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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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

OPPOSITION OF RCN TELECOM SERVICES, INC. AND TELCO COMMUNICATIONS GROUP, INC. TO SOUTHWESTERN BELL, PACIFIC BELL, AND NEVADA BELL JOINT PETITION FOR PARTIAL STAY, CC DOCKET NOS. 96-262 AND 94-1

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Dated: June 9, 1997

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RCN Telecom Services, Inc. ("RCN") and Telco Communications Group, Inc. ("Telco"), pursuant to Section 1.45(d) of the Federal Communications Commission's ("Commission") Rules, 47 C.F.R. § 1.45(d), and through their undersigned attorneys, hereby oppose the Joint Petition for Partial Stay by Southwestern Bell, Pacific Bell and Nevada Bell ("Joint Petitioners") filed June 3, 1997 in the above-captioned proceeding.[1]

INTRODUCTION AND SUMMARY

The Joint Petition, which requests a partial stay of the Commission's Access Charge Reform Order[2] and Fourth Price Cap Order,[3] is one further example of incumbent local exchange

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

[2] *Access Charge Reform*, CC Docket No. 96-262, First Report and Order, FCC 97-158 (rel. May 16, 1997) ("Access Charge Reform Order").

[3] *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, and *Access Charge Reform*, CC Docket No. 96-262, Fourth Report and Order in CC Docket No. 94-1 and Second

carriers' ("LECs") efforts to thwart the opening of local exchange markets to competition. The Commission and the courts must reject these efforts to undermine the pro-competitive intent of the Telecommunications Act of 1996 ("1996 Act"). The Commission should not be persuaded by the Joint Petitioners' overt threats to petition the Courts of Appeals for a stay and should deny the Joint Petition. The Rules recently adopted in the Access Charge Reform Order and the Fourth Price Cap Order should become effective as ordered. The Commission should defer to reconsideration the Joint Petitioners' and other carriers' arguments against the Rules adopted in the Orders.

Joint Petitioners have failed to make the required showing to justify a stay. Joint Petitioners have (1) failed to show that they are likely to succeed on the merits; (2) failed to demonstrate irreparable injury; (3) neglected to rebut the harm to new entrants and the public that would clearly result from imposition of a stay; and (4) failed to make any showing that a stay is in the public interest. As explained in greater detail below, Joint Petitioners fail to meet any of the required four showings and their Joint Petition must therefore be rejected.

I. JOINT PETITIONERS FAIL TO MEET THE STANDARDS TO JUSTIFY A STAY OF THE ORDERS

Under established standards, the Joint Petitioners are not entitled to a stay unless they show (1) a likelihood of success on the merits; (2) irreparable injury absent a stay; (3) the absence of

Report and Order in CC Docket No. 96-262, FCC 97-159 (rel. May 21, 1997) ("Fourth Price Cap Order").

harm to others from granting a stay; and (4) the public interest favors a stay. RCN and Telco show below that the Joint Petitioners fail to satisfy even one of these criteria.

The Joint Petition is fatally flawed in a number of aspects. To begin with, Joint Petitioners urge the Commission to apply a standard for stay that is wholly at odds with the law. Under the standard proposed by Joint Petitioners, the Commission could stay its Orders if the Commission "recognize[s] that it has ruled on concededly difficult issues and that the equities favor relief."[4] The Joint Petitioners incorrectly rely on a quote from *Holiday Tours* to support their alternative standard.[5] In fact, the court in *Holiday Tours* applied the same four-part traditional analysis. A proper reading of the *Holiday Tours* opinion shows that when the balance of hardships tips favorably toward the movant on the last three criteria, the equities of granting the stay may be considered as part of the analysis under the first criterion of the four-part test.[6] Because criteria two, three and four do not favor Joint Petitioners' position, the relaxed equities test for criterion one does not apply.

II. JOINT PETITIONERS ARE NOT LIKELY TO PREVAIL ON THE MERITS

The Commission exhaustively addressed and justified each and every issue complained of by the Joint Petitioners. While this exhaustive review does not guarantee that the Rules adopted

[4]Joint Petition, pg. 5.

[5]Joint Petition, pg. 5 *(citing Washington, Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844-45 (D.C. Cir. 1977)).

