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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Ms. Donna R. Searcy
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, DC 20554

Re: CC Docket No. 92-133

Dear Ms. Searcy:

Enclosed for filing please find an original plus nine (9) copies of the Comments of Rochester Telephone Corporation in this proceeding.

To acknowledge receipt, please affix an appropriate notation to the copy of this letter provided herewith for that purpose and return same to the undersigned in the enclosed self-addressed envelope.

Very truly yours,

A handwritten signature in cursive script, appearing to read "Michael J. Shortley, III".

Michael J. Shortley, III

cc: Downtown Copy Center

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAIL BRANCH

In the Matter of)

Amendment of Parts 65 and 69)
of the Commission's Rules To Reform)
the Interstate Rate of Return)
Represcription and Enforcement)
Processes)

CC Docket No. 92-133

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

COMMENTS OF ROCHESTER
TELEPHONE CORPORATION

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September 10, 1992

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) CC Docket No. 92-133

COMMENTS OF ROCHESTER
TELEPHONE CORPORATION

Introduction and Summary

Rochester Telephone Corporation ("Rochester"), on its
behalf and that of its exchange carrier subsidiaries,^{1/}

^{1/} AuSable Valley Telephone Company, Inc., Breezewood Telephone Company, C, C & S Telco, Inc., Canton Telephone Company, Citizens Telephone Company, Inc., DePue Telephone Company, Enterprise Telephone Company, Fairmount Telephone Company, Inc., Highland Telephone Company, Inland Telephone Company, Lakeshore Telephone Company, Lakeside Telephone Company, Lakewood Telephone Company, Lamar County Telephone Company, Inc., Midland Telephone Company, Mid-South Telephone Company, Inc., Midway Telephone Company, Minot Telephone Company, Mondovi Telephone Company, Monroeville Telephone Company, Inc., Mt. Pulaski Telephone & Electric Company, Ontonagon County Telephone Company, Orion Telephone Exchange Association, Oswayo River Telephone Company, Prairie Telephone Company, S & A Telephone Company, Inc., The Schuyler Telephone Company, Seneca-Gorham Telephone Corporation, Southland Telephone Company, The Statesboro Telephone Company, Sylvan Lake Telephone Company, Inc., The Thorntown Telephone Company, Inc., Urban Telephone Corporation, Viroqua Telephone Company, Vista Telephone Company of Iowa and Vista Telephone Company of Minnesota.

submits these comments in response to the Notice of Proposed Rulemaking initiating this proceeding.^{2/}

The Commission proposes to modify three broad aspects of its rate of return processes: (1) the procedures governing future reprscription proceedings; (2) the methodologies for determining the cost of capital for exchange carriers; and (3) the procedures for enforcing rate of return prescriptions. Rochester generally agrees with the Commission's stated goals of simplifying reprscription proceedings and providing greater certainty in the manner of enforcing rate of return prescriptions. The Commission, however, must ensure that the reprscription and enforcement procedures that it adopts satisfy applicable statutory and constitutional requirements. Thus, while the Commission may -- and should -- streamline its reprscription procedures, it should not abandon the basic structure of its paper hearing process, nor should it unduly restrict parties' discovery rights. In addition, the Commission should decline to incorporate into its Part 65 rules any specific methodologies for determining the cost of capital. Rather, it should permit the parties to propose and defend methodologies that they choose and then critically

^{2/} Amendment of Parts 65 and 69 of the Commission's Rules To Reform the Interstate Rate of Return Reprscription and Enforcement Processes, CC Dkt. No. 92-133, Notice of Proposed Rulemaking and Order, FCC 92-256 (July 14, 1992) ("NPRM").

evaluate the record compiled in a reprscription proceeding before selecting an authorized rate of return. Finally, the Commission should rely upon its tariff review and complaint procedures for enforcing a rate of return prescription. The Commission, however, should enforce any rate of return prescription on a prospective basis only. Experience to date with the automatic refund rules and similar retrospective enforcement mechanisms strongly suggests that such mechanisms are unlikely to survive judicial review.

