

MCI Telecommunications Corporation
1801 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

RECEIVED

MAY 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

May 17, 1995

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, NW
Washington, DC 20554

DOCKET FILE COPY ORIGINAL

Re: CC Docket No. 94-1; Price Cap Performance Review for Local Exchange Carriers

CC Docket No. 93-179; Price Cap Regulation of Local Exchange Carriers
Rate of Return Sharing and Lower Formula Adjustment

Dear Mr. Caton:

Enclosed herewith for filing are the original and four (4) copies of MCI Telecommunications Corporation's Motion to Accept Late-Filed Pleading and Opposition in the above-captioned proceeding.

Please acknowledge receipt by affixing an appropriate notation on the copy of the MCI comments furnished for such purpose and remit same to the bearer.

Sincerely yours,

Chris Frentrup
Senior Regulatory Analyst
Federal Regulatory

Enclosure
CF



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MAY 17 1995

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of)	
)	
Price Cap Performance Review for Local Exchange Carriers)	CC Docket No. 94-1
)	
Price Cap Regulation of Local Exchange Carriers)	CC Docket No. 93-179
)	
Rate of Return Sharing and Lower Formula Adjustment)	

MOTION TO ACCEPT LATE-FILED PLEADING

MCI Telecommunications Corporation (MCI) hereby requests that the Commission accept this Motion to Accept Late-Filed Pleading. MCI seeks to oppose the Joint Petition for Stay filed by Bell Atlantic and Southwestern Bell Telephone Company (Joint Parties) in the above-captioned dockets.¹

MCI received a copy of the Joint Parties' Petition for Partial Stay via mail service on Saturday, May 13, 1995. Pursuant to Section 1.45(d) of the Commission's rules, oppositions to motions for stay must be filed seven (7) days after the motion was filed with the Commission. In this case, the opposition was due Tuesday, May 16, 1995.

After evaluating whether the "mail rule" applied to oppositions for stays, and

¹ Joint Petition for a Partial Stay and for Imposition of an Escrow or Accounting Mechanism Pending Judicial Review, filed May 9, 1995.

deciding that it did not, MCI attempted to file its opposition on May 16, 1995.² Unfortunately, MCI's pleading did not arrive at the Commission's offices until shortly after 5:30 p.m. MCI is therefore filing its opposition on May 17, 1995, one day late. MCI does not believe that this brief delay will prejudice parties since reply comments on stay motions may not be filed.³ Nor should this brief delay disrupt the Commission's consideration of the stay motion.

For the reasons stated above, MCI respectfully requests that the Commission accept this Motion for Late-Filed Pleading.

Respectfully submitted,

By: 
Chris Frentrup
1801 Pennsylvania Ave. NW
Washington D.C. 20006
(202) 887-2731

Dated: May 17, 1995

² There is some conflict in the explanation of the Commission's "mail rule" for pleadings, and in its explanation of the due date for stay oppositions. Section 1.4(h) of the Commission's rules gives parties an additional three days to respond to pleadings, if the filing period is 10 days or less, and if the party has been served by mail. The Rule then lists specific exceptions to the "mail rule" requirement. Oppositions to stays is not listed as an exception. Section 1.45(d) of the Commission's rules, which provides that stay requests must be responded to in seven days, states that the provisions of Section 1.4(h) do not apply. Thus, one rule does not list stay oppositions as an exception to the mail rule, while the other does.

³ Section 1.45(d) of the Commission's Rules, 47 C.F.R. Section 1.45(d).

Before the
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In the Matter of)	
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Price Cap Regulation of Local Exchange Carriers)	CC Docket No. 93-179
)	
Rate-of-Return Sharing and Lower Formula Adjustment)	

**OPPOSITION OF MCI TELECOMMUNICATIONS CORPORATION
TO JOINT PETITION FOR STAY PENDING JUDICIAL REVIEW**

MCI Telecommunications Corporation (MCI) hereby opposes the Joint Petition For a Partial Stay and for Imposition of an Escrow or Accounting Mechanism Pending Judicial Review of the Commission's "Price Cap Performance Review for Local Exchange Carriers Order (Price Cap Review Order)"^{1/} and the Price Cap Regulation of Local Exchange Carriers: Rate of Return Sharing and Lower Formula Adjustment (Add-Back Order)^{2/} filed by Bell Atlantic and Southwestern Bell (jointly Petitioners). As explained below, Petitioners have not met the stringent requirements for a stay of a Commission order, and their request must therefore be denied.

^{1/} Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, FCC 95-132 (released April 7, 1995).

