Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 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

OPPOSITION OF BELLSOUTH, QWEST, SBC, AND VERIZON TO MOTION OF AT&T AND WORLDCOM FOR A MORATORIUM ON PRICING FLEXIBILITY PETITIONS PENDING JUDICIAL REVIEW

AT&T Corp. ("AT&T) and WorldCom. Inc. ("WorldCom") ask the Commission for a "moratorium" on petitions under the *Pricing Flexibility Order*[1] until 60 days after the D.C. Circuit rules on their pending petitions for judicial review of that order. Because the relief they seek is in all material respects identical to the relief normally sought in a petition for a stay pending judicial review. the Commission must evaluate the request in light of the standards

[1] Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221 (1999) ("*Pricing Flexibility Order*").

applicable to such stay petitions. Under those standards, the motion falls woefully short on every count.

In considering whether a stay pending appeal is appropriate, this Commission applies the well-established four-factor test of *Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958), under which it considers "(1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay." *See* Memorandum Opinion and Order, *Station KDEW(AM)*, 11 FCC Rcd 13683, 13685, ¶ 6 (1996). "A petitioner must satisfy each of these four tests in order for the Commission to grant a stay." Order, *Petition of the Connecticut Department Public Utility Control*, 11 FCC Rcd 848, 853 ¶ 14 (1995). Indeed, the movant "must make a convincing showing" with respect to each factor. Order, *Implementation of Section 309(j) of the Communications Act*, Gen. Docket No. 90-264, FCC 99-157, 1999 WL 446589, ¶ 9 (rel. July 2, 1999) ("*Section 309(j) Order*").

AT&T and WorldCom have made no showing at all — much less a convincing showing. Because they have satisfied *none* of the four factors, their motion should be denied.

First, AT&T and WorldCom make no assertion that they are likely to succeed on the merits, and for good reason: the Commission has considered and rejected each and every one of their arguments on the merits, both in the *Pricing Flexibility Order* itself and in its brief in the D.C. Circuit. *See* Brief for Federal Communications Commission, *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395, 99-1404 & 99-1472 (D.C. Cir. filed Sept. 8, 2000) ("FCC Br.") (attached). And this Commission has made clear that a party seeking a stay pending judicial review cannot establish a likelihood of success on the merits by relying "principally on arguments already considered [and rejected] on the merits." *Section 309(j) Order* ¶ 15. That principle alone bars any finding of likely success here.

Even aside from that salutary rule, it is clear that AT&T's and WorldCom's claims are meritless. Although they claim that the *Pricing Flexibility Order* grants an "extraordinary and unprecedented breadth of relief" and that the Commission has removed "all rate regulation," Motion at 5, 7, the *Pricing Flexibility Order* is, in fact, but another modest step in the Commission's effort over the past two decades, as competition has increased, to eliminate regulations when their costs outweigh their benefits and to allow market forces gradually to displace regulatory fiat in setting access charges. As the Commission explained in its brief to the D.C. Circuit, even after receiving Phase II relief, which is more generous than Phase I relief, a carrier remains subject to statutory obligations to charge just, reasonable, and nondiscriminatory rates and must continue to file tariffs. And parties may challenge the carrier's tariff filings in complaint proceedings. FCC Br. at 26-28. In addition, both Phase I and Phase II relief are granted only after the carrier demonstrates that markets are sufficiently competitive. *Id.* at 28-36.

The Commission's determinations will be accorded deference on appeal: its policy judgments were sound and carefully reasoned, and its findings were both reasonable and based on substantial evidence in the record. In the face of that reality, AT&T and WorldCom are forced to assert — without any explanation or support — that they are entitled to relief "*regardless* of the likelihood that AT&T, WorldCom and Time Warner will succeed in the Court of Appeals." Motion at 5, 7. But the Commission's well-established test for granting a stay requires a showing of likely success. Indeed, it could not sensibly be otherwise. Our system of administrative law rests on the presumption that agency orders are lawful and can be implemented immediately. Only when a party can show that this presumption is invalid in a particular case — and can make a convincing showing at that — must the agency forbear from carrying out what it believes to be its congressional mandate. Because AT&T and WorldCom do not even attempt such a showing, their motion must be denied.

Second, even if AT&T and WorldCom had succeeded in showing a likelihood of success on the merits, they would still not be entitled to a stay because they have failed to show that they will suffer any irreparable harm in the absence of the relief they request. "A party moving for a stay is required to demonstrate that the injury claimed is both certain and great." *CUOMO v. NRC*, 772 F.2d 972, 976 (D.C. Cir. 1985) (internal quotation marks omitted). AT&T and WorldCom have done neither. Although they vaguely claim that it would be "extremely burdensome . . . for all parties to attempt to undo arrangements, including contract tariffs, entered into under" the *Pricing Flexibility Order*, Motion at 5, they make no claim that they will suffer injury of any sort in the interim. And they do not begin to demonstrate that the inconvenience that may follow from a hypothetical and unlikely vacatur of the Commission's order some months from now would constitute the kind of "certain and great" irreparable harm that must be shown for a stay.