First, the Commission should decline to abandon its paper hearing process in favor of a notice and comment rulemaking proceeding as it proposes.^{3/} Section 205 of the Communications Act authorizes the Commission to prescribe, on a prospective basis, just and reasonable rates. However, section 205 authorizes such a prescription after notice and an opportunity for affected parties to be heard. The Courts, particularly the District of Columbia Circuit, have interpreted section 205 and similar statutory provisions as requiring something more than a notice and comment rulemaking before the Commission may prescribe rates. The Commission should remain faithful to this precedent. At the same time, the Commission may appropriately eliminate unnecessary procedural requirements currently contained in Part 65 to craft a more efficient, yet

^{3/} Id., ¶¶ 27-29.

permissible, represcription procedure. It should eliminate certain of its filing requirements, e.g., the production of certified copies of recent state rate of return awards and data to generate cost of capital estimates based upon specified methodologies. The Commission may also truncate the current discovery rules, some of which have proven to serve no useful purpose.

Second, the Commission should not specify in its Part 65 rules, as it proposes,^{4/} any particular methodologies that exchange carriers must present during a represcription proceeding. Although Part 65 has historically contained these requirements, the Commission has consistently granted waivers of these rules to permit parties to propose and defend particular methodologies that they choose to advocate. As such, it makes little sense to codify rules that will be honored only in the breach. Moreover, the techniques employed to estimate cost of capital are evolving over time. The Commission should not lock itself into only one or a few methodologies that may not represent the best techniques for estimating cost of capital.

^{4/} Id., ¶¶ 57, 60.

Finally, the Commission should, as it proposes,^{5/} rely upon its tariff review and complaint procedures for ensuring compliance with rate of return prescriptions. In addition, the Commission should enforce any rate of return prescription on a prospective basis only. The Courts have decisively rejected its automatic refund rules. The Commission should abandon that approach. Other attempts to enforce a rate of return prescription retrospectively will likely meet the same fate. Sound public policy also supports only giving prospective effect to any decision in an enforcement proceeding. Any attempted retrospective application will destroy the certainty, for customers and carriers alike, that the filed rate doctrine is intended to provide.

The NPRM contains many necessary suggestions for reform of the rate of return prescription and enforcement processes. By adopting the modifications suggested herein, the Commission may craft effective prescription and enforcement procedures that satisfy applicable statutory and constitutional requirements.

Argument

- I. THE COMMISSION SHOULD RETAIN, BUT MODIFY, THE PROCEDURAL REQUIREMENTS GOVERNING REPRESRIPTION PROCEEDINGS.

The Commission is proposing to substitute a notice and

^{5/} Id., ¶ 98.

comment rulemaking proceeding for the paper hearing procedure that currently governs prescription proceedings. The Commission should not adopt this proposal. Section 205 of the Communications Act, which provides the statutory basis for the Commission's rate prescription authority, requires the Commission to provide parties with an opportunity to be heard before it prescribes just and reasonable rates.^{6/} As the Courts have interpreted this, and similar statutory provisions, section 205 requires "something more" than a notice and comment rulemaking.^{7/} Thus, the Commission should not jettison the existing paper hearing procedure in favor of a notice and comment rulemaking that ultimately may not survive judicial review.

^{6/} In relevant part, section 205(a) provides that:

Whenever, after full opportunity for hearing, upon complaint or under an order for investigation and hearing made by the Commission on its own motion, the Commission shall be of the opinion that any charge, classification, regulation or practice of any carrier or carriers is or will be in violation of any provision of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge [classification, regulation or practice] ... to be thereafter observed.

^{7/} See, e.g., Action for Children's Television v. FCC, 564 F.2d 748 (D.C. Cir. 1977); Mobil Oil Corp. v. FPC, 483 F.2d 1238 (D.C. Cir. 1973).

