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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
	)	

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PETITION FOR LIMITED RECONSIDERATION OR, IN THE ALTERNATIVE, CLARIFICATION

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May 19, 1995

No. of Copies rec'd 0+9
List A B C D E

TABLE OF CONTENTS

		Page
SUMMARY		i
I.	THE REVISED PRODUCTIVITY FACTORS AND THE ONE-TIME ADJUSTMENT ARE STILL ERRONEOUSLY LOW	2
II.	THE TREATMENT OF SHARING AND THE LOWER FORMULA ADJUSTMENT REQUIRE FURTHER MODIFICATION OR CLARIFICATION	6
III.	THE COMMISSION ERRED IN FAILING TO IMMEDIATELY IMPLEMENT A "PER LINE" ADJUSTMENT FORMULA FOR THE COMMON LINE BASKET	10
IV.	THE COMMISSION ERRED IN FAILING TO REQUIRE EXOGENOUS TREATMENT OF FULLY AMORTIZED LEC EQUAL ACCESS COSTS	13
CONCLUSION		18

SUMMARY

Although it implemented many useful revisions to the LEC price cap plan, the First Report and Order in this proceeding failed in limited but important respects to correct deficiencies in the incentive regulation of those carriers. The Commission should therefore clarify and/or reconsider those portions of its decision to better assure reasonable rates for access ratepayers.

First, the Commission should increase its revised minimum and optional productivity offsets, which are still insufficient to reflect the LECs' achieved productivity. Except for correcting an error in the Frentrup-Uretsky study on which the Commission based its original productivity factor, the First Report and Order failed to take account of the clear record evidence showing that a productivity factor of 5.47 is the minimum required to reflect the LECs' actual performance. Additionally, the Commission should increase the one-time adjustment to the LECs' price caps by $322 million to reflect reductions in the LECs' cost of capital which the Commission failed to include in prescribing the adjustment mechanism.

Second, while it was erroneous to prospectively eliminate sharing in view of the inadequate revised productivity offsets, the Commission should at a minimum clarify that LECs that have elected the 5.3 percent optional productivity offset remain subject to a sharing

obligation with respect to the period January 1 through July 31, 1995 (when those carriers' rates were set using concededly understated productivity factors). Additionally, the Commission should eliminate the lower formula adjustment, which is unnecessary to prevent confiscatory earnings and has simply been used by LECs to "game" the price cap process.

Third, the Commission should immediately adopt a per-line mechanism for capping common line rates, which the First Report and Order acknowledged is superior to the current "balanced 50/50" method. The mere fact that the Commission in the next phase of this docket will study a total factor productivity methodology that does not require a separate common line formula cannot justify delaying implementation of the per-line method where, as AT&T shows, such action is necessary to prevent overstated common line rates.

Fourth, the Commission should act immediately to determine, either here or in connection with AT&T's application for review of Bureau action on the 1994 annual access tariffs, whether to accord exogenous treatment to the LECs' amortizations of equal access and network reconfiguration ("EANR") costs. AT&T has shown in both these proceedings that continued endogenous treatment of this amortization has overstated the LECs' price caps by approximately $100 million annually.

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PETITION FOR LIMITED RECONSIDERATION
OR, IN THE ALTERNATIVE, CLARIFICATION

Pursuant to Section 1.429 of the Commission's rules, 47 C.F.R. § 1.429, AT&T Corp. ("AT&T") hereby requests the Commission to reconsider or, in the alternative, to clarify limited portions of its First Report and Order in this proceeding.[1]

While the Commission's revisions to the LEC price cap plan adopted in the First Report and Order clearly represent a substantial improvement in that regulatory mechanism, as shown below that order erroneously decided (or, in some case, left entirely unaddressed) certain issues which have an important bearing on achieving the goals of incentive regulation of these carriers. By correcting these deficiencies on reconsideration, the Commission will promote its ongoing objective of assuring that access ratepayers are not

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[1] Price Cap Performance Review of Local Exchange Carriers, CC Docket No. 94-1, First Report and Order, FCC 95-132, released April 7, 1995 ("First Report and Order"), erratum, released April 26, 1995.

subjected to unreasonable charges in the absence of market competition for the access services they require.

