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

JUL 7 2000

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| In the Matter of | ) | |
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| Access Charge Reform | ) | CC Docket No. 96-262 |
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| Price Cap Performance Review for Local Exchange Carriers | ) | CC Docket No. 94-1 |
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| Low-Volume Long-Distance Users | ) | CC Docket No. 99-249 |
| | ) | |
| Federal-State Joint Board on Universal Service | ) | CC Docket No. 96-45 |
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**AT&T OPPOSITION TO U S WEST PETITION FOR PARTIAL STAY**


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**AT&T OPPOSITION TO U S WEST PETITION FOR PARTIAL STAY**

Pursuant to 47 C.F.R. § 1.45(g) of the Commission's rules, AT&T Corp. ("AT&T") submits this opposition to the Petition of U S WEST Communications Inc. ("U S WEST") for Partial Stay, filed in the above-captioned dockets on June 27, 2000 ("Petition"), with respect to the Commission's order in *Access Charge Reform et al.*, CC Docket Nos. 96-262 *et al.*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, and Eleventh Report and Order in CC Docket No. 96-45, FCC 00-193 (rel. May 31, 2000) ("*CALLS Order*").

U S WEST seeks what it calls a "stay" of the *CALLS Order*'s requirement that price cap LECs choose within 60 days whether they wish to remain in the existing regulatory system, in which the FCC will implement the "prescriptive" approach to access reform over the next year, or whether they wish to opt into the CALLS Plan. In fact, however, U S WEST seeks far more than a stay. What U S WEST is really asking for is a radical substantive change in the *CALLS Order*: it wants to make its election *after* the FCC establishes a forward-looking economic cost model, an X-Factor plan, and a price cap plan that would apply to U S WEST in the absence of CALLS, instead of before, as the *CALLS Order* provides.

Such a "stay" would turn the substance of the *CALLS Order* on its head. As the Commission has noted, the proceedings that U S WEST is asking for involve extraordinarily contentious issues that do not have easy answers. The reason the Commission adopted the CALLS Plan in the first place was that both the Commission and the industry wished to avoid such complex and controversial proceedings, and the accompanying uncertainties of judicial review. Indeed, the avoidance of such proceedings, and the regulatory certainty that CALLS affords, is one of the principal public interest benefits of the CALLS Plan. Forcing the Commission to conduct the proceedings first, and then permitting carriers to opt in or out, would thus undo many of the public interest benefits of the *CALLS Order*, and would represent a profound substantive change in the order itself. For these reasons, U S WEST's "stay petition" is really more in the nature of a petition for reconsideration.

More fundamentally, U S WEST cannot, as a legal matter, have its cake and eat it too. If the Commission were to go to the trouble of actually establishing a forward-looking cost model, X-Factor, and price cap plan for U S WEST in the absence of CALLS, it presumably would have no choice legally but to apply that plan to U S WEST. Thus, the choice that U S WEST seeks is in fact a chimera. To permit U S WEST to choose between the CALLS Plan and the fully-formed cost-study alternative would be wholly arbitrary.

Even if its proposal were construed as a stay petition (as the remainder of this brief assumes), U S WEST has not met the prerequisites for a stay. U S WEST has no likelihood of success on its claim that the opt-in provision is unlawful. The *Order*'s cost-study alternative is simply the *status quo ante*. The *CALLS Order* affirmatively benefits U S WEST by giving it another option – a way to opt out of the current system and into the CALLS Plan. For the same reason, the *CALLS Order* does not harm U S WEST at all, much less irreparably. And as explained above, the "stay" would eliminate many of the public interest benefits of the CALLS Plan. Accordingly, U S WEST's stay petition should be denied.

## ARGUMENT

As U S WEST notes, the FCC may grant a stay of the order only if the movant can show: (1) a substantial likelihood of success on the merits of its petition for review, (2) that it will suffer irreparable injury in the absence of a stay, (3) a stay would not harm other parties, and (4) a stay is in the public interest. Petition at 6; *Washington Metropolitan Area Transit Comm'n* v. *Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977); *Virginia Petroleum Jobbers Ass'n* v. *FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). U S WEST has not demonstrated any of the four prerequisites for a stay, and therefore its Petition should be denied.