Third, AT&T and WorldCom have similarly failed to show that others would be harmed in the absence of a stay. AT&T and WorldCom claim that the Commission would have to "consume valuable resources to conduct proceedings both to reestablish appropriate rates and price cap indices" and "to ensure that all customers were provided appropriate refunds." Motion at 7. But this "harm" is inherent in *all* cases in which an order is vacated on appeal. AT&T and WorldCom have made no effort to argue that the Commission would face any unusual burden on remand in the unlikely event of a vacatur. If anything, the private equities militate against the relief requested. If AT&T and WorldCom were to have their way, ILECs would suffer certain and irreparable injury because they would be unable to obtain pricing flexibility, even when the competitive circumstances so warrant, leaving them and their customers exposed to competitive assaults to which they would be powerless to respond.

Finally, granting a stay is contrary to the public interest. Although CAPs (including AT&T and WorldCom affiliates) reap economic gain when regulations restrict LECs' ability to meet the competition, consumers suffer under a regime that fosters pricing umbrellas and distorted incentives. That is one of the reasons why the Commission granted LECs additional flexibility in the first place — to ameliorate these market distortions and allow consumers to enjoy lower prices. It is also why the Commission has previously rejected requests for stays in its access-charge reform proceedings. "In a case such as this one, which involves significant and much needed reforms of access charge and price cap regulation, the burden of showing equitable entitlement to a stay is particularly heavy because of the strong public interest in implementing those reforms." Order, *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 10175, 10187, ¶ 27 (1997). It is therefore unsurprising that AT&T and WorldCom make no attempt to argue that a stay would further the public interest.

Indeed, AT&T and WorldCom do not even bother to cite *any* of the four relevant standards, much less attempt to meet them. Instead, in an obvious attempt to avoid having the Commission apply its settled and applicable precedent — which would fatally condemn their claim — AT&T and WorldCom have concocted a new name for a very old form of relief. They style their petition one for a "moratorium" on pricing flexibility petitions pending judicial review of the *Pricing Flexibility Order*. But, labels aside, what they seek is indistinguishable from a traditional stay pending judicial review: they ask the Commission, in effect, to suspend the effectiveness of *Pricing Flexibility Order* pending the outcome of the D.C. Circuit's review. A stay by any other name — whether a "moratorium," a "hold," a "freeze," or anything else — is still a stay. And this Commission has settled standards for determining whether such a stay is appropriate pending judicial review.

Not a single "moratorium" case cited by AT&T and WorldCom to support their motion involved a "moratorium" pending judicial review. Rather, each of those cases involved an agency determination that a moratorium on applications was appropriate because a pending agency rulemaking or public inquiry could change the substantive standard that applied to the application, or because the agency needed a temporary freeze in order to implement a new regime consistent with the policies of the Act it was implementing. *See*:

- *Kessler v. FCC*, 326 F.2d 673, 685 (D.C. Cir. 1963) (freezing acceptance of applications pending the adoption of new rules on the subject in order to assure that "the objectives of the contemplated rule-making proceeding would not be frustrated");

- *Harvey Radio Labs., Inc. v. United States*, 289 F.2d 458, 460 (D.C. Cir. 1961) (freezing applications until completion of an agency rulemaking because "'piecemeal' consideration of [individual] requests . . . might well prejudice . . . and defeat the purposes of the program");

- *Mesa Microwave, Inc. v. FCC*, 262 F.2d 723, 725 (D.C. Cir. 1958) (granting a freeze order on several applications pending the Commission's "general [agency] inquiry to determine what general program it should follow in dealing with . . . [a] multiplicity of problems");

- *Neighborhood TV Co. v. FCC*, 742 F.2d 629, 637-38 (D.C. Cir. 1984) (subjecting opposed translator applications to a processing freeze pending the outcome of agency rulemaking in order to "prepar[e] for timely implementation of the low power television service" and "assur[e] that grants of traditional translator licenses would not interfere with the future institution of that service");

- *Western Coal Traffic League v. STB*, 216 F.3d 1168, 1170, 1173 (D.C. Cir. 2000) (imposing moratorium on filing of railroad merger applications in "extraordinary circumstances" of pending agency inquiry "on the future of the railroad industry and the proper role of mergers in shaping that future" because it is "administratively necessary in order to realize the broader goals of the . . . statute");

