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STATE OF MICHIGAN
BEFORE THE PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the Telecommunications Act of 1996.	)	Case No. U-11104

NOTICE OF INTEREST OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION (COMPTEL)

The Competitive Telecommunications Association ("CompTel"), through its attorneys Norman C. Witte and Hogan & Hartson L.L.P., gives notice of its interest in this proceeding, and states as follows:

1. On June 5, 1996, the Commission issued an order commencing this docket for the stated purpose of "consulting with the FCC concerning Ameritech Michigan's compliance with the requirements of the competitive checklist [set forth in § 271 of the Federal Telecommunications Act of 1996]." In its Order Setting Procedures dated August 28, 1996, the Commission stated that "[i]nterested persons who [file their notice of interest after September 18, 1996] will be permitted to participate upon filing a notice, but their participation will be on a prospective basis; i.e. they will take the case as they find it."

2. CompTel is a national industry association representing the interests of competitive telecommunications service providers, including many smaller carriers. Its members include many companies that are providing service throughout Michigan. CompTel is par-

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ticipating in several key state regulatory proceedings that seek to develop local exchange competition because of the interests of its members in becoming local service providers and because of the potential impact of local competition on the long distance market. CompTel also has an interest in ensuring compliance by Ameritech with the requirements of § 271 of the Telecommunications Act of 1996, 47 U.S.C. § 271 (1976).

WHEREFORE, CompTel provides notice to the Commission and other interested parties of its interest in this docket and requests service of all papers or documents filed in this proceeding.

Respectfully submitted,

COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

Dated: October 17, 1996 By: ______________________

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October 18, 1996

Ms. Dorothy Wideman
Executive Secretary
Michigan Public Service Commission
6545 Mercantile Way
P. O. Box 30221
Lansing, MI 48909

Re: MPSC Case No. U-11104

Dear Ms. Wideman:

Enclosed for filing in the above-captioned matter, are an original and 15 copies of Michigan Cable Telecommunications Association's Comments with Proof of Service for same.

Very truly yours,

Fraser Trebilcock Davis & Foster, P.C.

Michael S. Ashton

MSA/csp
Encl.

cc: All Counsel of Record (w/Encl.)

STATE OF MICHIGAN

BEFORE THE MICHIGAN PUBLIC SERVICE COMMISSION

In the matter, on the Commission's own motion, to consider Ameritech Michigan's compliance with the competitive checklist in Section 271 of the Telecommunications Act of 1996.	)))))	Case No. U-11104

MICHIGAN CABLE TELECOMMUNICATIONS ASSOCIATION'S COMMENTS

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Date: October 18, 1996

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I. INTRODUCTION

On or about September 30, 1996, Ameritech Michigan filed an application for approval of a Statement of Generally Available Terms and Conditions ("SGAT"). In filing its application, Ameritech Michigan sought approval from the Michigan Public Service Commission of its SGAT pursuant to Section 252(f) of the Telecommunications Act of 1996 ("the federal Act"). Ameritech Michigan filed its application in the Commission's competitive checklist case, MPSC Case No. U-11104.

In filing its application in the competitive checklist case, Ameritech wholly ignored the scheduling requirements established by the Commission. For example, Ameritech Michigan failed to provide notice to the parties five business days prior to its filing. Also, Ameritech Michigan failed to complete the necessary protective arrangements prior to its filing. As a result, to date, the supposedly confidential information which was filed by Ameritech Michigan in support of its application has not been provided to the parties.

On October 4, 1996, AT&T and MCI filed papers with the Commission objecting to the procedural defects in Ameritech Michigan's filing. In addition, on October 11, 1996, the Michigan Cable Telecommunications Association ("MCTA") filed a motion formally requesting the Commission to reject Ameritech's application seeking approval of its SGAT in this docket, re-docket the application for approval of the SGAT in another docket, and allow all interested parties a reasonable opportunity to respond. To date, the Commission has not formally acted upon the papers filed by AT&T, MCI and MCTA.