### I. U S WEST HAS NO LIKELIHOOD OF SUCCESS ON APPEAL.

U S WEST has no likelihood of prevailing on its central merits claim – *i.e.*, "that the Commission failed to properly define the cost-study alternative to opting into the CALLS proposal." Petition at 6. Indeed, this claim fails for three independent reasons: (1) the opt-in provision of the *CALLS Order* affirmatively benefits U S WEST by expanding its options relative to the *status quo*; (2) in all events, the *status quo* is sufficiently defined to allow U S WEST to make a meaningful choice, and (3) the uncertainties that do exist in the *status quo* do not render the *CALLS Order* unlawful. For these reasons alone, the Petition should be denied.

#### A. The Opt-In Feature Of The *CALLS Order* Expands U S WEST's Options.

Giving price cap LECs the option of choosing the CALLS Plan or the pre-existing regulatory system within 60 days does not result in any cognizable injury to U S WEST. To the contrary, the "opt-in" expands U S WEST's options relative to the current system. The FCC's decision to increase U S WEST's regulatory options is not unlawful.

What U S WEST calls the "cost-study alternative" to CALLS is in fact the *status quo ante*. In 1997, the FCC established in the *Access Reform Order* that price cap LECs would be required to submit forward-looking costs studies no later than February 2001 and that the LECs' price caps would be reinitialized based on the FCC's evaluation of those studies. Contrary to U S WEST's suggestion (at 4), the FCC made clear in the *Access Reform Order* that the purpose of the cost studies was to facilitate the "prescriptive backstop" to the FCC's market-based approach to access reform. *Access Reform Order*, 12 FCC Rcd..15982, 16092-16099 (1997). That is, to the extent that market-based forces failed to drive access charges to forward-looking cost by 2001, the FCC would use the cost studies to reinitialize the caps at those levels as a Plan B, or "backstop." For three years, all price cap LECs have understood that the FCC would resort to the prescriptive backstop in 2001.

Thus, the *CALLS Order* betters U S WEST's position by giving it another option. It now has the ability to opt out of the existing system and into the CALLS Plan. Providing non-signatories like U S WEST additional regulatory options cannot be unlawful. Indeed, as the FCC noted, it has ample authority to make the CALLS Plan mandatory for all carriers. *See CALLS Order* ¶ 49. Allowing U S WEST to choose whether to remain under the existing scheme or to opt into CALLS reflects an "abundance of caution" on the FCC's part, not an unlawful Hobson's choice.

Indeed, U S WEST's argument has it entirely backwards. If the Commission were actually to determine the forward-looking economic cost model, X-Factor, and price cap plan that would apply to U S WEST in the absence of CALLS, as U S WEST says it must, the

Commission would presumably have no choice but to apply the cost-study alternative to U S WEST at that point. In other words, once the Commission has determined U S WEST's forward-looking economic costs with that degree of precision, at that juncture there may be no reasonable or lawful basis for allowing U S WEST to choose the less accurate compromise solution of the CALLS Plan, especially if the CALLS Plan resulted in higher access charges.

In short, if U S WEST declines to participate in CALLS, it will be left no better – and no worse – off than if the CALLS option was never offered. The fact that the FCC has placed a new and possibly better option on the table for U S WEST does not suddenly render the pre-existing system (adopted in the *Access Reform Order*) unlawful.

### B. The Pre-Existing Prescriptive Backstop Approach Is Sufficiently Defined For U S WEST To Choose Which System It Prefers.

Although giving U S WEST a new option and increasing its choices cannot be unlawful, U S WEST also exaggerates the lack of definition in the cost-study alternative. In fact, there is a significant body of FCC precedent governing each aspect of the prescriptive backstop alternative, which is sufficient to give U S WEST a clear enough picture of that alternative to make a meaningful choice.

