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MCI

September 4, 1996

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996; CC Docket No. 96-98

Dear Mr. Caton:

Enclosed herewith for filing are the original and six (6) copies of MCI Telecommunications Corporation's Opposition regarding the above-captioned matter.

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

Sincerely yours,

Don Sussman
Regulatory Analyst

Enclosure
DHS

No. of Copies rec'd 0+4
List ABCDE

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

**OPPOSITION OF MCI TO JOINT MOTION
OF GTE CORPORATION AND
THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY
FOR STAY PENDING JUDICIAL REVIEW**

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OPPOSITION OF MCI TO JOINT MOTION OF GTE CORPORATION AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR STAY PENDING JUDICIAL REVIEW

SUMMARY

In seeking a stay of the Commission's historic local competition decision,[1/] GTE and SNET ("movants") urge a course antithetical to the public interest as defined by Congress in the Telecommunications Act of 1996, Pub. L. No. 104-104. Movants themselves acknowledge that the Act "embodies a clear congressional judgment that the national interest favors the rapid and efficient introduction of competition in the local exchange." Joint Motion of GTE Corporation and the Southern New England Telephone Company for Stay Pending Judicial Review (filed August 28, 1996) ("Motion") at 39. Indeed, that purpose could not be more clear. Congress set an exacting six-month deadline for this Commission to issue regulations implementing section 251 of the Act, and required state commissions to complete section 252 arbitrations pursuant to the Act

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[1/] In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Federal Communications Commission, CC Docket No. 96-98 (Released August 8, 1996) ("Order").

and those regulations within a fixed period. The Commission did exactly what Congress required: it issued comprehensive regulations within six months of enactment, during the time when negotiations and arbitrations were underway, when new entrants were making critical investment decisions, and when the Commission had an historic opportunity to foster the development of effective local competition. Movants demand that this process be stopped in its tracks. Indeed, movants seek to stay the entire Order, not merely the specific aspects they challenge.

Because the relief movants request is so obviously contrary to the public interest, and the manifest purpose of Congress, it should take a strong case indeed to justify it. The case presented by movants, however, is entirely insubstantial.

First, movants have demonstrated no significant likelihood of success in their substantive challenges to the Order. They merely recycle arguments that the Commission already carefully considered and soundly rejected. The argument that the Commission exceeded its delegated authority in promulgating pricing and other unbundling rules is meritless. It is self-evident that Congress intended in the 1996 Act to expand the authority of the Commission with respect to intrastate telecommunications services, thereby changing the jurisdictional boundaries previously established by section 2(b) of the Communications Act of 1934. As a practical matter, the 1996 Act would be a nullity were it limited to traditional interstate services. Congress set forth terms, conditions and pricing standards for intrastate telecommunications service and gave the Commission substantial authority to implement these general directives. Movants have offered no statutory support, and no argument in logic or policy, for their

astounding claim that this unqualified authority contains an implicit exception denying the Commission to power to implement the portions of the Act establishing standards for pricing interconnection and access incumbent local exchange carriers ("ILECs") must make available to their nascent competitors. Moreover, movants' description of the Commission's pricing rules is highly misleading. The Commission did not set national prices; the Order merely sets forth the methodology states are to apply in setting actual prices.

Movants' Fifth Amendment challenge to the Commission's decision to adopt a TELRIC pricing methodology is equally insubstantial. This argument expressly depends on the premise that a regulated entity has a constitutionally protected entitlement to recover all its actual historical costs in all circumstances. That is not and has never been the law. To the contrary, the Supreme Court has made clear that rate methodologies may deny compensation for even prudently incurred historical costs, so long as the resulting rates are not so low as to jeopardize the regulated entity's ability to survive as a going concern. See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989). Movants do not even argue that they can meet that test under the TELRIC methodology properly applied. In any event, ILECs have by and large already recovered their historical costs, and there is no reason to think a proper forward-looking methodology will inadequately compensate them for any unrecovered costs. Movants have no constitutional guarantee to perpetual recovery of monopoly profits or inefficient costs.