[6]"[A] court, when confronted with a case in which the other three factors strongly favor interim relief may exercise its discretion to grant a stay if the movant has made a substantial case on the merits." *Holiday Tours*, 559 F.2d at 843.

in the Access Charge Reform and Fourth Price Cap Orders will not be refined on reconsideration, the Joint Petition provides no independent basis for the Commission to assume that the Orders are likely to be overturned upon judicial review. The Commission fully explains the bases for all conclusions which the Joint Petitioners contest. The Commission's construction of its mandate under Section 254 of the Communications Act of 1934, as amended by the 1996 Act, is fully supported by the statutory language, and by the legislative history and underlying policy of the 1996 Act. The Commission's reasonable interpretation of the statute it is charged with interpreting and implementing is entitled to deference and a reviewing court must uphold such a construction even if it is not the only permissible interpretation.[7]

A. The Commission's Part 69 Prohibition on Recovery of Interstate Access Charges on Unbundled Network Element Purchasers is Consistent with the Eighth Circuit's Stay and with the Communications Act.

1. The Commission's Order does not conflict with the Eighth Circuit's stay.

The Commission's determination that incumbent LECs may not impose Part 69 access charges on unbundled network elements (the "Part 69 prohibition") does not conflict with the Eighth Circuit's stay[8] of a portion of the Interconnection Order.[9] That stay merely prevents the effectiveness of Commission rules regarding intrastate telephone service pricing. The stay does

[7] *Chevron U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 & n. 11 (1984).

[8] *See, Iowa Utilities Bd. v. FCC*, 109 F.2d 418 (8th Cir. 1996).

[9] *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, First Report and Order, 11 FCC Rcd 15499 (1996) ("Interconnection Order").

not preclude Commission changes to Part 69 access charges, which are strictly ***interstate*** in nature. Consequently, the Commission's action did not violate the stay and Joint Petitioners' claim is without merit.

In the Interconnection Order, the Commission determined that allowing incumbent LECs to recover indefinitely federal or state access charges from unbundled network element purchasers would compensate incumbent LECs in excess of their underlying network costs, since unbundled element prices themselves must be cost-based.[10] The Commission elected to sunset intrastate and interstate access charges on unbundled element purchasers on June 30, 1997, when current LEC annual access tariffs expire, at the latest.[11] This Commission decision is codified at 47 C.F.R. § 51.515, a rule which the Eighth Circuit has stayed pending its review of the Interconnection Order.

Contrary to Joint Petitioners' argument, the Eighth Circuit's stay does not enjoin the Commission from modifying interstate access charges during the pendency of the Interconnection Order appeal. The Eighth Circuit stayed Section 51.515, and other provisions of the Interconnection Order, on the basis of its doubts regarding the Commission's authority under the

[10]Interconnection Order, ¶363; 47 U.S.C. § 252 (d)(1)(A)(i) (unbundled network element prices to be cost-based).

[11]Interconnection Order, ¶725. Under the Interconnection Order, intrastate and interstate access charge recovery on unbundled element purchasers sunsets on the earlier of: (1) June 30, 1997; (2) the effective date of Commission decisions in both universal service and access charge reform proceedings; or (3) grant to a relevant Bell Operating Company of Section 271 authority to offer in-region, interLATA service. 47 C.F.R. § 51.515; Interconnection Order, ¶720.

Act to "establish pricing regulations regarding ***intrastate*** telephone service."[12] Section 51.515's proscription of intrastate access charge recovery from unbundled network element purchasers squarely falls within the ambit of the Eighth Circuit stay. By contrast, the proscription of interstate access charge recovery does not. Joint Petitioners do not assert -- nor can they -- that modifications to ***interstate*** access rules are outside the Commission's jurisdiction.[13] Yet they argue that the Commission's clear authority to regulate interstate access charges is clouded by the Eighth Circuit's stay of Section 51.515, a portion of which involves Commission action in dispute before the appellate panel. However, Part 69 access charges are not before the Eighth Circuit. Joint Petitioners have not shown that the Commission does not currently have the authority to set interstate access charges and, consequently, Joint Petitioners cannot prevail on the merits of that argument.

2. The Commission's decision is not arbitrary and capricious.

Joint Petitioners claim that the Commission's Part 69 prohibition somehow is arbitrary and capricious due to the Commission's failure to identify *all* universal service support subsidies in access charges.[14] Apparently, Joint Petitioners believe that the Commission is compelled to

[12]*Iowa Utilities Bd.*, 109 F.3d at 424 (emphasis added).

