RECEIVED

SEP 4 - 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

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

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket 96-98

OPPOSITION OF AT&T CORP. TO THE JOINT MOTION OF GTE CORPORATION AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR STAY PENDING JUDICIAL REVIEW

DOCKET FILE COPY ORIGINAL

MARK C. ROSENBLUM
ROY E. HOFFINGER
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-3539

DAVID W. CARPENTER
PETER D. KEISLER
SIDLEY & AUSTIN
One First National Plaza
Chicago, Illinois 60603
(312) 853-7237

Attorneys for AT&T Corp.

September 4, 1996

No. of Copies rec'd 0+11
List ABCDE

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

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	**CC Docket 96-98**

OPPOSITION OF AT&T CORP. TO THE JOINT MOTION OF GTE CORPORATION AND THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY FOR STAY PENDING JUDICIAL REVIEW

Pursuant to Section 1.45(d) of the Commission's Rules (47 C.F.R. § 1.45(d)), AT&T Corp. ("AT&T") hereby submits its Opposition to the Joint Motion of GTE Corporation ("GTE") and the Southern New England Telephone Company ("SNET") for Stay Pending Judicial Review.[1] GTE and SNET seek a stay of all the regulations adopted in the Commission's First Report and Order, released on August 8, 1996, or, in the alternative, of those regulations that set pricing standards.[2]

INTRODUCTION AND SUMMARY

The Commission should deny the application. GTE and SNET have not remotely satisfied any of the four factors that the Commission considers in deciding whether to stay one of its orders.

---

[1] See Joint Motion of GTE Corporation and the Southern New England Telephone Company for Stay Pending Judicial Review, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (filed Aug. 28, 1996) ("Joint Motion").

[2] See First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996) ("Order").

First, there is no likelihood that the aspects of the Order about which GTE and SNET complain will be set aside on judicial review. GTE and SNET largely repeat the arguments they made unsuccessfully in their Comments and Reply Comments in this proceeding, and the Commission's reasons for rejecting those arguments remain valid.[3]

Second, GTE and SNET have failed to show irreparable harm. They make conclusory and unsupported claims that the process of negotiating or arbitrating interconnection agreements will be irrevocably altered if the rules remain in effect pending appeal, and that GTE and SNET will suffer significant losses in revenues in the time between the signing of interconnection agreements and a decision by the Court of Appeals. These are precisely the type of unsupported, speculative, and implausible assertions that consistently have been held insufficient to obtain such extraordinary relief. Indeed, GTE's and SNET's claims of harm here are particularly inapposite, given that these carriers are the beneficiaries of (1) the Order's unjustified requirement that competitive local exchange carriers that obtain unbundled elements continue for an interim period to pay excessive charges for access, and (2) the companion Order's grant of a one-year "grace period" during which GTE and SNET need not implement dialing parity -- the

[3] GTE and SNET also argue -- on the basis of newly created affidavits -- that the Commission acted unlawfully in treating the results of certain Florida state commission proceedings as one of many factors on which the Commission relied in establishing default rates. But this latter contention is meritless. It is also barred by Section 405 (47 U.S.C. § 405). It was never placed before the Commission until this stay application, and therefore cannot be grounds for reversal of the Order on judicial review.

only aspects of those Orders that present substantial vulnerability on appeal.

Third, other parties -- specifically, competitive local exchange carriers (CLECs), including interexchange carriers, competitive access providers, and others -- would suffer substantial harm in the event a stay were granted. In that regard, GTE's and SNET's repeated suggestion that "private negotiations" with their competitors will be sufficient to implement the Act is frivolous. The Act reflects Congress' recognition that no monopolist will open its market to competition and cede market share through voluntary negotiations, and Congress thus established a series of broad new requirements on incumbent LECs to be implemented through Commission regulations binding upon the states. That is particularly the case here because GTE and SNET are permitted to compete in the long distance market today, and delaying effective local entry of competitors would prolong the illicit advantages that they enjoy in local and long distance markets alike.

Indeed, Congress specifically thought it "important that the Commission rules to implement new section 251 be promulgated within six months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission's rules in requesting access and interconnection."[4] In the absence of such rules, the schedule established by Congress

[4] See Joint Explanatory Statement of the Comm. of Conference, H.R. Rep. No. 458, 104th Cong., 2d Sess. at 148-49 (1996) ("Conference Report").

will be vitiated, and numerous competitive carriers could thereby find themselves denied a meaningful opportunity for entry into the local markets until the Order is upheld on appeal, and until all arbitrations that were resolved in ways that contravened the Commission's rules could then be reopened and redone.