Nor have movants raised any substantial argument against the Commission's interim proxy rates for unbundled elements. To the extent movants contend these proxy

rates are lower than the price resulting from application of the TELRIC methodology to accurate cost information, they are free to make those arguments to state commissions, which are in turn free to adopt different rates. In any event, the proxy rates are reasonable (indeed conservative) estimates given the evidence in the record before the Commission and the limited but vital role they play.

Second, quite apart from the merits of their claims, movants have demonstrated absolutely no need for the extraordinary interim relief they seek. The pricing rules at issue -- the Commission's general TELRIC pricing methodology and specific interim proxy rates for unbundled elements -- are imposing no present harm of any kind, and do not threaten to impose any irreparable harm at any point in the future. Movants can raise takings claims before state public utilities commissions or in federal court pursuant to section 252. Indeed, movants' takings arguments are not even ripe: movants are objecting in advance to a methodology that may or may not produce noncompensatory rates in any given instance in future state proceedings. Similarly, interim proxy rates may or may not ever apply to movants, depending on future decisions of state commissions, and in any given case may be higher or lower than rates determined by state commissions within the framework of the act and implementing regulations. Obviously, in those instances where an actual cost study produces a price lower than the Commission's default rate, movants will not be harmed by application of the default rate. This is no mere theoretical possibility -- the Georgia Public Service Commission recently ordered unbundled loops to be priced at approximately $2 less than the interim

default rate for Georgia set by the Commission.[2/] Unless and until state commissions act to set rates or choose instead to rely on interim default rates, movants cannot even know whether they will be injured, much less prove it.

Faced with this obvious difficulty, the most movants can argue is that the very existence of the Order harms them by setting a "benchmark" that will affect the private negotiations contemplated under section 252 of the Act. The short answer to this argument is that nothing in the Act requires movants to agree to prices they believe to be noncompensatory or otherwise undesirable. Movants can just say no to such prices in negotiation, and are free to argue for any prices they wish in arbitrations pursuant to section 252. To the extent that the Commission's rules will produce a different result in arbitrations than state commissions otherwise have reached, that is precisely what Congress intended when it required the Commission independently to promulgate regulations no later than August 8, 1996, when negotiations and arbitrations were certain to be underway.

Third, granting movants' application would be devastating to the public interest because it would block Congress' principal objective in passing the Telecommunications Act of 1996 -- opening the local exchange market to the possibility of true competition as rapidly as possible. That, of course, is movants' true purpose here. But it must count strongly against the requested relief that it would frustrate the very public benefit Congress sought to bring about. Moreover, a stay would effectively defeat the express

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[2/] See In the Matter of MFS Intelenet of Georgia, Inc. Petition for BellSouth Nondiscriminatory Unbundled Rates, Terms, and Conditions; and MCIMetro Petition to Establish Nondiscriminatory Tates, Terms, and Conditions for the Unbunding of Local Loops; Docket Nos 6415-U & 6537-U ("GA Order")(Copy Attached).

statutory requirement that the Commission "complete all actions necessary to establish regulations to implement the requirements of this section" within a fixed, six-month period. The indefinite stay of the order in its entirety sought by movants would completely deny consumers, state commissions, and the competitive process the benefits that this statutory timetable was intended to produce.

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INTRODUCTION

In seeking a stay of the Commission's historic local competition decision, GTE and SNET ("movants") urge a course antithetical to the public interest as defined by Congress in the Telecommunications Act of 1996. Movants themselves acknowledge that the Act "embodies a clear congressional judgment that the national interest favors the rapid and efficient introduction of competition in the local exchange." Motion at 39. Indeed, that purpose could not be more clear. Congress set an exacting six-month deadline for this Commission to issue regulations implementing section 251 of the Act, and required state commissions to complete section 252 arbitrations pursuant to the Act and those regulations within a fixed period. The Commission did exactly what Congress required: it issued comprehensive regulations within six months of enactment, during the time when negotiations and arbitrations were underway, when new entrants were making critical investment decisions, and when the Commission had an historic

opportunity to foster the development of effective local competition. Movants demand that this process be stopped in its tracks. Indeed, movants seek to stay the entire Order, not merely the specific aspects they challenge.