I. THE REVISED PRODUCTIVITY FACTORS AND THE ONE-TIME ADJUSTMENT ARE STILL ERRONEOUSLY LOW.

Although it adjusted the LECs' minimum productivity offset from 3.3 percent to 4.0 percent, and established optional higher productivity offsets at 4.7 percent and 5.3 percent, the Commission in the First Report and Order nevertheless permitted the LECs to maintain productivity factors that are far below the levels that the record in this proceeding shows are warranted. Moreover, the one-time adjustment in the LECs' price caps that the Commission required the LECs to implement failed to take into account the impact of lower interest rates on the LECs' costs. The Commission should therefore reconsider its revised minimum and optional productivity offsets, and prescribe higher factors, as well as an additional one-time adjustment in the LECs' price caps, that more accurately reflect the LECs' demonstrated efficiency.

With respect to the level of the productivity adjustment, the First Report and Order belatedly acknowledged that the Frentrup-Uretsky study of LEC historical productivity, on which the Commission had relied in establishing the current offsets, was flawed by

questionable data because it included the 1984 tariff year in its calculations.[2] As AT&T and numerous other parties demonstrated in the original LEC price cap proceeding, this discrepant data point produced a significant downward bias in that study and, hence, in the Commission's selected productivity offsets. The First Report and Order therefore recalculated the results of the Frentrup-Uretsky study, excluding the 1984 data point, and developed a revised minimum productivity offset of 4.0 percent -- .7 percent above the level originally prescribed by the Commission.

Apart from correcting that longstanding error, however, the Commission made no other adjustment to the productivity factor computation, despite clear record evidence of other factors that contribute significantly to further understatement of that offset. AT&T showed that the available historical data on the LECs' performance since the inception of price cap regulation for those carriers reflect that the LECs have achieved an aggregate productivity of 5.54 percent.[3] This analysis -- which is based on the LECs' own earnings reports to the Commission for the relevant period -- underscores the inadequacy both of the prior productivity

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[2] See First Report and Order, Appendix D.

[3] See Ex parte letter dated November 29, 1994 from Richard Clarke, AT&T, to Secretary, FCC.

offsets and of the "interim" factors as revised in the First Report and Order.[4]

Despite the voluminous evidence submitted by AT&T and other commenters regarding the LECs' achieved productivity, the First Report and Order found that "there is an insufficient record to choose a long-term methodology for computing the [productivity] factor," and deferred that determination to a subsequent phase of this docket. By doing so, the Commission has permitted the LECs to set access rates based on "interim" productivity factors that remain seriously understated, as recent events confirm.

Specifically, in their 1995 annual access tariff filings on May 9, all but four price cap LECs elected the higher optional offset of 5.3 percent.[5] Their actions demonstrate that the higher optional

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[4] AT&T also showed in its Comments (pp. 26-28) that the "balanced 50/50" formula for capping the LECs' common line basket accounts for .8 percent of the foregoing amount of those carriers' achieved productivity offsets. The First Report and Order declined to immediately implement a change in the common line capping mechanism to a per-line formula, a decision which AT&T shows in Part III below should be reconsidered. Therefore, in the event the Commission now adopts the per-line formula for the LECs' current tariff filings, it should further adjust the revised productivity factor described in AT&T's study to reflect the change from the "balanced 50/50" methodology.

[5] The four LECs that did not so elect are NYNEX, U S WEST, SNET, and some GTE companies.

factor, far from presenting a challenging threshold for LEC productivity improvements, is already comfortably within the capabilities of those carriers. Indeed, AT&T's analysis of the achieved rates of return for those BOCs that have elected the 5.3 percent factor indicates that their earnings exceed by up to 65 basis points the levels that would have been necessary to achieve that productivity adjustment. Accordingly, the Commission on reconsideration should adjust its revised offsets to reflect the LECs' higher achieved productivity.

