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

JUN - 9 1997

In the Matter of	)	
	)	
Southwestern Bell, Pacific Bell and Nevada Bell	)	CC Docket Nos. 96-262, 94-1
	)	
Joint Petition For Partial Stay	)	

COMMENTS IN SUPPORT OF THE JOINT PETITION

BELLSOUTH TELECOMMUNICATIONS, INC.

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SUMMARY

BellSouth files these Comments in support of the Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review filed by Southwestern Bell Telephone Company, Pacific Bell and Nevada Bell. Under the applicable legal standard governing the issuance of a stay, the circumstances here warrant that the Commission grant the requested relief. Petitioners have demonstrated that they are likely to succeed on the merits and that the equities favor the Petitioners' request. Petitioners have also demonstrated that issuance of stay would not harm the public but would prevent Petitioners as well as other local exchanges carriers from incurring substantial financial harm from which there would be no effective remedy that would make Petitioners whole should they prevail on appeal.

Petitioners seek a stay of two aspects of the Commission's Access Charge Reform Order: the requirement to (1) exclude the unbundled network elements from Part 69 access charges; and (2) reduce their price cap indices (PCIs) to reflect the completion of the amortization of equal access non-capitalized costs.

BellSouth supports Petitioners' contentions that the Access Charge Reform Order conflicts with the stay of the Commission's Interconnection Order issued by the Court of Appeals for the Eighth Circuit. BellSouth also demonstrates in its Comments that the Commission's determinations with regard to unbundled network elements are arbitrary and capricious

Equally arbitrary is the Commission determination requiring exogenous price cap treatment of completed amortization of equal access costs. The Commission has previously

declined to take this type of action. As Petitioners show, the Commission has failed to adequately explain why it is rejecting its prior determinations.

Petitioners also seek to stay two aspects of the Price Cap Performance Review Order: (1) the increase in the X-factor to 6.5 percent; and (2) the application of the revised X-factor to the LEC price cap indices as if it had been prescribed in 1996 instead of 1997. BellSouth concurs with the arguments presented by the Petitioners on these issues. In addition, BellSouth provides additional reasons why the actions taken by the Commission are arbitrary and capricious, and are likely to be overturned on judicial review. The available data demonstrates that the Commission's existing upper productivity target of 5.3 percent was already at the upper end range of reasonableness. The Commission ignored this evidence and arbitrarily selected four intermediate data series as a basis for revising the X-factor. The Commission then compounds its error by arbitrarily adding a 0.5 percent consumer productivity dividend.

The Commission's "reach back" adjustment also cannot be justified. The Commission's staff analysis shows that the 5.3 upper productivity target was not too low. There is no justification in the record for any "reach back" at all.

Petitioners have shown the irreparable nature of the injury they will suffer in the absence of a stay. In addition, BellSouth notes that, market forces demand that it price many of its interstate access services below cap. The possibility of recovering lost revenues through future rate increases should the Petitioner prevail on appeal is highly problematic. Equally problematic is a later surcharge. If BellSouth's customers are later required to pay a large surcharge, they may be unable to recover these costs from their customers.

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COMMENTS IN SUPPORT OF THE JOINT PETITION

BellSouth Telecommunications, Inc. ("BellSouth") hereby submits its comments in support of the Joint Petition for Partial Stay of certain aspects of the Commission's Access Charge Reform Order[1] and Price Cap Performance Review Order[2] filed by Southwestern Bell, Pacific Bell and Nevada Bell ("Petitioners").

I. INTRODUCTION

On June 3, 1997, the Petitioners filed a Petition For Partial Stay of limited aspects of the Commission's Access Charge Reform Order and Price Cap Performance Review Order. Specifically, the Petitioners request that the Commission stay two of its determinations in the Access Charge Reform Order: that access charges should not apply to carriers purchasing unbundled network elements and that price cap indices be reduced to reflect the amortization of

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[1] Access Charge Reform, CC Docket No. 96-262, Price Cap Performance Review, CC Docket No. 94-1, Transport Rate Structure and Pricing, CC Docket No. 91-213 and End User Common Line Charges, CC Docket No. 95-72, First Report and Order, FCC 97-158, released May 16, 1997 ("Access Charge Reform Order").

