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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
	)	
Transport Rate Structure and Pricing	)	CC Docket No. 91-213
	)	
End User Common Line Charges	)	CC Docket No. 95-72

ORDER

Adopted: June 17, 1997 **Released: June 18, 1997**

By the Commission:

I. INTRODUCTION

1. On May 7, 1997, the Commission adopted two orders making revisions to its rules governing the interstate access service rate levels and rate structure of incumbent local exchange carriers (LECs) subject to price cap regulation.[1] On June 3, 1997, Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company (petitioners) jointly petitioned the Commission partially to stay the Access Reform Order and the X-Factor Order pending judicial review of those orders.[2] On June 9, 1997, nine parties filed oppositions to the

[1] Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges, CC Docket Nos. 96-262, 94-1, 91-213, 95-72, FCC 97-158 (adopted May 7, 1997; released May 16, 1997) (Access Reform Order); Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform, CC Docket Nos. 94-1, 96-262, FCC 97-159 (adopted May 7, 1997; released May 21, 1997) (X-Factor Order).

[2] Joint Petition for a Partial Stay and for Imposition of an Accounting Mechanism Pending Judicial Review (Jt. Pet.).

petition for stay,[3] and three parties filed pleadings in support of the petition.[4] We find that the petitioners have failed to show that they are entitled to the relief they have requested. We therefore deny their motion for stay.

II. PLEADINGS

2. The petitioners seek a stay of the Access Reform Order and the X-Factor Order in four respects. First, they ask the Commission to stay that portion of the Access Reform Order in which we decline to expand the application of the access charge regime set out in Part 69 of our rules (47 C.F.R. Part 69) to the unbundled network elements (UNEs) that incumbent LECs must make available to telecommunications carriers pursuant to Sections 251 and 252 of the Communications Act, 47 U.S.C. §§ 251, 252.[5] Second, the petitioners ask the Commission to stay the Access Reform Order insofar as it requires incumbent LECs subject to price cap regulation to make an exogenous cost adjustment to their price cap indices (PCIs) to reflect the completion of the amortization of certain equal access costs that commenced before the advent of price caps and that was reflected in the baseline rates used to initiate price cap regulation.[6] Third, the petitioners ask the Commission to stay the X-Factor Order insofar as it raises the productivity offset (or "X-Factor") by which price cap carriers must lower their rates each year (relative to cost changes in the general economy) from a maximum of 5.3% under the preexisting price cap formula to 6.5%.[7] Finally, the petitioners seek a stay of the X-Factor Order insofar as it requires carriers to reset their PCIs -- which will constrain future access rate levels -- as if the 6.5% X-Factor had been incorporated into the PCI formula in 1996.[8]

[3] Parties filing oppositions are AT&T Corp., MCI, WorldCom, Inc., the Competitive Telecommunications Ass'n, the Telecommunications Resellers Ass'n, the Competition Policy Institute, Sprint, LCI International Telecom Corp., and (jointly) RCN Telecom Services, Inc. and Telco Communications Group, Inc.

[4] Parties filing in support are GTE Service Corp., BellSouth Telecommunications, Inc., and the United States Telephone Ass'n. In addition to its comments, GTE filed its own two-page stay request which largely overlaps the petition filed by Southwestern Bell and Pacific. We do not separately address this skeletal pleading, but deny it largely for the same reasons, discussed below, that we deny the joint petition filed by Pacific Bell, Nevada Bell, and Southwestern Bell.

[5] Jt. Pet. 6-12.

[6] Jt. Pet. at 12-15.

[7] Jt. Pet. at 15-19.

[8] Jt. Pet. at 3, 18-20.

3. The petitioners and their supporters contend that they are entitled to a stay under prevailing standards because they are likely to prevail on the merits of legal challenges to each of these portions of orders and the balance of equities favors a stay.[9] Opponents challenge these contentions and argue that a stay would disserve other parties and the public interest.

III. DISCUSSION

4. In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921, 925 (D.C. Cir. 1958), as modified in Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977). Under that test, petitioners must demonstrate that: (1) they are likely to succeed on the merits on review;[10] (2) they would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest. We find that the petitioners have not satisfied any of the four factors for granting a stay.

A. The Merits

(1) The Application of Interstate Access Charges

5. In the Access Reform Order, the Commission concluded that incumbent LECs should not be permitted to include within their interstate access tariffs, filed pursuant to 47 U.S.C. §§ 201-205, and 47 C.F.R. Parts 61 & 69, charges that are imposed on the purchase of unbundled network elements that are leased pursuant to Sections 251 and 252 of the Communications Act, 47 U.S.C. §§ 251 & 252.[11] The petitioners contend (Jt. Pet. at 6-7) that this refusal to expand the scope of our interstate access charge regime violates an order of the United States Court of Appeals for the Eighth Circuit that stayed (pending review on the merits) certain unbundled network element pricing rules that we previously had adopted in the Section 251 Order.[12] The petitioners also contend that this action by the Commission arbitrarily imposes the costs of universal service on incumbents in a manner that is not

[9] Jt. Pet. at 5.

[10] The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on other factors is particularly strong. Expanded Interconnection of Local Company Facilities, 8 FCC Rcd 123, 124 n.10 (1992).

[11] Access Reform Order, paras. 337-340.

