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

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In the Matters of	
Access Charge Reform	CC Docket No. 96-262
Price Cap Performance Review for Local Exchange Carriers	CC Docket No. 94-1
Interexchange Carrier Purchases of Switched Access Services by Competitive Local Exchange Carriers	CCB/CPD File No. 98-63
Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	CC Docket No. 98-157

BELL ATLANTIC
PETITION FOR RECONSIDERATION

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SUMMARY

The Bell Atlantic telephone companies seek reconsideration of the Commission's decision to eliminate the low-end adjustment mechanism for those price-cap local exchange carriers that qualify for and choose the pricing flexibility offered in the *Fifth Report and Order*. Since 1990, the Commission has consistently justified the low-end adjustment mechanism as necessary to ensure that the price-cap formula does not force local exchange carrier rates down to confiscatory levels and thereby exact an unconstitutional taking. Yet now, for the first time, the Commission has abandoned its commitment to this constitutionally required protection. Rather than modify the low-end adjustment to account for the fact that certain services will no longer be regulated under price caps, the Commission has forced price-cap local exchange carriers into the impossible position of having to choose between obtaining the limited pricing flexibility essential to their ability to compete and preserving the low-end adjustment mechanism that is critically necessary to ensure compensatory rates for services remaining under price caps.

This decision is at odds with the Commission's own recent defense of the low-end adjustment mechanism before the D.C. Circuit Court of Appeals, which the Court upheld in *United States Tel. Ass'n v. FCC*, 1999 WL 317035, Nos. 97-1469 (and consolidated cases) (D.C. Cir. May 21, 1999). It also violates the principle established by the Supreme Court in such cases as *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 512 U.S. 374 (1994), that the government may not condition the granting of a discretionary benefit on a party's willingness to give up a constitutional right that has little or no relationship to the benefit.

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BELL ATLANTIC PETITION FOR RECONSIDERATION

Pursuant to section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, Bell Atlantic[1] hereby seeks reconsideration of the Commission's *Fifth Report and Order* on the issue of eliminating the low-end adjustment mechanism for price-cap local exchange carriers that qualify for and elect to exercise either Phase I or Phase II pricing flexibility.[2]

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[1] This petition is filed on behalf of the Bell Atlantic telephone companies: Bell Atlantic-Delaware, Inc.; Bell Atlantic-Maryland, Inc.; Bell Atlantic-New Jersey, Inc.; Bell Atlantic-Pennsylvania, Inc.; Bell Atlantic-Virginia, Inc.; Bell Atlantic-Washington, D.C., Inc.; Bell Atlantic-West Virginia, Inc.; New York Telephone Company; and New England Telephone and Telegraph Company (collectively "Bell Atlantic").

[2] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers;*

BACKGROUND

In 1990, as part of the original price-cap plan, the Commission established a lower-end adjustment mechanism "to ensure that the plan automatically corrects itself should [the Commission's] selection of a productivity factor for the industry turn out to be too high for a given company."[3] Because "[u]nusually low earnings over a prolonged period could threaten the LEC's ability to raise the capital necessary to provide modern, efficient services to customers," the Commission reasoned that a low-end adjustment would ensure that a local exchange carrier's rates are not driven to confiscatory levels.[4] The Commission concluded that, through no fault of their own, certain local exchange carriers might experience "[u]nusually low earnings . . . attributable to an error in the productivity factor, the application of an industry-wide factor to a particular LEC, or unforeseen circumstances in a particular area of the country."[5] The failure to include a low-end "backstop" could harm both local exchange carrier customers and shareholders.

At the same time, however, the Commission recognized that the lower-formula adjustment mark of 10.25 percent would not undermine the productivity incentives that the price-cap plan was intended to unleash: "because the lower end adjustment adjusts the [price-cap

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Petition of U S WEST Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA, FCC 99-206, CC Dkt Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63 (rel. Aug. 27, 1999) ("*Fifth Report and Order*").

[3] *See* Second Report and Order, *Policy and Rules Concerning Rates for Dominant Carriers*, 5 FCC Rcd 6786, 6788 [¶ 10] (1990) ("*LEC Price Cap Order*").

[4] *Id.* at 6804 [¶ 147].