Because the relief movants request is so obviously contrary to the public interest, and the manifest purpose of Congress, it should take a strong case indeed to justify it. The case presented by movants, however, is entirely insubstantial.

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Commission's pricing rules is highly misleading. The Commission did not set national prices; the Order merely sets forth the methodology states are to apply in setting actual prices.

Movants' Fifth Amendment challenge to the Commission's decision to adopt a TELRIC pricing methodology is equally insubstantial. This argument expressly depends on the premise that a regulated entity has a constitutionally protected entitlement to recover all its actual historical costs in all circumstances. That is not and has never been the law. To the contrary, the Supreme Court has made clear that rate methodologies may deny compensation for even prudently incurred historical costs, so long as the resulting rates are not so low as to jeopardize the regulated entity's ability to survive as a going concern. See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989). Movants do not even argue that they can meet that test under the TELRIC methodology properly applied. In any event, ILECs have by and large already recovered their historical costs, and there is no reason to think a proper forward-looking methodology will inadequately compensate them for any unrecovered costs. Movants have no constitutional guarantee to perpetual recovery of monopoly profits or inefficient costs.

Nor have movants raised any substantial argument against the Commission's interim proxy rates for unbundled elements. To the extent movants contend these proxy rates are lower than the price resulting from application of the TELRIC methodology to accurate cost information, they are free to make those arguments to state commissions, which are in turn free to adopt different rates. In any event, the proxy rates are

reasonable (indeed conservative) estimates given the evidence in the record before the Commission and the limited but vital role they play.

Second, quite apart from the merits of their claims, movants have demonstrated absolutely no need for the extraordinary interim relief they seek. The pricing rules at issue -- the Commission's general TELRIC pricing methodology and specific interim proxy rates for unbundled elements -- are imposing no present harm of any kind, and do not threaten to impose any irreparable harm at any point in the future. Movants can raise takings claims before state public utilities commissions or in federal court pursuant to section 252. Indeed, movants' takings arguments are not even ripe: movants are objecting in advance to a methodology that may or may not produce noncompensatory rates in any given instance in future state proceedings. Similarly, interim proxy rates may or may not ever apply to movants, depending on future decisions of state commissions, and in any given case may be higher or lower than rates determined by state commissions within the framework of the act and implementing regulations. Obviously, in those instances where an actual cost study produces a price lower than the Commission's default rate, movants will not be harmed by application of the default rate. This is no mere theoretical possibility -- the Georgia Public Service Commission recently ordered unbundled loops to be priced at approximately $2 less than the interim default rate for Georgia set by the Commission.[3/] Unless and until state commissions act to set rates or choose instead to rely on interim default rates, movants cannot even know whether they will be injured, much less prove it.

[3/] See GA Order.

Faced with this obvious difficulty, the most movants can argue is that the very existence of the Order harms them by setting a "benchmark" that will affect the private negotiations contemplated under section 252 of the Act. The short answer to this argument is that nothing in the Act requires movants to agree to prices they believe to be noncompensatory or otherwise undesirable. Movants can just say no to such prices in negotiation, and are free to argue for any prices they wish in arbitrations pursuant to section 252. To the extent that the Commission's rules will produce a different result in arbitrations than state commissions otherwise have reached, that is precisely what Congress intended when it required the Commission independently to promulgate regulations no later than August 8, 1996, when negotiations and arbitrations were certain to be underway.