^{2/} Price Cap Regulation of Local Exchange Carriers: Rate-of-Return Sharing and Lower Formula Adjustment, CC Docket No. 93-179, FCC 95-133 (released April 14, 1995).

Background

In the Price Cap Review Order, the Commission, inter alia, adjusted the productivity factor the local exchange carriers (LECs) must use in their annual price cap filings. In addition, the Commission also required the LECs to make a one-time adjustment in the Price Cap Indexes (PCIs) to reflect the difference between the Commission's original productivity factor of 3.3 percent and the new minimum factor of 4.0 percent. Finally, the Commission required the LECs to remove prospectively the exogenous change previously reflected in their PCIs for Other Post-Employment Benefits (OPEBs). In the Add-back Order, the Commission made explicit an implicit requirement of the LEC Price Cap Orders,^{3/} namely, that the calculation of a LEC's actual rate of return for a given year not be artificially depressed (or inflated) by the "sharing" obligation (or "low-end" adjustment) resulting from the previous year's earnings. As noted in the Add-Back Order, failure to remove the impact of a current sharing adjustment for the prior year's earnings from the current year's reported earnings "will make a LEC's [current] earnings, and therefore its productivity, appear to be lower than it actually is...."^{4/}

Petitioners have appealed these orders and now seek a stay from the Commission of these decisions in these two orders pending judicial review.

^{3/} Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (LEC Price Cap Order), Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), modified on recon., 6 FCC Rcd 2637 (1991) (LEC Price Cap Recon.), aff'd sub nom., National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

^{4/} Order at ¶ 23.

Petitioners argue, in support of their stay request, that they are likely to prevail on the merits because of analytical deficiencies in the orders and because the decisions reached by the Commission constitutes impermissible retroactive rulemaking. Petitioners also argue that they will, absent interim relief, be deprived of substantial revenue without any realistic prospect of recovery, and that a stay would not injure other parties and would benefit the public interest. As explained below, however, the main analytical deficiencies here are found in Petitioners' motion.

**PETITIONERS HAVE NOT MET THE REQUIREMENTS
FOR OBTAINING A STAY OF THE COMMISSION'S ORDER**

"On a motion for stay, it is the movant's obligation to justify the... exercise of such an extraordinary remedy." Cuomo v. United States Nuclear Regulatory Com'n., 772 F.2d 972, 978 (D.C. Cir. 1985). In order to obtain a stay of the orders pending appeal, Petitioners must show that: (1) they are likely to prevail on the merits of the appeal; (2) they will suffer irreparable harm absent a stay; (3) others will not be harmed by grant of the stay; and (4) the public interest supports grant of the stay. Washington Metropolitan Area Transit Com'n. v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). See also Virginia Petroleum Jobbers Ass'n. v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958). Each of these prerequisites must be met to support the extraordinary relief of a stay. Policy and Rules Concerning Rates for Dominant Carriers, 4 FCC Rcd 5384, 5385 (1989).

A. Petitioners Are Not Likely to Prevail on the Merits

Petitioners argue that the Commission's decisions in these orders are incorrect because they constitute retroactive ratemaking, and because they ignore relevant data on the record in this proceeding. In fact, the Commission has required the LECs to make only a prospective adjustment to their PCIs for the removal of the OPEB exogenous cost, and for the excessively low productivity factor the Commission previously chose. The Commission did not require the LECs to reduce their rates to refund money previously collected for OPEB expenses, nor did it require the LECs to reduce their PCIs to return to ratepayers the money collected in the past four years due to the excessively low productivity factor. The Commission required the LECs only to reduce their current PCIs to correct the PCI on a going-forward basis.

In addition, the Commission did not ignore data on the record regarding productivity, as Petitioners allege. In fact, the Commission noted that the Petitioners' own study, if performed properly, would have given a productivity factor of 4.8 percent. Other parties of record had filed studies and data supporting a productivity factor of 5.7 percent. If the Commission ignored any data, it ignored data which would have supported a higher productivity factor.

Petitioners also allege that the Commission's decision requiring add-back of sharing amounts is retroactive ratemaking. This is incorrect. The Commission only restored the way in which the LECs report their rate of return to the status quo before

price caps. MCI has the same objections to this portion of Petitioners' motion that it had regarding Ameritech's similar petition.^{5/}

In short, Petitioners' retroactive rulemaking argument is groundless. There is nothing "retroactive," in any legally meaningful sense, about the adjustments required by the orders. Petitioners do not, and cannot, deny that the only impact of the Order is on future rates. The adjustment may make those future rates lower than they otherwise might have been for some carriers, due to the impact of the adjustment on the measurement of their earnings for the prior year. There is nothing "retroactive," however, about imposing more stringent regulation for the future based on past history. It must be concluded that, based on Petitioners' flimsy showing in their motion, they have no chance of success in their appeal.