- *Permian Basin Area Rate Cases*, 390 U.S. 747, 780-81 (1968) (imposing moratorium on rate proceedings pending implementation of a new regional ratemaking scheme in order to "facilitate orderly administration and satisfactorily assure the protection of producers' rights");

- *Krueger v. Morton*, 539 F.2d 235, 240 (D.C. Cir. 1976) (instituting temporary suspension of issuance of prospecting permits "until an improved system could be worked out to better meet and reconcile" the objectives of the Mining and Minerals Policy Act);

- *Westinghouse Electric Corp. v. United States Nuclear Regulatory Comm'n*, 598 F.2d 759, 762 (3d Cir. 1979) (suspending decisionmaking process regarding proposals for recycling of spent nuclear fuel and use in nuclear reactors of plutonium in "deference to President Carter's stated objective of deferring domestic plutonium recycling while the United States initiated a multinational evaluation of alternative fuel cycles that would pose a lesser risk of international proliferation of nuclear weapons").

AT&T and WorldCom, in contrast, make no argument that a "moratorium" on applications is necessary to allow the Commission to complete a proceeding that would affect the applicable standards for pricing flexibility, or in any other respect to further the policies of the Communications Act. Indeed, the Commission already conclusively determined in the *Pricing Flexibility Order* what is necessary to further the goals of the Act. There is nothing left to decide with which a pending pricing flexibility application would interfere. AT&T's and WorldCom's proposed "moratorium" is designed solely to prevent the *Pricing Flexibility Order* from being implemented pending judicial review. Thus, unlike the moratorium cases upon which they rely, AT&T's and WorldCom's request is plainly one for a stay pending judicial review. And, as noted, they cannot meet the standard for such a stay.

Even AT&T and WorldCom seem to recognize, albeit grudgingly, that their request is tantamount to a run-of-the-mill petition for a stay pending judicial review. They bury in a footnote the implausible assertion that they did not seek a stay of the *Pricing Flexibility Order* pending review "*as an initial matter*, largely because there were no pending pricing flexibility petitions at that time." Motion at 4 n.4 (emphasis added). But it was entirely clear at the time the *Pricing Flexibility Order* was issued, and when the petitions for review were filed, that pricing flexibility petitions would soon be filed. AT&T and WorldCom themselves were aware of LEC claims in January 2000 that LECs could qualify for Phase I and Phase II relief in several markets. *See* Brief of Petitioners and Supporting Intervenors at 21, *MCI WorldCom, Inc. v. FCC*, Nos. 99-1395, 99-1404 & 99-1472 (D.C. Cir. filed Sept. 8, 2000) (citing Special Access Fact Report filed by LECs on January 19, 2000). In any event, the standard for granting a stay pending judicial review does not change depending on when the request is filed. The standard is the same now as it would have been had AT&T and WorldCom sought the stay immediately after release of the *Pricing Flexibility Order*.

AT&T and WorldCom can call it whatever they wish, but their motion seeks relief indistinguishable from a stay pending judicial review. Under the established standards for granting such relief, their motion must be denied.

Respectfully submitted.

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September 15, 2000

CERTIFICATE OF SERVICE

I, Sylena L. Slaughter, do hereby certify that on this 15th day of September, 2000, a copy of the foregoing Opposition of BellSouth, Qwest, SBC, and Verizon to Motion of AT&T and WorldCom For A Moratorium On Pricing Flexibility Petitions Pending Judicial Review was served by hand delivery or Federal Express, on the parties named below.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 99-1395 (AND CONSOLIDATED CASES)

MCI WORLDCOM, INC., *et al.*,

PETITIONERS,

v.

FEDERAL COMMUNICATIONS COMMISSION
AND UNITED STATES OF AMERICA,

RESPONDENTS.

ON PETITIONS FOR REVIEW OF AN ORDER OF THE
FEDERAL COMMUNICATIONS COMMISSION

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CETIFICATE AS TO PARTIES, RULINGS AND RELATED CASES

A. Parties and Amici

Because this case involves direct review of an informal rulemaking, a list of parties, intervenors and *amici* is not supplied.

All parties, intervenors and *amici* appearing before this Court are listed in the Brief for Petitioners and Supporting Intervenors.

B. Ruling Under Review

Fifth Report and Order and Further Notice of Proposed Rulemaking, *In re Access Charge Reform*, 14 FCC Rcd 14221 (1999) (JA 232).

C. Related Cases

AT&T Corp. et al. v. FCC, Nos. 99-1535 *et al.*, present challenges to an order closely related to the one at issue here. By order of the Court dated May 25, 2000, both cases are to be briefed and argued on the same schedule and before the same panel of this Court.