Third, granting movants' application would be devastating to the public interest because it would block Congress' principal objective in passing the Telecommunications Act of 1996 -- opening the local exchange market to the possibility of true competition as rapidly as possible. That, of course, is movants' true purpose here. But it must count strongly against the requested relief that it would frustrate the very public benefit Congress sought to bring about. Moreover, a stay would effectively defeat the express statutory requirement that the Commission "complete all actions necessary to establish regulations to implement the requirements of this section" within a fixed, six-month period. The indefinite stay of the order in it entirety sought by movants would completely deny consumers, state commissions, and the competitive process the benefits that this statutory timetable was intended to produce.

ARGUMENT

I. MOVANTS' ARGUMENTS HAVE NO LIKELIHOOD OF SUCCESS EITHER IN A PETITION FOR RECONSIDERATION OR A PETITION FOR REVIEW.

The Commission should not stay its Order because movants have not established any likelihood that the Commission's decision was wrong -- much less that an appellate court will find the Commission's interpretation and exercise of its authority under the Act to be "arbitrary, capricious, or manifestly contrary to the statute." Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984). In its First Report and Order, the Commission carefully and thoroughly reviewed and rejected the arguments movants recycle here.[4/] Those arguments have not improved with repetition.

Movants' inability to establish any probability of success on Commission reconsideration or judicial review is critical. In some circumstances, a party seeking a stay need establish a lower likelihood of success if the equities weigh heavily in favor of a stay. See Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843-44 (D.C. Cir. 1977); Coastal Bend Television Co. v. FCC, 231 F.2d 498, 500 (D.C. Cir. 1956). Here, however, there is no dispute that if the FCC had statutory authority to adopt its regulations and those regulations are consistent with the standards in section 251, the regulations further the public interest, and indefinite

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[4/] See, e.g., Order ¶¶ 69-103 (discussing commenters' arguments and explaining conclusions about Commission authority over intrastate services); ¶¶ 104-120 (discussing commenters' arguments and explaining conclusions about Commission's pricing authority); ¶¶ 613-617, 733-740, 1116, 1187-1192 (discussing and rejecting Takings arguments); ¶¶ 767-828 (discussing default rates).

postponement of their effective date would therefore harm the public interest. The Commission's reasoning clearly establishes that prompt implementation of its regulations is not only consistent with, but compelled by, the public interest in expeditious development of local competition. As a result, if the Commission finds that movants are unlikely to succeed on the merits, there can be no serious dispute that the balance of the equities tilts overwhelmingly against a stay.

A. The Commission Has Statutory Authority To Promulgate National Pricing Standards Governing Agreements Under Section 251 of the Act.

1. Congress gave the Commission authority to implement the rate requirements of section 251.

Congress granted the Commission broad authority to adopt regulations implementing the requirements of section 251. Order ¶ 117. Indeed, section 251(d)(1) expressly and unqualifiedly requires the Commission to adopt regulations "to implement the requirements of this section [251]." The requirements of section 251 include:

- requirements of sections 251(c)(2) and (c)(3) that ILEC rates for interconnection and unbundled elements be just, reasonable and nondiscriminatory;
- requirements of section 251(c)(4) that ILECs offer for resale at wholesale rates services it offers at retail;
- requirements of section 251(c)(6) that ILECs provide physical collocation at rates that are just, reasonable, and nondiscriminatory; and
- requirements of section 251(b)(5) that LECs establish reciprocal compensation arrangements for transport and termination.

See Order ¶ 115. "Section 251(d)(1) further expressly directs the Commission, without limitation, to `complete all actions necessary to implement the requirements of [section 251].'" Order ¶ 115.