[2] 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 Report and Order in CC Docket No. 96-262, FCC 97-159, released May 21, 1997 ("Price Cap Performance Review Order").

equal access costs. In addition, with regard to the Price Cap Performance Review Order, Petitioners seek a stay of the Commission's selection of a 6.5% productivity factor and the application of such factor as if it were in effect commencing in 1996 rather 1997.

Under the applicable legal standard governing the issuance of a stay, the circumstances here warrant that the Commission grant the requested relief. Petitioners have demonstrated that they are likely to succeed on the merits and that the equities favor the Petitioners' request. Petitioners have shown that the issuance of a stay would not harm the public but would prevent Petitioners, as well as other local exchange carriers, from incurring substantial financial harm for which it is unlikely that an effective remedy could be fashioned that would make Petitioners whole should they prevail on appeal.

II. PETITIONERS HAVE SHOWN THAT THEY WILL LIKELY PREVAIL ON THE MERITS

A. The Commission's Actions Concerning The Application Of Access Charges On Unbundled Network Elements and Its Treatment of Amortized Equal Access Costs Are Unjustified

Petitioners seek a stay of two aspects of the Access Charge Reform Order. The first is the Commission's determination that access charges should not be applied on unbundled network elements. The second is the determination that there should be an exogenous decrease in the local exchange carriers Price Cap Indices (PCI) to reflect the completion of the amortization of equal access costs. In neither case has the Commission adequately explained and justified its decision, and, accordingly, the Commission's determinations are contrary to the requirement that the Commission engage in reasoned decision making.

With regard to the application of access charges on unbundled network elements, the Petitioners correctly identify that, as a threshold matter, the Access Charge Reform Order

conflicts with the extant stay of the Commission's Interconnection Order[3] issued by the Court of Appeals For the Eighth Circuit.[4] Among the interconnection rules that the Court stayed was a rule which prohibited the application of access charges to purchasers of unbundled network elements.[5] The Commission, however, provides no legal justification or any other explanation that would permit the Commission to circumvent the Court's stay order simply by republishing, in a different order, the same requirement that the Court has stayed. Simply, the Commission has no such authority, and the conflict with the Court's stay order is reason alone to stay this aspect of the Access Charge Reform Order.

Even if there were no existing stay, the Commission's determination is arbitrary. The Commission claims that its decision not to impose access charges on unbundled network elements will not dramatically affect the ability of price cap LECs to fulfill their universal service obligations. The Commission's reasons for reaching this conclusion are non-sequitors. First, the Commission argues that "competitors using unbundled network elements to provide interstate service will contribute to universal service requirements."[6] While this statement is a theoretical truism, it is of no practical significance. The Commission acknowledges that it did not identify any of the implicit subsidies in interstate access charges and would be unable to do so before January 1, 1999.[7] Thus, as to the implicit subsidies, which have been and will continue to be the

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[3]Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 and Interconnection between Local Exchange Carriers and Commercial Mobile Radio Service Providers, CC Docket No. 95-185, First Report and Order, 11 FCC Rcd 15499 (1996) ("Interconnection Order").

[4]Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996).

[5] See 47 C.F.R. §51.515.

[6] Access Charge Reform Order , ¶ 338.

[7] Id., ¶ 9 and n. 16.

primary support for universal service, the is no universal service fund to which competitors will contribute. Indeed, unless access charges are assessed on unbundled network elements, competitors who use such elements will be able to avoid contributing to universal service support--leaving the incumbent local exchange carrier alone to bear the universal service burden. Not only is this result inconsistent with the mandate of Section 254 of the Communications Act, as Petitioners demonstrate, but in addition, it is directly contrary to the Commission's own reasoning here.

Next, the Commission offers that its rate structure changes and increases in multiline subscriber line charges are mitigate factors.[8] The flaw in the Commission's conclusion is that the rate structure changes in the access charge rules have merely shifted the implicit subsidies among access elements--the fact remains that the amount of the implicit subsidy is unchanged. Indeed, to the extent the rule changes increase the implicit subsidy that must be recovered from multiline customers, the rule changes increase rather than mitigating the impact of the Commission's determination not to impose access charges on unbundled elements. This is so because more implicit support would be recovered from the very group of users that competitors would attempt to capture first through the use of unbundled elements.

