulatory jurisdiction in section 364.01 and at the same time disregard the "essential condition" that section 364.385(4) imposes upon exercise of that jurisdiction. The Commission should not waste any time considering Sprint's and CompSouth's ill-advised attempts to turn this narrowly focused case into a generic review of ILEC access rates. It should, instead, promptly adopt the cap on CLEC rates that Verizon and AT&T have proposed.

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[12] MCI/GTE Order at 18, quoting *Edgerton v. International Company*, 89 So.2d 488, 490 (Fla. 1956).

[13] MCI/GTE Order at 17-18, citing *State ex rel. Burr et al., State Railroad Commissioners v. Jacksonville Terminal Co.*, 71 So.474 (Fla. 1916); *Deltona Corp. v. Mayo*, 342 So.2d 510 (Fla. 1977); *City of Cape Coral v. GAC Utilities, Inc.*, 281 So.2d 493 (Fla. 1973).

Respectfully submitted on August 25, 2008.

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