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

In the Matter 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 Offered by Competitive Local Exchange Carriers	CCB/CPD File No. 98-63
BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Special Access and Dedicated Transport	CCB/CPD File No. 00-20
BellSouth Telecommunications, Inc.'s Petition for Pricing Flexibility for Switched Access	CCB/CPD File No. 00-21

ORIGINAL

MOTION OF AT&T CORP. AND WORLDCOM, INC. FOR A MORATORIUM ON PRICING FLEXIBILITY PETITIONS PENDING JUDICIAL REVIEW

Pursuant to 47 C.F.R. § 1.41, AT&T Corp. ("AT&T") and WorldCom, Inc. ("WorldCom") respectfully move for a moratorium on all petitions under the Commission's *Pricing Flexibility Order*[1] pending judicial review of that *Order*.[2]

As explained below, a moratorium on all pricing flexibility petitions is in the public interest, because it could spare both the Commission and the parties the substantial cost of

[1] *Access Charge Reform, et al.*, CC Docket Nos. 96-262, 94-1, 98-157 and CCB/CPD File No. 98-63, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14222 (1999) ("Order").

[2] *MCI WORLDCOM, Inc. et al.* v. *FCC*, Nos. 99-1395, 99-1404, and 99-1492 (D.C. Cir.) (oral argument scheduled for November 30, 2000).

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various kinds of litigation both during the pendency of the appeals of the *Pricing Flexibility Order* and in the event that the D.C. Circuit vacates the *Order*. The relief granted in the *Order* is of unprecedented breadth and, indeed, all of the major price cap LECs could shortly seek broad and effectively nationwide deregulation of interstate access services. If the Commission grants such broad pricing flexibility and the Court subsequently vacates the *Order*, the task of undoing that pricing flexibility will be enormous.

Given that the D.C. Circuit is likely to rule within only a matter of months, the prudent course is for the Commission to institute a brief moratorium on all pricing flexibility petitions until sixty days after the Court rules on the pending appeals. Pursuant to such a moratorium, the Commission would temporarily prohibit the filing of pricing flexibility petitions, and hold in abeyance any existing proceedings.

BACKGROUND

On August 27, 1999, the Commission adopted the *Pricing Flexibility Order*, which established mechanisms by which price cap LECs could obtain sweeping deregulation of their interstate access services throughout a Metropolitan Statistical Area ("MSA") upon certain token showings of allegedly competitive entry in a fraction of that MSA. The *Order* created mechanisms for relief from price cap regulation in two "phases." In Phase I, a price cap LEC may enter into contract tariffs and file both contract tariffs and tariffs that offer volume and term discounts on one day's notice. *See Order* ¶ 122. In Phase II, the petitioning price cap LEC obtains *complete removal* of the price cap and rate structure rules governing the given services throughout a particular MSA and may file tariffs on only one day's notice. *See id.* ¶ 153.

Thus, upon receiving Phase II relief, the Commission will regulate the LEC under a regime that is virtually identical to "nondominant" regulation (*i.e.*, regulation for firms that

lack market power altogether). Although the Commission concedes that a LEC obtaining Phase II still has market power with respect to the services for which it has obtained relief, the Commission no longer subjects those services to price caps (which guard against monopoly rates) or restrictions on geographic rate deaveraging (which guard against discriminatory and predatory pricing). *See Petition of U S WEST Communications, Inc. For Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Memorandum Opinion and Order, 14 FCC Rcd. 19947, ¶ 11 (1999) ("*Forbearance Order*") (*Pricing Flexibility Order* allows price cap LECs to obtain "much, if not all" of the relief they seek – *i.e.*, nondominant treatment – without having to "demonstrate that they lack market power in the provision of any access service"). The only difference between Phase II relief and nondominant regulation is that, under Phase II, the price cap LEC must continue to file tariffs. *Order* ¶ 151.[3]

AT&T, WorldCom, and Time Warner Telecom Inc. petitioned for review of the *Order* in the United States Court of Appeals for the D.C. Circuit. *MCI WorldCom, Inc.* v. *FCC*, Nos. 99-1395 *et al.* (D.C. Cir.). AT&T and WorldCom immediately sought expedited review