For example, U S WEST's complaints that the FCC has not fleshed out what sort of forward-looking cost model would be used to reinitialize its price caps are unfounded. As U S WEST knows, the FCC has conducted an extraordinarily in-depth proceeding in the universal service docket to design a forward-looking economic cost model of the LECs' local networks, which culminated in the *Fifth Report and Order* and *Tenth Report and Order* in that docket. In those proceedings, the industry participants and the FCC have fully explored and debated the forward-looking economic cost of local service, and the FCC has now adopted a position on virtually every nuance of the forward-looking cost of the network. To be sure, the universal service model may not be wholly transferable to the context of access charges, but at the same time, it is obvious that the similarities would greatly outweigh whatever modifications would be necessary to conform the universal service model to the access charge context. Indeed, as U S WEST itself acknowledges, "past experience with state-ordered UNE rates has shown that rates based on the anticipated FCC-prescribed TELRIC methodology will be much lower – possibly more than 50% lower – than U S WEST's current tariffed rates for interstate access services." Petition at 19.

Similarly, U S WEST's claim that the FCC is somehow required to determine in advance what X-Factor is to be applied in the prescriptive backstop alternative is based largely on a fundamental misreading of the D.C. Circuit's decision in *USTA*. *See USTA* v. *FCC*, 188 F.3d 521 (D.C. Cir. 1999). Contrary to U S WEST's claims (at 11-12, 14-16), the D.C. Circuit did not order the FCC "to set and properly justify an X-Factor." The Court held merely that the FCC had not adequately explained its selection of 6.5 percent in its *1997 Price Cap Order*. The FCC's two-part response to the Court's mandate is entirely proper.

First, with respect to the period 1997-2000, in which the 6.5 percent X-Factor was in effect, the FCC has essentially acceded to the Court's ruling. The FCC has also correctly determined, however, that the non-signatory price cap LECs consistently earned rates-of-return in excess of 11.25 percent under the 6.5 percent X-Factor, and therefore none of those LECs suffered any damages from the FCC's selection of 6.5 percent that would warrant any recoupment. *CALLS Order* ¶¶ 156-57. As the FCC provided, U S WEST remains free to attempt to demonstrate any damages warranting recoupment notwithstanding its high rates of return under the 6.5 percent X-Factor. *Id.* ¶ 157 ("Any non-signatory price cap LEC may, however, seek to show that its access charge rates under the 6.5 percent X-Factor were confiscatory, and therefore may seek recoupment of amounts it undercharged during the period of the court's remand.").

For the period going forward, the FCC has discontinued the annual productivity offset altogether in favor of reasonable target rates that would remain in effect for the life of the CALLS Plan. The FCC has retained a temporary annual 6.5 percent offset, targeted to certain rate elements, as a transitional measure in lieu of a flash-cut to the target rates. This is an entirely appropriate response to the Court's mandate. The Court never said the price cap system had to have an annual productivity offset, and presumably U S WEST would not argue that the Court so held. In fact, the Court held only that, to the extent the FCC wished to apply a productivity offset of 6.5 percent, it had not adequately explained that choice. That ruling is irrelevant to the CALLS Plan, because the prospective features of that plan do not contain an annual productivity offset of any amount.

In that regard, now that the FCC has discontinued the productivity offset for the CALLS Plan, the prescriptive backstop alternative may not have a productivity offset either. The Commission may choose instead to permit the rates based on the forward-looking cost study to serve as U S WEST's target rates for the life of the CALLS Plan. That determination can only be made, however, after the Commission analyzes U S WEST's costs, and determines whether an annual offset is appropriate based on U S WEST's cost showings.[1]

Equally unfounded is U S WEST's further suggestion that the price cap plan that would apply is undefined. To the contrary, the vast bulk of the price cap plan consists of the

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[1] Contrary to U S WEST's suggestion, there is no theoretical inconsistency in applying an annual productivity offset to price caps determined on the basis of forward-looking economic costs. A forward-looking cost model would not automatically include productivity growth for future years.

rules governing rate structure, and the rate structure rules adopted in the *CALLS Order* are mandatory for all carriers, including non-signatories. The only thing at issue in the cost study proceeding is the rate levels – *i.e.*, the reinitialization of the price caps based on forward-looking economic cost.

In sum, U S WEST has sufficient information to make a meaningful choice between the CALLS Plan and the *Access Reform Order*'s prescriptive backstop.