At the same time, however, the Commission may substantially streamline the existing paper hearing procedure and thus eliminate many inefficiencies that it now contains. There are several steps the Commission should take to modify procedures governing prescription proceedings. These include: (a) adopting some version of the proposed automatic trigger mechanism; (b) retaining the basic Direct Case, Responsive Case and Rebuttal Case proceeding;^{8/} and (c) curtailing existing discovery mechanisms.

A. The Commission Should Retain the Essential Features of Its Paper Hearing Process.

The Commission should not adopt its proposal to substitute a notice and comment informal rulemaking, as provided for in section 553(a) of the Administrative Procedure Act ("APA"),^{9/} for the current evidentiary procedures that it has developed. Section 205 of the Communications Act requires that, before the Commission prescribes just and reasonable rates, it must provide affected parties, including the Commission in some circumstances, "a full opportunity for

^{8/} The Commission should eliminate, as mandatory steps, the filing of initial and reply proposed findings of fact and conclusions of law. Rochester believes that these steps produce little useful information and unduly delay the proceeding.

^{9/} 5 U.S.C. § 553(a).

hearing".^{10/} A notice and comment rulemaking proceeding fails to satisfy this requirement. In addition, the use of a notice and comment proceeding would upset the normal burden of proof requirements, outlined in sections 204 and 205, which depend critically upon whether the Commission or a carrier initiates the proceeding. Finally, retaining some form of an evidentiary proceeding will provide the Commission the full record necessary for informed agency decision making in a context where critical facts are likely to be in dispute.

1. A Notice and Comment Rulemaking Fails To Satisfy the Statutory Requirement for a Full Opportunity To Be Heard.

Although the Commission has correctly concluded that a ratemaking proceeding constitutes a rulemaking under the APA,^{11/} that conclusion does not end the inquiry. Ratemaking presents a special exception to the general standard that a notice and comment proceeding can satisfy the APA's hearing requirement when ratemaking is involved. As the D.C. Circuit has held:

In Mobil Oil Corp. v. FPC, ... [the court] recognized that informal rulemaking under § 553 might require

^{10/} The Commission may, as a part of its prescriptive authority under section 205, prescribe a rate of return -- as opposed to individual rates. See Nader v. FCC, 520 F.2d 182 (D.C. Cir. 1974).

^{11/} NPRM, ¶ 27 n.28.

certain adversary procedures akin to adjudications or formal rulemaking when circumstances, such as often obtain in rate-making cases, make them appropriate.^{12/}

The basic structure of the paper hearing process satisfies this requirement.

In Mobil Oil, for example, the Court rejected the claim that trial-type proceedings were required in a ratemaking proceeding. Nonetheless, it concluded that something more than minimum notice and comment procedures were required. The Court held that:

There must ... be some mechanism whereby adverse parties can best criticize and illuminate the flaws in the evidentiary basis being advanced regarding a particular point. The traditional method of doing this is cross-examination, but the Commission may find it appropriate to limit or even eliminate altogether oral cross-examination and rely upon written questions and responses.^{13/}

The Commission's proposed reliance upon informal notice and comment rulemaking proceedings fails to satisfy this requirement. The proposed elimination of both discovery and cross-examination, indeed, precludes the ability of all parties to "criticize and illuminate the flaws" in their adversaries'

^{12/} Action for Children's Television v. FCC, 564 F.2d at 470 n.19, citing Mobile Oil Corp., *supra*.

^{13/} Mobil Oil, 483 F.2d at 1262-63.

presentations.^{14/} Because notice and comment procedures are unlikely to survive judicial review, the Commission should decline to adopt them.^{15/}

2. Notice and Comment Procedures
Would Impermissibly Shift the
Burden of Proof to Exchange
Carriers in All Circumstances.