Finally, the public interest strongly weighs against a stay -- as the Commission has already effectively concluded in determining that its rules would serve the public interest and would best effectuate the terms and purposes of the Act. Indeed, a stay would delay the achievement of Congress' intent to promote the "rapid" development of competitive markets (see Conference Report, p. 113), postpone the consumer benefits that such competition would foster, and render pointless the extraordinary effort the Commission exerted in satisfying Congress's six-month deadline.

I. THERE IS NO LIKELIHOOD THAT GTE AND SNET WILL SUCCEED ON THE MERITS OF THEIR APPEAL.

The Joint Motion largely rehashes the arguments that GTE or SNET raised in their comments. The only exception is their new contention that the Order will be set aside because certain Florida state commission proceedings allegedly do not support its setting of default rates. This latter contention (and the affidavits submitted with the Joint Motion) were never even placed before the Commission until this stay application -- and therefore could not be grounds for reversal of the Order unless first presented to the Commission in a petition for reconsideration.[5]

[5] See 47 U.S.C. § 405.

All of these arguments are in any event meritless. The 1996 Act confers clear and explicit authority on the Commission to implement all of Section 251's requirements through regulations that are binding on the state commissions in conducting arbitrations and that will facilitate private negotiations between the monopoly incumbent LECs and their competitors. GTE's and SNET's specific attack on the pricing methodologies adopted by the Commission -- that they amount to an unconstitutional "taking" and are therefore unjust and unreasonable in contravention of Section 251's requirements -- is foreclosed by the fact that those pricing methodologies by definition capture all of the LECs' costs of providing access, unbundled elements, and services to the CLECs, including their costs of capital. The Commission's adoption of default proxy rates was lawful and reasonable, and GTE and SNET present no evidence of any error in those determinations, much less reversible error. And their remaining collection of claimed errors are likewise insubstantial.

A. The Commission Had Ample Statutory Authority To Issue Regulations Implementing The Local Competition Requirements Of Section 251, Including The Methodologies To Be Used By The State Commissions In Setting Prices.

GTE and SNET broadly dispute the Commission's authority to promulgate any national rules that define Section 251's requirements, but focus almost exclusively on its authority over pricing methodologies. Specifically, they contend that the Commission lacked the authority to issue national pricing standards because "the Act assigns th[e] responsibility" to set prices "specifically to the states" (p. 6), and because Section 2(b) of the Act (47 U.S.C. § 152(b) (Supp. 1996)) allegedly deprives the Commission of "any authority to regulate matters purely within the local exchange" (p. 9). These arguments are groundless, and the Commission's decision to reject them will therefore be upheld on review.[6]

As the Order explained (¶ 115), Section 251 imposes a number of requirements on incumbent local exchange carriers. These include not only the duty to provide interconnection and unbundled elements to requesting carriers and to make services available for resale, but also to charge rates for unbundled network elements and interconnection that are "just" and "reasonable."[7] The Commission, in turn, was expressly required "to establish regulations to implement the requirements of this section" (47 U.S.C. § 251(d)(1)). Section 251(d)(1) thus grants the Commission the authority to establish regulations implementing the pricing requirements of Section 251, and the Act makes explicit that the Commission may also "preclude the enforcement of any regulation,

---

[6] With respect to SNET, these arguments were also waived. SNET in its comments never argued that the Commission lacked the authority to issue regulations on pricing or any other issue. To the contrary, SNET took the position that "[i]n adopting rules to implement Sections 251 and 252, the Commission, can, and should, fashion Federal guidelines that encourage and empower the States to move quickly to implement a competitive local exchange environment." SNET Comments (filed May 16, 1996), p. 3 (emphasis added). SNET took the position merely that the Commission should "limit the exercise of its authority in favor of providing significant flexibility to the States." Id. p. 2.

[7] See 47 U.S.C. § 251(c)(2)(D) (interconnection must be "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreements and the requirements of this section and section 252"); 47 U.S.C. § 251(c)(3) (same with respect to unbundled network elements).

order or policy of a State commission" that would "substantially prevent the implementation of the requirements of this section" or "the purposes of this part."[8] Because the one form of state action that would be certain to defeat "the purposes of this part" -- i.e., the development of local competition -- would be state rules that allowed incumbent local exchange carriers to charge excessive prices for unbundled elements or wholesale services, Congress explicitly granted the Commission authority to implement pricing standards by including within Section 251 the requirement that pricing of unbundled network elements and interconnection be "just" and "reasonable." See Order, ¶¶ 113-115.