Movants are simply wrong in their renewed attack on the Commission's authority to adopt national pricing rules. Motion at 7. The Commission explains in detail how and why section 251(d)(1) and related sections give the Commission "broad authority to complete all actions necessary to implement the requirements of section 251." See Order ¶ 117. It is evident from the face of the statute that Congress intended to invest the Commission with broad authority to promulgate detailed regulations implementing all aspects of section 251. For example, in section 251(d)(2), Congress imposed specific conditions on the Commission's exercise of discretion in deciding which particular network elements should be unbundled pursuant to section 251(c)(3). However, nowhere in the Act did Congress specifically state that the Commission had the authority to determine which elements would be unbundled; this particular authority was simply part of the general authority granted the Commission by section 251(d)(1). Section 252(d)(2) makes clear that Congress understood section 251(d)(1) as a broad grant of authority, empowering the Commission to make specific decisions about the nature of unbundling under section 251(c)(3). Otherwise, Congress would have had no reason to condition the Commission's exercise of this authority in section 251(d)(2). Yet that is precisely what Congress did. Of course, Congress could have left decisions about what elements should be unbundled entirely to the states. But Congress plainly expected the Commission to exercise significant authority over this question.

There is simply no reason to think that the Congress intended the Commission's authority over pricing methodologies to be more limited than its authority over other aspects of unbundling. To accept movants' contrary argument, one would have to conclude that the general grant of implementing authority in section 251(d)(1) authorized the Commission to issue specific rules about what network elements would be unbundled (the first requirement of section 251(c)(3)), but simultaneously denied the Commission the authority to issue specific rules about the "rates, terms and conditions" on which such unbundled elements would be offered (the second requirement of section 251(c)(3)) -- and that this restriction would result not from a specific statutory limitation but merely by implication from the overall statutory design. Such an argument borders on the nonsensical.

Contrary to the arguments of the movants, the Commission's pricing rules do not usurp the role of the states in the rate-setting process. See Motion at 7-8. Movants rely primarily on provisions of section 252 contemplating that state commissions will determine just and reasonable rates. Under the Commission's rules, and just as movants wish, "[t]he states' role under section 252(c) is to establish specific rates when the parties cannot agree, consistent with the regulations prescribed by the Commission under sections 251(d)(1) and 252(d)." Order ¶ 111. State commissions will set these rates unless (a) they choose to use the Commission's proxy rates instead of conducting a proceeding to set specific rates within the framework established in the order, or (b) they fail to act at all, in which case the Commission will step in as section 252(e)(5) requires. Congress gave the final word on price to the federal government: the Commission may

step in to set actual prices under section 252(e)(5) if the state fails to act; section 252(e)(6) empowers federal district courts to review state pricing decisions for compliance with section 251; and the Commission can adjudicate complaints against ILECs alleging that their prices violate statutory standards. See Order ¶¶ 124-28. Given the right to ultimate federal review and the compelling interest in rapid development of local competition, it makes no sense to argue that Congress intended to prevent the Commission from articulating at the outset of the rate-setting process substantive standards that would guide state commissions.

The Commission rightly rejected movants' argument that section 252 rules out any role for the Commission in regulating rates because "[s]tates must comply with both the statutory standards under section 252(d) and the regulations prescribed by the Commission pursuant to section 251 when arbitrating rate disputes or when reviewing BOC statements of generally available terms." See Order ¶ 118. In this way the Commission provides for the "complementary and significant roles" of the Commission and the states envisioned by Congress. Order ¶ 111. The Commission's role under section 251(d)(1) is to establish underlying national pricing rules to ensure that specific rates determined by a state commission will be just, reasonable, and nondiscriminatory. Order ¶ 111.

2. Congress gave the Commission authority over intrastate as well as interstate rates.

Movants are similarly wrong that the Commission lacks authority under the Act "to promulgate rules governing pricing for the type of agreements concerning local

services that will be concluded under section 251," and that it "lacks any authority to regulate matters purely within the local exchange." Motion at 9. The 1996 Act "expands the applicability of both national rules to historically intrastate issues, and state rules to historically interstate issues." Order ¶ 83. The Commission correctly held that section 251 "authorizes the FCC to establish regulations regarding both interstate and intrastate aspects of interconnection, services, and access to unbundled elements." Order ¶ 84. One of the clearest examples of the Commission's authority over intrastate as well as interstate matters is the obligation it has pursuant to section 252(e)(5) to assume the state's section 252 duties should the state fail to act. See Order ¶ 85.[5]