[5] *Id.*

index] only enough to allow the LEC to earn at the lower end adjustment mark, using the prior period as the baseline, it continues to require that LECs gain in efficiency and productivity if they are to achieve even the average return allowed to them under rate of return regulation."[6]

On reconsideration, the Commission reiterated the point that the low-end adjustment mechanism operates as a one-time adjustment to a single year's rates, so it still provides "an incentive to become more profitable by increasing efficiency, not rates."[7] And in rejecting calls to eliminate the low-end adjustment altogether, the Commission acknowledged in its *LEC Price Cap Performance Review* that, since 1990, "the efficiency gains that individual LECs have been able to sustain, as measured by their interstate earnings, have indeed varied significantly . . . [and that] these differences may be caused by factors over which the LECs have no control, such as the strength of the regional or local economies in the areas in which a LEC provides service."[8]

Two years later, in its *Fourth Report and Order*, the Commission revised its price-cap plan by adopting a single productivity factor and eliminating sharing.[9] The Commission acknowledged that, while it was imposing a single productivity factor on an admittedly heterogeneous collection of local exchange carriers, "[i]f a particular LEC is unable to meet the 6.5 percent X-Factor target in a given year, the low-end adjustment mechanism prevents price-

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[6] *Id.*

[7] Order on Reconsideration, *Policy and Rules Concerning Rates for Dominant Carriers*, 6 FCC Rcd 2637, 2691 & n.166 (1991) ("*Price Cap Reconsideration Order*").

[8] First Report and Order, *Price Cap Performance Review*, 10 FCC Rcd 8961, 9048 [¶ 193] (1995) ("*LEC Price Cap Performance Review*").

[9] Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, *Price Cap Performance Review of Local Exchange Carriers; Access Charge Reform*, 12 FCC Rcd 16,642 (1997) ("*Fourth Report and Order*").

cap regulation from becoming confiscatory."[10] In defending its decision to retain the low-end adjustment while eliminating sharing, the Commission argued to the D.C. Circuit that the local exchange carriers would continue to bear the risks of decreased earnings under the price-cap plan and that the "Commission's low-end adjustment kicks in to ensure that the lower earnings do not constitute an unconstitutional taking."[11] The Commission justified this seeming asymmetry for the simple reason that, while the Constitution protects local exchange carriers against a taking of private property for public use without just compensation, "[t]here is no analogous Constitutional right in telephone ratepayers to have a sharing mechanism."[12]

In upholding the current plan, the D.C. Circuit recognized that the Commission had given "a good reason for creating this asymmetry — the Constitution's takings clause, which forbids the imposition of confiscatory rates without just compensation."[13] The court concluded that the Commission "thus avoided raising a non-trivial constitutional question, one that has no analogy at the upper end of the range of allowable rates."[14]

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[10] *Id.* at 16,704 [¶ 157].

[11] Brief for Respondents, *United States Tel. Ass'n v. FCC*, No. 97-1469 (and consolidated cases) at 54 n.29 (D.C. Cir. June 15, 1998) ("*Commission's Price Cap Brief*"); *see also id.* at 64 ("LECs *do* bear the risk of increased costs and decreased earnings, but only up to the point at which their Constitutional protections might be triggered" (emphasis in original)).

[12] *Id.* at 64.

[13] *United States Tel. Ass'n v. FCC*, 1999 WL 317035, Nos. 97-1469 (and consolidated cases) at * 5 (D.C. Cir. May 21, 1999) (citing *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 307-08 (1989)).

[14] *Id.* (citing *Time Warner Entertainment Co. v. FCC*, 56 F.3d 151, 170 (D.C. Cir. 1995)).

Yet now, in its *Fifth Report and Order*, the Commission has abandoned its consistent defense of the low-end adjustment mechanism. As a condition for obtaining the pricing flexibility necessary to compete against non-regulated competitive providers, local exchange carriers must now give up the only meaningful mechanism available to guard against a regulatory taking. The Commission concluded that "an incumbent LEC seeking pricing flexibility to compete more vigorously in the marketplace should not be afforded any rate-of-return-based protection from any risk associated with its competitive ventures."[15] But rather than modify the low-end adjustment mechanism to accommodate the fact that certain services will no longer be regulated under price caps, the Commission simply required the total elimination of the low-end adjustment mechanism for any local exchange carrier seeking the pricing flexibility that the Commission has offered.