Indeed, GTE and SNET do not dispute the Commission's conclusion (¶¶ 87-88) that Section 251 applies to the pricing of intrastate services and facilities including interconnection, unbundled network elements, and total service resale. However, they contend (pp. 9-11) that the Commission's authority over intrastate services is narrower than the authority of Section 251 itself, because Section 2(b) allegedly deprives the Commission of any jurisdiction over "matters purely within the local exchange." But as GTE and SNET admit (id.), Section 2(b) is merely a rule of construction, and does not deprive the Commission of jurisdiction over intrastate services where Congress has used "straightforward" language explicitly granting such authority. Here, GTE's and SNET's counterintuitive suggestion that Section 251 sweeps more

---

[8] See 47 U.S.C. § 251(d)(3); see also 47 U.S.C § 261(c) (additional requirements imposed by states must be consistent with Commission's Section 251 regulations).

broadly than the Commission's jurisdiction to implement it is foreclosed by Section 251(d)(1)'s direction that the Commission establish regulations implementing "the requirements of this section," and Section 251(d)(3)'s corresponding authorization to the Commission to preempt state regulations that would prevent implementation of "the requirements of this section." These provisions establish that the Commission's authority under Section 251 is completely parallel to, and as broad as, the scope of Section 251 itself.

In that regard, GTE's and SNET's argument (pp. 7-8) that the Commission lacks the authority to issue pricing standards because Congress assigned the responsibility of setting particular prices to the States is a non sequitur. The Commission's rules merely create pricing methodologies that the states are to follow; the Commission fully recognized (¶ 111) that the States will need to apply these methodologies to specific circumstances through "localized, case-specific decisionmaking" (Joint Motion, p. 6). The Order thus in no way takes away from the States the power to set particular prices -- any more than Congress did when it likewise required the state commissions to comply with various federal requirements in implementing that responsibility.[9]

[9] Indeed, while it was sensible for Congress to vest state commissions with the responsibility to set actual prices, because state commissions will be most familiar with local cost and demand conditions, GTE and SNET suggest no variations in local conditions that would conceivably justify variations in the underlying methodology. To the contrary, had Congress believed that there should be 51 different theories throughout the states and the District of Columbia on how the intercarrier arrangements required by the Act should be priced, it would never have established a uniform federal standard.

B. **The Commission's TELRIC Pricing Standard Does Not Effect an Unconstitutional Taking of Property.**

GTE and SNET also argue that the TELRIC pricing standard adopted by the Commission "violate[s] the requirements under the Act that prices for interconnection and access . . . be 'just' and 'reasonable'" because the prices they predict it will generate are insufficient "to avoid a taking of property without just compensation." (p. 12) The Commission's analysis of this issue is soundly reasoned, and GTE's and SNET's contrary arguments are frivolous.

The Order does not itself prohibit GTE and SNET from recovering their embedded costs through retail rates or other preexisting sources of revenue. Even if it did, however, the Commission's decision to adopt a TELRIC pricing methodology presents no constitutional difficulties. The mere "fact that the value [of the utility's property] is reduced does not mean that the [rate] regulation is invalid."[10] Indeed, contrary to GTE's and SNET's assertion (pp. 14-15) there can be no constitutional claim unless the agency's chosen ratemaking methodology produces rates as a whole[11] which are so low that they "jeopardize the financial integrity of the [regulated] companies, either by leaving them insufficient operating capital or by impeding their ability to

---

[10] See FPC v. Hope Natural Gas Co., 320 U.S. 591, 601 (1944).

[11] GTE and SNET are wrong in contending (p. 15) that this rule only applies to monopolies. While each is a monopoly today, the short answer to that contention is that a rate order cannot be unconstitutional unless its effect is to impair the ability of the enterprise as a whole to retain sufficient working capital and to attract future capital. See Hope, 320 U.S. at 601-03. An order that has no such effect cannot take property.

raise future capital."[12] And as the Commission concluded (¶ 740), by definition a ratemaking approach that provides a regulated entity the opportunity to recover all of the forward-looking costs of providing its services, including the costs of attracting capital -- as the TELRIC approach proposed by the Commission does -- is sufficient to allow that entity to attract capital.[13] Indeed, as the Commission noted (¶ 738), the record in this proceeding contains no showing by any "incumbent LEC . . . that prices based on a forward-looking economic cost methodology would have a significant impact on its 'financial integrity'" -- and GTE and SNET conspicuously fail to point to any such showing.[14]

---

[12] See Duquesne Light Co. v. Barasch, 488 U.S. 299, 312 (1989); also FPC v. Texaco, Inc., 417 U.S. 380, 391-92 (1974) ("All that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level"); Covington & Lexington Turnpike Road Co. v. Sandford, 164 U.S. 578, 597 (1896) (a rate is constitutionally "unjust" only if it acts to "destroy the value of [the] property for all the purposes for which it was acquired," and thereby "practically deprive[s] the owner of property without due process of law") (emphasis added); Jersey Cent. Power & Light Co. v. FERC, 810 F.2d 1168, 1181 n.3 (D.C. Cir. 1987) (en banc) (absent "the sort of deep financial hardship described in Hope, there is no taking").

