**Before the**
**Federal Communications Commission**
**Washington, D.C. 20554**

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| In the Matter of | ) | |
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| Access Charge Reform | ) | CC Docket No. 96-262 |
| | ) | |
| Price Cap Performance Review for Local Exchange Carriers | ) | CC Docket No. 94-1 |
| | ) | |
| Low-Volume Long-Distance Users | ) | CC Docket No. 99-249 |
| | ) | |
| Federal-State Joint Board On Universal Service | ) | CC Docket No. 96-45 |
| | ) | |

# ORDER

**Adopted:** July 13, 2000 **Released:** July 14, 2000

By the Commission: Commissioner Furchtgott-Roth concurring and issuing a statement.

## I. INTRODUCTION

1. On May 31, 2000, the Commission issued an order adopting, with certain modifications, an integrated interstate access reform and universal service reform proposal that had been submitted by members of the Coalition for Affordable Local and Long Distance Service (CALLS), a coalition consisting of four of the five largest local exchange carriers (LECs) and two of the three largest long distance companies.[1] Among many other things, the *CALLS Order* requires LECs that are subject to price cap regulation to make an election, by July 30, 2000, whether to have their rate levels for interstate access services constrained according to the specific terms of the CALLS proposal (as approved by the Commission), or to have such charges set according to a cost-study proceeding that the Commission subsequently would conduct for

[1] *See* Access Charge Reform, CC Docket No. 96-262, Sixth Report and Order, Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Sixth Report and Order, Low-Volume Long-Distance Users, CC Docket No. 99-249, Order, and Federal-State Joint Board on Universal Service, CC Docket No. 96-45, Eleventh Report and Order, FCC No. 00-193 (rel. May 31, 2000), as corrected by *Errata* (rel. June 14, 2000), *petition for review filed sub nom. U S West v. FCC*, No. 00-1279 (D.C. Cir. filed June 27, 2000) (*CALLS Order*). CALLS consists of AT&T Corporation, Bell Atlantic Telephone Companies, BellSouth Corporation, GTE Service Corporation, SBC Communications Inc., and Sprint Corporation.

carriers that opt out of the CALLS proposal.[2]

2. On June 27, 2000, U S WEST Communications, Inc. (U S WEST) petitioned the Commission for a partial stay of the *CALLS Order*.[3] In its petition, U S WEST asks the Commission to stay the July 30 deadline for choosing between the two access charge rate level constraint options until 60 days after the Commission issues a further order that "clarifies key aspects" of the cost-study option.[4] In the meantime, U S WEST has filed a petition for judicial review of the *CALLS Order* in the United States Court of Appeals for the District of Columbia Circuit and, on July 6, 2000, filed a motion for stay with that court seeking relief parallel to the relief that it seeks from us.[5]

3. For the reasons we discuss below, we deny U S WEST's petition for a stay. In brief, the petition lacks merit because, despite its contrary premise, U S WEST has no entitlement to complete information about the alternative cost-based regime to which it would be subject if it were to opt out of CALLS. U S WEST's only entitlement is to a lawful regime, and U S WEST itself concedes that the Commission's alternative cost-based regime would be subject to full judicial review; that it may well be upheld on review; and that, if the cost-based regime were not upheld, U S WEST would be entitled to a retroactive remedy that would make it whole.[6] Here, the Commission has entitled U S WEST not simply to elect *that* regime, which is all that U S WEST could plausibly demand, but also to choose an additional option --the CALLS proposal-- that may well serve U S WEST's interests even better. In choosing to give U S WEST that additional option, the Commission did not somehow incur a legal obligation to generate in advance all possible information that might be relevant to the exercise of that option. In particular, the Commission did not incur an obligation to anticipate the details of an extremely resource-intensive cost-study proceeding that the Commission has not yet conducted and may never need to conduct. Finally, the Commission's two-month deadline serves the public interest by promoting a greater degree of certainty in the telecommunications industry and by avoiding the wasteful expenditure of agency resources that may never need to be expended.