The one-time adjustment to the LECs' price caps ordered by the Commission, while fully warranted, also is nevertheless lower than warranted by the record evidence. In particular, AT&T demonstrated in its Comments that a discounted cash flow analysis indicates a 132 basis point reduction in the LECs' cost of capital for 1991-1993, and that half of that cost reduction had not been reflected in the Gross National Product Price Index ("GNP-PI") used in computing the LECs' price caps. AT&T also showed that the LECs' price caps should be immediately reduced by at least $322 million for this reason alone.[6]

Although it acknowledged that the LECs' cost of capital has decreased since the adoption of the LEC price cap plan,[7] the Commission failed without explanation to

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[6] See AT&T Comments, Appendix E.

[7] See First Report and Order, ¶ 231.

revise the those carriers' price cap indices to reflect the impact of that change.[8] Rather than allowing the LECs through such an omission again to improperly retain the benefits of a lower cost of capital, the Commission should reconsider this issue and adjust the LECs' price caps by at least a further $322 million.

II. THE TREATMENT OF SHARING AND THE LOWER FORMULA ADJUSTMENT REQUIRE FURTHER MODIFICATION OR CLARIFICATION.

The First Report and Order concludes (¶ 220) that, in light of the modifications adopted therein to the LECs' productivity adjustments, the sharing and lower formula adjustment ("LFAM") backstop mechanisms adopted in the LEC Price Cap Order should no longer be permitted for those LECs that adopt the optional 5.3 percent productivity factor. However, the Commission retained sharing and LFAM for LECs subject to the revised minimum productivity factor and those carriers that elect the optional 4.7 percent factor. Id., ¶¶ 221-222. These actions require clarification and/or reconsideration in two respects.

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[8] The First Report and Order addressed these changes in the LECs' capital costs and concluded that they did not warrant making an additional one-time adjustment to the LECs' price caps. Id. at ¶ 231. However, the reasons stated for that determination have no apparent bearing on the question whether the LECs' price cap indices should be adjusted to account for the change in LEC capital costs.

As a threshold matter, the First Report and Order does not clearly specify that carriers who elect a 5.3 percent productivity factor will nonetheless be subject to an ongoing sharing obligation with respect to the last seven months of the current access tariff year, i.e., from January 1 through July 31, 1995. Such a requirement, however, is implicit in the Commission's actions in this docket. During this period, the price caps for the LECs' access rates have been computed using the minimum 3.3 percent and optional 4.3 percent productivity offsets that the Commission in this proceeding has found were unreasonably low. Moreover, the Commission stressed in the LEC Price Cap Order that the very purpose of the sharing mechanism was to provide a backstop against inadequate productivity adjustments, such as those the LECs will have operated under for the last seven months of the 1994-95 tariff year.[9] Thus, there is no rational basis for allowing these carriers to avoid sharing for this period after electing the new, higher optional productivity factor.

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[9] See Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, 6801 (1990)("LEC Price Cap Order")(¶ 120), recon. 6 FCC Rcd 2637 ("LEC Price Cap Reconsideration Order"), further recon. 6 FCC Rcd 4524 (1991), second further recon. 7 FCC Rcd 5235 (1992), aff'd sub nom. National Rural Telecommunications Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

Even some LECs have now acknowledged that the First Report and Order necessarily requires continuation of the LECs' sharing obligations in these circumstances. Specifically, earlier this month in connection with its 1995 annual access tariff filing Ameritech, which has opted for the 5.3 percent productivity offset, petitioned the Commission for a waiver of its sharing obligation with respect to the first part of this calendar year in return for applying that optional adjustment retroactively to January 1.[10] Ameritech's request for waiver clearly demonstrates that, in the absence of such relief, LECs that have adopted the 5.3 percent productivity factor remain bound by the sharing obligation as to the January through July time period. However, to foreclose attempts by other LECs to avoid the operation of the backstop mechanism, the Commission should clarify the First Report and Order to state expressly that the sharing obligation remains applicable as to this period.