[13] GTE's and SNET's separate argument that the Commission's adoption of the TELRIC pricing standard is unlawful because it unconstitutionally takes their property by preventing the recovery of their joint and common costs is even more flawed. The FCC's Section 251 rules allow state commissions to add a "reasonable allocation" of joint and common costs that cannot be recovered elsewhere to the TELRIC based prices they set -- which is all GTE and SNET can be entitled to.

[14] GTE's and SNET's alternative suggestion that by requiring them to lease facilities to competitors at TELRIC based prices the Commission's Order constitutes a physical taking (p. 16) is baseless. They cite not a single case analyzing a ratemaking order, even one imposed on utilities with a duty to sell commodities, as a physical taking -- and none exists.

C. **The Commission Did Not Act Arbitrarily Or Capriciously In Setting Optional Default Proxy Rates.**

Nor do GTE and SNET have any likelihood of prevailing on their claim that the Commission acted arbitrarily and capriciously in establishing default proxy rates that a state commission may employ -- if it so chooses -- for a short interim period. They complain that: (1) they were not given an adequate opportunity to comment on the issue of default proxies (pp. 18-19); (2) the proxies improperly "short-circuit[] the case specific consideration for each party's circumstances" (p. 19); and (3) the proxies are "arbitrary" because extra-record evidence submitted for the first time with this Joint Motion supposedly reveals that one of many switch cost studies cited by the Commission and a GTE loop cost study that was not cited by the Commission did not include all costs that the Commission's rules would allow in a cost study supporting permanent rates (pp. 19-22). None of these objections has merit or could conceivably serve as a basis for invalidating any aspect of the Order.

First, the Notice of Proposed Rulemaking[15] devoted an entire section to rate proxies, discussed a number of possible proxy approaches (some of which were incorporated in the final rules),[16] and expressly invited parties to comment on other

---

[15] See Notice of Proposed Rulemaking, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98 (released Apr. 19, 1996) ("NPRM").

[16] Compare, e.g., NPRM, ¶ 137 ("One method for establishing proxies as a ceiling would be to use generic or averaged cost data") with Order, ¶ 792 ("We are adopting a proxy ceiling based on two cost models and [averaged] rates for unbundled loops allowed by six (continued...)

appropriate proxy methodologies. See NPRM, ¶¶ 134-43.[17] Many parties did so.[18] Thus, there can be no serious claim that the Commission failed to meet the Administrative Procedure Act's requirement that a notice of proposed rulemaking include "a description of the subjects and issues involved." 5 U.S.C. § 553(b)(3). In this regard, GTE's and SNET's contention that the adequate notice requirement is met only if the final rules themselves are previewed in the notice (p. 19) is contrary to all relevant authority.[19] And their further suggestion -- again without citation to a single authority -- that the "expedited" (p. 19) 41-day comment cycle established by the Commission to ensure compliance with its statutory rulemaking deadline was somehow legally inadequate is equally frivolous.[20]

---

16 (...continued)
states that had available to them the results of forward-looking economic cost studies").

17 See also NPRM, at ¶ 141 ("we seek comment more broadly on other possible administratively simple methods for setting a ceiling for the price of an unbundled loop to be applied by the states in an arbitration").

18 See Order, ¶¶ 773-781.

19 See, e.g., Sierra Club v. Costle, 657 F.2d 298, 352 (D.C. Cir. 1981) (final rules need only be a "logical outgrowth" of the proposed rules); American Iron & Steel Inst. v. EPA, 568 F.2d 284, 293 (3d Cir. 1977) (notice need only "fairly apprise interested persons of the 'subjects and issues'" of the rulemaking); Connecticut Light & Power Co. v. NRC, 673 F.2d 525, 533 (D.C. Cir. 1982) ("The agency need not renotice changes that follow logically from or that reasonably develop the rules it proposed originally. Otherwise, the comment period would be a perpetual exercise rather than a genuine interchange resulting in improved rules").

20 See, e.g., Florida Power & Light Co. v. United States, 846 F.2d 765, 772 (D.C. Cir. 1988) (fifteen-day comment period was "reasonable" given "Congress' deadline," particularly where the (continued...)

