BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

JUN - 9 1997

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In the Matter of	)	
Access Charge Reform	)	**CC Docket No. 96-262**
	)	
Price Cap Performance Review	)	**CC Docket No. 94-1**
for Local Exchange Carriers	)	

OPPOSITION OF SPRINT TO SOUTHWESTERN BELL, PACIFIC BELL AND NEVADA BELL PETITION FOR PARTIAL STAY

Sprint Corporation opposes the Joint Petition for a Partial Stay And For Imposition Of An Accounting Mechanism Pending Judicial Review, filed by Southwestern Bell, Pacific Bell and Nevada Bell (hereinafter, collectively "SBC"), of the Commission's recent orders in the above-captioned proceedings.[1] In its petition, SBC seeks a stay of only two aspects of the Access Reform Order: (1) the determination not to allow ILECs to impose access charges on purchasers of unbundled network elements; and (2) the determination to require an exogenous adjustment to price cap indices to reflect the completion of the amortization of equal access non-capitalized costs. With respect to the Price Cap Order, SBC attacks both the 6.5% productivity factor and the determination to give prospective effect to that factor as if it had been in effect since July 1, 1996. As Sprint will show below, SBC

[1] Access Charge Reform, First Report and Order released May 16, 1997 (FCC 97-158) ("Access Reform Order"); and Price Cap Performance Review for Local Exchange Carriers, Fourth Report and Order released May 21, 1997 (FCC 97-159) ("Price Cap Order").

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has failed to sustain the heavy burden imposed on one seeking stay of a Commission order.[2]

I. SBC HAS NOT DEMONSTRATED THAT IT IS LIKELY TO SUCCEED ON THE MERITS

Although SBC is correct in arguing (at 5) that for purposes of seeking a stay, it need not persuade the Commission that any of the Commission's determinations were erroneous, it has failed to demonstrate that any of the determinations here at issue are sufficiently questionable to pose "difficult" issues for a reviewing court.[3]

A. Failure to Allow LECs to Apply Access Charges to Unbundled Elements

SBC argues (at 6-12) that (1) the failure to permit LECs to impose access charges on purchasers of unbundled network elements conflicts with the Eighth Circuit's Stay of §51.515 of the Rules,[4] promulgated in the Commission's Local Competition Order;[5] and (2) given the Commission's determination not to remove all implicit universal service subsidies from access charges at once, it is arbitrary and capricious to decline to require purchasers of unbundled network elements to pay whatever implicit subsidies remain. Neither argument has merit.

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[2] See Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921(D.C. Cir. 1958), and Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977).

[3] Holiday Tours, 559 F.2d at 844.

[4] See October 15, 1996 Order Granting Stay Pending Judicial Review in Iowa Utilities Board v. FCC, 8th Circuit No. 96-3321 (hereinafter "Stay Order").

[5] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, 11 FCC Rcd 15499 (1996).

Section 51.515 of the Rules, stayed by the Eighth Circuit, has three subparagraphs: paragraph (a) sets forth the general Commission policy that access charges – both interstate and intrastate – do not apply to purchasers of unbundled network elements; paragraphs (b) and (c) create limited exceptions that would have allowed LECs, for a transitional period, to assess a portion of their interstate and intrastate access charges on purchasers of the unbundled local switching element. The court granted a stay of this section without any discussion of its specific provisions. Rather, this section was simply lumped together with other "pricing rules" (Stay Order, n.3 at 9) that were stayed because of the court's tentative belief that the FCC lacks jurisdiction to establish pricing regulations governing intrastate service (id. at 16). Thus, nothing in the court's Stay Order was explicitly intended to affect the Commission's ability to deal with jurisdictionally interstate charges.