If the Commission were to require parties to file their comments to Ameritech Michigan's application seeking approval of its SGAT in this docket within the 14 business days as set forth in this Commission's earlier Order, despite the significant procedural

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violations committed by Ameritech in filing its application, then parties' comments would be due on October 18, 1996. For the reasons stated in MCTA's earlier filed motion, which are incorporated herein by reference, the Commission should not require parties to file comments by Friday, October 18, 1996 and instead should reject Ameritech Michigan's filing in this case, re-docket Ameritech Michigan's application and allow a reasonable time for parties to respond to Ameritech Michigan's application after they have received all of the supposedly confidential information filed by Ameritech Michigan.

If, however, the Commission expects parties to respond by Friday, October 18, 1996, MCTA files these preliminary comments. Obviously, MCTA cannot comment in depth regarding this voluminous filing given the fact that the supposedly confidential information which supports the application has never been provided to MCTA. As a result, MCTA files these limited comments reserving its right, if and when its motion is granted, to file more detailed comments.

II. ANALYSIS

A. As Set Forth In Greater Detail In MCTA's Earlier Motion, Approval Of The SGAT Is Inappropriate In The Competitive Checklist Case

In addition to failing to comply with the procedures set forth by the Commission in the competitive checklist case, Ameritech Michigan's application seeking approval of its SGAT is not properly part of this competitive checklist case because approval of such an application is not a checklist item and an approved SGAT would be relevant to a determination of compliance with the competitive checklist case only under unique circumstances which have not yet, and may never, arise. As a result, Ameritech Michigan's application seeking an approval of its SGAT in this case should be re-docketed in another case.

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1. *Approval Of Ameritech's Application Should Not Be Heard In This Docket Because It Is Not A Competitive Checklist Item*

In filing its application, Ameritech Michigan is seeking affirmative relief from this Commission. Specifically, Ameritech Michigan is seeking approval of its SGAT pursuant to Section 252(f) of the Telecommunications Act of 1996, which states:

> "(f) Statements of Generally Available Terms.--
>
> (1) In general.--A Bell operating company may prepare and file with a State commission a statement of the terms and conditions that such company generally offers within that State to comply with the requirements of section 251 and the regulations thereunder and the standards applicable under this section.
>
> (2) State commission review.--A State commission may not approve such statement unless such statement complies with subsection (d) of this section and section 251 and the regulations thereunder. Except as provided in section 253, nothing in this section shall prohibit a State commission from establishing or enforcing other requirements of State law in its review of such statement, including requiring compliance with intrastate telecommunications service quality standards or requirements.
>
> (3) Schedule for review.--The State commission to which a statement is submitted shall, not later than 60 days after the date of such submission--
>
> > (A) complete the review of such statement under paragraph (2) (including any reconsideration thereof), unless the submitting carrier agrees to an extension of the period for such review; or
> >
> > (B) permit such statement to take effect.
>
> (4) Authority to continue review.--Paragraph (3) shall not preclude the State commission from continuing to review a statement that has been permitted to take effect under subparagraph (B) of such paragraph or from approving or disapproving such statement under paragraph (2)."

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Section 252(f) specifically allows the Commission a minimum of 60 days to review the reasonableness of a statement. If the review is not completed within 60 days, then the statement becomes effective only until the Commission's review is completed.

In filing its application in the competitive checklist case, Ameritech Michigan ignores the fact that approval of a SGAT pursuant to Section 252(f) is not a checklist item under Section 271(c)(2)(B). Therefore, there is no reason to consider Ameritech Michigan's request for approval under Section 252(f) in a docket established to determine if Ameritech Michigan has met the competitive checklist criteria set forth in Section 271(c)(2)(B). Consideration of whether the terms of a SGAT are just and reasonable under Section 252(f) should be decided in a separate docket, where parties will be able to more fully address the reasonableness of the proposal.

