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September 5, 2008

Mrs. Ann Cole
Director, Division of the Commission Clerk and Administrative Services
Florida Public Service Commission
2540 Shumard Oak Boulevard
Tallahassee, Florida 32399

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COMMISSION
CLERK

RE: Docket No. 080000
CLEC Intrastate Access Charges Workshop

Dear Mrs. Cole:

Attached please find the reply comments for AT&T Florida, AT&T Communications of the Southern States, Inc, TCG of South Florida and AT&T Long Distance.

If you have any further questions please do not hesitate to call.

Sincerely,

Greg Follensbee

Attachment

DOCUMENT NUMBER-DATE

08251 SEP-5 08

FPSC-COMMISSION CLERK

BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: CLEC Intrastate Access Charges Workshop)
Undocketed 080000)
Filed: September 5, 2008)
_____)

AT&T FLORIDA'S REPLY COMMENTS

The AT&T companies certified in Florida¹ respond to the post-workshop comments of CompSouth and Sprint Nextel Corporation ("Sprint"), neither of which provided any information that would cause this Commission to not consider opening a docket to constrain the intrastate switched access rates of competitive local exchange carriers ("CLECs"). The following are specific comments of the CLECs to the 12 questions posed by the Commission staff. In addition, while not posed by the Commission staff, AT&T Florida is also responding to the 6 additional questions posed by CompSouth.

- 1. What are the key factors that CLECs consider when determining how to set their access charge rate?**

Response:

AT&T Florida continues to stand by its response it filed on July 9, 2008.

- 2. Are the access rates being charged by Florida's CLECs cost-based?**

Response:

¹ These entities include AT&T Communications of the Southern States, LLC d/b/a AT&T, TCG South Florida, BellSouth Telecommunications, Inc, d/b/a AT&T Florida, BellSouth Long Distance, Inc. d/b/a AT&T Long Distance Service, SBC Long Distance, LLC d/b/a AT&T Long Distance, and SNET America, Inc. d/b/a AT&T Long Distance.

DOCUMENT NUMBER-DATE

08251 SEP-5 8

1

FPSC-COMMISSION CLERK

AT&T agrees with CompSouth that CLECs in Florida are not currently required to provide any cost justification for their rates. Rather, they charge any rate they choose once it is filed. AT&T does not believe, however, that cost justification would be necessary if a benchmark approach is adopted like we suggest in our initial response to question 10.

- 3. Should Florida's CLECs be allowed to set their intrastate access charge rates at any level they choose? Should their cost to provide access service be considered?**

Response:

CompSouth wrongly suggests that CLECs should be allowed to charge any rate they choose because they do not have market power. CompSouth's suggestion relies on a flawed analysis and conclusion that CLECs market share, nationally, is small and have declined since the mergers between the IXCs and ILECs. The CLEC size is not the controlling factor; rather it is the prevailing structure which gives the CLEC ability to control access rates perpetually. For example, the party paying for the terminating access service, i.e. the IXC, does not choose the access service provider which completes the call. Rather, it is the called party who, in practical effect, "chooses" the CLEC as the terminating access provider when the called party elects to purchase local telephone service from the CLEC. CompSouth's error can be exposed by exploring the logic behind the following question it poses while trying to make the point that the CLEC market has the capability to undergo a self-correcting process. CompSouth states as follows: "*If*

CLECs are supposed to have market power - which, by definition, implies that they can raise prices to earn supernormal profit' - what barriers-to-entry exist that permit them to luxuriate in those super normal profits in the long term? “ Obviously, CompSouth has not focused on the relevant trends. Since the FCC capped the CLEC interstate rates at the ILEC levels in 2001, the CLEC intrastate rates remain significantly above ILEC intrastate rates. After almost eight years, we are yet to see signs that the market forces upon which CompSouth analysis depend could constrain the outrageously high CLEC rates that are in their intrastate access tariffs. It is unreasonable to take CompSouth’s position that eight years is not long enough for the type of automatic market corrections that CompSouth anticipates.

The emphasis by CompSouth on long versus short term analysis misses the point. As AT&T explained in the initial response to Question 5, the fact that IXCs are faced with practical factors that make it impossible or difficult for them to reject CLEC rates is the most relevant consideration here. Ideally, unless the impediments are removed, CLECs can retain their current intrastate rate structure in Florida for another 100 years.

