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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
) CC Docket No. 96-45
Southwestern Bell, Pacific Bell,)
and Nevada Bell Joint Petition)
for Stay)

OPPOSITION

Teleport Communications Group Inc. ("TCG"), pursuant to Public Notice DA 97-1439 (rel. July 9, 1997), hereby opposes the above-captioned Joint Petition for stay of the Commission's Universal Service Order¹ filed by Southwestern Bell, Pacific Bell, and Nevada Bell (hereinafter collectively, "Petitioners"). The Petitioners fail to demonstrate that they will be irreparably harmed by the Order, and therefore fail to satisfy the established requirements for obtaining the stay they request. The Petitioners allege a series of highly speculative claims regarding customer losses they claim will result from the Commission's Order that have no probative value and do not in any respect amount to a showing of irreparable harm. Accordingly, the Commission should deny the Joint Petition.

1. Federal-State Joint Board on Universal Service, CC Docket No. 96-45, FCC 97-157 (rel. May 8, 1997) ("Universal Service Order" or "Order").

I. INTRODUCTION

To ensure that "consumers in all regions of the Nation, including low-income consumers, and those in rural, insular, and high-cost areas, . . . have access to telecommunications and information services . . . ,"² the 1996 Act directs the Commission to develop a universal service support mechanism that is consistent with achieving that Act's goal of promoting effective facilities-based competition. The 1996 Act establishes firm parameters which that mechanism must satisfy.³

The Universal Service Order seeks to discharge the Commission's statutory responsibilities by, inter alia, providing discounts for schools, libraries, and health care providers for all commercially available telecommunications services, Internet access, and internal connections. 47 U.S.C. § 254(h). The Petitioners seek a stay of the entire Universal Service Order or, at a minimum, the foregoing aspects of that Order.⁴ As explained below, the Petitioners utterly fail to justify their request.

2. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996), sec. 101(a), § 254(b)(3) ("1996 Act").

3. The 1996 Act directs the Commission to implement a support mechanism reflecting the following features: equitable and nondiscriminatory contributions from all telecommunications providers (§ 254(b)(4)); specific, predictable, and sufficient federal and state support mechanisms (§ 254(b)(5)); explicit support for the provision of basic service (§ 254(d)); and universal support available to any carrier advertising and willing to provide service throughout a state-designated area over its own facilities or some combination of its own facilities and those of another carrier (§ 214(e)). Pursuant to Section 254(c)(1) of the Communications Act, the Commission must consider a series of factors in defining basic service.

4. Petition at 9-30.

II. THE PETITIONERS FAIL TO DEMONSTRATE THEY WILL BE IRREPARABLY HARMED ABSENT A STAY

In order to obtain a stay pending appeal of the Universal Service Order, the Petitioners must demonstrate (1) a likelihood of success on the merits; (2) irreparable injury in the absence of a stay; (3) that a stay will not substantially harm other parties; (4) and that the public interest favors a stay.⁵ The Petitioners have not satisfied those stringent standards and, in particular, have not demonstrated that they will suffer irreparable injury in the absence of a stay.

The Petitioners unavailingly argue that, absent a stay of the Commission's implementation of Section 254(h) of the Communications Act, they

will continue to suffer the irreparable harm resulting from the Commission's continued reliance on implicit support generated by incumbent LECs in an inequitable and discriminatory manner to fund universal service. Competitors, who are not so burdened, will continue to be able to target customers that purchase Petitioners' telecommunications services that are priced to generate that implicit support, thereby resulting in customer and implicit support losses. The Universal Service Order will only exacerbate those losses and increase the existing irreparable harm.⁶

This argument is specious. It is hypocritical for Petitioners to contend they are being harmed by the very pre-Universal Service Order support mechanisms that have stifled competition -- mechanisms which the 1996 Act seeks to eradicate in order to promote competition -- when, to TCG's knowledge, Petitioners have never

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

6. Petition at 25.

made such an argument in the past. The immense prosperity of the Petitioners' operations indeed flatly undercuts their argument that they have been irreparably harmed by the existing support mechanisms. In any event, the Petitioners make no effort to demonstrate that they have been irreparably harmed by those established mechanisms.

The Petitioners also fail to demonstrate how the Universal Service Order will incrementally exacerbate the existing irreparable harm they now allege is being inflicted upon them, nor demonstrate that any such incremental harm will be definite, certain, and of such a magnitude as to threaten their viability. In fact, the Petitioners continue to enjoy immense advantages over their competitors and ample pricing flexibility to respond to their smaller rivals. Moreover, in the Switched Access NPRM proceeding,⁷ the Commission is considering measures to afford the Petitioners still more pricing flexibility to respond to competitors. In short, the Petitioners' contention that the Order will place them at such a grave competitive disadvantage as to cause them irreparable harm is ludicrous.