2. *Only In Unique Circumstances Which Have Not Yet Arisen Would An Approved SGAT Be Relevant To Determine Compliance With The Competitive Checklist*

If providers have sought to interconnect with Ameritech Michigan as described in Section 271(c)(1)(A) of the federal Act, then any approval of this SGAT will have no bearing on whether Ameritech has satisfied the competitive checklist items set forth in Section 271(c)(2)(B). Only in the limited circumstances where no provider has sought such interconnection with Ameritech Michigan, may an **approved** SGAT be used to determine if Ameritech Michigan has complied with each competitive checklist item. Section 271(c)(2)(A) of the federal Act states:

> "(2) Specific interconnection requirements.--
>
> (A) Agreement required.--A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought--

(i) (I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a ***statement described in paragraph (1)(B)*** [i.e., SGAT], and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph [***i.e. Section 271(c)(2)(B) -- the competitive checklist***] ." (Emphasis added.)

The general statement described in (1)(B) or the SGAT, which is referred to above, may be used only if no providers have sought interconnection as described in Section 271(c)(1)(A). Section 271(c)(1)(B), in relevant part, states:

> "Failure to request access.-- A Bell operating company meets the requirements of this subparagraph if, after 10 months after the date of enactment of the Telecommunications Act of 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1), and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f)."

At this time, this section is inapplicable because 10 months have not elapsed from the enactment of the federal Act, which occurred on February 8, 1996. Even after this 10 month period elapses, this section may apply only if no "provider has requested the access and interconnection described in [Section 271(c)(1)(A)]." If a provider does, in fact, seek such interconnection with Ameritech Michigan, then the SGAT will have no bearing on the competitive checklist case.

B. **The Pricing Terms Of The SGAT Fail To Comply With Applicable Law**

MCTA and the other parties to this proceeding have never received the confidential information filed by Ameritech Michigan in support of its pricing set forth in its SGAT. In any event, Ameritech Michigan's application makes it abundantly clear that its pricing is based on the First Report and Order released by the FCC on August 8, 1996. Recently, the United States Court of Appeals for the 8th Circuit has stayed the enforcement of these pricing rules. (See, Attachment A.) Thus, the pricing standards used by Ameritech Michigan are, at least for now, ineffective, and Ameritech Michigan is, at a minimum, required to file an amended application setting forth prices which meet the applicable Michigan law.[1]

C. **The Proposed Pole Rate Is Far Too High**

Without filing any supporting workpaper, Ameritech Michigan proposed a pole attachment rate of $1.97. This rate is far too high given the fact that Michigan recently adopted the FCC pole rate methodology when it amended the Michigan Telecommunications Act.[2] Using the FCC pole rate methodology, Robert Townsend in MPSC Case Nos. U-10741, U-10816 and U-10831, determined that the correct rate for Ameritech was $1.28 per pole per year. (See, Attachment B, which is Exhibit 45b from MPSC Case Nos. U-10741 et. al.) Ameritech Michigan's unsupported $1.97 rate must be rejected and the $1.28 rate should be adopted.

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[1]As this Commission has stated in its September 12, 1996 Order in MPSC Case Nos. U-10860, U-11155 & U-11156, the FCC TELRIC pricing standard includes common costs which are excluded under the Michigan-approved pricing methodology.

[2]See Section 361 of the MTA; MCL 484.2361; MSA 22.1469(361).

III. CONCLUSION

For the reasons more specifically identified in its earlier filed motion, Ameritech Michigan's application seeking approval of its SGAT must be rejected. Ameritech Michigan failed to comply with the procedural requirements set forth by the Commission in this case. Further, approval of an SGAT is not a checklist item. In fact, only under unique circumstances which have not yet, and may never, occur would an approved SGAT have any bearing whatsoever on whether Ameritech Michigan has satisfied the competitive checklist.

Given the failure of Ameritech Michigan to comply with the procedural requirements of this case, and its failure to provide the parties with all the information relied upon by Ameritech Michigan, MCTA cannot possibly offer extensive comments. Yet, it is beyond dispute that the pricing methodologies used by Ameritech Michigan in its application are inappropriate because they have been stayed by the United States Court of Appeals for the 8th Circuit. Thus, Ameritech Michigan, at a minimum, should be required to make a filing consistent with the Michigan pricing methodologies. Finally, the pole attachment rate contained in Ameritech Michigan's filing is unsupported and excessive. Michigan clearly adopted the FCC pole rate methodology for telecommunications providers when the Legislature amended the MTA. The correct pole attachment rate for Ameritech is $1.28 per pole per year and not the onerous rate proposed by Ameritech Michigan.