- 4. Are Florida consumers harmed by CLECs charging access rates that are in excess of those charged by the ILEC in the area in which they compete? Are there other adverse effects?**

Response:

CompSouth claims that consumers are not harmed by the outrageously high access rates the CLECs currently charge in Florida. Instead, CompSouth maintains consumers will be better off if CLEC status quo is allowed to remain. We disagree. CompSouth's attempt to draw conclusions for the CLEC market from an example about car transaction is not valid. The consumers in both markets do not face the same characteristics. While the IXCs who are customers of the monopoly CLECs cannot reject the CLEC's traffic, the consumers in CompSouth's example can walk away without completing the transaction if they think the price of the car is too high.

- 5. Is the market for the access service structured in a way that allows competitive pressures to effectively constrain access prices? Why or why not?**

Response:

CompSouth's response to this question is wrong, it continues to rely on flawed conclusion that the "invisible hand" will provide the corrections needed to force the CLEC rates down. However, it fails to address the practical factors currently present in the CLEC market and preventing the normal reactions by the IXC customers to the outrageously high CLEC access rates. We have explained these factors in AT&T's initial response to Question 5.

- 6. Do market forces applicable to originating switched access differ from the market forces for terminating switched access? If so, how?**

Response:

As we discussed in AT&T's initial comments on this question, the market forces applicable to both originating and terminating switched access do not differ. See AT&T's initial response to Question 6.

- 7. Under what condition, if any, can a carrier decline to terminate its traffic to another carrier?**

Response:

CompSouth's response alleging that AT&T and Verizon have monopsony power misses the point, and it is irrelevant. As we explained in our initial response to this question, the FCC has provided final ruling on this issue, prohibiting blocking of both intrastate and interstate traffic.² No further debate on this issue is warranted, and CompSouth's comment is moot.

- 8. On what basis can it be determined if CLEC access rates are just and reasonable?**

Response:

CompSouth invites Commission to rely on the economic perspective that "functional markets generate results that are generally superior to price-regulated markets." (CompSouth p.15). The point CompSouth fails to understand is that the benchmark approach which it criticized is based on the economic logic that

² See *In the Matter of Establishing Just and Reasonable Rates for Local Exchange Carriers and Call Blocking by Carriers*, WC Docket No. 07-135, Declaratory Ruling and Order, ¶6 (June 28, 2007) (DA 07-2863).

CLECs cannot be expected to sustain unreasonably high rates in a well-functioning market where customers are able to reject higher prices when they disagree. CompSouth continues to emphasize the role of CLEC cost in its response to this Question. We reiterate our position that the capping approach we suggest does not preclude the CLECs from recovering their costs across the spectrum of services they offer to their customers. It does not make any sense, however, for CompSouth to continue to plead on behalf of the CLECs that the Commission should force the IXCs and their long distance consumers to continue subsidizing the CLEC local exchange operations.

- 9. If it is determined that CLEC access charges are not just and reasonable, does the Commission have the authority to act to remedy this situation?**

Response.

AT&T agrees with Sprint/Nextel (Sprint) that the rates for intrastate switched access should be reduced but disagrees that ILEC switched access rates should be addressed by Commission. AT&T believes that the goal of this proceeding is to examine and reduce the switched access rates of CLECs. AT&T disagrees with Sprint on whether the Commission has any authority to reduce ILEC switched access rates.

Sprint argues extensively that the Commission should invoke its authority under 364.01, Florida Statutes, to reduce incumbent local exchange company (ILEC) intrastate switched access rates. Curiously, Sprint singles out ILEC switched

access rates and chooses to ignore CLEC switched access rates that were the genesis of the Staff's initiation of the instant inquiry and that are typically higher than the relevant ILEC switched access rates. Whatever the efficacy of Sprint's arguments regarding reductions in switched access rates, these arguments would apply equally, if not more strongly, to CLEC switched access rates.

AT&T agrees that Section 364.01 provides the Commission with broad authority to prevent unfair and anti-competitive behavior. However, Sprint's arguments that the Commission's general authority under Section 364.01 extends to reducing ILEC switched access rates are simply incorrect. As noted in Sprint's comments, the Commission has previously found that it lacks authority to reduce access charges due to the lack of legislative authority to do so. Sprint also correctly notes that Chapter 364 does not currently contain a specific legislative mechanism for switched access rate reductions for ILECs. However, Sprint incorrectly asserts that the lack of specific legislative authority to reduce ILEC switched access rates somehow opens the door for the Commission to reduce ILEC switched access rates under its general authority. Whatever door may have been opened, that door was closed by the legislature when it enacted Section 364.385(4), Florida Statutes.