Second, GTE's and SNET's claim (p. 19) that default proxies violate the APA and due process by "short-circuiting" case specific consideration of forward-looking costs is nonsensical. The Order could not be clearer in authorizing -- and, indeed, encouraging -- state commissions to base rates on case-specific cost estimates rather than the default proxies.[21] If GTE and SNET believe that the relevant forward-looking costs of providing network elements in one or more of their service areas exceed the corresponding default proxies, they are free to submit in state arbitration proceedings appropriate cost studies that justify higher rates.

GTE's and SNET's purported concerns about the availability of case-specific determinations are thus wholly fabricated. The default proxies are "presumptive ceilings" (Order, ¶ 768) that in no way foreclose states from implementing different prices that satisfy the requirements of the 1996 Act and the

---

[20] (...continued)
agency received numerous, lengthy comments that "had a measurable effect on the final rule").

[21] See, e.g., Order, ¶ 767 ("we strongly encourage state commissions, as a general rule, to set arbitrated rates for interconnection and access to unbundled network elements pursuant to the forward-looking, economic cost pricing methodology we adopt in this Order"). The Commission also made clear that even if a state does elect to set rates initially on the basis of the default proxies, those rates will be "interim only" and "will apply only until a state sets rates in arbitrations on the basis of an economic cost study, or until we promulgate new proxies based on economic cost models." Id. at ¶ 787; see also id., ¶ 790 ("These proxies would be used by a state commission until it is able either to complete a cost study or to evaluate and adopt the results of a study or studies submitted in the record").

Commission's permanent rate rules.[22] Indeed, the Commission's approach of giving states the ability to "take or leave" the default proxies is remarkably similar to the approach advocated by GTE itself. See GTE Comments, p. 12 (filed May 16, 1996) ("Specifically, the FCC should identify outcomes that it believes are sufficient to comply with the 1996 Act, without foreclosing private parties and states from implementing different, but equally acceptable, arrangements").[23]

Third, GTE's and SNET's belated extra-record criticisms of isolated record (and extra-record) cost studies as purportedly inconsistent with the permanent rate rules established in the Order are flawed for numerous independent reasons. Preliminarily, these arguments could not possibly be grounds for reversal even if they were meritorious. A party seeking to have an order set aside as arbitrary and capricious must rely on the record before the agency, not on new affidavits. Section 405 of the Communications Act (47 U.S.C. § 405) will thus bar this challenge on appeal unless the claims are first made to the Commission in a petition for reconsideration.

In any event, these claims of error are baseless. As an initial matter, it is well settled that an agency's short-term interim approach need not fully conform to each and every

---

[22] See Order, ¶ 798 ("We emphasize that use of the hybrid proxy model can be superseded at any time by a full forward looking economic cost study that follows the guidelines set forth in this order").

[23] See also GTE Reply Comments, p. 31 (filed May 30, 1996) ("GTE accordingly reiterates its call for the FCC to identify ranges of acceptable outcomes for § 251 pricing purposes").

theoretical principle the agency hopes to satisfy with permanent solutions.[24] Thus, even if GTE and SNET could establish that the default proxies depart from theoretical purity -- and, as demonstrated below, they plainly have not done so here -- "administrative and practical reasons" (¶ 782), such as providing states with "a faster, administratively simpler, and less costly approach to establishing prices on an interim basis" (¶ 767), would be more than adequate to support the Commission's interim default rules.[25]

In any event, GTE and SNET nowhere demonstrate that the default proxies depart from theoretical purity. Rather, they claim only that two specific cost studies -- a Pacific Bell switch cost study submitted by GTE in this proceeding and a loop cost study submitted by GTE in a Florida state commission proceeding -- failed to include all relevant forward-looking costs. Even if that were true, however, "the ultimate standard is not whether the agency's analysis is impeccable, but whether it is reasonable; not whether most of the evidence supports the agency's position but whether

---

[24] See, e.g., MCI Telecommunications Corp. v. FCC, 675 F.2d 408, 413-16 (D.C. Cir. 1982) (affirming Commission's decision implementing interim cost allocation methodology, largely on the basis of Commission' finding that no superior alternative was available); MCI Telecommunications Corp. v. FCC, 712 F.2d 517, 535-36 (D.C Cir. 1983) (affirming Commission's implementation of a "good interim solution" pending implementation of "a more permanent rate structure" and "defer[ring] to the Commission's judgment that it lacked the data necessary to prescribe" more precise interim rates).

