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Before the
Federal Communications Commission
Washington D.C. 20554

In the Matter of	)	
	)	
Implementation of	)	
the Local Competition Provisions of	)	CC Docket No. 96-98
the Telecommunications Act of 1996	)	
	)	
Deaveraged Rate Zones for	)	
Unbundled Network Elements	)	

Stay Order

Adopted: April 28, 1999 Released: May 7, 1999

By the Commission: Commissioner Ness concurring and issuing a statement.

I. Introduction

1. In this Order we issue a *sua sponte* stay of the effectiveness of section 51.507(f) of the Commission's rules. Section 51.507(f) requires each state commission to establish at least three geographic rate zones for unbundled network elements and interconnection that reflect cost differences.[1] The stay shall remain in effect until six months after the Commission issues its order in CC Docket No. 96-45 finalizing and ordering implementation of high-cost universal service support for non-rural local exchange carriers (LECs) under section 254 of the Communication Act of 1934, as amended.[2]

II. Background

2. In the *Local Competition Order*, the Commission promulgated certain rules to implement section 251 of the Communications Act of 1934, as amended.[3] One such rule, section 51.507(f), requires each state commission to "establish different rates for [interconnection and unbundled network elements] in at least three defined geographic areas within the state to reflect geographic cost differences."[4] The Commission released the *Local Competition Order* on August 8, 1996. A number of parties, including incumbent LECs and state commissions, appealed the order shortly thereafter. The U.S. Court of

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[1] 47 C.F.R. § 51.507(f).

[2] 47 U.S.C. § 254.

[3] *See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 15499 (1996).

[4] 47 C.F.R. § 51.507(f).

Appeals for the Eighth Circuit stayed the effectiveness of the section 251 pricing rules on September 27, 1996.[5] On July 18, 1997, the Court of Appeals vacated these rules, including Rule 51.507(f) on deaveraging, on the grounds that the Commission lacked jurisdiction.[6] On January 25, 1999, however, the U.S. Supreme Court reversed the Eighth Circuit's decision with regard to the Commission's section 251 pricing authority, and remanded the case to the Eighth Circuit for proceedings consistent with the Supreme Court's opinion.[7]

III. Discussion

3. We stay the effectiveness of section 51.507(f) of our rules until six months after the Commission issues its order in CC Docket No. 96-45 finalizing and ordering implementation of high-cost universal service support for non-rural LECs under section 254 of the Act.[8] The six-month period shall run from the Commission's release of that order. Neither petitions for reconsideration nor appeals of that order shall have any bearing on the length of the stay.

4. We find good cause to issue such a stay.[9] Because of the Eighth Circuit's decisions, the section 251 pricing rules were not in effect for approximately two-and-a-half years. During that time, not all states established at least three deaveraged rate zones for unbundled network elements and interconnection. Some have taken no action yet regarding deaveraging; others have affirmatively decided to adopt less than three zones.[10] A temporary stay will ameliorate the disruption that would otherwise occur, and will afford the states an opportunity to bring their rules into compliance with

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[5] Iowa Utils. Bd. v. FCC, 96 F. 3d 1116 (8th Cir. 1996) (per curium) (temporarily staying the *Local Competition Order* until the filing of the court's order resolving the petitioners' motion for stay). *See also* Iowa Utils. Bd. v. FCC, 109 F.3d 418 (8th Cir.) (dissolving temporary stay and granting petitioners' motion for stay, pending a final decision on the merits of the appeal), *motion to vacate stay denied*, 117 S. Ct. 429 (1996).

[6] Iowa Utils. v. FCC, 120 F.3d 753, 800 n.21, 819 n.39, 820 (8th Cir. 1997).

[7] AT&T v. Iowa Utils. Bd., 119 S. Ct. 721, 733, 738 (1999).

[8] *Accord Ex Parte* Letter from Bob Rowe, Chairman, NARUC Telecommunications Committee, to William Kennard, Chairman, FCC, *Re: NARUC's Request for a Stay of the FCC's De-Averaging Rules* (rec. March 4, 1999) (NARUC *Ex Parte*); *Ex Parte* Letter from Dave Fisher, Chairman, Montana Pub. Serv. Comm'n, to William Kennard, Chairman, FCC, *Re: Request for a Stay of the FCC's De-Averaging Rules* at 2 (rec. March 16, 1999) (Montana *Ex Parte*).