Section 364.385(4), provides:

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

As is clearly set forth in this section, the Commission has no generic authority to reduce ILEC switched access charges. ILEC switched access charges can only be changed "in accordance with ss. 364.051 and 364.163." Neither of these statutory provisions grants the Commission any authority to reduce ILEC intrastate switched access charges. The plain language of Section 364.385(4) clearly precludes any Commission exercise of its authority under Section 364.01 to reduce ILEC intrastate switched access rates. Accordingly, Sprint is incorrect in its assertion that the Commission has authority to reduce ILEC intrastate switched access rates.

AT&T notes that, consistent with its previous comments in the workshop, the statutory preclusion to the Commission addressing ILEC switched access rates does not apply to an examination of CLEC switched rates. The Commission's general authority under Section 364.01, does give the Commission authority to examine and reduce CLEC access charge that are unfair or anticompetitive.

- 10) Should the Commission establish caps on the intrastate access rates that CLECs can charge? If so, how should caps be determined?**

Response:

Yes. AT&T Florida continues to stand by its response it filed on July 9, 2008.

- 11) What would be the impact on Florida CLECs if this Commission were to cap CLEC access rates at the rates of the incumbent LEC in the area in which they serve?**

Response:

AT&T disagrees with CompSouth that CLECs would not recoup their cost of exchange access if a capping approach is adopted. AT&T believes that the only thing CLECs will be denied is the ability to over-recover their combined costs from the IXCs and their long distance consumers. See AT&T's initial response to Question 11.

- 12 If the Commission opts to constrain allowable CLEC access rates through some means other than rate caps, what options are available?**

Response:

CompSouth's response suggests that the Commission could constrain CLEC rates only through a comprehensive review of rates charged by all carriers, including ILECs. AT&T has explained in response to CompSouth's Question 18, discussed below, that it is more useful to first cap CLEC rates at the level of their ILEC rivals.

Also, CompSouth suggests that petitioning the FCC to relax the Section 254(g) is the answer. However, it fails to recognize that the prohibitions on de-averaging are not the only impediments that would not allow CLEC rates to be constrained naturally without a need for the FL PSC to step in. We explained a list of other

reasons in AT&T response to Question 5, all of which still provide valid reasons for the benchmarking approach we suggest. As a result, CompSouth comments should be rejected.

- 13. Do large IXC's have monopsony power in their purchase of switched access services from CLECs? If so, do those IXC's use that monopsony power to withhold payment and to engage in other unjust and unreasonable conduct to force CLECs to provide access service at rates other than tariffed rates?**

Response:

CompSouth's response to this question erroneously implies that Large IXC's have meaningful influence on the CLEC pricing, and suggests that IXC's can refuse payment or engage in other self help methods. Comp South is wrong; all of the self help practices alleged are prohibited either by statute or regulations.³

The size of the CLEC relative to the IXC's is not relevant when the IXC's face institutional factors that make them unable to react normally to existing market conditions, and as a result the CLECs are able to charge and sustain unreasonably high rates. For example, under the current access structure IXC's

³ See *Hyperion Order*, 12 FCC Rcd 8596, 8608-8611, ¶¶ 23-29 (1997). Cf. *Advantel*, 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). See also e.g. Order No. PSC-04-0974-FOF-TP, issued October 7, 2004 (discussion of the "filed rate doctrine" and finding that the tariff rates that were on file were the rates that were required to be charged).

(regardless of their size) cannot decline high rates tariffed by the CLECs. The reasons are as follows.

First, as discussed in our response to staff's question 5, AT&T must use the called party's *particular* local exchange carrier for the completion of the long distance call AT&T is carrying for its (originating) end-user customer. Because the terminating access service must be purchased for AT&T to complete the call and because, by definition, there is no other provider that can terminate a call that is already programmed for delivery to the called party, the called party's CLEC has – regardless of its size – the power to set whatever rate can pass through the tariff filing system.

Second, once the CLEC rate is filed, AT&T is compelled to pay despite the fact that the rate exceeds by many times the ILEC rate for the same service.

Third, because of the section 254(g) obligation regarding geographic averaging of toll rates, IXCs are unable to pass directly the intrastate access cost to an end user that originates a call from a CLEC with high access rates. Rather, if a CLEC charges high originating access rates in Florida, a large IXC like AT&T cannot reject it but would be forced to raise its toll rates for all of its long distance customers to recover the high access costs. If the CLEC has a relatively small customer base, then the high access rate will be spread over the large IXC's relatively larger customer base throughout Florida. Thus a small CLEC can

increase its originating access rates with a significantly diluted impact on other carrier's customers.