[25] See MCI, 675 F.2d at 414 ("Implementation is as critical to a policy's success as theoretical design"). GTE's and SNET's focus on the theoretical purity of the interim default rules is particularly misplaced given the Commission's ongoing efforts to develop more precise proxies with generic costing models.

enough of it does."[26] And with respect to the only two proxies they challenge -- the switch and loop proxies -- there is a wealth of record evidence cited by the Commission in the Order, including forward-looking cost studies and state commission findings in litigated network element rate proceedings, that would support proxies even significantly lower than those set by the Commission.[27]

By contrast, neither of the cost studies cited by GTE and SNET played any significant role in the Commission's default proxy findings. The Commission expressly recognized that the Pacific Bell switching cost study likely overstates the relevant costs, because it "apparently includes terminations at tandem switches in addition to end-office terminations" (¶ 813), and accordingly did

---

[26] See Small Refiner Lead Phase-Down Task Force v. EPA, 705 F.2d 506, 541 (D.C. Cir. 1983).

[27] See, e.g., Order, ¶ 812 ("The forward-looking cost studies contained in the record estimate that the average cost of end-office switching ranges from 0.18 cents ($0.0018) per minute of use to 0.35 cents ($0.0035) per minute of use"); id. ("Maryland and Florida have adopted [switch] rates based on forward-looking economic cost studies that fall within the default price range we are adopting"); id., ¶ 811 ("In setting this default [switch] price range, we consider the range of evidence in the record, and believe that the most credible studies fall at the lower end of this range"); id., ¶ 792 ("We are adopting a proxy ceiling based on two cost models and rates for unbundled loops allowed by six states that had available to them the results of forward-looking economic cost studies at the time they considered either interim or permanent rates for the unbundled loop element. These states are Colorado, Connecticut, Florida, Illinois, Michigan, and Oregon. Each of these states has used a standard that appears to be reasonably close to the forward-looking economic cost methodology that we require to be used, although possibly not consistent in every detail with our TELRIC methodology").

not list it among "the most credible studies" (¶ 811).[28] And the Commission could not have considered the GTE loop study because GTE did not submit it in this proceeding, and it was, in any event, only one of several studies considered by the Florida commission in establishing the loop rates upon which the Commission did rely in part. Those Florida loop rates substantially exceed the forward-looking loop findings of other states upon which the Commission relied[29] (and, indeed, were higher even than the cost studies submitted by GTE and BellSouth in the Florida proceeding).[30] In these circumstances, there can be no credible claim that the cost study defects alleged by GTE and SNET in any way undermine the Commission's default proxies.

Finally, GTE and SNET cannot even demonstrate that the two cost studies upon which they focus yield unreasonably low estimates of forward-looking costs. Their principal switch cost

---

28 See also id., ¶ 807 (noting Maryland Commission finding that tandem switch terminations are nearly twice as costly as end-office terminations).

29 See id., ¶ 792 ("Generally, these states appear to have included an allocation of forward-looking common costs in their unbundled loop prices. The individual state studies resulted in the following average rates for unbundled local loops: Colorado, $18; Connecticut, $12.95; Florida, $17.28; Illinois, $10.93; Michigan, $10.03; and Oregon, $12.45").

30 See Joint Motion, Trimble Aff., ¶ 11 (noting that Florida set GTE's loop rate "approximately 2% above GTE's filed TSLRIC estimate"); Order Establishing Provisions for the Resale of Services Provided by BellSouth Telecommunications, Inc., p. 16, Resolution of Petition to Establish Nondiscriminatory Rates, Terms, and Conditions for Resale Involving Local Exchange Companies and Alternative Local Exchange Companies, Docket No. 950984TP (Florida PSC March 29, 1996) (setting BellSouth loop rates at $17.00 "[a]lthough a rate as low as $16.00 could be set based on [BellSouth] cost figures in the record").

study claim -- that the failure to include additional costs associated with "vertical switching features" (p. 21) was error -- is a red herring. As the Commission recognized (¶ 816), there are no such additional costs -- "vertical features are part of the unbundled local switching element, because they are provided through the operation of hardware and software comprising the 'facility' that is the switch." And although GTE and SNET now complain loudly that the loop cost study GTE submitted in Florida did not include all "common" costs, they fail to point out that fully twelve percent of the costs that GTE did include were retail costs that do not belong in a forward-looking network element study.[31] Thus, even if GTE should be heard here to attack the cost study that it chose to submit to the Florida commission, there is absolutely no basis upon which to conclude that -- contrary to GTE's interests -- GTE there underestimated its forward-looking loop costs.

D. GTE's and SNET's' Remaining Claims Are Equally Meritless.

Finally, GTE and SNET present a hodgepodge of additional arguments (pp. 22-24) that the Commission properly rejected and that provide no colorable basis for appeal.