## II. DISCUSSION

4. In determining whether to stay the effectiveness of one of its orders, the Commission uses the four-factor test established in *Virginia Petroleum Jobbers Ass'n v FPC*,[7] as modified in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc.*[8] Under that

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[2] *CALLS Order*, paras. 57-62.

[3] U S WEST Communications, Inc.'s Petition for Partial Stay, CC Docket Nos. 96-262, 94-1, 99-249, and 96-45, filed June 27, 2000 (U S WEST petition).

[4] U S WEST petition at 2.

[5] *See* Emergency Motion of U S WEST Communications, Inc. for Partial Stay, D.C. Circuit No. 00-1279, filed July 6, 2000 (U S West judicial stay motion). This motion for judicial stay currently is pending before the court.

[6] U S WEST petition at 19.

[7] 259 F.2d 921, 925 (D.C. Cir. 1958).

[8] 559 F.2d 841, 843 (D.C. Cir. 1977).

test, a petitioner must demonstrate that: (1) it is likely to succeed on the merits on appeal;[9] (2) it would suffer irreparable injury absent a stay; (3) a stay would not substantially harm other interested parties; and (4) a stay would serve the public interest.[10] A petitioner must meet each of these tests in order for the Commission to grant a stay. U S WEST has not satisfied any of the four factors for granting a stay.

5. *The Merits.* U S WEST claims that the FCC has not defined the cost-study option in enough detail for it to make a meaningful choice between that option and the alternative rate level constraints set out in the CALLS proposal, and that forcing it to make such a choice is arbitrary and capricious.[11] U S WEST further contends that we have violated the D.C. Circuit's decision in *United States Telephone Ass'n v. FCC* (*USTA v. FCC*)[12] by failing to specify and justify the X-factor level that would apply to carriers electing the cost-study option.[13] We find, however, that the choices provided to U S WEST and other price cap carriers are reasonable within the framework of the *CALLS Order*, and that U S WEST has not established a likelihood of success on the merits of its challenge.

6. As an initial matter, the level of detail that the Commission provided with respect to the cost-study option is entirely commensurate with the role that we intended that option to play in the *CALLS Order*. The Commission concluded, as a general matter, that the detailed rate level constraints set out in the CALLS proposal were "reasonable for CALLS signatories and ... likely to be reasonable for non-signatory price cap LECs" such as U S WEST.[14] We found that the CALLS proposal would resolve a number of complex, contentious issues that we had not yet been able to resolve definitively in the absence of industry consensus, including determinations regarding appropriate interstate access charge levels, the amount of implicit universal service support that should be removed from access rates and funded through an explicit mechanism, and the appropriate X-factor to govern future rate levels under the price cap formula.[15] Finally, the CALLS proposal would provide "relative certainty in the marketplace during its five-year term,"

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[9] The Commission will consider granting a stay upon a showing that its action raises serious legal issues if the petitioner's showing on the other factors is particularly strong. Price Cap Performance Review for Local Exchange Carriers, CC Docket No. 94-1, Order, 10 FCC Rcd 11991, 11997 n.30 (1995) (*Price Cap Performance Review Order*) (citing Expanded Interconnection of Local Company Facilities, CC Docket No. 91-141, Order, 8 FCC Rcd 123, 124 n.10 (1992)).

[10] *See Price Cap Performance Review Order*, 10 FCC Rcd at 11996-97.

[11] U S WEST petition at 7-14

[12] 188 F.3d 521 (D.C. Cir. 1999).

[13] U S WEST petition at 14-16.

[14] *See CALLS Order*, para. 50; *see also CALLS Order*, para. 48 ("We believe that the proposal, particularly after taking its modifications into account, fairly balances the interests of all parties, including those who are not part of the coalition. We are supported in this belief by the support the plan has received from other interested parties, including certain consumer groups, some state regulators, and competitors.").