IV. RELIEF REQUESTED

WHEREFORE, the Michigan Cable Telecommunications Association respectfully requests that this Commission: 1) reject the filing of Ameritech Michigan's application for approval of its Generally Available Terms and Conditions filed in this docket; 2) re-docket Ameritech Michigan's application in a separate case; 3) allow interested parties to respond

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to Ameritech Michigan's filing within 30 days after they have received the complete filing, including the purported confidential material relied upon by Ameritech Michigan in support of its application; and 4) adopt a pole attachment rate of $1.28 per pole per year.

Respectfully submitted,

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Date: October 18, 1996

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California, Incorporated; GTE Florida, Incorporated; GTE Midwest, Incorporated; GTE South, Incorporated; GTE Southwest, Incorporated; GTE North, Incorporated; GTE Northwest, Incorporated; GTE Hawaiian Telephone Company, Incorporated; GTE West Coast, Incorporated; Contel of California, Inc.; Contel of Minnesota, Inc.; Contel of the South, Inc.,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents.

No. 96-3430

New York Telephone Company; New England Telephone and Telegraph Company,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents.

No. 96-3436

Cincinnati Bell Telephone Company,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents.

Federal Communications Commission; United States of America,

Respondents.

No. 96-3507

South Dakota Public Utilities Commission,

Petitioner,

v.

Federal Communications Commission; United States of America,

Respondents.

No. 96-3519

The People of the State of California; The Public Utilities Commission of the State of California,

Petitioners,

v.

Federal Communications Commission; United States of America,

Respondents.

No. 96-3520

United States Telephone Association,

Petitioner,

v.

Submitted: October 3, 1996

Filed: October 15, 1996

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

These cases have been consolidated in this circuit by the September 11, 1996 order of the Judicial Panel on Multidistrict Litigation, Docket No. RTC-31, pursuant to Rule 24 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. See 28 U.S.C. §§ 2112(a)(3) (1994). Numerous petitioners have moved this court for a stay pending judicial review of the Federal Communications Commission's First Report and Order.(1) The FCC promulgated the rules and regulations in its First Report and Order pursuant to its reading of its statutory duty to implement the local competition provisions of the Telecommunications Act of 1996 (the Act).(2) This court granted a temporary stay on September 27, 1996, pending oral argument. After hearing oral argument on October 3, 1996, from representatives of the concerned parties, we have decided to stay the operation and effect of only the pricing

(1) First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) (hereinafter First Report and Order].

(2) Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

provisions(3) and the "pick and choose" rule(4) contained in the FCC's

First Report and Order pending our final determination of the issues raised by the pending petitions for review.

I.

In the Telecommunications Act of 1996, Congress enacted a plan to alter the monopolistic structure of local telephone service markets with an injection of competition. The Act effectively opens up local markets by imposing several new obligations on the existing providers of local telephone service in those markets. The Act refers to the current local providers as "incumbent local exchange carriers" (incumbent LECs). See 47 U.S.C.A. SSSS 251(c), (h), 252(j) (West Supp. May 1996). Among other duties, the Act requires incumbent LECs (1) to allow other telecommunication carriers (such as cable television companies and current long-distance providers) to interconnect with the incumbent LEC's existing local network to provide competing local telephone service (interconnection); (2) to provide other telecommunication carriers access to elements of the incumbent LEC's local network on an unbundled basis (unbundled access); and (3) to sell to other telecommunication carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its retail customers (resale). Id. SS 251(c).