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[3] The Commission established separate triggers for different services. With respect to special access services, Phase I relief is available (except for channel terminations to end users) when a price cap LEC can demonstrate that competitors have collocated facilities in 15 percent of its wire centers in an MSA or in wire centers accounting for 30 percent of its revenues from those services in the MSA. Phase II relief is available for those services when competitors have collocated in 50 percent of the price cap LEC's wire centers in an MSA or in wire centers accounting for 65 percent of its revenues from those services in the MSA. Under each of these rules, the *Order* additionally requires price cap LECs to "show that at least one competitor relies on transport facilities provided by a transport provider other than the incumbent at each wire center listed in the incumbent's pricing flexibility petition as the site of an operational collocation arrangement." *Order* ¶ 82. For channel terminations to end users, Phase I relief is available when competitors have collocated in 50 percent of wire centers or in wire centers accounting for 65 percent of revenues. *Order* ¶¶ 105-106. Phase II relief is available when competitors have collocated in 65 percent of wire centers or in wire centers accounting for 85 percent of revenues. *Order* ¶ 150. For switched access services, price cap LECs may obtain Phase I relief if competing LECs offer service, using either their own facilities or their own

from the Court, and in response, the Court ordered that the cases be scheduled for oral argument on the first available date on the fall calendar.[4] These cases have now been fully briefed before the D.C. Circuit, and oral argument will occur on November 30, 2000.

Shortly after the close of briefing in the D.C. Circuit, BellSouth filed two petitions for pricing flexibility, one for special access and one for switched access. The sheer breadth of these petitions is astonishing. With respect to special access, BellSouth seeks Phase II relief – *i.e.*, removal of all price cap and rate structure rules – in all nine states in BellSouth's region. Specifically, it seeks Phase II relief for special access and dedicated transport in 38 MSAs, and Phase II relief for channel terminations in 26 MSAs. If BellSouth's petition were granted, it would result in effective deregulation of special access services in virtually every MSA containing a city of any significant size in the BellSouth service territory. With respect to switched access, BellSouth claims to have satisfied the triggers for Phase I relief in 10 MSAs, including Atlanta, Miami, Orlando, and Jacksonville.

It is not unreasonable to expect that all of the major price cap LECs will soon file similarly broad petitions for pricing flexibility covering virtually all major MSAs across the country, given that they have previously contended they will immediately qualify for Phase I relief in 45 of the top 50 markets, and Phase II relief in 35 of the top 50 markets.[5] Because of the extreme "bright-line" nature of the Commission's special access triggers, and the extremely low

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facilities in combination with unbundled loops, to 15 percent of the customer locations in the relevant MSA. *Order* ¶¶ 108, 113.

[4] AT&T and WorldCom did not seek a stay of the *Order* pending judicial review as an initial matter, largely because there were no pending pricing flexibility petitions at that time.

[5] Special Access Fact Report, at 9 (filed Jan. 19, 2000), submitted by the United States Telecom Association in *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98.

threshold established for relief, complete deregulation of special access services on a *nationwide basis* may be imminent.

ARGUMENT

There is a compelling need for a brief moratorium on all pricing flexibility petitions while the D.C. Circuit completes its review of the *Pricing Flexibility Order*. The Commission's *Order* is unprecedented – never before has the Commission removed all rate regulation from services over which the carrier is conceded to have market power – and AT&T, WorldCom, and Time Warner have presented substantial challenges to the *Order* in the D.C. Circuit. More importantly, however, *regardless* of the likelihood that AT&T, WorldCom and Time Warner will succeed in the Court of Appeals, if price cap LECs are awarded pricing flexibility and the Court does subsequently vacate the *Order*, it would be extremely burdensome for the Commission and for all parties to attempt to undo arrangements, including contract tariffs, entered into under the terms of the unfettered pricing flexibility provided under the *Order*. In the interest of avoiding potentially unnecessary pricing flexibility litigation and possible subsequent proceedings to re-establish price cap regulation, the Commission should immediately institute a moratorium, expected to last only a matter of months, on all pricing flexibility proceedings until the D.C. Circuit renders a decision on the petitions for review of the *Order*.

First, it is undisputed that the *Order* will free price cap LECs from virtually all existing regulatory constraints while those companies retain market power over the access services at issue. *See, e.g.*, *Forbearance Order* ¶¶ 11, 36 (*Pricing Flexibility Order* allows LECs to qualify for pricing flexibility "without having to demonstrate a lack of market power"). The *Order* thus substantially deregulates firms that, by definition, are still able to charge supra-competitive prices or to engage in discriminatory and exclusionary pricing for the services at

issue. *See, e.g., id.* ¶ 20 (market power is the ability "to raise and maintain price above the competitive level without driving away so many customers as to make the increase unprofitable"); *id.* ¶ 34 (firm with market power can "discriminate against certain customers by charging higher rates to those that lack competitive alternatives," thereby "deter[ring] entry by competitors").