Sections 204 and 205 of the Communications Act establish important burden of proof tests. Section 204 permits carrier-initiated rate changes, with the burden of proof upon the initiating carrier to demonstrate that the rates it proposes are just and reasonable. Section 205, which permits other parties and the Commission to initiate rate proceedings,^{16/} creates the opposite burden. That is, those parties, including the Commission, that seek to change existing rates bear the burden of proof. A notice and comment rulemaking, under which exchange carriers would essentially be required to justify existing rates, impermissibly shifts this

^{14/} The Commission's adoption of notice and comment procedures in a ratemaking context could also well run afoul of Constitutional standards of procedural due process. See Morgan v. United States, 304 U.S. 1 (1938).

^{15/} Rochester outlines the minimum procedures that it believes are necessary to satisfy this statutory requirement infra at 19-21.

^{16/} Under section 205, the Commission may initiate a represcription proceeding sua sponte. Affected parties may file a complaint alleging that existing rates are unjust or unreasonable.

burden. For this reason, the Courts have held that, when a rate reduction is being contemplated, automatic devices requiring carriers to justify the reasonableness of existing rates impermissibly shifts the burden of proof onto them.^{17/}

3. A Paper Hearing Proceeding Would Enhance the Record Upon Which the Commission Could Prescribe an Authorized Rate of Return.

Even if the Commission were to conclude that a notice and comment proceeding would satisfy statutory requirements, it should nonetheless decline to adopt its proposal. As the D.C. Circuit has cogently noted:

Administrative procedures fail of their fundamental purpose if the goal of expedition is bought at the sacrifice of reasoned decision-making and substantial fairness to the parties involved.^{18/}

To effectuate this goal, the Commission should retain some form of evidentiary proceeding. The requirement that evidence, as opposed to comment, be submitted can only enhance the reliability of the record. Individuals under oath -- or at least pain of perjury -- are likely to take far more care in preparing, documenting and submitting recommendations,

^{17/} See, e.g., New York PSC v. FERC, 866 F.2d 487 (D.C. Cir. 1989) (overturning a requirement that a pipeline file new rates every three years to reflect contemplated reductions in its single asset rate base).

^{18/} Municipal Elec. Util. Ass's v. FPC, 485 F.2d 967, 973 (D.C. Cir. 1973).

including their underlying factual and theoretical support, to the Commission. While notice and comment proceedings provide an appropriate basis for the Commission to decide broad policy issues, the same is not true for the Commission to decide a highly fact specific inquiry, such as a carrier's cost of capital.

In addition, the availability of some form of adversarial proceeding will permit affected parties to probe their adversaries' cases. Such a procedure would permit parties to probe the assumptions underlying, and the weaknesses of, their adversaries' presentations.

Some form of evidentiary proceeding, such as that envisioned by the paper hearing procedure, will best provide the Commission with the record it needs to prescribe an authorized rate of return.

B. The Commission Should Retain, But Streamline, Its Paper Hearing Procedures.

The Commission's goal of streamlining the represcription process is worthy of pursuit. Indeed, there are several steps that the Commission may take to reform the existing procedures. However, the existing procedures work reasonably well and require marginal, rather than wholesale, change. The complexity of the 1990 represcription resulted, not from fundamental flaws in these procedures, but from the necessity to resolve discovery disputes and the inclusion of additional rounds of filings addressed to price cap issues.

The Bureau was called upon to resolve a number of discovery disputes that added needless complexity. Moreover, the Bureau itself initiated a number of data requests and, in effect, became the clearinghouse for the production of additional data.^{19/} The activities provided for under these rules consumed substantial Bureau resources^{20/} and are largely unnecessary. This aspect of rescription proceedings can become largely unnecessary if discovery were somewhat limited and became more self-executing.

Similarly, the 1990 rescription was complicated by the inclusion of price caps issues. Thus, the 1990 rescription addressed not only the authorized rate of return, but also the design of the price cap sharing and lower end adjustment mechanisms. This added two additional rounds of filings -- Supplemental Submissions and Responses to Supplemental Submissions -- that had to be prepared and filed on an extremely compressed schedule.^{21/} Interposing these issues

^{19/} E.g., Rescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Dkt. 89-624, Order, 5 FCC Rcd. 543 (Com. Car. Bur. 1990).