All of these practical factors do not support Comp South's allegation that Large IXCs could unilaterally control CLEC rates, rather the correct conclusion that must be reached is that the current CLEC pricing structure has characteristics that make the IXCs captive, and indeed unwilling consumers of the CLEC's access services.

- 14. Should the Commission consider cost increases the ILECs impose on CLECs for access to network elements (as a result of the TRRO, supra-competitive SPA pricing, forbearance grants) and interconnection in this proceeding?**

Response:

The price that CLECs pay the ILECs for unbundled network elements and special access facilities, to the extent CLECs rely on these to provide intrastate switched access in Florida, cannot be the reason the CLEC intrastate access are so outrageously high. The UNE rates in Florida are 10 times lower than the rates CLECs charge for access. See also AT&T response to #16 below where we discuss the role of CLEC costs.

- 15. What factors do ILECs (large and small) consider in determining their access rates?**

a) Are the access rates of ILECs cost-based?

Response:

No.

b) Should the Commission order any change to the access rates of ILECs?

Response:

Before the Commission considers any change to the access rates of ILECs (assuming it has the legal authority to do so, which AT&T believes it does not), it should first address the access rates of CLECs.

16. Is it appropriate to use large or small ILEC switched access rates as benchmarks for establishing maximum CLEC switched access rates?

Response:

Yes. As we stated in our responses to staff question #3 and #12, capping the CLEC tariffed intrastate access rates at the rate level charged by the ILEC (large or small) operating in the same service areas as the CLECs is the best approach to constrain tariffed CLEC access rates. Contrary to Comp South's emphasis on cost differential, in a competitive market where an incumbent firm is present, an individual firm's cost for just one type of service is not the main determinant of the market price. Firms offer a bundle of services and recover their costs across all such services, and must continuously strive to employ more efficient methods to improve their cost positions. For example, some may have a cost advantage in one service, others in another service. Their ability to improve their cost

structure over time will determine whether they can be profitable in the market, i.e. it is based on the combined costs and revenues from all of their services. If a CLEC's network costs are so high that it cannot recover its total costs from revenues from all of its services, it is hard to conclude that a pro-competition policy is consistent with allowing such CLEC to tax other carriers and their customers in order to extract subsidies. Requiring more efficient firms to subsidize less efficient firms will have the net effect of increasing the cost of providing telecommunications services in Florida and ultimately the prices that Florida consumers pay.

One important question that must be answered in this context is that: in a well-functioning market where market pressures could constrain CLEC rates (i.e. IXCs have alternative paths for its traffic, end users that pick a high access CLEC would feel the impact of the high cost directly, IXCs could reject traffic from or block traffic to a high access CLEC) would CLECs be able to sustain their unreasonably high rates without losing traffic to their lower price (large or small) ILEC rivals? The answer to that question is no, notwithstanding the differences in cost structure. This is the logical underpinning of the benchmarking system that has been adopted by the FCC for CLEC interstate rates, and by many other states.

Contrary to CompSouth's proposal, this capping approach requires that if the CLECs operate in the same area as large ILEC then the large ILEC's rate should

be the appropriate benchmark because, as we discussed above, a well-functioning competitive market would not allow that CLEC to charge more than their large ILEC rival. Likewise, if the CLECs compete with rural ILECs then the rural incumbent's rate is the benchmark level, not because of the relative size but because as the FCC puts it: "...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."⁴ Therefore, the appropriate cap should be the rates charged by the ILEC with which the CLECs compete.

(a) If an ILEC's rates are used as benchmarks, what effect will such benchmarking have on CLECs?

Response:

As we discussed previously, the benchmark system would have minimum effect on FL CLECs. CLECs have no price constraints on the spectrum of services they offer to their customers. This is not the case for ILECs, which do have existing prices caps for both their basic and non-basic services. See AT&T response to staff questions 11 and 16 above.

(b) If an ILEC's rates are used as benchmarks, what effect will such benchmarking have on the market generally?

Response:

⁴ See *In the Matter of Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, Seventh Report and Order and Further Notice of Proposed Rulemaking, 16 FCC Rcd 9923 (2001) (*CLEC Access Reform Order*), ¶37.

In this subpart, Comp South claims that the CLECs would not be able to recover their costs if their rates are capped at the ILEC level. We have addressed the issues regarding the alternative ways available for the CLECs to recover their combined costs of all of their service without putting excessive burden on the IXCs to subsidize their local exchange operations. See AT&T's response to Staff's question 11.