The Commission further suggests that its conclusion is supported because access charges may reflect costs other than economic costs and implicit subsidies.[9] According to the Commission, imposing access charges on unbundled network elements could recover from market entrants substantially more than the amounts used to support universal service. This possibility, however,

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[8] Id. ¶ 338.

[9] Id.

does not provide a basis for the Commission to excuse purchasers of unbundled network elements from contributing altogether to universal service support as it has effectively done in the Access Charge Reform Order. At best the Commission's concern could substantiate a transition plan wherein only certain access charges (or a percentage of the access charges) that have been established in the record to include implicit universal service subsidies would apply. It is arbitrary, however, to side step the kind of reasoned-decision making that the law demands of an administrative agency by simply avoiding the question.

The Commission also perceives that the deaveraging of unbundled network elements prices will somehow ameliorate the impact of its decision. Contrary to Commission's belief, deaveraging of unbundled network element prices will exacerbate the adverse impact of the Commission's determination. The implicit subsidies are averaged in access charges, including those areas which could be categorized as low cost. Deaveraged unbundled network prices would increase the incentive to displace access services in low cost areas with unbundled elements because the implicit subsidies serve to increase the arbitrage opportunities between averaged and deaveraged rates in these areas. The Commission cannot ignore this negative impact on universal service support.

Finally, the Commission notes that, although in the Interconnection Order it adopted a transition program that applied certain non-cost based access charges to unbundled network elements, the transition program was to end on June 30, 1997.[10] In the Interconnection Order, the Commission stated that it could not conceive of any circumstances that would warrant extension of the transition program. While the Commission might have considered that not all

[10] Id. ¶ 339.

aspects of the universal service proceeding might not be completed by the June 30th date, it is inconceivable that the Commission or any party could have anticipated that not only is the proceeding not completed, but also that the substance of that proceeding, identifying implicit universal service subsidies and making them explicit has yet to begin. Further, the fact that the high cost universal service fund that fulfills the requirements of Section 254 will not be in place until January 1, 1999 is an extraordinary change in circumstances that nullifies the Commission's reasoning in the Interconnection Order. Thus, given the substantial change in circumstances, the Commission cannot simply use the date in the Interconnection Order as means of mooting the issue.

As is evident in the Petition, and further explained here, the Commission's determination in the Access Charge Reform Order regarding the application of access charges on users of unbundled elements will not withstand judicial scrutiny. Accordingly, a stay of this determination is warranted.

Equally arbitrary is the Commission determination regarding the price cap treatment of completed amortization of equal access costs.[11] As the Petitioners explain, the Commission in the past has consistently declined to take the type of action it adopted in the Access Charge Reform Order. It simply is not enough for the Commission to justify its policy reversal with the explanation that procedural obstacles prevented them from taking action earlier. The Commission must, as a matter of law, explain why it is now rejecting its prior determinations. As the Petitioners show, such explanation is lacking in the Access Charge Reform Order.

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[11] Id. ¶ 302.

The Commission apparently takes solace in the fact that with respect to depreciation reserve deficiency amortization and inside wire amortization, it required exogenous adjustments of the price cap indices when the amortization's were completed. Overlooked by the Commission is the fact that in both the case of the depreciation reserve deficiency and inside wire amortization, the amounts were fixed at the time price cap regulation was adopted. With regard to equal access amortization, however, amounts were added after price cap regulation began and for which no exogenous treatment was afforded by the Commission. The Commission does not explain or justify the asymmetrical approach it has now adopted in the Access Charge Reform Order that only recognizes as exogenous that aspect of the equal access amortization which reduces the price cap index but continues to exclude from exogenous treatment that portion which would increase the price cap index. Such result oriented decision making is arbitrary and capricious.

