

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

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FILED

AUG 15 1997

In the Matter of:)
)
Emergency Petition for Waiver)
of Sections 61.45(b)(1) and 61.459(c))
of the Commission's Rules Filed by the)
Citizens Utilities Company)
Local Exchange Companies)

CC Docket No. 94-1

MCI OPPOSITION

I. Introduction

MCI Telecommunications Corporation (MCI) hereby submits its opposition to the Emergency Petition for Waiver filed by the Citizens Utilities Company (Citizens) on May 16, 1997. Citizens requests that the Commission grant an emergency waiver of application of the 6.5 percent X-factor to rural price cap LECs. The Fourth Price Cap Order amends the Commission's price cap regime to adopt a single X factor that requires price cap LECs to reduce inflation-adjusted prices for interstate access services by approximately 6.5 percent annually.¹ Citizens argues that the waiver is justified because of "the immediate, severe impact of the 6.5 percent X-factor upon the Citizens LECs"

¹In the Matter of Price Cap Performance Review for Local Exchange Carriers and Access Charge Reform, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, released May 21, 1997 (Fourth Price Cap Order).

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efforts to meet their universal service obligations, including their efforts to bring advanced telecommunications services to the rural communities they serve.”²

MCI urges the Commission to deny the requested waiver. Waiver of Commission rules is appropriate only if special circumstances warrant a deviation from the general rule and such deviation serves the public interest.³ Citizens has failed to demonstrate that the necessary special circumstances exist.

II. Citizens Has Failed to Demonstrate “Special Circumstances”

Citizens does not explicitly state, in its waiver petition, the special circumstances that it believes warrant grant of a waiver. Instead, it refers to arguments raised in its petition for reconsideration⁴ of the Fourth Report and Order, which is attached to the waiver petition. In the attached petition for reconsideration, Citizens argues that the Commission’s selection of a 6.5 X factor was based only on BOC data, and that the circumstances faced by the BOCs do not necessarily apply to the Citizens LECs. Citizens contends that application of the 6.5 X factor will drive the Citizens LECs’ composite rate of return below 10.25%,⁵ force the Citizens LECs to delay or eliminate

²Waiver Petition at 2.

³Northeast Cellular Telephone Company v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990); WAIT Radio v. FCC, 418 F.2d 1153, 1159 (D.C. Cir. 1969).

⁴Citizens Utilities Company, Petition for Reconsideration of Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, July 11, 1997 (Reconsideration Petition).

⁵Reconsideration Petition at 9.

investment in facilities upgrades required to provide advanced telecommunications services,⁶ and ultimately endanger universal service. The waiver petition does not clearly state the relief that Citizens seeks but, in the attached petition for reconsideration, Citizens suggests that the Commission impose an interim 5.3% productivity factor.⁷

Citizens has failed to demonstrate that the necessary special circumstances exist. The analysis in the Citizens petition makes only generalized assertions concerning possible differences between urban and rural markets. Nothing in the Citizens petition suggests that the impact of the 6.5 X-factor on the Citizens companies will be as Citizens suggests. Notably, Citizens admits that its rate of return before sharing during the first year in which it elected price caps was significantly above the prescribed rate of return of 11.25%. Citizens states that its rate of return for the first six months of price cap regulation was 15.02%, increasing to 16.13% for the second six months of price cap regulation.⁸ If Citizens can attain such a rate of return under the current price cap rules, there is no reason to believe that a 6.5 percent X-factor will have the dire consequences that Citizens predicts.

Close examination of the Citizens petition shows that its prediction of financial harm is not based on the assessment of the 6.5 X-factor, but on expenditures mandated by the Telecommunications Act of 1996.⁹ For example, Citizens notes that it will be

⁶Id. at 13.

⁷Id. at 5.

⁸Reconsideration Petition, Affidavit of Mark T. Shine (Attachment 2), at 7.

⁹Id. at 11-13.

required to make certain expenditures in order to provide wholesale local exchange service and unbundled network elements to competitors.¹⁰ Even assuming that Citizens' estimates of the magnitude of these expenditures are accurate, the fact that Citizens will have to make these investments does not constitute special circumstances justifying waiver of the 6.5 X factor. The Act's mandates apply to all price cap LECs; there is certainly no evidence that the burden falls more heavily on Citizens.

III. The Price Cap Regime As a Whole Ensures Universal Service

Citizens has thus failed to demonstrate that the circumstances it faces differ materially from those faced by other price cap LECs. Moreover, the price cap plan already contains sufficient safeguards to address variation among the LECs. In the Fourth Price Cap Order, the Commission concludes "that the low-end adjustment mechanism is sufficient to address any heterogeneity that may exist among price cap LECs."¹¹ The Commission also finds that "multiple X-Factors are not necessary to be fair to LECs with productivity growth less than the industry average because the low-end adjustment mechanism provides adequate protection for these LECs."¹²

Furthermore, the Commission has found that the "the lower end adjustment factor protects the goals of universal and quality service in the Communications Act."¹³

¹⁰Id.

¹¹Fourth Price Cap Order at ¶160.

¹²Id.

¹³LEC Price Cap Order, 5 FCC Rcd at 6804.

Additionally, the Commission has observed that a 10.25% low-end adjustment mark represents a “return that is not likely to be confiscatory because it should still allow most companies to continue to attract capital and maintain service.”¹⁴ The Commission has therefore already addressed the universal service arguments that Citizens has raised in its petition and incorporated appropriate safeguards in the price cap plan. Under these circumstances, it is apparent that Citizens cannot demonstrate the necessary special circumstances that would justify grant of a waiver.

Citizens argues that the low-end adjustment formula is not a meaningful remedy.¹⁵ In particular, Citizens complains that carriers “cannot take advantage of the low-end adjustment until well after the fact.”¹⁶ This aspect of the low-end adjustment formula has, however, always been a component of the price cap plan and was a component of the price cap plan when the Citizens companies elected price cap regulation. Even if the observation that Citizens makes is accurate, the low-end adjustment formula nonetheless guarantees a 10.25 percent rate of return for each year thereafter.

¹⁴Id. at 6807.

¹⁵Reconsideration Petition at 9-10.

¹⁶Reconsideration Petition at 10.

IV. Conclusion

For the reasons stated herein, MCI recommends that the Commission reject Citizens request for a waiver of Sections 61.45(b)(1) and 61.45(c) of the Commission's rules.

Respectfully submitted,
MCI TELECOMMUNICATIONS
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August 15, 1997

STATEMENT OF VERIFICATION

I have read the foregoing, and to the best of my knowledge, information, and belief there is good ground to support it, and that it is not interposed for delay. I verify under penalty of perjury that the foregoing is true and correct. Executed on August 15, 1997.



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CERTIFICATE OF SERVICE

I, Barbara Nowlin, do hereby certify that copies of the foregoing Opposition were sent via first class mail, postage paid, to the following on this 15th day of August, 1997.

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**HAND DELIVERED


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