[12] Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98), FCC 96-325 (released August 8, 1996) (Section 251 Order), petitions for judicial review pending, Iowa Utilities Board, et al. v. FCC, Eighth Circuit Nos. 96-3321, et al. The Eighth Circuit issued its stay order on October 15, 1996. Iowa Utilities Board v. FCC, 109 F.3d 418 (8th Cir. 1996).

competitively neutral and unlawfully discriminates between purchasers of allegedly "like" offerings.[13] These claims are without merit.

(a) Consistency with Eighth Circuit Stay

6. As an initial matter, we do not take lightly the charge that we violated the court's stay order. This Commission would not knowingly take any action that violated a court order. If there were any question whether an action we contemplated was contrary to a stay order such as that issued by the Eighth Circuit, we would seek clarification from the court that issued the order before taking action, and we would, of course, abide by the court's decision. But there is no such question here. The Eighth Circuit stayed the pricing rules we issued to implement sections 251 and 252 of the Act, and it did so because it concluded that "petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service."[14] The rules at issue here implement a different section of the Act -- section 201-- and they concern interstate charges only.[15] The rule at issue merely provides that incumbent LECs may not charge customers for interstate access service when the LECs do not in fact provide interstate access service.

7. It may be helpful to place this issue in context. Incumbent LECs such as petitioners offer local exchange service to end-users and exchange access service to interexchange carriers (IXCs). Thus, LECs such as Pacific Bell provide local exchange service (for example, completing calls within San Francisco) to consumers and charge state-regulated rates for that service. A LEC also provides access service to IXCs such as AT&T and MCI by connecting long-distance calls carried by the IXCs from the IXCs' facilities to end-users' telephones.[16] When the calling party and the called party involved in such long distance calls are located in different states, the Act classifies such calls as interstate telecommunications, which are under the exclusive jurisdiction of the FCC. Pursuant to section 201, the Commission regulates the prices charged for interstate access service under

[13] Jt. Pet. at 7-12.

[14] Iowa Utilities Board v. FCC, 109 F.3d 418, 425 (8th Cir. 1996) (emphasis added).

[15] Access Charge Reform, CC Docket Nos. 96-262 et al., FCC 96-488, Notice of Proposed Rulemaking, para. 54 (released December 24, 1996) (Access Reform Notice).

[16] For example, a typical long-distance call from New England to California is carried by a LEC for a few miles to an IXC's facilities, and the IXC then carries the call across country before handing it off to another LEC in California, which carries the call for the last few miles. The LECs on both ends of the call are providing interstate access service.

Part 69 of our rules, and no one has questioned (or plausibly could question) our authority over interstate access charges.[17]

8. The issues pending before the Eighth Circuit do not involve interstate access charges. Rather, as relevant here, they involve a new type of rate resulting from the introduction of competition to the local exchange and exchange access markets. In the 1996 Telecommunications Act, Congress in the new section 253 of the Communications Act barred states from prohibiting competition in the local exchange or exchange access markets. New competitors -- competitive local exchange carriers (CLECs) -- may now provide local exchange service and exchange access service in competition with incumbent LECs (ILECs). Congress gave CLECs a number of rights, including the rights to interconnect with ILECs, to lease ILECs' facilities (or "unbundled network elements"), and to resell ILECs' retail services.[18] With respect to leasing network elements, Congress provided that ILECs must charge CLECs "just, reasonable, and nondiscriminatory" rates that are "based on the cost ... of providing the ... network element."[19]

9. Last August, this Commission issued rules implementing the new statutory provisions governing the rates ILECs may charge CLECs that lease network elements. The Commission's view was that UNEs were themselves neither interstate nor intrastate within the structure of separate and exclusive federal and state regulatory jurisdictions established by the 1934 statute. Rather, the FCC could specify pricing principles for UNEs under Section 251 and the States were to establish specific prices pursuant to Section 252. Among the Commission's implementing rules -- issued in Part 51 of our regulations -- was 47 C.F.R. § 51.515(a), cited by petitioners, which was stayed. Pending before the Eighth Circuit, among other issues, is the question whether Congress gave the Commission authority to issue rules regarding the rates ILECs may charge CLECs to lease network elements. While the stay has been in effect, state commissions have been issuing arbitration decisions setting the rates ILECs may charge CLECs to lease network elements without regard to those Commission rules, including section 51.515(a), that have been stayed.

10. The access charge order at issue does not involve the rates ILECs may charge CLECs to lease network elements. As just stated, those rates currently are being established by state commissions without regard to our stayed rules, including section 51.515(a), and those rates are not affected by the Order at issue. Thus, although petitioners complain that

[17] Section 201(b), relating to "interstate or foreign communication," provides that "[a]ll charges, . . . for and in connection with such communication service, shall be just and reasonable," and further provides that "[t]he Commission may prescribe such rules and regulations as may be necessary in the public interest to carry out the provisions of this Act."

[18] 47 U.S.C. § 251(c)(2), (3), and (4).

[19] 47 U.S.C. §§ 251(c)(3) and 252(d)(1)(A)(i).

the Order at issue "does not refer to or even note the existing rule (§51.515) nor the stay of that rule,"[20] that is because the stayed rule relates to the rates ILECs may charge CLECs to lease network elements, not the different question of whether the ILEC or the CLEC may charge IXCs for providing interstate access when the CLEC uses network elements to originate and terminate interstate long distance calls. In the Access Reform Order, the Commission provided the straightforward answer that the IXC pays the CLEC that actually provides the service and that an ILEC that does not provide exchange access service cannot charge for it. In other words, all the disputed provision of the Order at issue tells ILECs such as petitioners is "do not charge for a service you are not providing."