Moreover, the effect of staying §51.515 in its entirety is simply to leave the existing Part 69 rules in effect. Nothing in Part 69 can be construed as applying interstate access charges to competitive local carriers that purchase unbundled network elements from incumbent local exchange carriers.[6] Indeed, the CLECs have no need to purchase access services from the ILECs, because the unbundled network elements give them the piece-parts of the network that enable them to provide exchange access to IXCs that wish to originate calls from or terminate calls to the CLECs' end-user customers.[7] Thus, permitting the ILECs to assess access charges on purchasers of unbundled network elements

[6] Thus, the only real need for §51.515(a) was to make clear that, except as provided in paragraph (c), states could not impose access charges on unbundled network elements. Given that need to address intrastate access charges, it made sense for paragraph (a) to refer as well to interstate access charges to avoid any ambiguity on this point.

[7] See Local Competition Order, supra, 11 FCC Rcd at 15679-80.

would require an affirmative amendment of the rules – as in §51.515(b) – to determine which access charges apply to which unbundled network elements. The Commission's policy determination herein not to allow LECs to apply interstate access charges to purchasers of unbundled network elements, accordingly, does not change the status quo or conflict with the Eighth Circuit's stay.

Second, the FCC thoroughly addressed its reasons for not allowing the LECs to assess access charges on unbundled network elements in ¶¶337-340 of the Access Reform Order, and considered, but rejected for sound reasons, the arguments to the contrary here advanced by SBC. Even though SBC disagrees with those determinations, it has not shown that the Commission acted arbitrarily and capriciously in deciding those issues as it did.

Furthermore, SBC fails to offer a road map to accomplish the result it intends. SBC does not appear to argue that full access charges should be assessed on purchasers of unbundled network elements. Clearly that would be an unreasonable result: access charges in part cover the costs of the underlying facilities used to provide access, and only in part contain implicit universal service subsidies. Since purchasers of unbundled network elements are already paying cost-based rates for those elements, they would obviously be overcompensating the ILECs if they were to pay full access charges. Thus, SBC appears to envision that only the remaining implicit subsidy would be charged to purchasers of unbundled elements.[8] However, SBC does not come to grips with the problem of determining how much of the current access charges constitute implicit subsidy and therefore how

[8] See Petition at 10-13.

much it proposes to charge purchasers of unbundled network elements. The Commission was unable, on this record, "to identify the existing subsidies precisely at this time."[9] In the guise of seeking a "stay," SBC is asking the impossible.

B. Adjustment for Completed Amortization of Equal Access Costs

The Commission also gave a thorough explanation (Access Reform Order, ¶¶302-312) of its decision to require a downward adjustment in price cap indices to reflect the completed amortization of non-capitalized equal access costs. Focusing on the fact – freely admitted in the Order – that this action represents a rejection of prior Commission analyses of the issue, SBC demands to know (at 13) what "caused it to change its mind." However, no such explication of the internal thought processes that led to the Commission's confession of error is required. All the Commission is obligated to do is to supply a reasoned analysis for its change in course,[10] and the Commission has amply done so.

C. The Increase In the Price Cap Productivity Factor

In adopting a 6.5% X-factor, the Commission departed from the methodology Sprint had proposed, and Sprint is still internally reviewing the methodology and evidence used to support the 6.5% factor. Nonetheless, Sprint does not believe SBC's arguments warrant a stay. The applicable standard for judicial review of a change in the price cap X-factor is whether "the Commission committed a clear error" in selecting the factor.[11] There

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[9] Access Reform Order, ¶9.

[10] Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970), cert. denied, 403 U.S. 923, reh. denied, 404 U.S. 877 (1971).

[11] Bell Atlantic Telephone Companies v. FCC, 79 F.3rd 1195, 1202 (D.C. Cir. 1996) (upholding a previous Commission upward adjustment in the X-factor).

is no simple mathematical formula that can be used to arrive at a "perfect" X-factor. Determining such a factor involves the complex tasks of both measuring the LECs' past productivity gains relative to the general economy, and deciding the extent to which these past productivity gains would be a good indicator of the future productivity gains that can be reasonably expected of the LECs. As such, there is necessarily a substantial amount of informed judgment that must be brought to bear in arriving at an appropriate X-factor. Sprint submits that SBC has fallen far short of demonstrating that the Commission's analysis would satisfy the court's "clear error" test.