Additionally, the Commission erred in failing to eliminate entirely the LFAM procedure for LECs that

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[10] See Ameritech Petition for Clarification or Waiver filed May 9, 1995 in Annual 1995 Access Tariff Filings. The Commission has requested comments on Ameritech's petition (see Public Notice, DA 95-1097, released May 16, 1995), and AT&T will address the merits of Ameritech's waiver request in the context of that pleading cycle.

retain the minimum productivity factor or elect the lower optional factor. AT&T demonstrated in its Comments (pp. 34-38) that the LFAM device was originally intended by the Commission to avoid prolonged LEC underearnings due to an error in setting the productivity factor or other factors beyond the LEC's control, "such as local or regional recessions."[11] To date, however, that procedure has primarily been used by a few LECs to recoup one-time accounting charges for corporate "downsizings" intended to achieve greater efficiency - - and, thus, increased future earnings - - for those carriers.[12]

Any contention that the Commission might have inadvertently established the LECs' productivity factors at too high a level in the LEC Price Cap Order has been foreclosed by the First Report and Order's finding that those productivity offsets were seriously understated due to reliance on erroneous historical data. In fact, as shown above in Part I, even the revised productivity offsets adopted by the Commission in this proceeding are

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[11] LEC Price Cap Order, 5 FCC Rcd at 6804 (¶ 147).

[12] See, e.g., 1992 Annual Access Tariff Filings, 7 FCC Rcd 4731, 4735 (1992). In that instance, NYNEX filed an increase in its PCI levels of approximately $69 million, based on a one-time charge against earnings for workforce retirement inducements and other "downsizing" measures designed to increase long-term productivity that had initially reduced its current earnings before the 10.25 percent "lower mark" triggering an LFAM adjustment.

still considerably understated. Moreover, no LEC has identified any credible threat that it would be threatened with confiscatory earnings in the absence of this vehicle. On this record, there was no justification for failing to eliminate the LFAM device for all price cap LECs, as AT&T and other commenters requested.[13] The Commission should therefore reconsider its decision and eliminate entirely this portion of its "backstop" mechanism.

III. THE COMMISSION ERRED IN FAILING TO IMMEDIATELY IMPLEMENT A "PER LINE" ADJUSTMENT FORMULA FOR THE COMMON LINE BASKET.

The First Report and Order found (¶¶ 266-269) that the extensive record in this proceeding demonstrates the "balanced 50/50" formula adopted in the LEC Price Cap Order for capping the common line basket has failed to achieve its objective of encouraging growth in common line usage. Moreover, the Commission acknowledged (¶ 271) that, as AT&T and other commenters have argued (both here and in the original LEC price cap proceeding), a per-line formula "is superior" to the balanced formula

[13] Moreover, because as shown in Part I above the LECs' revised minimum and optional productivity factors prescribed in the First Report and Order are still considerably understated, the Commission's decision to eliminate sharing for carriers that elect the higher 5.3 percent optional offset was likewise unjustified, and should be reconsidered if the Commission nevertheless continues to adhere to those levels for the productivity factors.

or other methods for capping common line rates under the current price cap formula.

Astonishingly, however, the First Report and Order refused to require that change at this time. The sole explanation provided for that decision is that the Commission in a further phase of this proceeding intends to examine the advisability of adopting a price cap formula based on total factor productivity ("TFP"), which would not require a common line cap adjustment for demand growth. Id. at ¶ 271.

The Commission's failure promptly to adopt an admittedly meritorious modification of its common line capping mechanism for its current price cap formula is clearly unjustified. There is no assurance that the Commission will ultimately adopt a TFP-based price cap formula; indeed, in the further phase of the proceeding the Commission will also examine revisions to the current productivity methodology proposed by AT&T which would retain a common line adjustment formula. And while the Commission has expressed its desire to complete the further phase of this proceeding expeditiously (¶ 198), there likewise is no assurance that the Commission's deliberations (even assuming they result in adoption of a TFP-based price cap formula) can be completed by early

next April, when the LECs are required to file their 1996 annual access tariffs.[14]

Failure immediately to adopt the per-line adjustment formula will result in overstatement of the common line caps for the LECs' 1995 annual access rates, and raises serious risks that the 1996 common line caps will be overstated as well. The First Report and Order's anticipation (¶ 273) that the Commission's original 1991 "calibration" of common line minute growth will be

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[14] The Commission's other stated reasons for failing immediately to implement the per-line common line cap likewise do not withstand analysis. The assertion in the First Report and Order (¶ 272) that immediate adoption of per-line capping "would create excessive rate churn and confusion" has no record basis and, like the Commission's expectations that it will imminently adopt a TFP-based price cap plan, is necessarily speculative.