[13]*See,* 47 U.S.C. § 201 (Commission's mandate is to regulate *interstate* and foreign communication); 47 C.F.R. § 69.1 ("This part establishes rules for access charges for *interstate* or foreign access services . . .").

[14]Joint Petition, pp. 7-11.

identify dollar for dollar correspondence between existing universal service subsidy and access charges before any access charge may be phased out or excluded. The argument is without merit.

In the Access Charge Reform Order, the Commission outlined a three-part process for identifying universal service support contained within access charges. First, the Commission reduced usage-sensitive interstate access charges by phasing out local loop and other non-traffic-sensitive costs, as those costs, by definition, represent an implicit subsidy from high-volume to low-volume interstate toll customers.[15] Second, the Commission decided to rely on competition by new entrant LECs to identify the implicit subsidies in price cap regulated incumbent LEC interstate access rates as compared to corresponding rates of new entrants.[16] Third, the Commission set a process for adopting and implementing a forward-looking, cost-based mechanism to distribute universal service support.[17] The Commission forthrightly stated that it would not remove (or even identify) all implicit universal service support in access charges immediately, nor was it required to do so.[18] Section 254(b)(5) of the 1996 Act states only that universal service support "*should* [as distinguished from *shall*] be specific, predictable, and

[15]Access Charge Reform Order, ¶6.

[16]*Id.* at ¶7.

[17]*Id.* at ¶8.

[18]*Id.* at ¶9.

sufficient."[19] It does not compel the Commission to identify all subsidies before taking any action regarding access charges.

The Commission carefully considered Joint Petitioners' Comments that access charges should be imposed on unbundled elements, and was not persuaded.[20] The Commission determined that access charges should not apply to unbundled elements because: (1) unbundled element purchasers are otherwise obligated to contribute to universal service; (2) modifications of existing rate structure elements would reduce the impact on incumbent LECs of the unbundled element exclusion; (3) geographic deaveraging of unbundled elements will enable incumbent LECs to recover higher prices when they incur higher costs; and (4) imposing access charges on unbundled elements could recover in excess of universal service subsidies.[21] In contrast to Joint Petitioners' contentions, the Commission did consider whether excluding unbundled elements from access charges would impose equitable burdens on incumbent LECs and new entrants, and decided that it would. Joint Petitioners have not demonstrated that the Commission's decision is likely to be considered arbitrary and capricious.

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[19] *Id.* (emphasis added).

[20] *See,* Access Charge Reform Order, ¶338 (rejecting Pacific Telesis' argument that "access charges should be imposed on unbundled elements because cost-based rates for such elements would not recover universal service support subsidies built into the access charge regime").

[21] *Id.*

3. Exclusion of unbundled elements from access charges is not discriminatory.

Joint Petitioners assert that the Commission's justification for excluding unbundled elements from access charges is erroneous.[22] Specifically, Joint Petitioners claim that the Commission erred in reasoning that unbundled element purchasers bear investment risks that resellers do not, such that the former need not pay access charges.[23] Joint Petitioners fundamentally mischaracterize the difference between resale of retail services and combination of unbundled elements. Resellers are limited to reselling existing retail services because they have no facilities or services of their own which are added to or complement the unbundled network elements. By contrast, purchasers of unbundled elements combine some of their own facilities or services with incumbent LEC unbundled elements. Such new entrants bear investment risks that pure resellers do not -- namely, that their customers' demand does not justify the new entrant's investment in facilities or services. While Joint Petitioners fear new entrants will combine unbundled incumbent LEC elements to reconstitute services available for resale, this is nothing more than speculation which in all likelihood does not accurately characterize the uses to which new entrants will make of unbundled incumbent LEC elements. The Commission's analysis of the difference between unbundled element purchasers and resellers was correct, and the Commission's application of access charges to resellers, but not purchasers of unbundled network elements, is not discriminatory.

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[22]Joint Petition, pg. 11.

[23]*See*, Access Charge Reform Order, ¶340.