Although the Commission acknowledged that it had previously "retained the low-end adjustment mechanism to help prevent price cap regulation from becoming confiscatory,"[16] it has now suggested for the first time that the option of an above-cap filing is sufficient to protect local exchange carriers against the risks of confiscatory rates.[17] But the Commission itself has described the above-cap filing as "burdensome to the Commission, LECs, and customers alike."[18] The Commission has always justified the low-end adjustment as a means "to avoid

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[15] *Fifth Report and Order* ¶ 164.

[16] *Id.* ¶ 166 n.418.

[17] *Id.* ¶ 167.

[18] *LEC Price Cap Performance Review*, 10 FCC Rcd at 9059 [¶ 223]; *see also LEC Price Cap Order*, 5 FCC Rcd at 6823 [¶ 303] (describing rate-of-return requirements of an above-cap filing).

both confiscatory rates and extended rate proceedings."[19] The theoretical availability of an above-cap filing as a means of avoiding confiscatory rates is wholly unrealistic. There has never been such a filing, and for good reason: Bell Atlantic, for example, would have to perform at least a hundred different cost-of-service studies in order to satisfy the Commission's vague direction that "cost support data [be] broken down to the lowest possible level for each relevant basket for each of the most recent four years under price cap regulation."[20] The Commission has described the "cost support standards for above-cap filings [as] extensive and rigorous," anticipating a full, five-month suspension and a "lengthy investigation."[21] As a meaningful guard against confiscatory rates, the above-cap filing is entirely inadequate.

ARGUMENT

THE COMMISSION MAY NOT CONDITION THE AVAILABILITY OF PRICING FLEXIBILITY ESSENTIAL TO THE LOCAL EXCHANGE CARRIERS' ABILITY TO COMPETE ON THE ELIMINATION OF THE ONLY MEANINGFUL MECHANISM AVAILABLE TO ENSURE THAT PRICE-CAP RATES DO NOT BECOME CONFISCATORY

The Constitution clearly "protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co.*, 488 U.S. at 307 (citing *Covington & Lexington Turnpike Road Co. v. Sandford*, 164 U.S. 578, 597 (1896)). If the rate allowed under the Commission's regulatory scheme does not afford

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[19] *LEC Price Cap Performance Review*, 10 FCC Rcd at 9059 [¶ 223]; *see also Fifth Report and Order* ¶ 166 ("We have retained the low-end adjustment mechanism in part to avoid costly above-cap filings").

[20] *LEC Price Cap Order*, 5 FCC Rcd at 6823 [¶ 303].

[21] *LEC Price Cap Performance Review*, 10 FCC Rcd at 9059 [¶ 223].

sufficient compensation, the federal government "has taken the use of utility property without paying just compensation and so violated the Fifth . . . Amendment[]." *Id.* at 308.

The Commission has long acknowledged that the low-end adjustment is the only means reasonably available for a price-cap local exchange carrier to avoid the risk of confiscatory rates.[22] With its elimination, the only protection even theoretically available is an above-cap filing that no one can seriously contend is an effective substitute for the automatic adjustment mechanism. The result, therefore, is that price-cap local exchange carriers — for reasons that may lie entirely beyond their control[23] — may be forced by operation of the price-cap plan to forgo a constitutionally sufficient rate of return with no reasonable prospect for regulatory relief.

This serious constitutional problem cannot be avoided by characterizing the elimination of the low-end adjustment as a conditional requirement: A local exchange carrier must give up the protection of the low-end adjustment mechanism only if it chooses the new pricing flexibility offered in the *Fifth Report and Order*. There are at least two difficulties with this argument: First, the Commission has placed price-cap local exchange carriers in an impossible position by forcing them to choose between pricing flexibility that is essential for them to compete in the provision of competitive services and the retention of the low-end adjustment, which is the only effective protection they have against a regulatory taking. Second, the Commission's condition — that a local exchange carrier subject itself to the risk of confiscatory

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[22] *See, e.g., LEC Price Cap Performance Review*, 10 FCC Rcd at 9059 [¶ 223].