11. That the Access Reform Order is completely separate from the Interconnection Order also is illustrated by the fact that the Commission's interstate access rule does not vary depending on how the relevant state commission calculated the rate the CLEC must pay the ILEC to lease network elements. A state commission may decide to set the price for leasing network elements at forward-looking economic cost, including a reasonable profit, as we would prefer (and as the vast majority of state commissions have done). Or, under the stay of our pricing rules interpreting sections 251 and 252, a state commission may choose some other approach. But regardless of how the state commission established the rate for leasing network elements, under the different rule at issue here IXCs pay CLECs for providing interstate access service when the CLEC leases network elements to provide interstate access. Accordingly, there is no basis for the claim that the Commission's ruling interpreting section 201 violated the Eighth Circuit's order staying the pricing rules we issued to implement sections 251 and 252.

12. In addition, as noted above, the interstate access rates at issue in the Access Reform Order do not involve any "jurisdictional" issue such as that pending before the Eighth Circuit. Traditionally, the states have regulated intrastate rates and the Commission has regulated interstate rates. Network elements leased by CLECs may be used to provide intrastate services (such as typical local exchange service) and interstate services (such as interstate access service), and the provisions in sections 251 and 252 governing the prices charged for network elements therefore raise a question involving the division of state and federal authority. In contrast, the Commission's section 201 authority over interstate access charges is unquestioned, and nothing in the 1996 Act even arguably changes the rule that the Commission has authority over the rates charged for interstate access services.

13. A different case would be presented if we were "to establish pricing regulations regarding intrastate telephone service,"[21] but we have not established any intrastate pricing regulations in the Access Reform Order. Rather, we merely have exercised our unquestioned

[20] Pet. 7.

[21] Iowa Utilities Board v. FCC, 109 F.3d 418, 425 (8th Cir. 1996).

jurisdiction over interstate access charges and concluded that an ILEC that does not provide interstate access service, but leases facilities to a CLEC that provides interstate access service, is not entitled to charge for a service provided by the CLEC.

(b) Reasonableness of the Commission's Action

14. The petitioners also contend that access charges currently include some implicit subsidies that support universal service while UNEs (under our currently-stayed UNE pricing rules) do not. They further contend that UNEs may provide CLECs with the opportunity to provide access service that is substitutable for the access service ILECs provide. Therefore, they assert, CLECs that obtain the ability to provide access service by leasing UNEs will be able to undercut their access prices, compete away their access customers, and thereby erode the subsidy-laden revenue stream that currently allows them to provide telephone service universally in their territories. They contend that this result will irreparably harm their ability to provide universal service and means that the costs of universal service will not be recovered in a competitively neutral manner as required by 47 U.S.C. § 254.[22] They argue, further, that our rules impose access charges in a discriminatory manner in violation of 47 U.S.C. § 202(a) insofar as they apply where an interexchange carrier (IXC) carries the long distance call of an end user served by a local exchange service reseller, but do not apply where the IXC carries the call of an end user served by a carrier that provides local exchange service through unbundled network elements.[23] We disagree with these assertions.

15. Impact on Universal Service Funding. There is no merit to the petitioners' claims that the Access Reform Order unlawfully undermines incumbents' ability to provide universal service. As an initial matter, we note that this claim is premised upon assumptions that are, at this time, entirely hypothetical. In particular, although potential new entrants around the country have been attempting to invoke their rights under sections 251 and 252 to obtain interconnection agreements that include provisions for the leasing of UNEs, we understand that new entrants currently are providing no more than a de minimis share of industry-wide access service through the use of unbundled elements;[24] and the petitioners provide no information in their petition or their accompanying affidavits to rebut this understanding. Moreover, the Commission (as well as the states) will have many additional opportunities to address universal service funding issues in the future should we be presented with evidence

[22] Jt. Pet. at 7-11.

[23] Jt. Pet. at 11-12.

[24] See, e.g., MCI Opposition to Joint Motion for a Partial Stay, filed June 9, 1997, at 28-29, Attachment; Opposition of AT&T Corp. To Southwestern Bell, Pacific Bell, and Nevada Bell Joint Petition for Partial Stay, CC Docket Nos. 96-262 and 94-1, filed June 9, 1997, at 8-11, Attachments 2 & 3.

that any real threat to universal service actually is developing.[25] In any event, contrary to the petitioners' contentions, the Access Reform Order itself actually lessens the threat -- negligible in the short term, in any event -- that the requirements of the 1996 Telecommunications Act pose to existing universal service support mechanisms.