B. The Commission Has Adequately Explained and Justified Its Decision to Require Price Cap LECs to Reduce Their PCIs to Reflect the Completion of the Amortization of Equal Access Non-Capitalized Costs

Joint Petitioners allege that the Commission provided no reasoned explanation of why it decided to reverse course and require price cap LECs to reduce their price cap indices ("PCIs") to reflect the completion of the amortization of equal access non-capitalized costs. Joint Petitioners cite case law to support the proposition that an agency changing its course must supply "a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored,"[24] and argue that the Commission failed to supply such a reasoned analysis here. This is simply not the case. The Commission explicitly stated that its prior analysis of the issue was incomplete[25] and that it had determined, based on the record in the current proceeding,[26] that it could now make a reasoned decision on this issue. As the Commission has argued in support of other policy reversals, where "both decisions are rational," the first decision "should not be viewed as more rational or as binding on the later" decision merely because it occurred at an earlier date.[27] Because the Commission has relied on the current record, has specifically rejected its prior analyses, and has supplied a reasoned basis for its policy reversal, Joint

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[24]*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).

[25]Access Charge Reform Order, ¶308.

[26]Access Charge Reform Order, ¶311.

[27]*See, Bell Atlantic v. FCC*, 79 F.3d 1195, 1201 (D.C. Cir. 1996) (court citing with approval Commission Brief in support of its decision to reverse prior policy and exclude relevant but suspicious data point in X-Factor calculation).

Petitioners have not shown that they are likely to succeed on overturning the Commission's decision with respect to this issue.

C. The Commission's Choice of a Single Productivity Factor of 6.5% Is Supported by a Thorough and Reasoned Analysis of the Data

Joint Petitioners fault the Commission for selectively manipulating the evidence to arrive at a 6.0% productivity factor and for creating a .5% consumer productivity dividend out of ether. Once again, Joint Petitioners selectively quote from and misstate the record. The Commission provided a reasoned and principled basis for selecting these figures and its findings are not likely to be overturned on appeal.

Joint Petitioners contend that the Commission, in contravention of its own findings, relied more heavily on old incumbent LEC productivity data, placing less emphasis on more recent incumbent LEC productivity gains under incentive regulation.[28] This is simply not correct. The Commission chose to evaluate the X-Factor based on a series of moving averages that weigh more heavily the most recent years of incumbent LEC productivity gains.[29] While the Commission has held that a critical element in X-Factor analysis is actual LEC performance under price caps, the Commission has also found, in both the Fourth Price Cap Order and in prior decisions regarding recalculation of the X-Factor, that relevant but suspicious data, or "outliers," should be excluded

[28]*See, e.g.*, Joint Petition, pp. 2, 15.

[29]As the Commission adequately explained, by taking averages over a series of years, always ending with 1995, and dropping the oldest year from each subsequent average, the most recent five years of incumbent LEC productivity under price cap incentive regulation are weighted most heavily. Fourth Price Cap Order, ¶138.

from its calculation.[30] Although Joint Petitioners may not agree with this exclusion, they cannot show that the Commission failed to consider all relevant data or that the Commission acted arbitrarily and capriciously, and thus are not likely to prevail on the merits.

Nor are Joint Petitioners likely to succeed on the merits to overturn the Commission's decision to retain the .5% consumer productivity dividend ("CPD"). Where the Commission has thoroughly explained its X-Factor calculation, as it has done in the Fourth Price Cap Order, the courts have previously upheld the Commission's decision to retain the .5% CPD, even where the Commission "provided no specific reasons for retaining a consumer productivity dividend or for setting the figure at 0.5 percent."[31]

D. Requiring Price Cap LECs to Adjust Their 1997-1998 Access Rates to Reflect Historically Low Regulatory-Mandated Productivity Levels Is Not Retroactive and Is Supported by the Record

The lack of support in the record for establishing the 6.5% X-Factor is one of Joint Petitioners' primary arguments against the Commission's decision to require calculation of 1997-1998 access rate levels assuming use of the 6.5% X-Factor in 1996-1997 rate filings. As shown above, the record does support adoption of the 6.5% X-Factor. The record also supports the Commission's decision to require incumbent price cap LECs to calculate their 1997-1998 access rates assuming the 6.5% X-Factor was put in place in time for the 1996-1997 access rate filing.

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[30] *See, Bell Atlantic v. FCC*, 79 F.3d at 1201 (court citing with approval Commission Brief in support of its decision to reverse prior policy and exclude relevant but suspicious data point in X-Factor calculation).

[31] *Bell Atlantic v. FCC*, 79 F.3d at 1201.