D. The Alleged "Retroactive" Adjustment

The Commission's decision to require the price cap LECs to prospectively adjust their PCIs to the level that would have been in effect had it adopted the 6.5% X-factor in time to become effective with the LECs' 1996 annual access tariff filings does not constitute a retroactive rate adjustment. Despite SBC's vague argument to the contrary (n.38 at 20), this adjustment is no different in kind than the one upheld by the Court of Appeals in the Bell Atlantic case, supra. Again, SBC has not even come close to a prima facie showing that there is "clear error" in what the Commission has done.

II. SBC HAS NOT SHOWN THAT IT WILL SUFFER IRREPARABLE INJURY

SBC (at 22-23) relies principally on two forms of irreparable injury it will allegedly suffer if a stay is not granted: (1) its local service customer base is at risk from competitors serving customers through the purchase of unbundled network elements, if such competitors do not have to pay access charges on such elements; and (2) with respect to the monetary losses resulting from the increased X-factor, "[e]ver-expanding competition in LEC

interstate access service markets already limits the ability of LECs to raise their prices and will have an even larger effect in the future" (Petition at 23, footnote omitted), thus making it difficult for the LECs to make themselves whole in the event the increase in the X-factor is overturned on appeal. Neither of these claims is supported or meritorious.

With respect to diversion of local business to purchasers of unbundled network elements, SBC makes no claims about how many customers are served through such elements today, or how many customers it believes are likely to be served in that fashion by the time judicial review proceedings are completed. Given the lack of commercially practicable OSS interfaces between SBC and CLECs for unbundled network elements, Sprint suspects that the number of customers served in that fashion today is de minimis and is unlikely to grow appreciably for a substantial period of time in the future. In addition, the uncertainties created by the Eighth Circuit stay and pending appeal, and the fact that the states, by and large, have not yet set permanent, cost-based rates for unbundled network elements, make it impossible for CLECs to know whether a sound business case can be made for entry through the purchase of unbundled network elements. Moreover, SBC overlooks the fact that other aspects of the Commission's Access Reform Order make its local customer base less susceptible to diversion to competition from purchasers of unbundled network elements. The lowering of minute of use ("MOU") charges, and the recovery of a greater proportion of access revenues from flat per-line charges, will make Southwestern Bell's customers less subject to diversion than they would be under the current situation if the purchase of unbundled network elements were otherwise practicable.[12]

[12] Recovering non-traffic-sensitive costs from MOU charges (as is the case today) means that customers making above-average numbers of toll calls generate access revenues for

Likewise, with respect to its price cap-related injury, SBC fails to document its assertion that competition would preclude it from making itself whole in the event the Commission's determinations were not upheld on appeal. Indeed, in contrast to SBC's claim (at 23) that access competition "already limits the ability of LECs to raise their prices," GTE, in the wake of the Commission's decisions, increased all of its below-cap rates to the maximum permissible ceilings, an increase with an annual revenue effect of $149,000,000.[13] Furthermore, SBC itself argues elsewhere that the courts grant agencies wide latitude in fashioning relief, even retroactively from the carriers' customers, to make up for the effect of judicial reversals. See Petition, n.45 at 23, and n.48 at 25.

Thus, SBC has failed to show that whatever injury it may suffer in the absence of a stay would, in fact, be irreparable.

III. HARM TO OTHER PARTIES

SBC freely admits, as it must, that granting a stay could harm other parties. SBC's facile solution to this potential harm is "to require Petitioners to account for any funds collected as a result of the stay" (Petition at 2). Such funds, plus interest, would then be delivered to its access customers in the event that orders are affirmed on review (id.). However, SBC fails to demonstrate that the Commission has authority to impose the suggested accounting order. The only explicit statutory authority for imposing accounting orders, in

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the ILECs that more than recover the ILECs' costs. This gives IXCs an incentive to enter the market as CLECs, through the purchase of unbundled network elements, to reduce the access expenses they now incur in supplying long distance service to those customers. Reducing the MOU charges, and recovering the NTS costs through increases in flat charges, ameliorate that incentive.