B. The Commission's Adjustments To The X-Factor In The LEC Price Cap Formula Are Arbitrary And Capricious

Petitioners request the Commission to stay two aspects of its Price Cap Performance Review Order: the increase in the X-Factor to 6.5 percent and the application of that revised X-Factor to the LEC price cap indices as if it had been prescribed in 1996 instead of 1997.[12] BellSouth concurs that each of these actions was arbitrary and capricious, and is likely to be reversed on judicial review. BellSouth concurs with the arguments presented by Petitioners on these issues, and will not repeat those arguments here. In addition to the arguments presented by Petitioners, BellSouth sets forth below additional reasons why the actions taken by the Commission are arbitrary and capricious, and are likely to be overturned on judicial review.

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[12] Petition for Partial Stay, p.p. 15-20.

In paragraph 137 of the Price Cap Performance Review Order, the Commission sets forth a summary of the results of the staff productivity analysis given the most weight in the prescription of the revised X-Factor.[13] That analysis shows that whether one looks at the entire data series (1986-1995) or the most recent five year period (1991-1995), which reflects the LEC productivity performance under price cap regulation, the LECs' achieved productivity was 5.2 percent. This data demonstrates conclusively that the Commission's existing upper productivity target of 5.3 percent was already at the upper end of the range of reasonableness and was fully supported by the historical record.[14] Rather than rely on the entire data series or the LECs' actual performance under price cap regulation, the Price Cap Performance Review Order arbitrarily selects four intermediate data series (87,95)(88,95)(89,95) and (90,95) which "are closely grouped around 6.0 percent" as the base for revising the X-Factor.[15] The order attempts to justify this statistical gerrymandering by disparaging the 1992 data point as "an artifact of a one-year jump in the measured productivity of the national economy as economic activity increased, rather than a change in the growth rate of LEC productivity or input prices."[16] In fact, the 1992 data point reflects the fact that the national economy was emerging from a recession. In 1992, the productivity of the national economy improved 1.12 percent. This followed years (1987-91) in which the productivity changes of the national economy was 0.00%, 0.50%, -0.60%, -0.50% and

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[13] BellSouth cites the staff analysis in commenting on the stay petition because the Commission placed primary reliance on that analysis to justify an increase in the X-Factor. BellSouth does not endorse the staff analysis, and reserves the right to challenge the staff analysis during judicial review on the merits.

[14] The Price Cap Performance Review Order expressly finds that "these averages, rather than the yearly estimates, provide the most reliable basis in the current record for estimating incumbent LEC productivity targets (including input price differential) for the immediate future." Price Cap Performance Review Order, ¶ 138.

[15] Price Cap Performance Review Order, ¶139.

-0.91%, respectively.[17] It is the prior years (1987-1991), which the Commission is giving excessive weight, rather than the 1992 data point, that are unusual. Indeed, if one examines national productivity results over the last five recessions, the average productivity gain in the United States economy in non-recessionary years is 1.14 percent.[18] This demonstrates that the 1992 data point, far from being an "artifact", is entirely typical of a non-recessionary year for the United States economy as a whole.[19]

The facts remain that whether the entire data series (86,95), which includes an entire business cycle, or the most recent five years (91-95), which is a period of sustained growth, are examined objectively, the LEC achieved X-factor was 5.2 percent. The Commission's selection of 6.0 percent as the jumping-off point for revising the X-Factor was arbitrary and capricious.[20]

The Commission based its decision to set the X-Factor at the upper end of the range of achieved productivity results, in part, on the observation that the actions taken in the Access

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[16] Price Cap Performance Review Order, ¶ 139.

[17] Bureau of Labor Statistics, Major Sector Multifactor Productivity Index, Private Nonfarm Business Multifactor Productivity.

[18] Bureau of Labor Statistics, Major Section Multifactor Productivity Index, Private Nonfarm Business Multifactor Productivity from 1970-1994. BellSouth eliminated the following recessionary periods from the composite data: December 1969-November, 1970; November, 1973-March, 1975; January, 1980-July, 1980; July, 1981-November, 1982; and July, 1990-March, 1991.

[19] The Commission also dismisses the 1986 X-factor estimate as probably too low. Again the Commission overlooks that a strong U.S. productivity result of +0.92 (FCC Staff Study, Chart D1) contributed to the X-factor result that the Commission has characterized as low.