Presently, the Commission employs two principal regulatory mechanisms to guard against the LECs' exercise of market power. First, price caps prevent the LECs from raising access charges to monopoly levels in areas where they face no competition. Second, restrictions on excessive geographic deaveraging of rates prevent LECs from engaging in exclusionary pricing for customers where the LECs face the threat of competitive entry. *See Forbearance Order* ¶ 34 (in the absence of the Commission's rules on price caps and rate averaging, LECs with market power could engage in strategic pricing and exclude competitors). Under Phase II, however, the Commission removes *both safeguards*. And even under Phase I, the Commission removes important restrictions on geographic deaveraging which, under the Commission's own theory (*see Order* ¶ 79), would permit exclusionary pricing practices for any customer on any route in the relevant MSA where sunk facilities do not already exist.

Thus, the Commission's triggers facilitate – indeed, invite – the very anticompetitive pricing practices in which, as the Commission has conceded, the LECs have the ability to engage. The Commission itself has already anticipated these likely consequences. It has acknowledged, for example, that the decision to grant MSA-wide Phase I relief based on collocation in a small fraction of the wire centers creates the possibility that a price cap LEC "could use pricing flexibility in a predatory manner to deter investment in competitive facilities in those wire centers where it as yet faces no competition." *Order* ¶ 83. Similarly, the

Commission conceded that the granting of Phase II relief absent a showing of competition *throughout* the MSA "might lead to higher rates for access to some parts of an MSA that lack a competitive alternative." *Id.* ¶ 142.

Because of the extraordinary and unprecedented breadth of the relief afforded by the *Pricing Flexibility Order*, a brief moratorium on pricing flexibility petitions while the D.C. Circuit completes its review of the *Order* is in the public interest. If the Commission grants pricing flexibility and the Court of Appeals subsequently vacates the *Order*, undoing the unlawful arrangements entered into while the appeal is pending would be an enormous (and perhaps even impossible) task. At a minimum, the Commission would have to consume valuable resources to conduct proceedings both to reestablish appropriate rates and price cap indices for all relevant services (*i.e.*, all special and switched access rates in the affected MSAs) and to ensure that all customers were provided appropriate refunds for any rates that were inconsistent with the Commission's price cap and rate structure rules. Moreover, the Commission would have to abolish contract tariffs and reimpose generally available rates, and perhaps conduct burdensome proceedings to determine whether the contract tariffs in effect during the pendency of the appeal were lawful and nondiscriminatory. Because contract tariffs are permitted under Phase I, they would likely occur in every MSA covered by the petitions, and could potentially number in the thousands.

In short, this is no run of the mill case, and if the Court does vacate the *Order*, undoing prematurely granted pricing flexibility will be unusually burdensome on the Commission, the parties, and likely the courts. There is no need for the Commission to run that risk, regardless of the likelihood of success on appeal. The Commission should immediately impose a brief moratorium on all pricing flexibility petitions until the Court decides the appeals

of the *Pricing Flexibility Order*. Pursuant to such a moratorium, the Commission would prohibit any pricing flexibility petitions until sixty days after the D.C. Circuit's final decision in the appeal, and it would hold all existing proceedings in abeyance.

Such a moratorium would probably not last very long. The cases are fully briefed, and oral argument is scheduled for November 30, 2000. A decision can reasonably be expected within a few months after the argument. At that time, the D.C. Circuit will have delivered a definitive ruling on the lawfulness of the *Order*. If it upholds the *Order*, the moratorium can be lifted and the petitions processed. If the Court vacates the *Order*, the Commission will have saved itself untold resources that would have had to be devoted to litigation undoing the effects of granting the petitions.

A moratorium would also spare the Commission resources that would have to be devoted to other potentially unnecessary litigation during the pendency of the appeal. Most obviously, a moratorium would relieve the Commission, its staff, and all parties from the burden of litigating the pricing flexibility petitions themselves. BellSouth's switched access petition, for example, has 1000 pages of attachments. The Commission need not spend the resources to pore through such materials to confirm whether or not a petitioning party has satisfied the triggers before the D.C. Circuit has ruled on the lawfulness of the *Order*.

Similarly, as explained above, by removing all rate regulation from services over which the carrier concededly has market power, the Commission has invited all manner of anticompetitive pricing practices that will harm competition and consumers. To be sure, the Commission stated in the *Order* that it would deal with such problems through the Section 208 complaint process. *See, e.g., Order* ¶¶ 83, 96, 127, 129. The prospect of numerous Section 208 complaints, however, is a prospect the Commission need not entertain prior to the D.C. Circuit's

decision. Indeed, regulating the LECs' monopoly rates retrospectively through complaint proceedings is a potentially far more burdensome practice, in terms of Commission resources, than the administration of the Commission's price cap regime, which establishes prophylactic curbs on anticompetitive pricing practices.