16. Under our existing interstate access charge regime, the rates incumbent LECs may charge interexchange carriers for originating and terminating long distance traffic include a number of component costs: they include the historical cost of network investment employed in providing access; they include expenses related to the provision of access; and they include implicit subsidies of other services.[26] These subsidies have existed both among different interstate access elements (e.g., when the access charge rate structure prevents the costs of providing a particular access service from being recovered in the manner in which they are incurred) and between interstate access services and intrastate telecommunications services (where the jurisdictional separations rules provide for an overassignment of shared costs to the interstate jurisdiction).[27] These various implicit subsidies have never been precisely quantified, but it is generally agreed that some of them operate to support universal service.[28]

17. Over the long run, it is clear that such a system of implicit subsidies is sustainable only in a monopoly environment in which the incumbent LEC is guaranteed an opportunity to earn returns from low cost services that are sufficient to support the high costs of other services, and we recognize that the new competitive environment contemplated by the 1996 Telecommunications Act will tend to undermine this subsidy structure over time.[29] The 1996 Act threatens this system of implicit universal subsidies in the long run, because Sections 251(c)(3) and 252(d)(1) require incumbent LECs to make UNEs available to new

[25] In the Access Reform Order, at para. 14, for instance, we noted that one subsequent order in the present docket will "give carriers progressively greater flexibility in setting rates as competition develops," and another order "will also address 'historical cost' recovery: whether and to what extent carriers should receive compensation for the recovery of allocated costs of past investments if competitive market conditions prevent them from recovering such costs in their charges for interstate access services." Further proceedings are also scheduled in the Universal Service docket. See Universal Service Order, paras. 223, 245,

[26] See generally Access Reform Order, paras. 17-31.

[27] See Access Reform Order, paras. 28-29.

[28] There also are numerous intrastate sources of subsidies that contribute to universal service: e.g., intrastate access rates; intrastate business line rates; rates for vertical features (such as call waiting, call forwarding, and caller ID); intrastate toll service rates. See Access Reform Order, para. 11. None of those sources of universal service subsidies is affected by the Access Reform Order or the X-Factor Order.

[29] Access Reform Order, para. 32.

competitors at rates that exclude the cost of universal service subsidies,[30] and the new competitors can, in turn, use those UNEs to offer their own access services in competition with the incumbent LEC offerings. Congress directed us to adopt rules that implement these requirements by August 1996,[31] and we complied with that directive in the Section 251 Order.

18. The 1996 Act also provides a framework for a substitute system of universal service support that will be sustainable in the contemplated competitive environment. In 47 U.S.C. § 254, Congress required the Commission, by May 1997, to adopt rules that establish a "specific timetable" for implementation of revised federal universal service support mechanisms that are explicit, predictable and competitively neutral. In the Universal Service Order,[32] we complied, on schedule, with that statutory directive, by establishing a multi-year schedule for the implementation of such a mechanism. That plan contemplates that current implicit subsidies will be squeezed out of access charges as competition develops over the course of the multi-year timetable. But the Universal Service Order itself leaves the access charge subsidies in place, and concludes that, because competition will not immediately erode access charge revenues to any significant degree, "[a]t present, the existing system ... can continue to serve its [universal service] purpose."[33] The petitioners' stay request does not assert that we lacked authority in the Universal Service Order to create such a plan.

19. The FCC having complied with the staggered statutory rulemaking timetable for implementing access to unbundled network elements under Sections 251 and 252 and adopting a "specific schedule" for implementing universal service revisions under Section 254, the Access Reform Order that the petitioners here ask us to stay certainly does not exacerbate any threat to universal service. To the contrary, the order lessens the chance that incumbents will suffer significant short-term losses of access charge-generated universal service subsidy revenues. In particular, by converting carrier common line charge (CCLC) recovery from a per-minute charge to a flat rate charge,[34] the Access Reform Order reduces the chance that new entrants that compete through the use of UNEs can pick off a disproportionate share of access revenues by winning just a few high volume users. The petitioners do not dispute this consequence of the rate structure changes adopted in the order.

[30] Section 252(d)(1) provides that rates for UNEs must be "based on the cost ... if providing the ... network element" and not on other costs such as subsidies for other telecommunications offerings. See Section 251 Order, para. 712.

[31] 47 U.S.C. § 251(d)(1).

[32] Federal-State Joint Board on Universal Service, Report and Order, FCC 97-157, paras. 13-14 (released May 8, 1997) ("Universal Service Order").

[33] Universal Service Order, para. 17.

[34] See Access Reform Order, paras. 54-60.

20. Moreover, we specifically found in the Access Reform Order, as we had in the Universal Service Order,[35] the availability of UNEs at rates that exclude subsidies was unlikely to have dramatic short-term impact on the ability of price cap LECs to fulfill their universal service obligations.[36] That is a predictive judgment within our area of expertise and, as stated above, the petitioners have presented no evidence to suggest that it is an unreasonable assessment.[37] Congress has presented to this Commission a long list of assignments in the 1996 Act, which we are attempting to implement in compliance with ambitious timetables. We believe it is entirely reasonable, in carrying out Congress's directions, to confine our attention initially to problems that are real and not hypothetical.

21. Alleged Discrimination. There also is no merit to the petitioners' claims that our decision not to apply access charges to unbundled network elements unreasonably discriminates against local service resellers, whose offerings are subject to access charges. UNEs and resale are, both as a practical matter and by statutory definition, distinct offerings.[38] Under Section 251(c)(3), carriers that lease UNEs thereby obtain the capability to provide access service themselves and do not need to purchase access additionally and separately from the incumbent. Resale, however, is governed by Section 251(c)(4) and applies only to telecommunications services that the incumbent LEC "provides at retail to subscribers who are not telecommunications carriers."[39] Since access service is not provided "at retail" to end users, but rather is provided to interexchange carriers seeking to carry end users' long distance traffic, a purchaser of service for resale under Section 251(c)(4) does not thereby purchase the ability to provide access. Thus, if access is to be provided, it necessarily must be purchased separately from the incumbent. There is no discrimination in imposing access charges on customers that in fact take access service because they lack the ability to provide access themselves, and in not imposing access charges on customers that neither need, nor in fact purchase, access service.