To accomplish these directives, the Act places a duty on incumbent LECs to privately negotiate, in good faith, comprehensive

(3) The pricing provisions refer to First Report and Order, Appendix B-Final Rules §§§51.501-51.515 (inclusive), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive) and to the default proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.
(4) The "pick and choose" rule refers to First Report and Order,

Appendix B-Final Rules §§51.809.

agreements with other telecommunication carriers seeking to enter the local market. See id. §§§§ 251(c)(1), 252(a). If the incumbent LEC and the carrier seeking entry are unable to reach a negotiated agreement, either party may petition the respective state utility commission to conduct a compulsory arbitration of the open and disputed issues and arrive at an arbitrated agreement. See id. §§ 252(b). The final agreement, whether arrived at through negotiation or arbitration, must be approved by the state commission. Id. §§ 252(e)(1). Certain portions of the Act also require the FCC to participate in the Act's implementation. See, e.g., id. §§§§ 251(b)(2), (d)(1), (e), 252(e)(5). The FCC's regulations pertaining to the Act form the heart of the controversies at bar.

On August 8, 1996, the FCC released its First Report and Order in which it published its comments and rules regarding the local competition provisions of the Act. The petitioners in this consolidated proceeding, consisting, at the moment, primarily of incumbent LECs and state utility commissions, argue that the FCC exceeded its authority in promulgating these rules. While several of the petitioners object to the FCC's regulations in their entirety, others specifically challenge the FCC's rules regarding the prices that an incumbent LEC may charge an incoming competitor for interconnection, unbundled access to network elements, and resale of its services.

Despite the different approaches, it is clear that all of the petitioners object principally to the FCC's pricing rules. One such rule is a mandate from the FCC that state commissions employ the "total element long-run incremental cost" (TELRIC) method to calculate the costs that an incumbent LEC incurs in making its facilities available to competitors. See First Report and Order, Appendix B-Final Rules §§§§ 51.503, 51.505. After applying the TELRIC method and arriving at a cost figure, the state commissions, acting as arbitrators, must then determine the price that an

incumbent LEC may charge its competitors, based on the TELRIC driven cost figure. See id.

Many of the incumbent LECs object to the TELRIC method for two reasons. First, it does not consider their "historical" or "embedded" costs (costs that an incumbent incurred in the past) in calculating the cost figure to be used to determine the rates. See id. §§ 51.505(d)(1). Second, it requires that an incumbent LEC's cost be measured as if the incumbent were using the most efficient telecommunications technology currently available, regardless of the technology presently employed by the incumbent and to be used by the competitor. See id. §§ 51.505(b)(1). The incumbent LECs argue that the TELRIC method underestimates their costs and results in prices that are too low. The incumbent LECs maintain that these low prices would effectively require them to subsidize their competitors and thereby threaten the viability of the LECs' own businesses.

For similar reasons, the petitioners also object to the FCC's proxy rates, which are to be used by the state commissions if they elect not to employ the TELRIC method to set prices. See id. SSS§ 51.503(b)(2), 51.513, 51.705(a)(2), 51.707. The incumbent LECs argue that these proxy rates do not accurately reflect their costs and are artificially low. In addition to the rules regarding TELRIC and the proxy rates, the petitioners object to several other FCC regulations that pertain to the pricing of intrastate telephone service.(5)

(5) The state utilities commissions take issue with the "deaveraging" rule requiring them to establish different rates in at least three different geographic areas within each state. See id. §§51.507(f). Many of the incumbent LECs also challenge the FCC's wholesale rate rules, asserting that the FCC's mandated method for calculating these rates, as well as its interim wholesale rates, result in rates that are also too low and threaten the incumbent LECs' viability. See id. §§§§51.607, 51.609, 51.611.

Some of the petitioners also seek to stay the FCC's so-called "pick and choose" rule, id. §§ 51.809, with which the FCC purports to implement §§ 252(i) of the Act. Section 252(i) requires an LEC to make available any interconnection, service, or network element contained in an approved agreement to which it is a party to any other telecommunications carrier upon the same "terms and conditions" as those provided in the agreement. Here again, price becomes a key issue. When the FCC promulgated its rule, it expanded the statutory language of §§ 252(i) to include "rates, terms, and conditions." Id. §§ 51.809 (emphasis added). The petitioners' objection is that the rule would permit the carriers seeking entry into a local market to "pick and choose" the lowest-priced individual elements and services they need from among all of the prior approved agreements between that LEC and other carriers, taking one element and its price from one agreement and another element and its price from a different approved agreement.