[20] Several other factors demonstrate the arbitrary and capricious nature of the manipulation of the staff data to reach a preordained result: 1) only three of the ten data points exceed 6.0 percent; 2) the distribution appears skewed, and the median value, between 5.0 and 5.4 percent, is better representative of the entire series than the mean; 3) the Commission arbitrarily rejected the two lowest data points in the series (if the two highest data points are also eliminated, the mean of the resulting six data points is 5.45 percent, only slightly above the median).

Charge Reform Order "should greatly stimulate usage."[21] While there may be some stimulation of demand, that stimulation will not result in a corresponding increase in productivity. A major reason that the LECs have had historical productivity gains in excess of those achieved in the national economy generally is the ability of the LECs to generate increased revenue by generating more minutes of use over non-traffic sensitive plant.[22] The prescribed rate structure permitted the LECs to charge per minute prices for increased usage, even though the cost of many of the facilities used did not vary with usage. Increasing usage therefore not only resulted in increased efficiency in plant utilization, but also revenue increases that significantly exceeded cost increases. The Commission expressly recognized this source of productivity in the LEC Price Cap Order, and adopted the "Balanced 50-50" common line formula to share this source of productivity between the LECs and IXCs.[23]

In the Access Charge Reform Order, the Commission shifted a significant amount of LEC revenue from per minute carrier common line charges to per line charges.[24] While this shift will improve economic efficiency, it will also greatly reduce the ability of the LECs to generate increased revenue through growth in minutes of use, and hence future productivity results. In the LEC Price Cap Order, the Commission estimated the impact on total factor productivity of shifting from a per minute to a per line formula at .67 percent.[25] The Commission totally

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[21] Price Cap Performance Review Order, ¶ 142.

[22] See, e.g., Policy and Rules Concerning Rates for Dominant Carriers, Second Report and Order, 5 FCC Rcd 6786, 6794, (1990)("LEC Price Cap Order"), at ¶ 65.

[23] LEC Price Cap Order, ¶¶ 69-70.

[24] Access Charge Reform Order, ¶ 53

[25] LEC Price Cap Order, ¶ 94.

disregarded the known and measurable reduction in future productivity results that will result from the changes mandated in the Access Charge Reform Order.

In addition, the Commission disregarded the fact that a large portion of the achieved productivity gains under price cap regulation resulted from force reductions. In Appendix D, Chart D6: Labor Input Price and Growth, the Commission Staff shows that a major source of LEC productivity gain came from reducing force levels.[26] Between 1985 and 1995, the LECs reduced their force levels by over 157,000 employees. To sustain the level of productivity growth achieved in the 1986-1995 time period--5.2 percent--the LECs would have to continue to reduce force levels at this rate. To achieve the prescribed 6.5 percent productivity target, the LECs would have to accelerate their force reductions far beyond those driven by market forces. It is not at all clear that LECs can achieve such additional force reductions and remain efficient and productive, not to mention the impact on the employees affected and on customer service. The LECs have already harvested the "low hanging fruit" during the first six years of price cap regulation. The Commission's conclusion that the LECs can increase their productivity beyond the levels achieved to date under price caps is not supported by record evidence, and hence is arbitrary and capricious.

Having started off with a number that is significantly higher than the LECs achieved results for the entire period and under price caps, the Commission then compounded the error by arbitrarily adding a 0.5 percent "consumer productivity dividend" ("CPD") to the prescribed X-factor. The Commission's entire justification for the CPD can be boiled down to two

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[26] Price Cap Performance Review Order, Appendix D, Chart D6.

propositions: we did it before so we can do it again[27], and a CPD is necessary "to ensure that price cap LECs flow-through a reasonable portion of the benefits of productivity growth to ratepayers."[28] Neither proposition is adequate to justify the inclusion of a CPD in the revised X-Factor.