(2) Other Challenges

[35] Universal Service Order, para. 17.

[36] Access Reform Order, para. 338.

[37] Cf. MCI Opposition at 4 ("petitioners' injury argument depends on an exquisite fortuity of timing. As petitioners would have it, local competition will not develop fast enough to preclude them from charging maximum [access] rates during the pendency of judicial review, but will miraculously spring into being when review is concluded and thereby prevent recoupment under an adjusted price cap formula if petitioners eventually win on the merits").

[38] See Access Reform Order, para. 340.

[39] 47 U.S.C. § 251(c)(4)(A).

22. The petitioners' remaining challenges -- to the Commission's requirement that price cap LECs make PCI adjustments reflecting the expiration of previously ordered equal access cost amortization and the adoption of a revised 6.5% X-Factor -- are insubstantial and are, in any event, fully addressed in the Access Reform Order and the X-Factor Order. They require only brief response here.

23. Adjustments for the Expiration of Equal Access Cost Amortization. We acknowledged in the Access Reform Order that our decision to require price cap LECs to adjust their PCIs to reflect the expiration of the equal access cost amortization constituted a change from the treatment of such amortization that was provided in orders originally adopting and subsequently applying price cap regulation.[40] We fully explained, however, that such an adjustment was required to ensure that ratepayers are not forced to continue paying indefinitely for extraordinary costs that were reflected in the baseline (rate of return regulation-derived) rates used to initiate price cap regulation in 1991, that have now been fully recovered, and that would already have been removed from rates had rate of return regulation continued.[41] The petitioners offer no substantive rebuttal to our analysis, which fully complies with general administrative law requirements that agencies acknowledge and explain decisions to change course.[42]

24. The Adoption of a 6.5% X-Factor. There is no merit to the petitioners' claim that we arbitrarily and selectively considered the record in revising the X-Factor upward from 5.3% to 6.5%.[43] The petitioners base this claim primarily on the false premise that the Commission "reject[ed]" the average LEC productivity results for the five most recent years for which we had data, despite past statements that actual performance under price cap regulation would provide the best estimate of future productivity performance.[44] In fact, the Commission considered each of the following averages of LEC productivity performance: years 1986 through 1995; years 1987 through 1995; years 1988 through 1995; years 1989 through 1995; years 1990 through 1995; and years 1991 through 1995.[45] Since pre-price cap performance makes a declining contribution to each successive average, our consideration of all of those averages clearly accords more weight to productivity performance under price

[40] Access Reform Order, paras. 302, 306-310.

[41] Access Reform Order, paras. 302-311.

[42] See generally Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto Ins. Co., 463 U.S. 29, 57 (1983); Greater Boston Television Corp. v. FCC, 444 F.2d 841, 852 (D.C. Cir. 1970).

[43] See Jt. Pet. at 15-17.

[44] Jt. Pet. at 16 (citing Policy and Rules Concerning Rates for Dominant Carriers, 5 FCC Rcd 6786, para.191 (1990)).

[45] X-Factor Order, para. 137; see also id., paras. 138-143.

caps than to productivity performance in prior periods. We have never suggested, however, that data from particular years must be employed uncritically to yield the proper X-Factor under price caps, and we reasonably decided to give "less weight" to the most recent average (years 1991-1995) because that average accorded the most weight to the apparently aberrational results of one year -- 1992.[46] The petitioners offer no reason to question our skepticism regarding the 1992 results. Moreover, even if we were to give the most weight to the 1991 through 1995 average, the AT&T productivity study, upon which we relied in part, yielded an X-Factor productivity component of 6.3% for that period, a figure above the 6.0% productivity component that we actually adopted.[47]

25. The Commission also continued its practice -- consistently applied since the inception of price cap regulation -- of adding a .5% consumer productivity dividend (CPD) to the productivity component of the X-Factor, this time yielding a total X-Factor of 6.5%.[48] Contrary to the petitioners' assertion,[49] we do not believe that retention of the CPD was arbitrary. We explained that a .5% CPD would continue to act as a mechanism to encourage LECs to improve further their productivity performance over historical levels and to flow through a reasonable portion of that anticipated improvement to consumers.[50] We found in this regard that LECs could be expected to continue to improve their productivity performance over past levels in light of our concurrent decision in the X-Factor Order to eliminate "sharing" and our decision in the Access Reform Order to make access charge rate structure changes that would likely stimulate usage.[51] And we stressed that we were retaining the low end adjustment mechanism -- which allows price cap LECs with rates of return below 10.25 percent to raise their PCIs to a level that would enable them to earn 10.25 percent -- to protect against the possibility that the new X-Factor might, in some cases, be too challenging.[52] The petitioners have not shown that this justification for the continued

[46] X-Factor Order, para. 139. We found that the "decline in measured X-Factor in 1992 appears to be 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." Id.

[47] See X-Factor Order, para. 137.