Moreover, if an LEC and Carrier A, for example, reach an approved agreement, and then the LEC and a subsequent entrant, Carrier B, agree in their agreement to a lower price for one of the elements or services provided for in the LEC's agreement with Carrier A, Carrier A will be able to demand that its agreement be modified to reflect the lower cost negotiated in the agreement with Carrier B. Consequently, the petitioners assert that the congressional preference for negotiated agreements would be undermined because an agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized.

II.

We consider the following four factors in determining whether a stay is warranted: (1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. See Arkansas Peace Ctr. v. Dep't of Pollution Control, 992 F.2d 145, 147 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994); Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 673-74 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986). Applying these factors to the case at hand leads us to conclude that a stay pending final review of the FCC's pricing and "pick and choose" rules is justified.

A.

In evaluating the likelihood of the petitioners' success on appeal, we note that the petitioners "need not establish an absolute certainty of success." Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Instead, as the actual terms of the test indicate, the petitioners must show that they are "likely" to succeed on the merits. Here, the petitioners allege primarily that the FCC exceeded its jurisdiction by imposing national pricing rules for what is essentially local service. They argue that the text and the structure of the Act give the States, not the FCC, authority over the pricing of intrastate telephone service. After evaluating the contentions of all of the interested parties, we believe that the petitioners present a strong argument that is sufficient to satisfy the first prong.

Historically, the state commissions have determined the rates for intrastate communications services. See Communications Act of 1934, §§ 2(b), 47 U.S.C. §§ 152(b) (1994). Subsection 252(d), which indicates that state commissions have the authority to determine "just and reasonable rates" necessary to implement the local competition provisions of the Act, appears consistent with that past practice. This subsection, entitled "Pricing standards," makes no mention of FCC rules on pricing. Moreover, subsection 252(c)(2) directs state commissions to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." Again, no reference is made to

FCC regulations regarding rates. By contrast, where Congress intended for the state commissions to follow FCC rules in arbitrations, it expressly said so. In subsection 252(c)(1), the Act requires state commissions to ensure that their resolutions of arbitrated disputes comply with both section 251 and with the regulations that the FCC is specifically authorized to issue under section 251. But nowhere in section 251 is the FCC specifically authorized to issue rules on pricing. The sections of the Act that directly authorize the state commissions to establish prices are devoid of any command requiring the state commissions to comply with FCC pricing rules (or, for that matter, authorizing the FCC to issue any pricing rules). This absence indicates a likelihood that Congress intended to grant the state commissions the authority over pricing of local telephone service, either by approving or disapproving the agreements negotiated by the parties, or, when the parties cannot agree, through compulsory arbitration, thereby preserving what historically has been the States' role.

We are mindful of the FCC's contrary interpretation of the Act. The FCC asserts that subsection 251(d)(1), when read together with subsection 252(c)(1), authorizes the FCC to establish rules regarding pricing. Subsection 251(d)(1) directs the FCC to complete the promulgation of regulations pursuant to its duties under section 251 by August 8, 1996. The FCC also urges us to read the general provisions of subsection 251(c) together with subsection 252(d) (the *pricing standards*) and conclude that these portions of the Act supply the FCC with the power to issue pricing rules.

We recognize that courts must give deference to an agency's reasonable interpretation of an unclear statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984). In this case, however, we believe that the petitioners have a better than even chance of convincing the court that the FCC's pricing rules conflict with the plain meaning of the Act, in which case the court would not be bound by Chevron deference and would be entitled to overturn the agency's interpretation. See id. at 842 ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); id. at 844 (indicating that courts should not give controlling weight to regulations that are contrary to the statute). In this, our first look at the issue, we are skeptical that the FCC's roundabout construction of the statute could override what, at first blush, appears to be a rather clear and direct indication in subsections 252(c)(2) and 252(d) that the state commissions should establish prices.