[15] *See CALLS Order*, para. 38; *see also CALLS Order*, paras. 35-36, 40-41.

and give parties "a much clearer blueprint for developing their business plans and attracting capital than they would [have] in the absence of CALLS."[16]

7. In assessing the benefits of the CALLS proposal, the Commission recognized that the plan was "a cohesive proposal," and that -- unless it was applied to all price cap LECs -- the consumer benefits and the strides toward competitive and universal service goals that we hope to achieve could not be fully realized.[17] As a consequence -- and in light of our general belief that the CALLS proposal would be reasonable for all price cap carriers and their customers -- we clearly hoped that all price cap LECs would elect the CALLS option and not the cost-study option.

8. We provided carriers with an opportunity to have their rate levels determined on the basis of a cost-study proceeding, instead of the constraints provided in the CALLS proposal, only "out of an abundance of caution."[18] In light of the more limited role envisioned for the cost-study option, and the considerable additional work that would be needed to implement it if it were selected, we necessarily provided a less detailed description of that option. We stated generally that any carriers electing the cost-study option would have their baseline rates set on the basis of forward-looking economic cost, and we stated that we would determine an appropriate price cap X-factor to apply to those rates to keep them within a just and reasonable range on a going-forward basis.[19] Carriers electing the cost-study option would be subject to the terms of the CALLS proposal on an interim basis until the cost-study proceeding was concluded, but those interim rates would then be subject to true-up.[20]

9. We reject U S WEST's contention that, because we did not define in advance the details of the cost-study option, the Commission arbitrarily "has presented U S WEST with a chimerical choice, which is really no choice at all."[21] Contrary to U S WEST's assumption, the Commission is under no obligation under present circumstances to provide options that would allow U S WEST, prior to selection, to know with certainty which option will be more economically advantageous. So long as the Commission has offered U S WEST and other price cap LECs the opportunity to select a regulatory alternative to the CALLS proposal that is *lawful*, we have provided such carriers with a meaningful choice.

10. U S WEST provides no basis to believe that the cost-study option that the Commission provided would be unlawful; indeed, U S WEST's principal concern seems to be that the option would in fact prevail on review.[22] The forward-looking economic cost principles

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[16] *CALLS Order*, para. 37.

[17] *CALLS Order*, para. 50; *see also* paras. 51-55.

[18] *CALLS Order*, para. 57.

[19] *CALLS Order*, paras. 57, 59.

[20] *CALLS Order*, paras. 61-62.

[21] U S WEST petition at 13.

[22] U S WEST petition at 19.

that we said would govern the cost-study proceeding provide a theoretically sound basis upon which to set rates, and courts have upheld particular applications of those general principles.[23] Courts also have upheld price cap regulation (including the application of an X-factor component) as a general method of rate regulation, so long as the particular components of that regulatory method are reasonably supported.[24] Moreover, the results of any cost-study and/or X-factor proceeding would be subject to judicial review at the option of the affected LEC (or any other aggrieved party), and the Commission has expressly provided that the interim CALLS-based rates that would initially apply to carriers electing the cost-study option will be subject to true-up to reflect the result of the such proceedings (including any judicial review thereof). Thus, U S WEST can be assured that, if it selects the cost-study option, it will be permitted to charge rates that satisfy the statutory (and constitutional) "just and reasonable" standard.[25]

11. Moreover, we believe that it was reasonable to decline, at this stage, to develop that option in greater detail than we did. The development of detailed forward-looking cost standards would have required a significant additional allocation of the Commission's scarce resources. So, too, would establishing a new X-factor to apply to carriers opting for the cost-study alternative. Indeed, the choice of an appropriate X-factor could well raise policy questions the resolution of which would best wait until after the agency found out how many carriers, if any, selected the cost-study option. For example, the Commission historically has determined the appropriate X-factor for price cap carriers on the basis of industry-wide data. However, if the Commission were faced with developing an X-factor for a single carrier rather than all large LECs, the agency would confront the question of whether it would be better to consider only that single carrier's data, or whether doing so would tend to recreate some of the "cost-plus" efficiency disincentives that previously plagued rate-of-return regulation. If more than one carrier chose the cost-study option, the balance might well be different than if only one carrier did so. Furthermore, there may be different legal, economic, and policy considerations involved in developing a price cap formula to apply to rates based on forward-looking costs than were considered in developing the formula that the Commission applied in the past to rates based on embedded costs.