Further, Comp South erroneously alleges that the access reductions from the capping of CLEC rates will not benefit Florida consumers because CompSouth thinks the reduction will not flow to consumers. CompSouth has not provided any solid evidence that the long distance market is not competitive enough to control the price that consumers pay for toll and long distance service. Contrary to Comp South, AT&T expects greater consumer benefits following an access reduction from the capping system suggested here. Even though IXCs continue to pay high CLEC access charges that carriers using alternative technologies often avoid, long distance prices throughout the country have been reduced faster than access rates, as IXCs react to competition. Over many years, as competition has intensified, carriers across the country have introduced different calling plans in the form of bundled packages which often translate into rate reductions; and every time a customer selects a lower priced bundled package that customer experiences an effective price reduction.

All of these trends have been observed even when IXCs pay high access charges, because they must keep up with the competitive pressures that confront them. It would be illogical to suggest that this trend would cease when access charges decline and competition with alternative technologies intensifies, causing further erosion in wireline long distance minutes.

- 17. If the Commission establishes a presumptive cap on CLEC access rates, do CLECs have the ability to recover access revenue reductions resulting from capped access rates through rate increases to end user customers?**

Response:

Yes. CLEC currently have pricing flexibility for all of their other services. There is no regulatory constraint that curtails their ability to recover the reduced revenue from other services. Comp South's statement that the benchmarking approach would mean that its end users would be subsidizing the cost of exchange access is false. The benchmarking system that we suggest will only disallow CLECs from over-recovering their combined costs from only the IXCs. The access rates that would be permitted under this system will be sufficient to cover the cost of exchange access, similar to when the FCC adopted the benchmark system for interstate access.⁵

⁵ Since the FCC adopted a similar benchmarking system for CLEC interstate rates almost eight years ago (in 2001), we are yet to witness a mass exit by CLECs due to inability to cover their exchange access costs for interstate traffic.

(a) Do CLECs have the same ability to pass through such rate increases as ILECs or RLECs?

Response:

Yes. See Response to 17 above.

(b) If not, what impact should CLEC inability to pass through such rate increases have on the Commission action in this matter?

Response:

The FL PSC could adopted the benchmark system to cap CLEC access rates as proposed without any concern about CLECs ability to recover their combined costs from other services, since they have flexibility to price all of their other services any way they choose without any regulatory or legislative constraint.

18. Should the Commission review the entire Florida market for access services and the access rates of all carriers, not just CLEC access rates?

Response:

If the Commission adopts the benchmark system as recommended, it would be more expedient if the commission keeps the investigations of the CLEC and ILEC rates separated. Historically, the commission has extensively reviewed the rates charged by the ILECs who are currently under some kind of regulation, and the rates they currently charge have been determined by the commission to be just and reasonable. In fact, that is why the ILEC rates are many times lower than the CLEC access rates. It is appropriate therefore to use these ILEC rates

as benchmarks at which the CLEC rates are capped under the market approach we have suggested. Since the ILEC continues to be regulated, and if in the future or immediately after the CLEC case the commission see a need to reduce the ILEC rates the benchmark at which the CLEC rates are capped will automatically decline without any need for commission action. It is in the public interest to focus on the outrageously high CLEC access rates (some of which are 20 – 79 percent higher than the rates charged by their ILEC rivals), and return to the ILEC rates later if necessary.

(a) What harm will result if the Commission takes action only with respect to CLEC access rates?

Response:

As discussed above, capping the CLEC rates at the level of their ILEC rivals (i.e. the rate benchmark) will not have any adverse effect on the CLECs as long as they are not precluded from recovering their costs across the spectrum of services they offer to their customers. Even more importantly, if the commission focus on CLEC access review first and adopts the benchmark system the amount of access reduction that the CLECs will have to experience on a flash cut basis will be limited, relative to the reduction that would occur if the commission reduces the ILEC rates and adopts the benchmark system for the CLECs concurrently.

(b) What effect would Commission action only with respect to CLEC access rates have on the market for intrastate interexchange service?

Response:

If the Commission first focus its attention on CLEC access rates and reduce them to the ILEC level in the service areas where the CLECs operate, it will bring the CLEC rates in line with the ILECs and eliminate any opportunities for arbitrage in the market (e.g. traffic pumping, phantom traffic, etc.). As we discussed above, consumers of long distance service will also benefit because as the trend in interstate access shows lower access rates often translate into lower prices for long distance customers.