The Petitioners are also mistaken in claiming they will be irreparably harmed because they will have to fill orders for "basic service" at discounted rates from schools and libraries without any assurance of recovering those costs if they are successful on appeal.⁸ The extent and magnitude of the alleged costs which

7. Access Charge Reform, Notice of Proposed Rulemaking, CC Docket No. 96-262, FCC 96-488 (rel. Dec. 24, 1996) at ¶¶ 140-48 ("Switched Access NPRM").

8. Petition at 25-27.

Petitioners hypothesize they will incur are purely speculative, because the quantity and scope of the discounted services Petitioners actually will be providing is completely unknown at this time. Thus, the possible financial impact of the Commission's Order on Petitioners cannot be predicted. Consequently, it is clear that Petitioners have not established that the impact is so definite, certain, and economically threatening as to constitute irreparable harm.

The Petitioners are also wrong in arguing they will suffer the loss of customers and customer goodwill by the Commission's implementation of Section 254(h) because the Commission's Order "will increase [interstate] access prices above where they otherwise would be, further exacerbating the price differences between those prices and UNE prices," which will result in the loss of customers.⁹ In fact, competition for the Petitioners' interstate access services is negligible,¹⁰ and therefore any increase in the Petitioners' interstate access rates resulting from the Commission's Order cannot have the customer loss effects speculated by Petitioners. Moreover, to the extent customers are attracted to the Petitioners' unbundled network elements because any pricing disparity with access rates would be exacerbated as Petitioners allege, that will not result in irreparable harm, because Petitioners will be compensated for providing such unbundled network elements.

9. Petition at 27-28.

10. Indeed, the LECs have used the RIC pricing mechanism in misallocating tandem switched costs and stifling switched service competition. See Competitive Telecommunications Ass'n v. F.C.C., 87 F.3d 522 (D.C. Cir. 1996).

Finally, in the Switched Access NPRM, the Commission is considering the entire issue of affording LECs such as Petitioners additional pricing flexibility, and it is specifically considering the issue of access vs. unbundled network element comparative pricing and the effects of these different pricing regimes. The Petitioners will have an opportunity to raise the pricing concerns presented in their stay request in the context of that proceeding.¹¹ In any event, both the impact of the Commission's Order on the Petitioners' interstate access prices and the reaction of customers to any such changes in prices is unknown at this juncture. Therefore, the Commission cannot conclude that Petitioners have demonstrated that the Order will cause customer losses that are certain, definite, and amounting to irreparable harm.

Equally without merit is Petitioners' claim that the "Commission's bidding structure also will result in loss of customers" -- i.e., because the Petitioners must offer bids for discounted services at tariffed prices.¹² However, as the Petitioners acknowledge, the Commission has significantly limited this general policy, and as so limited the policy obviously cannot cause Petitioners the irreparable harm they allege.

First, to the extent Petitioners participate in intrastate competitive bid situations, their pricing practices will be governed by state public utility commission policies, which might afford Petitioners the flexibility they seek.

11. Switched Access NPRM, supra.

12. Petition at 28-29.

Second, pursuant to Sections 201(b) and 254 of the Communications Act, the Petitioners may offer "differing, including lower, rates to consortia consisting of section 254-eligible schools and libraries, eligible health care providers, state schools and universities, and state and local governments."¹³ Third, the Commission's decision in the Switched Access NPRM proceeding may afford the Petitioners further flexibility to participate in interstate competitive bid situations.¹⁴

Given the foregoing clarifications and limitations to the Commission's competitive bid tariffing policy, it is obvious that this policy cannot have the negative impact on the Petitioners' ability to successfully win bids they allege. Thus, the harm the Petitioners allege will be caused by the Commission's Order is purely speculative, and is clearly not definite, certain, and of such a magnitude as to be irreparable.

13. Universal Service Order at ¶ 483.

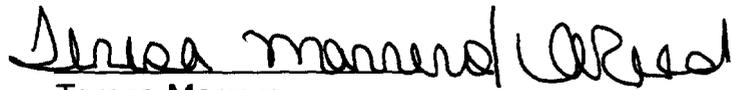
14. Id.

III. CONCLUSION

For the reasons stated above, the Commission should deny the Petitioners' request for a stay of the Universal Service Order.

Respectfully submitted,

TELEPORT COMMUNICATIONS GROUP INC.

A handwritten signature in black ink, appearing to read "Teresa Marrero" followed by a stylized flourish.

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July 18, 1997

CERTIFICATE OF SERVICE

I, Charlene A. Reed, do hereby certify that on this 17th day of July, 1997, I have caused a copy of the foregoing OPPOSITION OF TELEPORT COMMUNICATIONS GROUP INC. to be served via first-class U.S. Mail,* postage-prepaid, upon the persons listed on the attached service list.


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