12. We see no reason to depart from the view, underlying our analysis in the *CALLS Order*, that the dedication of agency resources is not warranted unless and until a carrier actually selects the cost-study option, particularly since we prefer the CALLS proposal as a policy matter and have found that it is likely to be suitable for all price cap LECs, such as U S WEST.[26] Neither principles of reasoned decision making, nor the D.C. Circuit's decision in *USTA v. FCC* to remand our previous X-factor for further explanation, requires us to devote substantial resources in advance to a regulatory regime that may never be implemented. We also continue to

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[23] *See, e.g., Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393, 411 n. 12 (5th Cir. 1999), *cert. granted*, 120 S.Ct. 2214 (2000) (citing *Mobil Oil Exploration & Producing Southeast Inc. v. United Distrib. Cos.*, 498 U.S. 211, 224-25 n.5 (1991)); *Burlington N.R.R. v. Surface Transportation Bd.*, 114 F.3d 206, 213 (D.C. Cir. 1997).

[24] *See National Rural Telecom Ass'n v. FCC*, 988 F.2d 174 (D.C. Cir. 1993); *Bell Atlantic Telephone Cos. v. FCC*, 79 F.3d 1195 (D.C. Cir. 1996); *USTA v. FCC*, 188 F.3d at 521.

[25] *See* 47 U.S.C. § 201(b).

[26] *CALLS Order*, paras 48, 50.

believe that it is reasonable to require carriers to make their election of regulatory options by July 30, 2000, and to make such elections binding for the five-year term of the CALLS proposal.[27] By requiring carriers to choose between regulatory regimes by July 30, we allow ourselves an opportunity to conduct any required cost-study and price cap proceedings in a timely manner, and minimize the scope of any subsequent true-up that might result from such proceedings.[28] By making the election binding, we prevent carriers from requiring the Commission unnecessarily to conduct cost-study/price cap proceedings "solely for the purpose of having LECs determine under which approach they would be better off."[29]

13. *Balance of Equities.* Nor does the balance of the competing equities in this case -- the harm to U S WEST absent a stay, the harm to others if a stay is granted, and the public interest -- support U S WEST's request for a stay. Stripped of rhetoric, the only harm to itself that U S WEST claims would be averted by a stay is the possibility that (viewed with 20/20 hindsight) it will elect the economically less advantageous option if it is forced to make its selection on July 30, 2000.[30] Such "harm," however, is entirely speculative at this stage. Moreover, we doubt that the "harm" U S WEST alleges would be legally cognizable, even if it were concrete and certain. U S WEST does not claim that it will be forced to charge *unlawfully* low rates if it selects the cost-study option. Rather, the carrier complains that, if it selects that option, a court may *uphold* the resulting rates and that it may be "forced to live with [*lawful*] rates and terms less favorable than those under CALLS."[31] As discussed, that is not a legally cognizable injury, and it is entitled to little, if any, weight in the balance of equities.

14. By contrast, the harm to others and to the public interest would be significant if we were to grant U S WEST's stay request. As we have explained, the Commission and interested parties would be forced to devote significant resources to conduct and participate in further proceedings regarding forward-looking economic cost standards and appropriate X-factor levels, even if neither U S WEST nor any other carrier might ultimately select the cost-study

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[27] *See CALLS Order*, para. 61.