The first justification assumes that continued application of the CPD merely maintains the status quo and therefore requires no additional justification. This severely misapprehends how the CPD, as part of the X-Factor, operates in the price cap formula. The X-Factor results in an annual adjustment to the price cap index, which in turn operates as a ceiling on LEC prices. Because the X-Factor is applied annually, its impact is cumulative: in order to improve earnings the LEC must maintain its current level of productivity plus achieve new productivity gains in excess of the X-Factor. Prior applications of the X-Factor become embedded in the index, and have the effect of restraining prices in each subsequent period. Thus, each year in which a CPD is applied results in an additional 0.5 percent index reduction which carries forward to all future periods. The Commission has included a 0.5 percent CPD in each year of LEC price cap regulation: 1991-1997. Thus, there is embedded in the current price cap index a 3.5 percent cumulative price reduction from the operation of the CPD alone (0.5 percent x 7 years). If the Commission eliminated the CPD going forward, LEC prices would reflect this 3.5 percent "benefit" to consumers in all future periods. By continuing the CPD in the current price cap order, the Commission will drive LEC prices down an additional (and cumulative) 0.5 percent per

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[27] See Price Cap Performance Review Order, ¶ 123: "Consistent with our practice in both AT&T and LEC price cap regulation, we retain a 0.5 percent Consumer Productivity Dividend in our revised price cap plan."

[28] Id.

year for each year that the price cap plan remains in effect. Thus, the inclusion of a CPD in the revised price cap plan represents not simply a continuation of the status quo, but a new, cumulative increase in the productivity target in the LEC price cap plan each year. The Commission has not even acknowledged, must less justified, this ever-increasing burden.

The second justification is equally unavailing. Having determined the LECs achieved productivity performance under five years of price cap regulation and selected a base X-Factor that is substantially higher than that achieved performance level, the Commission is already flowing through to ratepayers more than 100 percent of the LEC productivity improvements. By any measure this is more than "a reasonable portion of the benefits of productivity growth."[29] Layering on an additional CPD is wholly unjustified. Whatever the merits of the CPD at the outset of LEC price cap regulation, its continued application at this time is arbitrary and capricious.

Finally, the Commission's "reach back" adjustment cannot be justified. As a factual matter, the staff's own analysis shows that the 5.3 percent upper productivity target established in 1994 was not too low. Indeed, the application of that productivity factor is sufficient to flow through more than 100 percent of the LECs achieved productivity gains, whether the Commission looks at all of the data or only the LECs performance under price caps. Thus, there is no justification in the factual record for any "reach back" at all.[30]

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[29] Price Cap Performance Review Order, ¶ 123.

[30] BellSouth concurs with Petitioners' arguments that even if a "reach back" adjustment could be justified on the current record, there is no rational basis for including a CPD as part of the "reach back". Petition for Partial Stay, p.p. 18-19.

Second, the court cases cited by the Commission as approving such "reach back" adjustments[31] have been rejected in a later decision, Toledo Hospital v. Shalala, 104 F.3d 791 (6th Cir. 1997). On June 4, 1997, the Supreme Court granted certiorari in St. Paul-Ramsey to resolve the conflict in the circuits. This history clearly indicates that the "reach back" issue presents an "admittedly difficult legal issue"[32] and for the reasons set forth by Petitioners, the equities favor granting a stay to preserve the status quo on this issue until the Supreme Court rules.

For the reasons set forth above, as well as for the reasons advanced by Petitioners, this Commission should stay the increase in the X-Factor and the "reach back" requirement pending judicial review.

III. FAILURE TO GRANT THE PARTIAL STAY WILL CAUSE IRREPARABLE HARM

Like Petitioners, BellSouth will suffer irreparable harm if the elements of the Price Cap Performance Review Order and the Access Charge Reform Order challenged by Petitioners are allowed to become effective prior to judicial review. As demonstrated in the attached Affidavit of Randy M. Kinkaid, in the absence of a stay, BellSouth will be forced to reduce its price cap index, and hence its prices, by more than $86 million.[33]

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[31] Administrators of the Tulane Education Fund v. Shalala, 987 F.2d 790 (D.C. Cir. 1993) and St. Paul-Ramsey Medical Center, Inc. v. Shalala, 91 F.3d 57 (8th Cir. 1996)("St. Paul-Ramsey").

[32] Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 844-45 (D.C. Cir. 1977).