The Commission's additional observation (¶ 24) that an immediate revision to the common line cap formula "would require LECs to compute all their price cap indices" is puzzling, at best. As a threshold matter, the change in the "g" factor to the LEC price cap equation applies solely to the common line basket, see 47 C.F.R. §61.45(c), and thus there should be no need for the LECs to revise "all their price cap indices." Moreover, in other portions of the First Report and Order the Commission required those carriers to immediately implement changes to their price cap index calculations. See also Cost Support Material to be Filed with 1995 Annual Access Tariffs, Revisions to Tariff Review Plan for Price Cap Companies and Order, DA 95-823, released April 14, 1995 (providing specific instructions for implementing index revisions). The First Report and Order does not provide any reasoned explanation (and AT&T contends there is none) why a revision to the common line formula would be any more difficult for LECs to implement than those other rule changes.

"approximately equal" to demand growth until the conclusion of further proceedings herein is unsupported in the record, and is irrelevant even if correct. This is because the effect of the balanced 50/50 formula is to attenuate reductions in the LECs' common line price caps as demand growth increases, compared to a per-line approach that automatically reduces per minute common line charges as demand increases.

Thus, access ratepayers and their customers will be seriously disadvantaged by the Commission's action, both under the LECs' 1995 annual tariffs and in any future tariff years in which the balanced 50/50 formula may be applied, because retention of that methodology necessarily results in overstatement of the LECs' common line rates.[15] The Commission should therefore reconsider this aspect of the First Report and Order, and immediately adopt the per-line formula for capping common line rates.

IV. THE COMMISSION ERRED IN FAILING TO REQUIRE EXOGENOUS TREATMENT OF FULLY AMORTIZED LEC EQUAL ACCESS COSTS.

Finally, the First Report and Order failed without justification to modify the LEC price cap plan to require exogenous treatment of equal access and network

[15] As the First Report and Order points out (n.506), reductions in the LECs' common line rates through adoption of a per-line formula would allow AT&T to pass through some of those cost savings in reduced rates.

reconfiguration ("EANR") costs that have been fully amortized by those carriers, as AT&T had requested. As a result of this omission, the Commission has erroneously permitted the LECs to continue to overstate their aggregate price caps by approximately $100 million annually.

As AT&T showed in its Comments (pp. 46-49), EANR costs were incurred by LECs in the years following adoption of the Commission's access charge plan to convert their end offices to equal access, to ballot their subscribers concerning their choice of a presubscribed carrier, and (in the case of the BOCs) to conform their network facilities to the requirements of the Bell System divestiture. The Commission directed the LECs to defer the non-capitalized portion of these access expenses and to amortize them over a single eight-year period ending December 31, 1993.[16] A substantial unamortized portion of those costs (estimated by AT&T at $100 million) remained reflected in the LECs' access rates when the LEC price cap plan took effect in 1990, and as a result became embedded in the LECs' price caps,

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[16] See Petitions for Recovery of Equal Access Costs, Memorandum Opinion and Order, FCC 85-628, 50 Fed. Reg. 50,910 (1985), recon. 1 FCC Rcd 434 (1986).

even after the LECs completed their EANR amortizations (and, thus, fully recovered those costs) in 1993.[17]

AT&T demonstrated that treating the expiration of the amortizations exogenously would accord with the treatment of other expense amortizations under the LEC price cap plan.[18] Moreover, such treatment would mirror the outcome under rate of return regulation, in which the LECs' rates would have been reduced at the conclusion of the EANR amortization; incentive regulation was not intended to produce a different result for ratepayers.[19]

The First Report and Order nevertheless ignored AT&T's showing and declined to accord exogenous treatment to the EANR amortization for the sole reason that the Common Carrier Bureau, in its review of the LECs' annual

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[17] Indeed, in filings with the divestiture court concurrently with the conclusion of the amortization period the BOCs acknowledged that they had fully recovered their EANR expenses.