[23] *Id.* at 9048 [¶ 193]; *LEC Price Cap Order*, 5 FCC Rcd at 6801 [¶ 120].

rates — is unlawful because the elimination of the low-end adjustment is insufficiently related to the purposes of pricing flexibility to survive constitutional scrutiny under *Nollan* and *Dolan*.

1. Although the pricing flexibility that the Commission has offered in its *Fifth Report and Order* cannot easily be forgone, the Commission will grant such flexibility only where the local exchange carriers can demonstrate that they meet stringent tests for competition. The Commission has recognized that existing pricing restrictions hinder local exchange carriers' ability to meet that competition.[24]

Bell Atlantic's dedicated transport services are already subject to extensive competition in many of the markets it serves.[25] And Bell Atlantic's facilities-based competitors have taken advantage of its lack of pricing flexibility to gain market share by pricing their services just below Bell Atlantic's published rates. Anecdotal information from customers indicates that competitors provide quotes that are guaranteed to be 15% or 20% below Bell Atlantic's prices, whatever the service. Without pricing flexibility, Bell Atlantic must continue to provide advance notice of any rate reductions through tariff filings and offer average rates throughout its service area; competitors win business simply because Bell Atlantic cannot participate effectively in the competitive bidding process. Yet, despite the obvious importance of this pricing flexibility to Bell Atlantic's ability to compete, Bell Atlantic may be required to turn it

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[24] *See Fifth Report and Order* ¶¶ 124, 128, 143.

[25] In these markets, competitors are providing competing services, and have facilities in place that allow them to reach customers who account for approximately 90 percent of the services that Bell Atlantic still provides.

down because the "price" of such flexibility — the elimination of the low-end adjustment — is too high.

In the only other instance where local exchange carriers waived this important protection, the balance was quite different. In the 1995 *LEC Price Cap Performance Review*, the Commission gave each price-cap local exchange carrier the option of choosing among three separate X-Factors. Local exchange carriers choosing either of the two lowest X-Factors — 4.0 or 4.7 — would continue to have sharing obligations if their earnings exceeded a certain rate of return, and they would be protected by the low-end adjustment mechanism should their earnings fall below the low-end formula adjustment mark.[26] However, "LECs selecting the highest X-Factor [5.3] [would] not be subject to sharing, *nor [would] they be permitted to make low-end adjustments*."[27] The Commission reasoned that, in providing a selection of different X-Factors, it had to provide a range of different options to permit a local exchange carrier to choose the highest X-Factor possible.[28] The Commission chose, therefore, "to build into the system incentives for a LEC to opt for the X-Factor that most closely corresponds to the LEC's actual efficiency growth."[29]

The Commission never mentioned in its *Fifth Report and Order* this prior experience with a "conditional" elimination of the low-end adjustment. And for good reason. No one had challenged the Commission's decision in the *LEC Price Cap Performance Review* to eliminate

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[26] *LEC Price Cap Performance Review*, 10 FCC Rcd at 9058-59 [¶¶ 221-223].

[27] *Id.* at 9050 [¶ 200] (emphasis added).

[28] *See id.* at 9048 [¶ 194].

[29] *Id.* at 9049 [¶ 195].

the low-end adjustment mechanism for those local exchange carriers opting for the highest X-Factor, so no court ever upheld that decision. Moreover, the choice among X-Factors was to be made annually: it was possible for a local exchange carrier to switch from the higher to the lower X-Factors if it determined, after one year, that the risks associated with the elimination of the low-end adjustment were simply too great. And given a one-year timeframe, local exchange carriers were able to predict with relative confidence what their overall productivity was likely to be. In contrast, the *Fifth Report and Order* now requires price-cap local exchange carriers to make a permanent choice between pricing flexibility and the low-end adjustment based on predictions of productivity over the indefinite future.

The price-cap local exchange carriers' predicament is made even worse by the fact that the Commission is currently contemplating various strategies that will lower the local exchange carriers' interstate revenues even further over the next few years.[30] Under these circumstances, price-cap local exchange carriers have a Hobson's choice: either forgo the much-needed pricing flexibility, or subject themselves to significant risks that their interstate rates will be forced down below confiscatory levels sometime in the near future.