[33] Although BellSouth had previously priced its services well below the cap voluntarily and in response to market forces, the Commission's required exogenous cost adjustment to remove payphone costs from regulated rates drove the price cap index down near BellSouth's Actual Price Index, eliminating most of the "headroom" that BellSouth had previously created. Therefore, any further significant reduction in the price cap index will require BellSouth to reduce its actual prices, not just its price cap index.

Petitioners have shown the irreparable nature of the injury they will suffer in the absence of a stay.[34] BellSouth concurs with that analysis and will not repeat it here. In addition, BellSouth notes that it, like most price cap LECs, has been required by market forces to price its interstate access services below the cap for several years. Those market forces derive from the fact that BellSouth's interstate access customers, such as AT&T, MCI, Sprint and Worldcom, are large, sophisticated and well financed companies who demand competitive prices for their access services. If BellSouth were not responsive to those customers' demands for lower access prices, the IXCs could quickly self-provision or shift to competitive access providers large amounts of interstate access traffic.[35] The capability of BellSouth's large access customers to take their business elsewhere has been enhanced by the increased competition spawned by the 1996 Telecom Act, the regulations adopted by the Commission in the Interconnection Order, and the procompetitive actions of the state commissions that regulate BellSouth. Thus, BellSouth agrees with the Petitioners that the possibility of recovering through future rate increases the revenues lost during the period of judicial review that result from implementing the price reductions mandated by the Commission is highly problematical.

The other possible recovery mechanism identified by Petitioners is a surcharge on the interstate access customers that receive the benefits of the forced rate reductions resulting from

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[34] Petition for Partial Stay, pp. 21-24.

[35] In the Access Reform and Price Cap rulemaking records, BellSouth demonstrated the pervasive fiber networks that competitive access providers have constructed in BellSouth's major markets. These facilities have the capability of handling large amounts of interstate access traffic at very low incremental costs. In the Matter of Access Charge Reform CC Docket No. 96-262, Price Cap Performance Review, 94-1, Transport Rate Structure and Pricing, CC Docket No. 91-213 and Usage of the Public Switched Network by Information Service and Internet Access Providers, CC Docket No. 96-23, BellSouth Comments filed January 29, 1997.

implementing the Price Cap Performance Review Order and the Access Charge Reform Order. Such surcharges can be authorized to correct legal error by a regulatory agency.[36] Implementing this mechanism would simply shift the harm from petitioners to its customers. The Commission has found that the interexchange telecommunications market is competitive. If so, competitive forces will require the interexchange carriers to pass along to their customers the access charge reductions ordered by the Commission.[37] If BellSouth's customers are later required to pay a large surcharge, they may be unable to recover these costs from their customers.

As Petitioners demonstrate, the Commission can best balance the equities by partially staying the Price Cap Performance Review Order and the Access Charge Reform Order pending judicial review and imposing an accounting order that would require the LECs to pay the amount of the stayed rate reductions, plus interest, if the Commission's Orders are affirmed by the Court. This course of action prevents either the LECs or their access customers from being harmed regardless of the outcome of the appeals.

IV. CONCLUSION

The Petitioners have demonstrated that the Commission should issue the limited stay that has been requested. The Commission has a responsibility to balance competing interests and render decisions that promote the public interest. In the instant case, it is clear that the equities support the issuance of a stay. Customers of access can be protected through the accounting order mechanism proposed by the Petitioners. Only a stay can afford the Petitioners and other

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[36] See, e.g., Natural Gas Clearing House v. FERC, 965 F.2d 1066, 1973-75 (D.C. Cir. 1992).

[37] Even if, as BellSouth believes, the interstate interexchange market is presently an oligopoly, the much publicized commitments by AT&T and MCI to flow through the benefits of the access charge reductions, if honored, will create the same problem identified in the text.

price cap local exchange carriers a similar protection. Accordingly for the reasons set forth in the Joint Petition and these comments, the Commission should issue a limited stay of its Access Charge Reform Order and Price Cap Performance Review Order.