[48] X-Factor Order, paras. 122-127, 141. No party challenged the imposition of a CPD at the time the Commission first adopted price caps for LECs. In Bell Atlantic Telephone Cos. v. FCC, 79 F.3d 1195, 1204 (D.C. Cir. 1996), the United States Court of Appeals for the District of Columbia Circuit upheld our decision to retain the CPD in our interim 1995 performance review order (10 FCC Rcd 5656 (1995).

[49] Jt. Pet. at 18-19.

[50] X-Factor Order, paras. 123-135.

[51] X-Factor Order, para. 142.

[52] X-Factor Order, para. 127.

imposition of a CPD is unreasonable, nor have they suggested a basis to change the level of the CPD that we have historically applied (with judicial approval) to price cap carriers.[53]

26. Resetting PCIs as if the Revised X-Factor Had Been Adopted in 1996. Finally, there is no merit to the petitioners' claim that we acted unlawfully in requiring LECs -- beginning with access tariff filings scheduled to take effect in July 1997 and applying prospectively only -- to reset their PCIs to the levels that would have resulted if the 6.5% X-Factor had been incorporated into the PCI formula in 1996.[54] That adjustment, which we fully justified in the X-Factor Order (at paras. 177-181), is in all pertinent respects identical to the type of adjustment we made in the 1995 interim performance review order upon concluding that the pre-existing X-Factor at that time was too low.[55] The Court of Appeals rejected claims that that adjustment constituted unlawful retroactive rulemaking, and upheld the adjustment as a reasonable measure designed to ensure that future high earnings would result from actual improvements in productivity and not from an X-Factor that was too low.[56]

B. Balance of Equities

27. We generally will stay the effectiveness of one of our orders only if the party seeking such relief has shown that a balance of the relevant equities favors a retention of the status quo pending further consideration or judicial review. See, e.g., Expanded Interconnection, 8 FCC Rcd at 124. See also Cuomo v. NRC, 772 F.2d 972, 978 (D.C. Cir. 1985). In a case such as this one, which involves significant and much needed reforms of access charge and price caps regulation, the burden of showing equitable entitlement to a stay is particularly heavy because of the strong public interest in implementing those reforms. See Expanded Interconnection, 8 FCC Rcd at 125 (denying stay, where delay would thwart "important public policy objective"). We conclude that the petitioners here have not justified interim relief, and, indeed, that prompt implementation of our order is essential.

[53] We note that marketplace reaction to our order has been generally positive, suggesting that we have imposed no unreasonable or unexpected risk upon price cap LECs. See, e.g., Janney Montgomery Scott Inc., "Access Charge Reform, Price Caps, and Universal Service: Pretty Much As Expected," p. 5 (May 8, 1997) ("It is difficult for us to find areas that the LECs could complain about."); Merrill Lynch, "RBOCs and GTE," p. 12 (May 19, 1997) ("We view the FCC's decisions as positive for all local phone companies, incumbents and new entrants....").

[54] Jt. Pet. at 18-120.

[55] Indeed, our 1995 performance review precedent suggests that we could, in this case, have reset LEC PCIs as if the revised X-Factor had been in effect in 1995, or even in 1991 (when price caps began). We chose a balance more favorable to the LECs out of concern for LEC productivity incentives. X-Factor Order, para. 179.

[56] Bell Atlantic Telephone Cos. v. FCC, 79 F.3d at 1204-05.

28. One significant aspect of the request for stay does not seek a retention of the "status quo" at all but, in effect, asks the Commission to extend the application of its Part 69 access charge rules to purchasers of unbundled network elements, which never have been subject to the Part 69 rules. Unbundled network elements were not offered to competing LECs before the adoption of the 1996 Act, and the preexisting Part 69 rules did not automatically apply to those who took that offering. The question regarding unbundled elements in this proceeding was whether the Commission should extend access charges to such elements for the first time -- not whether the Commission should eliminate the application of access charges. See NPRM, para. 54. The Commission decided not to allow ILECs to impose interstate access charges on purchasers of network elements because those purchasers do not obtain access from the ILECs. Insofar as this part of the stay petition asks us as an interim matter to change our rules affirmatively to cover something they never have covered, it is a request for mandatory relief rather than injunctive relief and thus is inappropriate for consideration in a stay context. In any event, as we find below, the equities do not support any part of the stay request.

(1) Irreparable Harm

29. The petitioners argue primarily that a stay is necessary to avoid an irreparable loss of revenues and customers. Jt. Pet. at 21-24. But the argument ultimately comes down to a bare claim that the company will suffer an economic loss (because access revenues may be smaller) and a complaint about unwanted competition. Neither aspect of the argument establishes "irreparable harm" sufficient to justify interim relief.

30. The courts have made clear that, in the context of stay requests, "economic loss does not, in and of itself, constitute irreparable harm." [57] Moreover, because competitive harm is simply a particular kind of economic loss, "revenues and customers lost to competition which can be regained through competition are not irreparable."[58] Both of these propositions rest on the assumption that the losses are recoverable, however, and the threat of unrecoverable economic loss "does qualify as irreparable harm." Iowa Utilities Board v. FCC, 109 F.3d 418, 426 (8th Cir. 1996). We believe that neither the claimed decrease in access revenues nor the potential loss of customers to competition in this case, even if they were certain to occur,[59] would constitute "irreparable" harm under the applicable standards.

[57] Wisconsin Gas Co. v. FERC, 758 F.2d 669, 674 (D.C. Cir. 1985).