### C. The Uncertainties That Do Exist Do Not Render The *CALLS Order's* Opt-In Feature Unlawful.

Finally, the mere fact that the choice facing non-signatories has some uncertainties associated with it does not render the *CALLS Order* unlawful. Indeed, the FCC has offered carriers a similar choice of regulatory regimes before. For example, most LECs may choose whether to be regulated under a rate-of-return regime or a price cap regime. Once a rate-of-return LEC chooses the price cap regime, it cannot go back, even if the price cap regime proves to be less advantageous in future years. Report and Order, *Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation*, CC Docket No. 92-135, FCC 93-253, 8 FCC Rcd. 4545 (rel. June 11, 1993), at ¶ 7.

Similarly, the FCC allowed price cap carriers to choose different X-Factors with different sharing thresholds in the early years of the price cap system. Significantly, the D.C. Circuit upheld aspects of that system even after carriers complained later that they had chosen a less advantageous X-Factor. In 1995, the Commission issued an order clarifying that carriers were to calculate their price cap indices by applying the "add-back" principle to undo sharing amounts from the previous year – a rule which had the effect of requiring reductions in access charges beyond what the price cap LECs had anticipated. A number of LECs appealed, arguing that if they had known the Commission would have required them to apply the add-back principle, they would have chosen a different X-Factor. The D.C. Circuit rejected those claims. The Court found that the add-back rule did not upset these carriers' reasonable reliance interests, because "the state of the law has never been clear, and the issue has been disputed since it first arose." *Bell Atlantic Tel. Cos.* v. *FCC*, 79 F.3d 1195, 1207 (D.C. Cir. 1996). Indeed, the Court noted that the LECs "made their X-Factor decisions in the face of considerable uncertainty about whether the 1990 *LEC Price Cap Order* included add-back." *Id.* Those uncertainties did not create any legally cognizable claim, however.

At bottom, U S WEST is complaining about the sort of uncertainties that inhere in any regulatory scheme.

## II. THE BALANCE OF EQUITIES AND THE PUBLIC INTEREST FAVOR DENIAL OF THE "STAY."

The balance of equities and the public interest also weigh strongly against U S WEST's "stay" request. First, U S WEST has failed to demonstrate any harm, let alone any "irreparable harm," arising from the challenged order. As explained above, the *CALLS Order* does not harm U S WEST at all, because it merely expands the choices available to carriers such as U S WEST, allowing them either to "opt-in" to the CALLS plan or to remain in the position they now occupy. As it recognizes in its own brief, if U S WEST declines to participate in CALLS, it will continue to "operate under the framework the Commission set forth in the *Access Charge Reform Order*." Petition at 4 (quoting *CALLS Order* at ¶ 60). Thus, the challenged order merely provides an additional option that U S WEST may take or leave, as it chooses.

Accordingly, if U S WEST chooses the prescriptive backstop, and it turns out to be less favorable than the CALLS Plan, U S WEST would be in exactly the same position it would have been if the *CALLS Order* had never been issued. In other words, any reduction in access revenues that U S WEST would experience under the prescriptive backstop approach would not be traceable to the *CALLS Order*. Far from causing such "harms," the *CALLS Order* affirmatively benefits U S WEST by offering it a way to opt out of that system.

Similarly, a stay would harm other parties and the public interest. As U S WEST concedes, a stay would place a substantial burden on the Commission, which would "be required to designate a cost model and price cap plan, and justify and set an X-Factor." These are not small tasks. Indeed, as the *CALLS Order* (¶ 38) notes, these are extraordinarily contentious issues that defy easy solutions, and conducting such proceedings would place an enormous burden on both the Commission and members of the industry that would participate in such proceedings.

One of the principal public interest benefits of the CALLS Plan is that it provides reasonable compromise solutions to these contentious issues that would obviate the need for the very proceedings U S WEST seeks in its stay petition. Thus, the stay U S WEST seeks would largely dissipate many of the public interest benefits of the CALLS Plan.

## CONCLUSION

For the foregoing reasons, U S WEST's Petition for Partial Stay should be denied.

Respectfully submitted,

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July 7, 2000

**CERTIFICATE OF SERVICE**

I, James P. Young, do hereby certify that on this 7th day of July, 2000, a copy of the foregoing AT&T Opposition to U S WEST Petition For Partial Stay was served by U.S. first class mail, postage prepaid, on the parties named below.

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