1. GTE and SNET claim (pp. 22-23) that a CLEC should not be able to obtain unbundled network elements unless it owns some of

---

[31] See Order Establishing Provisions for the Resale of Services Provided by GTE Florida Inc., et al., Resolution of Petition to Establish Nondiscriminatory Rates, Terms, and Conditions for Resale Involving Local Exchange Companies and Alternative Local Exchange Companies, Docket No. 950984TP at 12 (Florida PSC June 24, 1996) ("marketing or customer support costs were slightly over 12% of the total unbundled 2-wire loop cost").

its own facilities, for otherwise, they assert, the CLEC would be receiving the "functional equivalent of a resold service" without being subject to the conditions applicable to resale. However, the Commission properly concluded -- as did both the Department of Justice (Order, ¶ 323) and the Illinois Commerce Commission (id., ¶ 328) -- that Section 251(c)(3) contains no such restriction (id.). GTE and SNET point to no language to the contrary, and the assertion critical to their argument -- that service provided through a combination of unbundled elements is equivalent to resale -- was specifically rejected by the Commission. The Commission discussed in detail (¶¶ 332-334) the many differences in "opportunities, risks, and costs" presented by the two entry strategies, and its findings on these points reflect precisely the type of informed market assessments, made by an agency about the industry it regulates on the basis of substantial record evidence, to which courts routinely defer.

2. GTE and SNET argue (p. 23) that the Commission has ignored Section 251(g) by permitting CLECs to use unbundled network elements to provide access. This argument is preposterous. By its terms, Section 251(g) preserves the "equal access" requirements (see 47 U.S.C. § 251(g)) of the AT&T and GTE consent decrees and the Commission's rules, not the Commission's Part 69 access charge regime. In any event, whatever regulations Section 251(g) preserves are preserved only until the Commission adopts "supersed[ing] . . . regulations" (id.). It is therefore logically impossible for any Commission regulation to "violate" Section 251(g).

Moreover, for GTE and SNET to protest the portions of the Order addressing access charges requires extraordinary chutzpah. GTE and SNET are the beneficiaries of the Commission's improper decision to require double recovery for incumbent LECs by compelling CLECs that purchase unbundled network elements to pay additional charges to use those facilities for access. Given the Commission's concessions that the 1996 Act does not authorize such charges (¶¶ 717, 719, 721) and that eliminating such charges "would be consistent with the long term outcome in a competitive market," and in light of the recent decision by the Court of Appeals in Competitive Telecommunications Ass'n. v. FCC, 87 F.3d 522 (D.C. Cir. 1996) disapproving the Commission's avoidance of a cost-based rate structure through a succession of interim rates, the aspect of the Order that is likely to be reversed on appeal is the Commission's decision to permit GTE, SNET, and others to continue to charge excessive rates for access.

3. GTE and SNET briefly contend (p. 23) that the Commission erred when it held (¶ 911) that the "avoided costs" that must be excluded under Section 252(d)(3) "include[] all of the costs that the LEC incurs in maintaining a retail, as opposed to a wholesale, business." They claim that if an incumbent LEC does not in fact choose to eliminate such costs, it should be permitted to build them into inflated resale rates. However, the Commission properly found (¶ 911) -- as did the state commissions of Colorado, Georgia, Illinois, New York, and Ohio (id. & n.2194) -- that Congress did not "intend[] to allow incumbent LECs to sustain artificially high wholesale prices by declining to reduce their

expenditures to the degree that certain costs are readily avoidable." GTE and SNET present no authority or argument for concluding otherwise.

4. GTE and SNET argue (p. 24) that the Commission erred (¶¶ 410, 412-13) when it concluded that the switching element must include vertical features. However, the Act defines "network element" to include all "features, functions, and capabilities" provided by the particular facility or equipment (see 47 U.S.C. § 153(45)), and vertical features provided through software in the switch are obviously "features, functions, and capabilities" of the switch. No court will reverse the Commission's straightforward application of this plain statutory language.

5. GTE and SNET contend (p. 24) that the Commission erred by holding that the Act requires interconnection even where incumbent LECs would need to make modifications in their networks, and complains that it did not "prescrib[e] adequate measures of compensation." These Commission holdings merely implement, however, the explicit statutory requirements that incumbent LECs provide interconnection and unbundled network elements "at any technically feasible point" (see 47 U.S.C. §§ 251(c)(2)(B), 251(c)(3)), and, contrary to the Joint Motion's misstatement, the Commission reiterated (¶¶ 225, 382) that new entrants would compensate the incumbent LEC for the associated costs.

II. GTE AND SNET WILL NOT SUFFER IRREPARABLE HARM IF THE ORDER IS ALLOWED TO GO INTO EFFECT.

GTE and SNET argue that the Order will cause them "immediate and irreparable harm" in two ways: the process of negotiation will be harmed, and they will lose market share that can never be recovered. Both of these claims of irreparable injury are meritless.