[58] Central & Southern Motor Freight Tariff Ass'n v. U.S., 757 F.2d 301, 309 (D.C. Cir.), cert denied, 474 U.S. 1019 (1985). See also Washington Metro. Area Transit Auth. v. Holiday Tours, Inc., 559 F.2d 841, 843 n.3 (D.C. Cir. 1977)("mere existence of competition is not irreparable harm").

[59] A party attempting to show irreparable harm must show that the alleged harm is "both certain and great; ... actual and not theoretical." Wisconsin Gas Co., 758 F.2d at 674. "Bare allegations of what is likely to occur" are not sufficient, because the test is whether the harm "will in fact occur." Id.

31. As to the claimed loss of access revenues (primarily as a result of the change in the X factor), there can be no question but that the increase in the productivity factor either will limit the amounts by which price cap companies can increase their rates or will raise the amounts by which they must decrease them in the future. But the change in the X factor itself was based on data showing that price cap companies in fact had higher productivity than the older factor presupposed. And the record in the access charge proceeding indicated that their earnings on interstate access services were well above the rate of return of 11.25% that the Commission had prescribed. See Access Reform Order, para. 293.[60] The petitioners have not shown and cannot show that their future earnings on access after application of the new X-Factor will be depressed to a level that justifies interim relief.[61] It is far more likely that their earnings will continue to be at least at the level of the prescribed rate of return.

32. Any such losses, moreover, would be recoverable if the Commission's decision should be overturned on review. The petitioners acknowledge that the Commission has "substantial latitude" to adjust future rates to make up for any losses where the Commission's decision occasioning those losses is reversed on appeal.[62] The parties seeking a stay argue, however, that adjustments to future rates will not work in this case because competition will make it "unlikely" that the telephone companies will be able to raise their rates in the future to recoup any losses.[63] But the incumbent telephone companies almost certainly will not face substantial competition for all services in all geographic areas in the near future and thus will be able to take full advantage of any Commission order permitting them to make up for lost revenues.[64] And, as AT&T points out, even SWB's own declarant has not supported the claim that competitive pressures make it "unlikely" that rates could be raised, asserting only that recoupment is "uncertain."[65] In these circumstances, we find that any decreases in access

[60] Data supplied by AT&T in support of its opposition to the petitioners' motion for stay indicate that price cap LECs earned a return of 14.84% collectively in 1996. The data were compiled from Form 492 interstate earnings reports filed by the LECs with the FCC. See Lubin Affidavit & Schedule 1, attached to AT&T Opposition.

[61] See Wisconsin Gas Co., 758 F.2d at 674. Indeed, in their argument on irreparable harm, they contend only that their revenues will be reduced without even asserting that they will be reduced to inadequate levels. Jt. Pet. at 22-24.

[62] Jt. Pet. at 23 n. 45, citing Public Utils. Comm'n of California v. FERC, 988 F.2d 154, 162 (D.C. Cir. 1993). The courts have required, as a precondition to any such "makeup" adjustments, that the agency give adequate notice to ratepayers that adjustments might be necessary after judicial review. 988 F.2d at 163-66. We hereby give notice to customers paying access charges that their future rates may be subject to adjustment to make up for any revenue losses occasioned by our order if judicial review makes such adjustments appropriate.

[63] Jt. Pet. at 23.

[64] See, e.g., MCI Opposition at 28-30.

[65] AT&T Opposition at 9.

revenues, even if they were certain and substantial, would not be irreparable and thus do not justify a stay.[66]

33. The claims of losses to competition are inadequate for some of the same reasons. First, within the time frame necessary for a court to review the Commission's decision, the level of competition will not be sufficient to make substantial inroads on the incumbent telephone companies' customer bases. Neither the petitioners nor GTE submits any factual information demonstrating that competition is advancing rapidly in its service territories. In fact, neither they nor their supporting commenters have submitted any documentation showing that the petitioners can provide either unbundled network elements or services for resale in quantities that would remotely constitute a competitive threat in the short term. Moreover, there is no reason to believe that the incumbents will be unable to compete effectively to retain their customers.[67] Their pricing of services, after all, is within their own control; and their levels of earning in recent years suggest that they can reduce their access charges below price cap ceilings if that is necessary to retain business. We conclude that significant losses to competition are unlikely in the short term, and that any customers lost to competition by the incumbent carriers "can be regained through competition."[68] Thus, any such loss is not irreparable. Indeed, a primary objective of the 1996 Act and our efforts to implement it is to encourage precisely this kind of competition, in which newcomers and incumbents alike vie for customers on the basis of price and service improvements.[69]

[66] We rejected a similar argument, that competitive conditions would not permit recoupment of lost revenues through higher prices, in denying a stay of our interim price cap review order. See Price Cap Performance Review, 10 FCC Rcd 11991, 11996-98 (1995). The D.C. Circuit subsequently affirmed the interim order after denying a request for a judicial stay. Bell Atlantic Telephone Co., 79 F.3d 1195. See also Wisconsin Gas Co., 758 F.2d at 675 (party claiming irreparable harm in the form of losses to competition must show both that such losses are "likely to occur" and that it cannot "mitigate this loss" by competing for other business).

[67] For the longer term, we have undertaken to adopt detailed rules in subsequent proceedings that will give carriers "progressively greater flexibility in setting rates as competition develops ...." Access Reform Order, para. 14.

