

first place. The Order thus leaves intact all of the "bargaining opportunities" granted to incumbent LECs under the Act.

B. GTE And SNET Have Provided No Evidence That They Will Suffer A Certain, Imminent And Irremediable Loss Of Revenue, Customers and Goodwill As A Result Of The Order.

GTE's and SNET's second argument -- that the Commission's "national pricing standards" will result in an "immediate loss of customers, goodwill and revenue" (pp. 30-35) -- does not come close to meeting the legal standard for showing irreparable harm and obtaining injunctive relief, and misstates the effects of the Order and of a stay.

First, the courts have made clear that there is no irreparable injury where the asserted harms are not "of such imminence that there is a clear and present need for equitable relief to prevent irreparable harm."³⁴ As their own submission demonstrates, it is clear that GTE and SNET cannot suffer any of the harms they assert in the short term because there are no CLECs currently operating in the local exchange market as to which the Order is relevant.

The statutory period for seeking arbitration is only now beginning. Once a CLEC requests interconnection from an incumbent LEC, either party can seek arbitration any time between 135 days and 160 days after the CLEC's original request. See 47 U.S.C. § 252(b)(1). The first CLECs to request interconnection under the Act are now in that period, and many others have not yet reached that period. Thus, virtually all CLECs are either still

³⁴ See Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations and internal quotation marks omitted).

negotiating with GTE and SNET³⁵ or have only recently invoked their right to arbitration.³⁶ The Act requires the States to complete each arbitration within nine months after that CLEC's request for interconnection, but under that timetable the very earliest of the Section 252 arbitrations may not end until late November (and most will end considerably later than that) -- at which point the CLECs would still then have to begin the process of winning their first customers.³⁷ In short, a stay entered today could have no immediate effect whatsoever on GTE's or SNET's revenues.³⁸

Thus, the only possible "injuries" about which GTE and SNET can be complaining would be hypothetical losses that they assert may occur during the period after the interconnection agreements have been finally arbitrated and implemented but before the Court of Appeals issues its decision on review. Because of the statutory timetables governing Section 252 arbitrations, and because additional time will be needed to implement the agreements once finalized, this "damage period" likely will not begin for

³⁵ See, e.g., Affidavit of Donald W. McLeod, Exhibit 1 (GTE); Affidavit of Anne U. MacClintock, Exhibit 2 (SNET).

³⁶ See Affidavit of Donald W. McLeod, Exhibit 2 (GTE); Affidavit of Anne U. MacClintock, Exhibit 2 (SNET).

³⁷ See Affidavit of Donald W. McLeod, Exhibit 2 (GTE); Affidavit of Anne U. MacClintock, Exhibit 2 (SNET).

³⁸ To the extent that incumbent LECs have entered into (or will enter into) negotiated agreements, such agreements need not comply with Section 251 or the Order's pricing rules, and therefore may provide for unbundled network elements or interconnection at any rates that the LECs are able to agree upon with those CLECs. See 47 U.S.C. § 252(e)(2)(A).

several months, and indeed may never occur at all if the Court renders a decision quickly.

Second, irreparable harm must be "certain" to occur,³⁹ but the claims here are completely speculative. The Commission merely adopted certain methodologies to be used in computing the proper rates, and it is the States that will implement those methodologies based on the evidence submitted in the Section 252 arbitration process.⁴⁰ Thus, State commissions have not yet established the rates about which GTE and SNET complain, and there is no way to predict what the marketplace effects will be of prices that have not yet been determined.

For example, while GTE and SNET focus on the Commission's default prices (pp. 30-32), they will have every opportunity to submit their own cost studies to the State commissions before any prices based on those proxies (or on anything else) are set. Each State will then analyze their evidence and make its judgment about the appropriate rates. It is therefore completely premature to assume (as GTE and SNET do) that the Commission's default rates will ever be applied, or that the States will adopt similar rates in implementing the Order.

Third, even assuming there is no Court of Appeals decision before the agreements are implemented, and assuming that GTE and SNET do not prevail on their cost theories at the State commissions, the losses they claim they would suffer because of the

³⁹ See Wisconsin Gas, 758 F.2d at 674.

⁴⁰ See Order, ¶¶ 111-20, 133-37, 619.