As the Commission explained, this calculation will not impact the incumbent LECs' 1996-1997 rates or earnings. Rather, its is a one-time adjustment to the incumbent LECs' access rate levels to ensure that 1997-1998 access rates accurately reflect LEC productivity gains. Like the adjustment upheld in *Bell Atlantic v. FCC,* this adjustment "place[s] a local exchange carrier's future price cap index where it would have been" had the X-Factor been 6.5% all along.[32]

III. JOINT PETITIONERS WILL NOT SUFFER IRREPARABLE INJURY ABSENT A STAY

In order to show irreparable harm, Joint Petitioners must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief.[33] Although the Joint Petitioners fashion their argument to allege irreparable harm in the form of "an uncompensated economic loss," what they are alleging, at bottom, is an uncompensated taking of their property. As the courts and the Commission have held many times, the determination of whether a rate is confiscatory, and an uncompensated taking of property, depends on whether the rates themselves are just and reasonable, not on what methodology is used to derive those rates.[34] The Joint Petitioners cannot make the required threshold showing that they have been robbed of their ability to earn an overall reasonable rate of return.[35]

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[32]*Id.* (Commission ordered LECs to take .7% reduction in PCI prospectively).

[33]*See, Packard Elevator v. I.C.C.*, 782 F.2d 112, 115 (8th Cir. 1986), *cert. denied*, 484 U.S. 828 (1987).

[34]*Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591, 602-603 (1944).

[35]*See, Dusquesne Light Co. v. Barash*, 488 U.S. 299 (1989).

In this case, the Commission concluded that the price cap LECs will be able to meet the "achievable but significantly more demanding" productivity factor target of 6.5%.[36] Furthermore, the Commission specifically retained the low-end adjustment mechanism for price cap LECs that have substantially below-average earnings. This mechanism permits price cap LECs with rates of return less than 10.25% to increase their price cap indices to a level that will enable them to earn a rate of return of 10.25%.[37] Thus, although the Joint Petitioners failed to make a case in this proceeding that the Part 69 prohibition and other price cap adjustments will have a total effect of denying a fair return on investment, each petitioner will have a second chance to do so as the methodology is applied to their operations. Because Joint Petitioners retain the right to earn a rate of return of 10.25%, the economic effect of these Rules on Joint Petitioners are distinguishable from the Interconnection Rules stayed by the Eighth Circuit.

Furthermore, Joint Petitioners turn upside down one of the primary goals of the Commission's efforts to reduce access charges to cost-based rates. Joint Petitioners argue that taken together, the Commission's Rules will result in a loss of customers, revenues and goodwill that cannot be recovered if the Commission's Rules are subsequently overturned. Joint Petitioners theorize that the ability of competitive access providers to underprice incumbent LECs in the provision of interstate access will result in a shrinking customer base such that any rate increase to make the incumbent LECs whole will further price the incumbent LECs' services out of the

[36]Fourth Price Cap Order, ¶¶142, 148.

[37]Fourth Price Cap Order, ¶127.

market. To the contrary, as access charges are restructured to correctly reflect the manner in which costs are incurred and to remove implicit universal service subsidies, incumbent LECs' access prices will decrease, thereby reducing the margin that competitive access providers enjoy. Staying the very rules that begin the process of removing implicit subsidies and decreasing that margin will only accelerate the incumbent LECs' loss of customers to competitive access providers.

IV. JOINT PETITIONERS HAVE NOT, AND CANNOT, SHOW THAT NEW ENTRANTS AND THE PUBLIC WILL NOT BE HARMED BY THE GRANTING OF A STAY

Contrary to the Joint Petitioners' arguments, granting the requested stay would cause irreparable harm to competitive carriers and the public. Most notably, the Joint Petitioners focus their showing of lack of harm on interexchange carriers ("IXCs") only, claiming that if the Orders are affirmed on appeal the IXCs "will be restored to their pre-stay financial position through distribution of the difference between the amount they actually paid and the amount they would have paid absent a stay, plus interest."[38] Joint Petitioners are effectively asking the Commission to apply a double standard with respect to financial harm. If the Joint Petitioners lose revenues, customers and goodwill absent the stay, that harm is irreparable. However, according to Joint Petitioners, if IXCs lose revenues, customers and goodwill as the result of the stay, they are not irreparably harmed.

[38]Joint Petition, pg. 2.