[28] In its motion for judicial stay, U S West has asserted that the July 30, election deadline "appears to be utterly arbitrary" because "[i]f U S West elects the cost-study alternative, its cost study will not be due until February 8, 2001." U S West judicial stay motion at 4. U S West's assumption that the cost study will not be due until February 8, 2001, is not necessarily correct and, in any event, is beside the point. U S West's reference to the February 8, 2001 date presumably is based upon the statement in the Commission's *Access Charge Reform First Report and Order* that we would require price cap carriers to file forward-looking cost studies no later than February 8, 2001. *See* Access Charge Reform, CC Docket No. 96-262, First Report and Order, 12 FCC Rcd 15982, 16099 (1997), *aff'd sub nom. Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (8th Cir. 1998). As pertinent here, however, if a carrier selects the cost-study option, the Commission must expend substantial resources, *in advance* of any cost study filings, to determine in detail what types of information such filings must contain. We would then issue a subsequent order setting forth the details of the required filing and a firm filing deadline—which may be before (or after) the February 8, 2001 date announced in the *Access Charge Reform First Report and Order*. A July 30 election deadline will allow the Commission to determine in a timely manner whether it will need to devote such resources at all.

[29] *CALLS Order*, para. 61.

[30] U S WEST petition at 17-21.

[31] U S WEST petition at 19 (emphasis added).

option. Moreover, a stay would undermine the Commission's goal of generating a period of regulatory certainty in the interstate access marketplace. Even apart from the resulting uncertainty concerning U S WEST's own choice of access charge regimes, other price cap LECs, including the CALLS signatories themselves, might argue that they too should be able to take advantage of a delay in the deadline for electing between the CALLS proposal and the cost-study option. Such a lengthened period of uncertainty could ultimately threaten the industry consensus reflected in the CALLS proposal and imperil the public interest benefits that we sought to achieve in the *CALLS Order*.[32]

## III. ORDERING CLAUSE

15. Accordingly, IT IS ORDERED that U S West Communications Inc.'s motion for partial stay is DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Magalie Roman Salas

Magalie Roman Salas
Secretary

[32] *See CALLS Order*, para. 50 (noting that failure to implement the CALLS proposal fully would frustrate consumer, competitive and universal service benefits of the plan).

## CONCURRING STATEMENT OF COMMISSIONER HAROLD FURCHTGOTT-ROTH

*Re: Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Low-Volume Long-Distance Users, Federal-State Joint Board on Universal Service*, Order, CC Docket Nos. 96-262, 94-1, 99-249, 96-45.

As I indicated in the statement I issued regarding the Commission's adoption of the CALLS proposal, I disagree profoundly with certain aspects of the way in which the Commission has restructured the interstate access charge regime. The process through which the CALLS proposal was adopted was fundamentally defective. Moreover, the Commission's creation of a new $650 million universal service fund was inconsistent with section 254 of the 1996 Act, and it had no legal basis for adopting the order's requirement that the interexchange signatories to the CALLS proposal (*i.e.*, AT&T and Sprint) adhere to the commitments made in letters to the Commission. Despite my disagreement with the Commission's resolution of these matters, however, I concur in its refusal to grant U S WEST's petition for a partial stay.

I base my concurrence on my conclusion that U S WEST has not shown that it will be irreparably harmed if the Commission does not stay its order. I do not find persuasive U S WEST's assertion that it will suffer irrecoverable economic damages as a result of the Commission's requirement that the company choose between implementing the CALLS access charge regime and the cost-study alternative. U S WEST asserts that, unless it knows the details of the cost-study alternative when it chooses between that alternative and CALLS, it may be forced to operate for five years under a plan that is economically disadvantageous to it, which could cost it millions of dollars. I do not agree with U S WEST's logic. If it is determined that the Commission could not legally require U S WEST to choose between these two alternatives (an issue upon which I express no view), U S WEST will not have to bear the losses it sustained as a result of that illegal requirement. Rather, the company could be made whole through some kind of "true-up" mechanism. For these reasons, I agree that the partial stay of the order that U S WEST seeks would be inappropriate.