[9] *See* 47 C.F.R. § 1.3 (allowing the Commission to suspend its rules for good cause).

[10] *Cf. NARUC Ex Parte* at 3 (stating that, of 36 states for which information was available, approximately 13 had deaveraged wholesale rates); *Ex Parte* Letter from Leonard J. Cali, Vice President & Director of Federal Regulatory Affairs, AT&T, to William Kennard, Chairman, FCC, *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, at 3 & n.3, tbl. 1. (rec. March 2, 1999) (AT&T Ex Parte) (listing 23 states that have required deaveraging, and referencing decisions in other jurisdictions that do not require deaveraged rates).

Concurring Statement
of
Commissioner Susan Ness

Re: In the Matter of Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Deaveraged Rate Zones for Unbundled Network Elements, CC Docket No. 96-98

I concur in today's decision to the extent that it imposes a stay of our deaveraging rules to provide a transition period for those states that have not yet acted to come into compliance with our rules. I firmly believe that we must work closely and cooperatively with our colleagues on the state commissions to effectuate a smooth transition from monopoly to competition in local telephony. But I cannot fully support today's decision for two reasons: (1) we are changing course without seeking comment from the public, and (2) we do not establish a firm effective date for our rules and, thus, we are failing to give competitive carriers -- and states -- the regulatory certainty they need to bring competition to the local market.

The Supreme Court rendered its opinion upholding our August 1996 deaveraging rules on January 25, 1999, and the time has long arrived to move forward on this matter. Before the Supreme Court ruled, the status of our deaveraging rules was uncertain, and now we are not, in my opinion, significantly advancing the ball. Three years after passage of the 1996 Telecommunications Act, parties still do not know the date on which our deaveraging rules will go into effect. Both states and the industry require certainty. State commissions need to schedule proceedings, competitors need to devise appropriate business plans, and investors need assurance that rates will be deaveraged. Regulatory certainty is crucial if we expect competition to evolve.

While I would have preferred a stay with a firm end date, I agree with the majority that a transition period is appropriate in order to provide states with sufficient time to come into compliance. States have practical concerns that need to be addressed. For example, states might need extra time to establish geographically deaveraged rates because of administrative requirements, resource constraints and, in some instances, statutory constraints. The problem is, we don't really know what the length of the stay should be.

The better course would have been to stay our rules for a relatively short period of time -- say, 45 to 60 days -- during which we could have solicited comments from all interested parties: comments on an appropriate implementation schedule that takes into account the needs of the states; comments on the importance of rapidly implementing deaveraged rates to promote competition; comments on the timing of universal service and access reform and how those proceedings interrelate with our deaveraging rules; comments on how our actions affect the section 271 process.

Informed by these comments, we then could have issued an order setting forth a date-specific implementation schedule that truly reflects the needs of the states and other affected parties. Such an implementation schedule would also include dates for completing other potentially- related rulemaking proceedings, such as access reform and high-cost universal service support.

But rather than hearing from the parties and addressing their concerns, the majority has chosen to set its own course of action. It has abandoned the Commission's earlier decision not to link our geographic deaveraging rules with universal service reform. While there may be a nexus between high-cost universal service support and deaveraging, there might be equally valid reasons to continue down our earlier path while at the same time providing a reasonable transition period.

I remain steadfastly committed to the principle of geographic deaveraging. The 1996 Act mandates that rates for interconnection and unbundled elements be "based on the cost . . . of providing the interconnection of network elements."[1] In the *Local Competition Order*, the Commission concluded that rates for interconnection and unbundled elements must be geographically deaveraged.[2] In that decision, the Commission agreed with the majority of commenters that deaveraged rates more closely reflect the actual cost of providing interconnection and unbundled network elements. I stand by that decision.

I reaffirm my longstanding commitment to work with our state partners so that their needs are met as we press forward with the statutory goals of local competition. But for the reasons I have stated, I cannot fully support today's decision.

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[1] 47 U.S.C. Sec. 252(d)(1)(a)(i).