^{20/} See, e.g., Rescribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, CC Dkt. 89-624, Order, 5 FCC Rcd. 2091, ¶¶ 7-9 (Com. Car. Bur. 1990).

^{21/} See Policy and Rules Concerning Rates for Dominant Carriers, CC Dkt. 87-313, Supplemental Notice of Proposed Rulemaking, 5 FCC Rcd. 2176, 2257-58, ¶¶ 177-81 (1990).

into the 1990 rescription added a level of complexity that is not likely to recur.^{22/}

When these additional complexities are taken into account, the 1990 rescription proceeding functioned reasonably well. Thus, the Commission should retain the core procedures that it followed in 1990. Specifically, Rochester proposes a six step procedure for future rescriptions that retains the core features of the current paper hearing process, but eliminates unnecessary and redundant steps. This process would include: (a) a trigger mechanism; (b) an order commencing proceedings; (c) direct cases; (d) responsive cases; (e) rebuttal cases; and (f) discovery.

1. Trigger Mechanism

Rochester agrees with the Commission's conclusion that a two-year rescription cycle is not realistic.^{23/} The Commission should commence a rescription proceeding only in the face of objective indications that there has been a

^{22/} Rochester understands that it was a matter of judgment whether to address these issues in the rescription proceeding rather than directly in the price cap proceeding. Because the two proceedings were on parallel tracks, the design of the sharing and lower end adjustment mechanisms logically could have been addressed in either proceeding.

^{23/} NPRM, ¶ 21.

sustained change in the cost of capital. There is no reason to believe that such changes occur every two years. Moreover, as the Commission correctly notes,^{24/} the two year cycle has been honored only in the breach.

Thus, the Commission should replace the two year cycle with a trigger mechanism. Of the two proposals set forth by the Commission, Rochester believes that the Commission should adopt its automatic trigger.^{25/} The Commission should design the trigger so that a represcription proceeding is commenced when there are objective indications that the cost of capital may have undergone a sustained change. At the same time, the Commission should avoid designing a trigger that may tend to answer the ultimate question at issue -- namely, what the authorized rate of return should be.

On this basis, Rochester believes that a represcription proceeding should be commenced if the composite Moody's

^{24/} Id., ¶ 20; see Refinement of Procedures and Methodologies for Represcribing Interstate Rates of Return of AT&T Communications and Local Exchange Carriers, CC Dkt. 87-463, Order, 5 FCC Rcd. 197, 202-203, ¶¶ 47-49 (1989) ("Interim Represcription Order").

^{25/} NPRM, ¶ 25.

The automatic trigger is somewhat of a misnomer. The Commission will -- as it should -- retain the discretion to delay or accelerate the commencement of a represcription proceeding, as circumstances warrant.

interest rate for Aa rated public utility bonds sustains a change of 150 basis points measured over a moving six month period. Such a trigger relies upon objective indicia of possible changes in the cost of capital.^{26/} Reliance on an interest rate trigger^{27/} avoids the potential prejudgment of the ultimate issue at stake that the use of some form of cost of equity or cost of capital screen could entail. For these reasons, the Commission should avoid utilizing a trigger that relies upon cost of capital or cost of equity estimates.

2. Order Commencing Proceeding

If the trigger indicates that a reprscription is warranted, the Commission should, as it proposes, issue an order commencing a proceeding.^{28/} The order should contain

^{26/} When the Commission commenced the 1990 reprscription, it noted that interest rates had changed sufficiently since the last reprscription to warrant a reexamination of the cost of capital. Interim Reprscription Order, 5 FCC Rcd. at 202, ¶ 45. This is not to say that the cost of capital will change in lockstep with changes in interest rates. A change in interest rates may not necessarily indicate a change in the cost of capital. The interest rate test is merely a screen. If a sustanited change in interest rates exists, up or down, this may suggest that further examination is warranted.

^{27/} E.g., NPRM, ¶ 8.