Joint Petitioners also ignore the effect that the consequent lack of competition will have on IXCs and the public. Their curt analysis incorrectly assumes that all IXCs provide only interexchange services and ignores the adverse impact a stay would have on carriers that compete, or are attempting to compete, with incumbent LECs in the local exchange market. The Commission has already found that if incumbent LECs were to impose access charges on the sale of unbundled network elements, "the added cost to competitive LECs would impair, if not foreclose, their ability to offer competitive access services."[39] The Commission has also found that its Access Charge Reform Order will result in lower long distance rates for many consumers, promote the spread of competition, foster economic prosperity, and promote the public welfare by encouraging investment and efficient competition.[40] Joint Petitioners have failed to show that new entrants and the public will not be harmed by granting the requested stay and thus fail to satisfy the third criterion in the four-part standard.

V. GRANTING A STAY IS NOT IN THE PUBLIC INTEREST

Joint Petitioners' argument that the requested stay is in the public interest is specious and self-serving at best. According to them:

> [I]t should be noted that the public interest strongly favors prompt disposition of this motion. Each day the orders are left in effect is a day that the *LECs* and the *Commission* must spend on tariffs that may need to be entirely redone.[41]

[39]Access Charge Reform Order, ¶337.

[40]Access Charge Reform Order, ¶¶16, 35.

[41]Joint Petition, pg. 25 (emphasis added).

While RCN and Telco appreciate the burden that annual access tariff filings place on both incumbent LECs and the Commission, removal or lessening of that burden is of benefit primarily to the incumbent LECs, not the public. As for the Commission, it has made its decision and bears no more risk of wasted resources than it does with any decision which may be subject to adverse judicial review. The public interest test does not require proof that the incumbent LEC and the Commission's Competitive Pricing Division may benefit from the stay, rather the test requires a showing that the public will benefit from the granting of the requested stay.

The actions taken in the Access Charge Reform Orders and the Price Cap Order are in the public interest because, as the Commission has repeatedly recognized, the Orders will reduce prices to consumers, encourage economic efficiency and investment, and promote the public welfare. Rather than showing that the public will be harmed if the Orders are not stayed, the Joint Petitioners have focused on the alleged financial harm that will accrue to their company and their shareholders if the requested stay is not granted. Joint Petitioners have thus failed to show that granting a stay is in the public interest and cannot meet the fourth criterion of the four-part standard.

VI. IF THE COMMISSION EXERCISES ITS EQUITABLE DISCRETION TO GRANT A STAY, AN ACCOUNTING ORDER IS REASONABLE

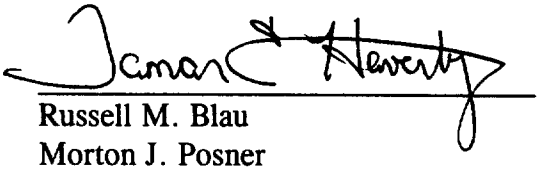
Joint Petitioners suggest that if the Commission grants the requested stay, they would be willing to hold the access charges in controversy in an interest bearing escrow account, subject to an accounting if the Commission's Orders are subsequently upheld. Although RCN and Telco believe that Joint Petitioners will lose any appeal on the merits and that Joint Petitioners have

failed to make the necessary showing to receive a stay, if the Commission determines to exercise its equitable discretion and grant the stay, it should protect the public interest by adopting an accounting order and requiring Joint Petitioners and other incumbent LECs subject to the Rules to provide proof that amounts owed as a result of the Orders will be placed in an interest bearing escrow account.

CONCLUSION

Joint Petitioners have failed to make the required showing to justify a stay of the Commission's Orders. Joint Petitioners have (1) failed to show that they are likely to succeed on the merits; (2) failed to demonstrate irreparable injury; (3) neglected to rebut the harm to new entrants and the public that would clearly result from imposition of a stay; and (4) failed to make any showing that a stay is in the public interest. The Commission must reject the Joint Petition and should address Joint Petitioners' and other carriers' arguments regarding the Access Charge Reform and Fourth Price Cap Orders on reconsideration.

Respectfully submitted,



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Dated: June 9, 1997

CERTIFICATE OF SERVICE

I, Wendy Mills, hereby certify that on this 9th day of June, 1997 a copy of the foregoing Opposition of RCN Telecom Services, Inc. and Telco Communications Group, Inc. to the Southwestern Bell, Pacific Bell and Nevada Bell Joint Petition for Partial Stay was served via courier or overnight delivery* on the following:

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And a copy was served via first class, postage-prepaid mail on the individuals on the attached list.

Wendy Mills

193116.1

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