2. The price for flexibility is also unconstitutional. The Commission's decision simply cannot be squared with Supreme Court precedents governing the ability of a governmental

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[30] *See, e.g., Fifth Report and Order* ¶ 207 (soliciting comment on a variety of proposals, the net effect of which would be to reduce substantially interstate access revenues); Press Release, *FCC Promotes Local Telecommunications Competition; Adopts Rules on Unbundling of Network Elements*, Report No CC 99-41, 1999 FCC LEXIS 4534, at *3 (Sept. 15, 1999) (announcing further rulemaking to consider "issues surrounding the ability of carriers to use certain unbundled network elements as a substitute for the incumbent LECs' special access services").

entity to provide a benefit subject to an otherwise unlawful condition. In *Nollan v. California Coastal Commission*, 483 U.S. 825, the Court considered whether it was lawful for the state to permit the building of a house on beachfront property upon the condition that the owners grant the public an easement to pass across their beach. The Court assumed that the state had the authority under its police power to prohibit the building of the house altogether. But "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'" [31] The Court went on to conclude that the only purpose of the easement was to grant the public continuous access to the public beaches; "[t]he Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization."[32]

The analogy to the Commission's conditional elimination of the low-end adjustment is striking. Having already rejected the outright termination of the low-end adjustment, concluding that its retention is necessary as a "means of prevent[ing] price cap regulation from

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[31] *Nollan*, 483 U.S. at 837 (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981)).

[32] *Id.* at 841. The purpose that would have been served by an outright prohibition on further development was to guarantee "visual access" to the public beach. The purpose of the easement, by contrast, was simply to provide access to the public to enable them to go from one public beach to another. "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. . . . We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land-use power for any of these purposes." *Id.* at 838-39.

becoming confiscatory,"[33] the Commission has now attempted to require local exchange carriers to give it up as the price to be paid for receiving flexibility to compete in the provision of certain telecommunications services. The Commission has taken the position that pricing flexibility, "if granted prematurely, might enable price cap LECs to (1) exclude new entrants from their markets, or (2) increase rates to unreasonable levels."[34] But the stated purpose of conditionally eliminating the low-end adjustment mechanism — that it "can create undesirable incentives for price cap LECs when they move some demand for some services out of price cap regulation"[35] — has nothing to do with ensuring that local exchange carriers not exclude new entrants from certain markets or that they not increase their rates to unreasonable levels. Like the land-use authorities in *Nollan*, the Commission has imposed a condition on granting a benefit that is unrelated to the Commission's articulated justifications for prohibiting the benefit altogether. "The evident constitutional propriety disappears . . . if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[36]

Seven years after *Nollan*, the Supreme Court had occasion once again to revisit the area of the unconstitutional conditioning of a public benefit. In *Dolan v. City of Tigard*, 512 U.S. 374, the Court applied "the well-settled doctrine of 'unconstitutional conditions,' [under which] the government may not require a person to give up a constitutional right — here the right to receive just compensation when property is taken for a public use — in exchange for a

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[33] *Commission's Price Cap Brief* at 63 (internal quotation marks omitted).

[34] *Fifth Report and Order* ¶ 68.

[35] *Id.* ¶ 163.

[36] *Nollan*, 483 U.S. at 837.

discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property."[37] In *Nollan*, the Court had concluded that there was no connection at all "between the exactions and the projected impact of the proposed development," so the Court did not reach the question of the degree of connection that is required.[38] In *Dolan*, the city imposed conditions on the development of the property — that property be dedicated both to improve storm drainage within the floodplain along the creek and to create a pedestrian/bicycle pathway adjacent to the floodplain — that were obviously related to the city's concerns that further development would both increase the risk of flooding and exacerbate traffic congestion within the central business district. The question in *Dolan* was "whether the degree of the exactions demanded by the city's permit conditions bears the required relationship to the projected impact of petitioner's proposed development."[39]

The Court announced a rule requiring "rough proportionality" — "the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[40] On the record before it, the Court concluded that the city had failed to meet its burden of making an individualized determination that its goals of reducing flooding hazards and traffic congestion were sufficiently related to the two permit conditions it had imposed. The city never explained why, for example, its interest in preventing flooding required property to be dedicated for public use along the creek within the

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[37] *Dolan*, 512 U.S. at 385.

[38] *Id.* at 386.