**B. Petitioners Will Not be Irreparably Harmed in the
Absence of a Stay**

In order to demonstrate irreparable harm, the movant is required to demonstrate that "the injury must be both certain and great; it must be actual and not theoretical. Injunctive relief 'will not be granted against something merely feared as liable to occur at some indefinite time,'...the party seeking injunctive relief must show that '[t]he

^{5/} **See** Opposition of MCI Telecommunications Corporation to Emergency Motion for Stay Pending Judicial Review, CC Docket No. 93-179, filed May 5, 1995.

injury complained of [is] of such imminence that there is a "clear and present" need for equitable relief to prevent irreparable harm.^{9/}

Petitioners' claim of injury strikes out on every element. First, Petitioners have made no showing that, in fact, these changes will make any difference at all in the access rates they must file. In fact, these petitioners have both elected a productivity factor even higher than the Commission's 4.0 percent minimum. Thus, the Petitioners have not demonstrated that the changes which they seek to overturn here will affect them adversely.

Second, and more importantly, even if there is some impact on their 1995 rates, Petitioners still have not demonstrated irreparable injury from either the Commission's productivity factor, one-time adjustment, or add-back decisions. Regarding add-back, under Section 65.600(d)(2) of the Commission's Rules, 47 C.F.R. § 65.600(d)(2), Petitioners may make corrections to their reported 1994 earnings next year, which can be reflected in their 1996 access tariff filing.^{1/} Thus, if Petitioners win on appeal or the Commission for any reason modifies its ruling by next March, the effect of the add-back adjustment on 1995 rates, if any, can be corrected in the 1996 rates. The threat of injury accordingly is not "of such imminence that there is a "clear and

^{9/} Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (quoting Connecticut v. Massachusetts, 282 U.S. 660, 674 (1931) and Ashland Oil, Inc. v. FTC, 409 F. Supp. 297, 307 (D.D.C.), aff'd, 548 F.2d 977 (D.C. Cir. 1976)) (emphasis in original).

^{1/} LEC Price Cap Recon., 6 FCC Rcd at 2689, ¶¶ 114-15.

present" need for equitable relief" at this time. Petitioners therefore have not made the required showing of immediate irreparable injury.

In addition, the other changes to which petitioners object can also be corrected by an exogenous adjustment to allow Petitioners to raise rates if the Commission reverses its decision. Petitioners' argument that competition in the future may not allow them to raise their rates are irrelevant; if competition keeps them from raising their rates, it is not the Commission's actions which prevent them from recovering that money, but the market.

C. Issuance of a Stay Would Substantially Harm the Legitimate Interests of Other Parties and the Public Interest

To obtain a stay, Petitioners must also demonstrate that other parties will not be harmed and that the public interest supports the stay. "In litigation involving the administration of regulatory statutes designed to promote the public interest, this factor necessarily becomes crucial. The interests of private litigants must give way to the realization of public purposes." Virginia Petroleum Jobbers, 259 F.2d at 925. Assuming that the effect of these changes would be to reduce 1995 access rates, a stay of the Order would force ratepayers to incur higher access rates. Even if the impact of such a stay on access rates could be reversed in a future rate filing, the damage would have been done, in terms of higher access rates filtering through the economy and stunted demand. Accordingly, the public at large would be harmed by a stay, and, thus, by definition, the public interest would also be harmed.

CONCLUSION

For the reasons stated above, Petitioners have not demonstrated any of the elements required for a stay of the Commission's Order. Their Joint Petition for Stay Pending Judicial Review should therefore be denied.

Respectfully submitted,

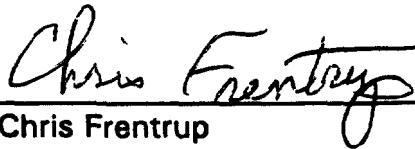
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By: Chris Frentrup
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Dated: May 17, 1995

STATEMENT OF VERIFICATION

I have read the foregoing and, to the best of my knowledge, information, and belief, there is good ground to support it, and it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on May 17, 1995.

A handwritten signature in cursive script that reads "Chris Frentrup". The signature is written in black ink and is positioned above a horizontal line.

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CERTIFICATE OF SERVICE

I, Stan Miller, do hereby certify that copies of the foregoing Opposition were sent via first class mail, postage paid, to the following on this 17th day of May, 1995.

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HAND DELIVERED**

A handwritten signature in cursive script that reads "Stan Miller". The signature is written in black ink and is positioned above a horizontal line.

Stan Miller