[18] See LEC Price Cap Order, 5 FCC Rcd at 6608 (¶ 173); (LEC amortization of depreciation reserve deficiencies); LEC Price Cap Reconsideration Order, 6 FCC Rcd at 2673-74 (¶ 79)(LEC amortizations of inside wire).

[19] AT&T Comments, p. 48. AT&T also showed that the Commission's original basis for denying exogenous treatment of the EANR costs in the LEC Price Cap Order (namely, to reduce incentives for cost shifting by the LECs) is no longer applicable now that the amortization of those expenses has been completed. Id.

1994 access tariffs, had also denied such relief.[20] Noting that AT&T has filed an application for review of the Bureau's decision there, the First Report and Order asserted (¶ 305) that "the record in that proceeding would provide a better basis to consider this issue, and accordingly, we will not act on this issue here."

The Commission's refusal to entertain the question of exogenous treatment for the amortization of EANR costs in this rulemaking was arbitrary and lacking in reasoned basis. The First Report and Order does not identify any deficiency in the record here, much less one that could conceivably impair the Commission's ability to exercise informed decisionmaking in this matter. Given the extensive briefing of this issue, both by AT&T and other commenters and by the LECs, any such claim is implausible on its face.

Nor does the First Report and Order describe any manner in which the record in AT&T's application for review of the 1994 Annual Access Order (which has been pending for almost year) allegedly provides a superior vehicle for resolution of this issue.[21] In fact, a

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[20] First Report and Order, ¶ 305, citing 1994 Annual Access Tariff Filings, 9 FCC Rcd 3519, 3535-36 (1994)(¶¶ 36-38)("1994 Annual Access Order").

[21] Moreover, elsewhere the First Report and Order indicates that the tariff review process is not ordinarily a preferable means for determining whether to accord exogenous treatment to the EANR amortization. Specifically, the Commission concluded

(footnote continued on following page)

principal ground for the Bureau's decision in that tariff review proceeding declining to treat the EANR amortization exogenously was its finding that a Commission rulemaking would be a more appropriate vehicle for such a determination.[22] The Commission's decision now to remit this issue to its review of the Bureau's order thus is all the more inexplicable.

As shown above, the question of exogenous treatment for the LECs' EANR amortizations has now been squarely presented to the Commission and fully briefed in two separate regulatory proceedings within the past year, without any ruling from the Commission on this issue. AT&T and other commenters who have raised this matter are entitled to a prompt determination of the issue by the Commission in one of those pending proceedings, and should not continue to be subjected to a regulatory "Catch 22." AT&T submits that the exogenous treatment issue can be resolved either in the instant docket or its pending application for review. However, in view of the Bureau's concern in the 1994 Annual Access Order that

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(footnote continued from previous page)

that, to provide "consistent procedures for reviewing all proposals for new or revised exogenous costs," the application of such treatment to particular LEC cost changes should in the future be addressed in rulemakings in the ordinary course. Id., ¶¶ 312-319.

[22] See 1994 Annual Access Order, 9 FCC Rcd at 3536 (¶ 38).

this question requires notice and comment rulemaking (and absent any indication of imminent Commission action on its pending application for review), AT&T suggests that the Commission address that issue on reconsideration in this proceeding.

CONCLUSION

For the reasons stated above, the Commission should reconsider, or in the alternative clarify, the First Report and Order in accordance with AT&T's Petition.

Respectfully submitted,

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May 19, 1995

CERTIFICATE OF SERVICE

I, Ann Marie Abrahamson, do hereby certify that on this 19th day of May, 1995, a copy of the foregoing "Petition for Limited Reconsideration Or, In The Alternative, Clarification" of AT&T Corp. was mailed by U.S. first class mail, postage prepaid, to the parties listed on the attached Service List.

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