^{28/} See id., ¶ 28.

all material necessary -- such as the basis for starting the proceeding and additional issues to be addressed -- for carriers to prepare their Direct Cases.^{29/}

3. Direct Cases

Carrier Direct Cases, within the proposed page limits, should be filed within the time frame proposed by the Commission.^{30/} In their Direct Cases, participating carriers should recommend an appropriate rate of return to be prescribed and include the material that supports the recommendation.^{31/} The Direct Cases should also contain any proposed findings that a carrier wishes to submit for the record.

^{29/} The current rules provide for the filing of entries of appearance. Id., ¶ 30. This step is not strictly necessary, as it simply identifies those parties that wish to receive copies of the Direct Cases. Parties that wish to participate will have every incentive to acquire the Direct Cases from normal sources, such as the Commission's commercial contractor. However, if the Commission believes that this step is useful, Rochester would not oppose its retention.

^{30/} Id., ¶ 31.

^{31/} Discovery issues will arise as soon as carriers file their Direct Cases. Rochester suggests a framework for discovery infra at 19-21.

Similarly, in Part II, Rochester suggests modifications to the filing requirements that should simplify prescription proceedings.

The rules should not mandate participation by a particular carrier or group of carriers. Although the focus of such a proceeding will be on those carriers subject to rate of return regulation, most, if not all, price cap regulated carriers will participate voluntarily, thus ensuring that the Commission will have the record that it needs to prescribe an authorized rate of return. However, if the Commission believes that some mandatory participation may be desirable in a particular prescription proceeding, it should so specify in its order commencing that proceeding. This determination is best made on a case-by-case basis rather than being specified in the rules.

4. Responsive Cases

Other parties that wish to participate should do so by filing Responsive Cases, within the time frames and subject to the page limitations proposed by the Commission,^{32/} and serving their Responsive Cases on all parties filing Direct Cases. Like the Direct Cases, the Responsive Cases should recommend the appropriate rate of return to be prescribed and include all material that supports the recommendation. The Responsive Cases should also discuss any material contained in the Direct Cases with which the party differs. Proposed findings, if any, should be filed with the Responsive Case.

^{32/} Id., ¶ 31.

5. Rebuttal Cases

Carriers should have the opportunity to file Rebuttal Cases within the same time frame as that governing the filing of Responsive Cases. Carriers should serve their Rebuttal Cases on all parties to the proceeding. Any additional findings that a carrier wishes to submit for the record should be included in its Rebuttal Case.

6. Discovery

A major source of complexity in the existing procedures relates to discovery and the time required for the Commission to act on discovery requests. In addition, the Commission should not, as it proposes, substitute Bureau-originated data requests for discovery.^{33/} Rather, the Commission should substitute a limited set of self-executing discovery procedures for the current system. The bulk of discovery consists of the production of workpapers and related background documents. This material should be automatically available to any party to the proceeding upon request. The rules should require that a party produce this material to any other party within ten days of the filing of the Direct, Responsive or, if necessary,

^{33/} Id., ¶ 35.

Rebuttal Cases.^{34/} The Commission, of course, should also have the right to request production of such documents.

This exchange of documents should virtually eliminate the need for contention interrogatories and the rules need not specify their availability. However, their use should not be foreclosed entirely. As described above,^{35/} some ability to test the factual presentations of adverse parties is necessary to satisfy the hearing requirement of section 205. The Order Commencing Proceeding could specify the circumstances under which interrogatories will be permitted -- for example, to clarify ambiguities contained in the workpapers. These discovery tools should, absent a compelling showing of need, be limited to factual inquiries. Because parties can be expected to set forth their contentions fully in their Cases, there should be a heavy presumption against the use of contention interrogatories.

These self-executing procedures should resolve virtually all of the problems identified by the Commission^{36/} -- filing, pleading cycles and Commission decisions on discovery requests

^{34/} Rochester anticipates little, if any, new workpapers or related documents will be generated in connection with the preparation and filing of Rebuttal Cases.

^{35/} See supra at 8-10.

^{36/} NPRM, ¶ 37.