[68] Central & Southern Motor Freight Tariff Ass'n v. U.S., 757 F.2d at 309.

[69] The petitioners also argue that irreparable harm will result from a purported "conflict" between the Commission's refusal to impose interstate access charges on purchasers of unbundled network elements and the Eighth Circuit's stay of pricing provisions of our rules implementing the interconnection requirements of section 251(c). Jt. Pet. at 21. The argument appears to be that the petitioners themselves will violate the Eighth Circuit's stay order (and state commission directives that are consistent with that stay) if they follow our directive and decline to impose interstate access charges on purchasers of unbundled elements. Because, as discussed above, there is no conflict between the Access Reform Order and the 8th Circuit stay, we fail to see how our order could require petitioners to violate the stay (or any state commission decision consistent with the stay). In any event, the petitioners do not identify the sense in which such a conflict (even if it existed) would result in irreparable harm to them, and it is not apparent to us. We find no merit to this "irreparable harm" argument.

(2) Harm to Others; The Public Interest

34. The petitioners devote but a single paragraph to the issues of harm to other parties and the public interest.[70] They do not argue that a stay will not affect other parties and the public. They contend instead that interexchange carriers (who are the customers of access services) and their customers can be protected adequately, during the period of the stay they request, by the imposition of an accounting order and the possibility of refunds. But, in the analysis of stay requests, the interests of other parties and the public interest are at least as important as the claims of irreparable harm to the moving party in the absence of a stay.[71] Our analysis concludes that a stay would be harmful to other parties and adverse to the public interest.

35. The petitioners have proposed, as the price of a stay, that they and other incumbent telephone companies keep an accounting of access customers and what they pay under the stay, to be compared later with what they would have paid if a stay had not been granted. If the Commission's order ultimately is affirmed, the petitioners suggest, the telephone companies could readily calculate the difference between the two payments and make refunds to their access customers with interest.

36. The principal difficulty with this proposal is that it would avoid the immediate benefits to ratepayers that the Commission sought to provide in its orders. The Commission's price cap decision was driven in major part by its judgment that increasing the X-factor to reflect incumbent price cap LECs' demonstrated productivity gains would provide immediate benefits to consumers when long-distance carriers flowed the reductions in access charges through to their customers. A stay of our order at the very least would delay, among other things, the reductions in long-distance prices that reflect the reduced access charges. The petitioners do not even acknowledge this harm to the public and thus do not defend it in any way.

37. Moreover, an accounting order would not guarantee that the delayed refunds to IXCs ever would reach end users.[72] Even if there were a flow through of refunds by IXCs, it likely would take the form of prospective rate decreases for current and future customers and thus would not necessarily reach the same customers who paid the inflated prices preserved

[70] Jt. Pet. at 24-25. The petitioners also argue that the public interest favors "prompt disposition" of its request for stay, id., but that argument apparently applies whether the Commission grants or denies interim relief.

[71] E.g., Virginia Petroleum Jobbers Ass'n v. FPC, 259 F.2d 921.

[72] Once it has been ordered, a refund relating to an IXC's access service purchases in a past period does not affect that IXC's current cost of providing long distance service (which is governed instead by the LEC's prevailing access charge levels). Thus, even in the competitive interexchange marketplace, an IXC would be unlikely to pass the benefits of its refund on to end users.

by the stay. More important, for the duration of the stay, IXCs and their customers would continue to pay charges for services that virtually everybody agrees have been higher than necessary, with all the economic distortions and disincentives such charges for vital services entail. In particular, we have found that the reductions in long-distance rates that will result from our orders will stimulate demand for long-distance service, which will benefit both the long-distance carriers and the individual business and residential customers they serve. After-the-fact payments cannot undo the adverse effects on these interests of a stay.

38. In addition, a "stay" order that extended interstate access charges to purchasers of unbundled network elements for the first time (even subject to refunds) would needlessly and seriously delay the development of local competition -- in direct contravention of the goals Congress sought to achieve in the 1996 Telecommunications Act. Such charges would create additional disincentives for potential local competitors to use unbundled network elements as a means of entering that already difficult market. (The incumbents in that market are precisely the same parties who would be collecting this additional charge -- further extending the advantage of their incumbency.) If new entrants were required to pay interstate access charges to ILECs for access that the ILECs do not provide, on top of cost-based rates for unbundled elements, many entry decisions that were predicated on the use of unbundled elements almost certainly would be discouraged or at least delayed. The prospect of possible refunds would be little comfort for a potential entrant already confronting daunting economic entry barriers. And refund payments down the road would not undo the damage done to entry plans distorted by the effects of a stay.

39. We conclude, in evaluating the relevant equities, that the correct approach here is to allow the immediate realization of the benefits of our orders, subject to the availability of corrective price adjustments in the future if that should become necessary. We are influenced in this decision both by the importance we perceive in the immediate availability of access charge reform and by our conviction that we will be affirmed ultimately on the merits.

IV. ORDERING CLAUSE

40. Accordingly, IT IS ORDERED that the joint petition for partial stay and for imposition of an accounting mechanism filed by Pacific Bell, Nevada Bell, and Southwestern Bell Telephone Company is DENIED, and that the separate stay request filed by GTE is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton

William F. Caton
Acting Secretary