Respectfully submitted,

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Date: June 9, 1997

Before the
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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

DECLARATION OF RANDY KINKAID

I, Randy M. Kinkaid, declare the following:

1. I am Director - Switched Access Product Management for BellSouth Telecommunications (BST). My responsibilities encompass management and oversight of various functions, including market planning and analysis, service development and pricing, for Interconnection services. This includes responsibility for managing the switched access services offered by BST including the interstate services that are regulated by the Federal Communications Commission. I am familiar with the Commission's regulation of our services, including the effects on BST of the First Report and Order in CC Docket No. 96-262, Access Charge Reform, (released May 16, 1997) (the "Access Reform Order") and the Fourth Report and Order in CC Docket 94-1 and Second Report and Order in CC Docket No. 96-262, Price Cap Performance Review for Local Exchange Carriers and Access Charge Reform (released May 21, 1997) (the "Price Cap Performance Review Order").

2. The Commission's Price Cap Performance Review Order significantly modifies the price cap plan under which BST and certain other local exchange carriers ("LECs") are to be regulated. The Commission adopts a new productivity factor of 6.5% that is 1.2% higher than the 5.3% factor, the highest productivity offset established in 1995 price cap plan revisions. The Order also requires the price cap

LECs to reduce their current price cap indexes as if they had been required to use an X-factor of 6.5% in 1996.

3. In addition, the Access Reform Order requires an additional reduction in price cap indices to reflect the completion of the amortization of equal access non-capitalized costs. These reductions must be reflected in tariffs that will go in to effect on July 1, 1997. The Access Reform Order also prohibits LECs from assessing Part 69 access charges on unbundled network elements.

4. BST staff have calculated the revenue effects on BST of the price cap index reductions that these orders require. These calculations, which conform with all relevant Commission price cap rules and procedures, assume average price levels at the maximum levels allowed by the newly revised price cap rules.

5. Application of the 6.5% X-factor to BST's price cap indices for 1997 would decrease annual revenues by approximately $41 million as compared to the revenues that BST would be able to obtain under the 5.3% productivity factor that has been in effect since 1995. BST's annual revenues would decrease by an additional $37 million as a result of recalculating the price cap index as if the 6.5% productivity factor were in effect on July 1, 1996. Further, the additional reduction in price cap indexes to reflect the completion of the amortization of equal access non-capitalized costs will reduce annual revenue by approximately $7.7 million.

6. Unless the Commission issues a stay, BST may be unable to recoup these lost revenues if the Commission's orders are overturned an appeal. During the course of these proceedings, BST has shown that many interstate services already are subject to growing competitive pressures that constrain the prices that can be charged for these services.

Numerous alternatives exist for high capacity access services from competitors such as competitive access providers, interexchange carriers, cable companies, utility companies and customer's own private networks. The scope and intensity of this competition is expanding, and will continue to do so.

7. Under these market conditions, any later remedial action ordered by a court that would increase prices in an effort to reclaim the lost revenues described above would be ineffective. Compared to the current price cap rules, and assuming the orders were in effect for only a single year, the lost revenues would total approximately $86 million. In order to recoup losses of this magnitude, prices would have to be increased significantly above the rates in effect today before the mandated reductions. In the future that would require a temporary price increase that could be twice the reduction ordered by the Commission in the Price Cap Order. There is no way to assure that the marketplace would permit realization of price increases of this magnitude in the future. As a result, it is extremely uncertain whether BST would be able to recover these losses. Thus, there is no effective remedial action that the Commission can undertake that would prevent BST from being irreparably harmed.

8. BST's revenues could also be affected by the inability to assess access charges to purchasers of unbundled network elements. Because of the substantial difference in price between the unbundled network elements and their access counterparts, purchasers of unbundled network elements will be able to offer service at a substantial price advantage over BST. In large measure this price advantage reflects the fact that BST must continue to recover in its access charge prices implicit subsidy for universal service. By allowing purchasers of

unbundled network elements to avoid any responsibility for this implicit universal service support, the Commission has put a substantial portion of the implicit subsidy at risk due to the fact that a large portion of BST's end user customer base, and the associated revenues, could leave BST, possibly forever.

I declare under penalty of perjury under the law of the United States of America that the foregoing is true and correct. Executed on June 9, 1997.

RANDY M. KINKAID