Moreover, we have serious doubts that the FCC's interpretation of the Act constitutes the straightforward or unambiguous grant of intrastate pricing authority to the FCC sufficient to qualify as an exception to the provisions of subsection 2(b) of the Communications Act of 1934, 47 U.S.C. §§ 152(b) (1994). See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377 (1986). Subsection 2(b) provides that "nothing in this Chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. §§ 152(b) (1994). In Louisiana, the Supreme Court determined that in order to overcome subsection 2(b)'s limits on the FCC's jurisdiction with respect to intrastate communications service, Congress must "unambiguously" or "straightforwardly" either modify subsection 2(b) or grant the FCC additional authority. 476 U.S. at 377. We acknowledge that portions of the Telecommunications Act of 1996 expressly grant the FCC authority over some aspects of intrastate telephone service. See, e.g., 47 U.S.C.A. §§ 251(e) (West Supp. May 1996) (FCC authority regarding numbering administration). We have been unable, however, to find such an express grant of authority to the FCC over the pricing of

intrastate telephone service, nor does there appear to be a modification of subsection 2(b).[6] The combination of these omissions indicates a sufficient likelihood that the petitioners will succeed on the merits of their appeal. We, of course, remain open to being persuaded that the FCC's read is the correct one when full briefing and argument on the merits have been concluded.

Because we believe that the petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service, we think that it is unnecessary at this time to address the remaining theories which the petitioners use to challenge the legality of the FCC's pricing rules.

B.

With respect to the likelihood of irreparable harm, the petitioners initially assert that their interest in productive ongoing negotiations and arbitrations regarding the implementation of the Act will be irreparably harmed if the FCC's pricing regulations are not stayed. They argue that the competitors seeking entry into the local phone markets will refuse even to consider prices that are higher than the FCC's proxy rates and will simply hold out for the proxy rates that the States will feel obligated to impose in their arbitrations. In this manner, the proxy rates effectively establish a price ceiling, an observation recognized by the FCC itself, which inevitably confines and restricts the give and take characteristic of free negotiations and arbitrations. The state commissions specifically argue that the FCC's pricing regulations effectively undermine their authority,

(6) In fact, we are told that a provision which specifically modified subsection 2(b) was expressly rejected by Congress before the bill was passed. See S. 652, 104th Cong., 1st Sess. SS101(c) (1995).

and if not stayed, the rules will disrupt the predictability and continuity of the existing regulatory system. The state commissions explain that the FCC pricing rules essentially handcuff their discretion in determining the just and reasonable rates in arbitrations required under subsection 252(d)(1).

In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief. See Packard Elevator v. I.C.C., 782 F.2d 112, 115 (8th Cir. 1986), cert. denied, 484 U.S. 828 (1987) (quoting Wisconsin Gas, 758 F.2d at 673-74). The FCC asserts that the petitioners' allegations of irreparable harm are merely speculative and that there is no certainty that its proxy rates will ever be applied to the petitioners. We are persuaded, however, by the petitioners' evidence that the negotiations preferred by the Congress are already breaking down due to the competitors' desire to hold out for the FCC's proxy rates. Moreover, given the time constraints under the Act, some state commissions have already felt obliged to impose the proxy rates in their arbitrations. These experiences indicate that the FCC's pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the "pick and choose" rule will operate to further undercut any agreements that are actually negotiated or arbitrated. The inability of the incumbent LECs and the state commissions to effectively negotiate and arbitrate agreements free from the influence of the FCC's pricing rules, including the "pick and choose" rule, will irreparably injure the interests of the petitioners. If the FCC's rules are later struck down, it will be extremely difficult for the parties to abandon the influence of their previous agreements that were based on the national pricing rules and to recreate the atmosphere of free negotiations that would have existed in the absence of the FCC's dictated presumptive prices. Without a stay, the opportunity for effective private negotiations will be irretrievably lost. We initially believe that this result would be

contrary to Congress's intent that these matters be resolved through negotiation and/or arbitration.

The petitioners also argue that the FCC's pricing rules will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue. The FCC contends that its pricing rules, in particular its proxy rates, are merely an option for the parties