A. **The Order Does Not Undermine The Processes Of Negotiation And Arbitration Established By The Act.**

The Joint Motion's first claim of irreparable injury (pp. 25-30) is that the Order will have a "dramatic effect" on the negotiation process currently under way by "tak[ing] a host of issues off the bargaining table." If CLECs can obtain better terms in arbitration under the Order than incumbent LECs are willing to offer in negotiation, GTE and Sprint argue, then CLECs will invoke arbitration and obtain those terms. But that is exactly what Congress intended. The prospect of arbitration -- and the application of the Commission's implementing rules in those arbitrations -- was meant to influence the negotiation process. That influence is inherent in the design and structure of Sections 251 and 252, and therefore cannot be deemed "irreparable injury."

Indeed, the Joint Motion's entire argument fails to come to grips with the nature and purpose of Sections 251 and 252. The "bargaining process" to which they refer (p. 26) does not remotely resemble typical contract negotiations that occur in a free market. GTE and SNET are monopolists that control bottleneck facilities to which the CLECs must gain access if they are to offer competitive local exchange service, but that have no incentive whatsoever to share those facilities with CLECs on reasonable terms that would permit local competition to emerge.[32] That is why, prior to the Act, no incumbent LEC ever came voluntarily to the bargaining table with potential CLECs to negotiate arrangements of the type now mandated for the provision of competitive local service.

Therefore, although GTE and SNET would undoubtedly prefer to use their enormous bargaining power to dictate terms to the CLECs through the "negotiation process," there is virtually no chance -- contrary to their claims (Joint Motion, pp. 25-27) -- that most CLECs could obtain acceptable negotiated agreements if the Order were stayed.[33] GTE and SNET have consistently maintained throughout the negotiation process that they would not offer unbundled network elements and interconnection at rates based on the methodologies insisted on by many CLECs and that were adopted in the Order. Similarly, CLECs such as AT&T have consistently

---

[32] As GTE's Chairman and CEO has bluntly stated: "We own the infrastructure. AT&T, MCI, and Sprint basically get to their customers through us . . . ." Interview, Chuck Lee, GTE Annual Report, p. 5 (1995).

[33] Indeed, GTE and SNET have consistently taken extreme positions throughout their negotiations with AT&T that have made reaching agreements impossible. Most outrageously, GTE has taken the position that it has no duty to provide AT&T unbundled network elements and interconnection in all but four of its states, on the grounds that GTE -- the self-described "largest U.S. based local telephone company" (GTE 1995 Annual Report, at *2, Dec. 31, 1995, available in LEXIS, FEDSEC Library, ARS file) with revenues in 1995 of $20 billion (id. at *4) -- is exempt from Section 251(c) as a "rural telephone company." See 47 U.S.C. § 251(f)(1). GTE continues to take this position, despite being expressly rebuked by the Ohio Public Utility Commission: "Such posturing certainly causes us to step back and ponder [GTE's] intentions including whether [GTE] is positioning itself to act in an anti-competitive fashion going into the emerging local competitive era." Entry, GTE North Incorporated's Rural Local Exchange Carrier Exemption Under the Telecommunications Act of 1996, p. 3, No. 96-612-TP-UNC (Ohio PUC, June 27, 1996).

maintained that they would not accept rates for unbundled network elements and interconnection higher than those that would result from the methodologies adopted in the Order. Thus, AT&T has invoked arbitration with both GTE and SNET, as many other CLECs are likely to do.

If CLECs invoke arbitration, however, then the Act will be working exactly as Congress intended. As a counterweight to the LECs' overwhelming bargaining power, Congress established in Section 251 a set of duties that incumbent LECs owe to CLECs and an arbitration process in which all carriers would be assured of obtaining terms consistent with the minimum standards set out in Section 251. Most important, Congress required the Commission to "establish regulations to implement the requirements of [Section 251]" within six months after enactment precisely because Congress wanted those regulations to be in force when the States conducted the arbitrations under Section 252. See 47 U.S.C. §§ 251(d)(1) & 252(c); see also Conference Report, pp. 148-49 ("Consequently, it is important that the Commission rules to implement new section 251 be promulgated within 6 months after the date of enactment, so that potential competitors will have the benefit of being informed of the Commission rules in requesting access and interconnection").

The Joint Motion's attempts to transform Congress's carefully crafted counterweight to their own enormous bargaining power into "irreparable injury" is thus absurd. Congress fully intended that the States would apply the Commission's rules in their arbitrations. That does not "harm" the negotiation process; rather, it is necessary to make the negotiation process work in the