[2] See Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Report and Order, 11 FCC Rcd 15499, 15882 at para. 764 (1996) (implementing 47 U.S.C. § 251).

section 51.507(f).[11]

5. A number of parties argue that the Commission made the appropriate policy decisions regarding deaveraging when it issued the *Local Competition Order*, and that implementation should not be further postponed.[12] Some contend that it may be appropriate for the Commission to give states a reasonable amount of time to implement conforming rules, but argue that any "significant" delay is unwarranted.[13] We believe that six months following the Commission's order in CC Docket No. 96-45 represents an appropriate length for the stay. State and federal regulators now have the benefit of not only a variety of court decisions, but also nearly three more years of experience and data. The stay will allow the states and the Commission a sufficient, but not excessive, amount of time to investigate what has happened since adoption of section 51.507(f), and to work together to make any necessary adjustments.

6. By linking the duration of the stay to the universal service proceeding, we afford the states and ourselves the opportunity to consider in a coordinated manner the deaveraging issues that are arising in a variety of contexts affecting local competition. We are considering in the universal service proceeding what level of geographic deaveraging to use in determining the universal service support available to non-rural LECs serving high-cost areas.[14] States are confronting similar issues. In addition, in the access charge reform proceeding, we are continuing to assess the application of deaveraging policies to the interstate access rates of incumbent LECs.[15] Applying different standards for, or degrees of, geographic deaveraging in different contexts might create arbitrage opportunities or distort entry incentives for new competitors. Temporarily staying the effectiveness of section 51.507(f) will afford regulators the opportunity to consider the ramifications of deaveraging for the pricing of unbundled network elements, for universal service support in high-cost areas, and for interstate access services.

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[11] *Accord Ex Parte* Letter from Josiah L. Neeper, Commissioner, Calif. Pub. Utils. Comm'n, to William Kennard, Chairman, FCC, *Re: Implementation of the Local Competition Provisions of the Telecommunications Act of 1996* (rec. March 3, 1999); *NARUC Ex Parte*; *Montana Ex Parte*.

[12] *See, e.g., Ex Parte* Letter from Michael D. Pelcovits, Chief Economist, MCI WorldCom, to William Kennard, Chairman, FCC, *Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996* (rec. Feb. 26, 1999); *AT&T Ex Parte* at 5; *Ex Parte* Letter from Carol Ann Bischoff, Executive Vice President and General Counsel, CompTel, to William Kennard, Chairman, FCC, *Re: Ex Parte Communication in CC Docket No. 96-98* (dated March 30, 1999).

[13] *See, e.g., Ex Parte* Letter from John Windhausen Jr., ALTS, to William Kennard, Chairman, FCC, *Re: Requests for Stay of the FCC's Deaveraging Rules* (rec. March 10, 1999). *Cf. Ex Parte* Letter from Lyle Patrick, Group Vice President—Public Policy, McLeodUSA, to William Kennard, Chairman, FCC, *Re: Request for Prompt Action Following* AT&T Corp. v. Iowa Utilities Board (rec. March 9, 1999) (proposing that Commission not enforce pricing rules for thirty days after formal reinstatement to permit incumbent LECs and states a reasonable period to comply).

[14] *See* CC Docket No. 96-45.

[15] *Access Charge Reform*, Notice of Proposed Rulemaking, 11 FCC Rcd 21354, 21432-35 (1997).

7. Finally, we recognize the possibility that the three-zone rule may not be appropriate in all states. In some states, for instance, it may be that local circumstances dictate the establishment of only two deaveraged rate zones. We intend to address such situations on a case-by-case basis. States may file waiver requests with the Commission seeking relief from the general rule in light of their particular facts and circumstances.[16]

IV. Ordering Clauses

8. Accordingly, IT IS ORDERED, pursuant to sections 4(i) and 251 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 251, that this Order IS ADOPTED.

9. IT IS FURTHER ORDERED that section 51.507(f) of the Commission's rules, 47 C.F.R. § 51.507(f), IS STAYED until six months after the Commission releases an order in CC Docket No. 96-45 as described herein.

Federal Communications Commission

Magalie Roman Salas

Magalie Roman Salas
Secretary

[16] *See* 47 C.F.R. § 1.3 (allowing the Commission to waive any provision of its rules based on a petition if good cause is shown).