[13] See GTOC Transmittal No. 1096, May 19, 1997, and GSTC Transmittal No. 207, May 19, 1997.

§204(a)(1), is highly constrained. That section permits the Commission to impose an accounting order only with respect to rates that it has suspended and set for investigation. In addition, §204(a)(2)(A) requires any such investigation to be completed within five months after the date that the rate change is allowed to be effective. Thus, although it is conceivable that the Commission could suspend the tariff filings of SBC implementing the orders in question for one day,[14] so as to enable it to issue an accounting order, the Commission would have to conclude its "investigation" within five months, a period that is too short for the completion of judicial review, even under an expedited briefing schedule. Without suspension, it is not clear whether the Commission has the implicit power under §4(i) to impose an accounting order. Moreover, the Commission has interpreted §204(a)(3) as giving LEC tariffs that are not suspended a conclusive presumption of lawfulness, and as barring the Commission from awarding damages if the tariffs are later found unlawful.[15] If that interpretation is correct, there is no way the IXCs could ever receive refunds for the excessive charges they will have paid, under SBC's plan, during the pendency of judicial review if the orders here in question are upheld.

Moreover, the vague action SBC wishes to take with respect to purchasers of unbundled network elements could only serve to inhibit even further the development of local competition. As discussed above, while SBC seeks to apply only a portion of existing access charges to unbundled network elements, it fails to show how this partial amount

[14] Although the statute permits a longer suspension period, since the rate changes going into effect on July 1 presumably will be decreases in SBC's rates, suspension for a longer period would be clearly inimicable to the interests of IXCs and their customers.

[15] See ¶¶19-20 of Implementation of §402(b)(1)(A) of the Telecommunications Act of 1996, Report and Order released January 31, 1997 (FCC 97-23), reconsideration pending.

should be computed. In any event, the prospect of having to pay some arbitrary amount above the costs of the underlying facilities would further deter the use of unbundled elements as a local entry strategy by CLECs already faced with the lack of OSS interfaces and with uncertainty as to the permanent rates for the unbundled elements themselves. Any additional delays in the onset of effective local competition, at a time when SBC is vigorously pursuing entry into the long distance market,[16] would conflict with the Commission's reliance, in the Access Reform Order (¶263), on market forces to drive access charges to costs, and would dampen the prospect that Congress' objective, in the 1996 Act, of promoting vigorous competition in both local and long distance markets, will ever be fulfilled.

CONCLUSION

SBC has fallen far short of making the showings necessary to justify a stay. Its petition should be denied forthwith.

Respectfully submitted,

SPRINT CORPORATION

Leon M. Kestenbaum
Jay C. Keithley
H. Richard Juhnke
1850 M Street, N.W., 11th Floor
Washington, D.C. 20036
(202) 857-1030

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[16] As the Commission is well aware, SBC has an application pending for §271 authority for the state of Oklahoma in CC Docket No. 97-121. In addition, there are numerous press reports that SBC is in merger discussions with AT&T.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Opposition of Sprint to Southwestern Bell, Pacific Bell and Nevada Bell Petition for Partial Stay was Hand Delivered or sent by United States first-class mail, postage prepaid, on this the 9th day of June, 1997 to the below-listed parties:

Joan A. Hesler

Joan A. Hesler

James Schlichting, Chief*
Competitive Pricing Division
Room 518
Federal Communications Comm.
1919 M Street, N.W.
Washington, D.C. 20554

International Transcription Svc.
1919 M Street, N.W.
Washington, D.C. 20554

Robert M. Lynch
Durward D. Dupre
Michael J. Zpevak
Thomas A. Pajda
Southwestern Bell Telephone
One Bell Center, Room 3520
St. Louis, MO 63101

Nancy C. Woolf
Pacific Bell and Nevada Bell
140 New Montgomery Street
Room 1523
San Francisco, CA 94105

* Two copies delivered