The Commission has clear authority to institute such a moratorium. Courts have upheld similar moratoriums on numerous occasions when strict adherence to deadlines for processing applications – even statutory deadlines – would conflict with the agency's broader mission under its governing statute. *See Neighborhood TV Co., Inc.* v. *FCC*, 742 F.2d 629, 634-40 (D.C. Cir. 1984) (approving FCC's temporary freeze upon filing of certain applications for broadcast licenses); *Kessler* v. *FCC*, 326 F.2d 673, 679-85, (D.C. Cir. 1963) (upholding FCC's "freeze" upon acceptance of applications pending adoption of new rules); *Harvey Radio* v. *United States*, 289 F.2d 458 (D.C. Cir. 1961); *Mesa Microwave, Inc.* v. *FCC*, 262 F.2d 723, 725 (D.C. Cir. 1958) (same). Indeed, just this year, the D.C. Circuit upheld an order of the Surface Transportation Board declaring a fifteen-month moratorium on railroad merger applications, notwithstanding the Interstate Commerce Act's statutory deadlines for the consideration of mergers. *See Western Coal Traffic League* v. *Surface Transportation Bd.*, 216 F.3d 1168, 1177 (D.C. Cir. 2000).[6]

Here, Congress has given the Commission the broad mission both to regulate telecommunications markets generally and to ensure just, reasonable, and nondiscriminatory

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[6] Other courts likewise have upheld various agency decisions to place a moratorium upon the processing of applications. *See, e.g., Permian Basin Area Rate Cases*, 390 U.S. 747, 777-81 (1968) (approving moratorium on rate proceedings under § 4(d) of Natural Gas Act); *Westinghouse Elec. Corp.* v. *NRC*, 598 F.2d 759, 769-76 (3d Cir. 1979) (upholding two-year suspension of pending rulemaking and related licensing proceedings). *See also Krueger* v. *Morton*, 539 F.2d 235, 239-40 (D.C. Cir. 1976) (upholding "pause" in issuance of coal permits as not abuse of discretion).

rates for interstate access services. Moreover, as the D.C. Circuit has held, the "agency is in a unique – and authoritative – position to view its projects as a whole, estimate the prospects for each, and allocate its resources in the optimal way." *See Western Coal*, 216 F.3d at 1175 (*quoting In re Barr Laboratories, Inc.*, 980 F.2d 72 (D.C. Cir. 1991)). If the Court vacates the *Pricing Flexibility Order*, the Commission will be faced with the prospect of transferring many of its scarce resources from matters that it deems higher priorities to the enormously complex process of undoing the pricing flexibility that was prematurely granted. Given that the D.C. Circuit can be expected to rule shortly, the prudent course is to impose a moratorium on pricing flexibility petitions until the legality of the *Order* can be conclusively determined, to avoid the need for such burdensome proceedings.

Kessler and *Harvey Radio* are particularly analogous to the situation here. In those cases, the D.C. Circuit upheld processing freezes pending rulemaking proceedings because the "effort invested" in individual applications "might be rendered futile by a contrary disposition" in the generally applicable rulemaking proceeding. *Kessler*, 326 F.2d at 682; *see Harvey Radio*, 289 F.2d at 460. Here, the effort invested in litigating, reviewing, and implementing individual petitions under the Order similarly might be rendered futile by reversal of the *Order* by the D.C. Circuit on judicial review. Further, because such a freeze would not change the substantive standards for pricing flexibility, but would be "primarily concerned with the effective function of Commission processes," it would be "procedural in nature and not subject to the formal rulemaking requirements of the Administrative Procedure Act." *Kessler*, 326 F.2d at 681; *see Neighborhood TV*, 742 F.2d at 638.

In short, the Commission has clear authority to order summarily the requested moratorium, and such a brief freeze would avoid a potentially enormous and needless

expenditure of Commission and party resources in litigating and undoing the pricing flexibility awarded in the *Order*. By contrast, the effect on price cap LECs from a moratorium is minimal. The appeal of the *Order* is fully briefed before the D.C. Circuit, with oral argument set for November 30, 2000, and a decision likely a few months later. Therefore, the moratorium AT&T and WorldCom seek would last at most only a matter of months.

CONCLUSION

For the foregoing reasons, the Commission should declare a moratorium on petitions under the *Order* until sixty days after the D.C. Circuit's final decision on judicial review of that *Order*.

Respectfully submitted,

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September 8, 2000

CERTIFICATE OF SERVICE

I, James P. Young, do hereby certify that on this 8th day of September, 2000, a copy of the foregoing "Motion of AT&T Corp. and Worldcom, Inc. for a Moratorium on Pricing Flexibility Petitions Pending Judicial Review" was served by facsimile and U.S. first class mail, postage prepaid, on the parties named below.

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