[39] *Id.* at 388.

[40] *Id.* at 391.

floodplain (as opposed to simply imposing a requirement that the owner not build in the floodplain). Nor did it adequately demonstrate why its interest in reducing traffic congestion required the dedication of a pedestrian/bicycle pathway easement: "the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated" by the development of the property.[41]

The Commission has fallen into the same error here. The *Fifth Report and Order* merely concludes that the elimination of the low-end adjustment mechanism follows naturally from the fact that price-cap local exchange carriers have an incentive to underallocate costs to non-price cap services in order to minimize measured interstate earnings.[42] "Currently, this underallocation incentive is not a serious concern, because non-price cap services represent a very small fraction of the price cap local exchange carriers' federally tariffed activities, and so the effects of any underallocation are minimal. Once a local exchange carrier has removed a significant amount of demand associated with contract tariff offerings from price cap regulation, however, its incentive to underallocate the costs of non-price cap services and the effects of such underallocation will be greater."[43]

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[41] *Id.* at 395-96.

[42] *Fifth Report and Order* ¶ 163. Non-price cap services are not considered part of "total interstate earnings" for purposes of calculating the low-end adjustment. *See Price Cap Reconsideration Order*, 6 FCC Rcd at 2682 [¶ 99]; *LEC Price Cap Order*, 5 FCC Rcd at 6805 [¶ 151].

[43] Fifth Report and Order ¶ 163.

But the Court flatly rejected this kind of reasoning in *Dolan*. A finding that the bicycle pathway system "*could* offset some of the traffic demand is a far cry from a finding that the bicycle pathway system *will*, or is *likely to*, offset some of the traffic demand."[44] The mere conjecture that "[t]he low-end adjustment mechanism can create undesirable incentives for price cap LECs when they move some demand for some services out of price cap regulation"[45] does not mean that these incentives *will* or are even *likely to* lead to a misallocation of costs.[46] Moreover, the Commission rejected far less severe conditions — including the modification of the low-end adjustment mechanism to limit the "undesirable incentives" and the specification of cost-allocation rules that local exchange carriers would then use to segregate costs and revenues that should not be included in determining whether the low-end adjustment mechanism applies.[47]

Although the Commission's pricing flexibility should eventually permit local exchange carriers to remove certain services from price-cap regulation, many services will remain subject to price caps for the foreseeable future. The low-end adjustment applies, by definition, only to

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[44] *Dolan*, 512 U.S. at 395 (emphasis in original and internal quotation marks omitted).

[45] *Fifth Report and Order* ¶ 163.

[46] The Commission has consistently found such cost-misallocation and cross-subsidization arguments unpersuasive in other contexts. *See* Second Report and Order in CC Docket No. 96-149 and Third Report and Order in CC Docket No. 96-61, *Regulatory Treatment of LEC Provision of Interexchange Services Originating in the LEC's Local Exchange Area and Policy and Rules Concerning the Interstate, Interexchange Marketplace*, 12 FCC Rcd 15,756, 15,815-19 [¶¶ 103-108] (1997); *see also United States v. Western Elec. Co.*, 993 F.2d 1572, 1580-81 (D.C. Cir. 1993).

[47] *Id.* ¶¶ *165-166.*

those services that are *not* subject to the pricing flexibility.[48] The Commission has failed "to show the required reasonable relationship"[49] between the condition (the elimination of the low-end adjustment mechanism for price-cap services) and the benefit (the offering of pricing flexibility applicable to an entirely different category of services).

CONCLUSION

For the reasons stated above, the Commission should reconsider its decision to eliminate the low-end adjustment mechanism as a condition for granting Phase I and Phase II pricing flexibility.

Respectfully submitted,

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[48] For example, the Commission's near-term pricing flexibility would apply, at most, to the 28% of Bell Atlantic's interstate revenues attributable to special-access and direct-trunk-transport services. *See generally* Bell Atlantic's 1999 Annual Filing, *Transmittal No. 1148*, tbls. SUM-1, RTE-1 (FCC June 16, 1999). But that leaves more than 72% of total interstate revenues that are completely unaffected by pricing flexibility but that would have no protection from confiscatory rates under the Commission's order.

[49] *Dolan*, 512 U.S. at 395.