Order remain purely speculative. Their irreparable harm argument requires them to show that, if the Order were stayed, the states would adopt different methodologies or rates that would result in GTE and SNET losing a smaller portion of their 100% local market shares than would be the case under the Commission's rules. GTE and SNET have made no such showing, however, and such an assumption would in any event be unwarranted. There was widespread support in the record for the use of long-run incremental cost as the basic methodology to price interconnection and unbundled elements, and the Commission found based on that record that such rates would be fully compensatory. Moreover, some States have previously endorsed long-run incremental cost, and indeed, the Commission based much of its work on analysis done previously in the States.⁴¹

GTE and SNET also complain (see Affidavit of Barry W. Paulson) that the Order requires them to conduct certain reconfigurations of their networks in order to accommodate CLECs, and if the Order is reversed the reconfigurations cannot be undone nor can the money invested be recovered. Sections 251(c)(2)(B) and 251(c)(3), however, require incumbent LECs to provide interconnection and unbundled network elements " at any technically feasible point." If GTE or SNET in fact succeed in performing these reconfigurations during the pendency of their petition for review, they will have proven that such reconfigurations are

⁴¹ For example, as SNET's affiant admits, Connecticut has embraced the long-run incremental cost methodology. See Affidavit of Anne U. MacClintock, Exhibit 1.

"technically feasible," and thus that they were statutorily required to implement them.

In all events, the claims of financial losses ring particularly hollow in light of the special dispensations awarded to GTE and SNET in the Order. As previously explained (see supra p. 20), the Order grants an entirely unjustified windfall to GTE and SNET by permitting them to impose inflated access charges in contravention of the Act and of the D.C. Circuit's recent decision in Competitive Telecommunications Ass'n v. FCC, 87 F.3d 522 (D.C. Cir. 1996). Similarly, the Commission's companion order on dialing parity permits GTE and SNET to delay implementing toll dialing parity for up to a year.⁴² As the beneficiaries of these substantial and unjustified acts of agency largesse, GTE and SNET are particularly hard pressed to make any credible claim of irreparable harm from the Order.

III. THE BALANCE OF HARMS REQUIRES THAT THE JOINT MOTION BE DENIED.

GTE's and SNET's argument (pp. 35-38) that they will be harmed absent a stay but other parties will not be harmed if there is a stay is frivolous. If GTE and SNET were correct that they will suffer irreparable harm from the Order (as they will not), CLECs would suffer exactly the same types of harms in the event of a stay, in terms of the inclusion of different terms in interconnection agreements, lost customers, and higher prices for interconnection and unbundled network elements. The two injuries

⁴² See Second Report and Order and Memorandum Opinion and Order, ¶ 61, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (rel. August 8, 1996).

would thus balance out perfectly, and that alone means that the balance of equities favors denying the stay: because GTE and SNET have no likelihood of succeeding on the merits, it is more likely that the CLECs would suffer unjustly if a stay were granted than that GTE and SNET would suffer if a stay is denied.

IV. THE PUBLIC INTEREST REQUIRES THAT THE STAY BE DENIED.

Finally, the public interest strongly favors denial of the stay for two reasons. First, a stay would upset the carefully crafted scheme established by Congress in the Act. Contrary to GTE's and SNET's assertions (pp. 36, 39), Congress thought it critically important that the Commission's rules be promulgated in time for the States to apply them in the Section 252 arbitration process -- which is why the Commission was required to complete the rulemaking within six months of enactment. See supra pp. 3 (citing Conference Report, pp. 148-49). Congress also established the timing of the arbitration process with the Commission's Section 251 rulemaking in mind: the statutory period for initiating the earliest arbitrations roughly coincides with the promulgation of the Commission's rules, and the earliest possible arbitrations are to be completed within nine months of enactment. Thus, under Congress's scheme, so long as the Commission fulfilled its duty to promulgate the rules within six months -- as it did -- then those rules were to be available to the states in any arbitration initiated under the Act.

Second, the Commission has already determined that these rules would be in the public interest because they are necessary to achieve the consumer benefits of local exchange competition. In

that regard, GTE and SNET seek a stay of the entire Order -- thus throwing into doubt the applicability of a wide range of critically important rules concerning not only pricing but full unbundling of the network, access to poles, ducts, conduits and rights of way, physical collocation, and many other issues. These are requirements that incumbent LECs opposed during the rulemaking and would undoubtedly contest in the State arbitrations, and the Commission's implementing rules are thus absolutely essential to the development of local competition. To the extent that the States do not apply these implementing rules in the upcoming arbitration process, the benefits of local competition are likely to be substantially delayed. Entry of a stay would therefore cause profound harm not only to CLECs but to consumers as well.

CONCLUSION

For the foregoing reasons, the Joint Motion of GTE Corporation and the Southern New England Telephone Company For Stay Pending Judicial Review should be denied.

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CERTIFICATE OF SERVICE

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