Equally correctly, the Commission rejected movants' argument that section 2(b) of the 1934 Act, 47 U.S.C. section 152(b), limits its intrastate authority because Congress "intended for sections 251 and 252 to take precedence over any contrary implications based on section 2(b)." Order ¶ 93. The Act provides strong support for this conclusion, because several of its local competition provisions are explicitly directed to intrastate as well as interstate matters. Order ¶¶ 87, 93 (discussing sections 253, 251(c)(2), 251(e)(1), 276(b), and 276(d)). While movants continue to quarrel with the Commission's understanding of the legislative history of the 1996 Act, they provide no new or persuasive reasons to reconsider it. Compare Motion at 9 with Order ¶¶ 94-95.

B. The TELRIC Pricing Standard Does Not Effect a Taking in Violation of the Fifth Amendment

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[5] The Commission also correctly rejected movants' arguments based on Louisiana Public Serv. Comm'n v. FCC, 476 U.S. 355 (1986). Compare Motion at 12 with Order ¶ 97.

Movants argue that the Commission's TELRIC pricing rules constitute a taking in violation of the Fifth Amendment whether those rules are analyzed as regulatory takings or as physical invasions under the per se rule that applies when government mandates a permanent physical occupation of private property. Motion at 12-13. Movants are wrong on both counts.

1. The TELRIC Pricing Standard Does Not Constitute a Regulatory Taking

The Constitution does not require administrative agencies to adopt any particular ratemaking methodology. More than fifty years ago, in Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591, 602 (1944), the Supreme Court held squarely that agencies are "not bound to the use of any single formula or combination of formulae in determining rates." Thus, it is long-settled that utilities have no vested rights in existing ratemaking methodologies. See, e.g., Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989); Wisconsin v. Federal Power Comm'n, 373 U.S. 294 (1963). Equally important, the mere "fact that the value [of the utility's property] is reduced does not mean that the [rate] regulation is invalid." Hope, 320 U.S. at 601. Rather, the Takings Clause is implicated only if an agency's regulatory scheme produces overall rates so low as to "jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to raise future capital." Duquesne, 488 U.S. at 312. See Federal Power Comm'n v. Texaco, Inc., 417 U.S. 380, 391-92 (1974).

Movants' arguments fly in the face of this established law. First, according to movants, "[t]he investments an incumbent LEC has actually made in constructing its network . . . must be recovered if the company is to provide a return to investors sufficient to continue attracting capital." Motion at 17. This argument is fundamentally wrong because it fails to treat bygones as bygones. Rational investors seek to recover adequate returns on future investments. Because the Commission's forward-looking TELRIC pricing methodology most nearly replicates what an efficient firm would recover under competitive conditions, it necessarily affords ILECs the opportunity to earn reasonable returns and, therefore, to attract sufficient capital. Even if true, the claim that ILECs will suffer short-term losses to the extent that their embedded costs exceed economic cost is immaterial. Firms in unregulated markets routinely risk losses due, for example, to their own inefficiencies or to improvements in technology that cause them to write off outdated assets. Regulated utilities are not constitutionally entitled to protection against such ordinary market forces. See, e.g., Duquesne, 488 U.S. at 308-09 (approving rate methodology that "mimics the operation of the competitive market" and "gives utilities strong incentive to manage their affairs well and to provide efficient services to the public"). It is therefore an entirely satisfactory answer to movants' concerns "that forward-looking incremental costs provide the proper measure for determining prices that would prevail in a competitive market."[6]

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[6] Indeed, in the Florida proceeding, GTE itself advocated a pricing standard that would set prices "at a level comparable to where they would be in a competitive marketplace." In Re: Resolution of petition(s) to establish nondiscriminatory rates, terms, and conditions for resale involving local exchange companies and alternative local exchange companies pursuant to Section 364.161, F.S., Docket No. 950984-TP (June 24, 1996)

(continued...)

The only reason why movants, or other ILECs, would fail to recover their actual costs under the TELRIC methodology is they do not use the most efficient available technology in their networks. It is telling that movants contend that no ILEC actually employs the most efficient available technology. E.g., Declaration of Anne U. MacClintock at 13 ¶ 23. Nothing in the Constitution requires regulated utilities to recover investments in inefficient technology.

In any event, movants' challenge to the Commission's choice of a forward-looking methodology paints a highly misleading picture. Movants will not be denied recovery of all historically incurred costs. Indeed, by and large, ILECs have already recovered most if not all of their past investments. And there is no reason to think that a methodology focused on efficient investment will fail to compensate them adequately for costs they have not already recovered. What movants seek here is nothing less than a guarantee of monopoly revenues for the future.

Second, movants complain that the Commission's pricing rules are constitutionally infirm for allowing only reasonable contributions to joint and common costs. But in a competitive market, no firm would be able, or would likely even try, to recover all of its joint and common costs from the sale of any one or several of its services. And movants and other ILECs are not precluded by the order from arguing that the portion of joint and common costs recovered through TELRIC prices for interconnection and access should be higher rather than lower.

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[6] (...continued)
("FPSC Order") at 16.

For these reasons, the D.C. Circuit recently rejected challenges to Commission regulations comparable to those contemplated here. Illinois Bell Tel. Co. v. FCC, 988 F.2d 1254 (D.C. Cir. 1993), concerned a rate order that served to "exclude part of [an] original investment from the rate base." Id. at 1263. Noting that the Commission has no obligation "to include in the rate base all actual costs for investments prudent when made," the court squarely held that, even if the exclusion resulted in a loss of revenues, "[t]here simply has been no demonstration that the FCC's rate base policy threatens the financial integrity of [ILECs] or otherwise impedes their ability to attract capital." Id.

The same analysis dooms any ILEC takings challenge to the Commission's rules for the pricing of interconnection and unbundled elements. As the Commission noted, no ILEC has produced any evidence to show that application of the Commission's pricing rules would threaten its financial integrity. Order ¶ 738. In the extraordinarily unlikely event that an ILEC can make such a showing, however, the Order specifically provides that it may seek relief from application of the TELRIC pricing methodology. Id. ¶ 739. For all these reasons, the pricing rules, by themselves, cannot be found to take the ILECs' property in violation of the Fifth Amendment.

2. The TELRIC Pricing Standard Does Not Constitute an Uncompensated Physical Taking

The per se takings analysis set forth in Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982), provides an inapposite framework because a competitor's use of an ILEC's network element simply does not constitute a physical invasion of that property. Even were the analysis appropriate, however, it would still

not point toward a constitutional violation in this case. The Constitution does not prohibit all takings; it bars only those takings for which just compensation is not paid. See, e.g., First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 314-15 (1987).[7] Nor can there by any question that the Commission has the appropriate statutory authority to impose these requirements. See Order ¶¶ 615-16 (discussing inapplicability of Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441 (D.C. Cir. 1994)). Accordingly, assuming arguendo that the rules mandating that ILECs offer competitors unbundled access to their network elements effect a per se taking, the dispositive constitutional question is only whether the Commission's rules provide the ILECs with "just compensation."

The answer to this question is plainly yes. Just compensation is usually measured by fair market value -- that is, "what it fairly may be believed that a purchaser in fair market conditions would have given." See, e.g., United States v. Miller, 317 U.S. 369, 374 (1943) (internal quotation omitted); Almota Farmers Elevator & Warehouse Co. v. United States, 409 U.S. 470, 473-74 (1973). There can be no doubt that the Commission's articulation of forward-looking economic costs -- which specifically includes both a normal profit and a reasonable contribution to the ILEC's joint and common costs, see, e.g., Order ¶ 673 -- provides just compensation for access to unbundled network elements whether or not such unbundled access rules constitute a taking. Because such forward-looking costs are the best approximation of what the

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[7] Movants make no claim that any taking was not for a public purpose.