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* *Cases and other authorities principally relied upon are marked with asterisks.*

GLOSSARY

BOC	Bell operating company
ILEC	Incumbent local exchange carrier
IXC	Interexchange carrier
LEC	Local Exchange Carrier
MCI	Petitioner MCI WorldCom, Inc., petitioner AT&T Corp., petitioner Time Warner Telecom Inc., and the petitioners' supporting intervenors
MSA	Metropolitan Statistical Area
POP	Point of presence
RSA	Rural Service Area
UNE	Unbundled network element

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FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR FEDERAL COMMUNICATIONS COMMISSION

JURISDICTION

The Federal Communications Commission adopted a final order and amended rules expanding the pricing flexibility that price cap local exchange carriers have in setting rates for certain services. *Access Charge Reform*, 14 FCC Rcd 14221 (1999) ("*Order*") (JA 232). This Court has jurisdiction to review the *Order* pursuant to 47 U.S.C. § 402(a) and 28 U.S.C. § 2342(1).

STATEMENT OF ISSUES PRESENTED

1. Whether the Commission's decision to grant additional, limited pricing flexibility was reasonable.

2. Whether the Commission was obligated, as a matter of law, policy, or precedent, to consider market share in deciding whether to grant pricing flexibility.

STATUTES AND REGULATIONS

Pertinent statutes and regulations are set out in the Statutory Appendix to this brief.

COUNTERSTATEMENT

The order on review continues the Commission's efforts to enable local exchange carriers (LECs)[1] to adjust their interstate access prices in order to respond to competition as it develops. The Commission has increased LECs' pricing flexibility, through measured steps, over the past decade. In the midst of that process, Congress passed the Telecommunications Act of 1996 (1996 Act), which dramatically increased opportunities for competition, particularly in the local exchange and exchange access markets. Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996). In light of the increasingly competitive environment that the 1996 Act created, the Commission decided once again to consider LEC pricing flexibility. The order on review is the product of that consideration and is designed to help provide consumers with the benefits associated with competition.

The Commission's decision balances the needs of incumbent LECs for additional pricing flexibility to respond to competition with the need to retain adequate protections to ensure that LECs do not take advantage of their market position to charge unreasonable rates or restrict competitive entry. The Commission established a staged approach for granting pricing flexibility: it authorized certain types of increased pricing flexibility immediately, and it

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[1] The definition of a "local exchange carrier" is set forth in 47 U.S.C. § 153(26). The definition of an "incumbent local exchange carrier," for purposes of section 251, is set forth in 47 U.S.C. § 251(h)(1). As used herein, the terms "LEC," "price cap LEC" and "ILEC" all refer to carriers that are subject to price cap regulation, unless otherwise noted.

identified competitive conditions that, if met, would allow additional pricing flexibility in the future. In all cases, the Commission retained adequate regulations to limit the LECs' ability to charge unreasonable rates and to increase the opportunities for consumers to benefit from competitive entry.

I. BACKGROUND

A. Competitive Developments in the Interstate Access Market.

For much of this century, most telephone customers obtained both local and long distance services from AT&T and its affiliates. In the mid-1980s, pursuant to an antitrust consent decree known as the Modification of Final Judgment or MFJ, AT&T divested its local exchange operations. *United States v. American Tel. and Tel. Co.*, 552 F. Supp. 131, 141-42 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983). Pursuant to the MFJ, AT&T continued to provide long distance (or interexchange) service in a market that already was subject to some competition; and the divested companies (the Bell Operating Companies or BOCs) provided local exchange service on a *de facto* monopoly basis.

When a customer makes a long distance call, the interexchange carrier (IXC) must have "access" to the local networks at both ends of the call, so that it can complete the connection between the calling and the called parties. Local carriers recover their costs of providing such access primarily through interstate access charges assessed on the IXC. The Commission has established rules that govern the interstate access charges that incumbent local exchange carriers (ILECs) may impose. *See* 47 C.F.R. Part 69. Part 69 identifies two basic categories of access services: special access services and switched access services. *Order* ¶ 8 (JA 237). Special access services do not use local switches but instead employ dedicated lines that run between the customer and the IXC's point of presence (POP) in the local exchange area.[2] *Id.* Because special access services employ dedicated facilities, special access is typically used by IXCs and large businesses with high traffic volumes. *Order* ¶ 142 (JA 306); MCI Br. at 3. Switched access services use local exchange switches to originate and terminate interstate long distance calls. *Id.*

In the 1980s, competitive access providers (CAPs) challenged the LEC monopolies and began to offer limited end-to-end special access services in competition with ILECs by building their own transport facilities in order to serve the IXCs. *See Expanded Interconnection with Local Telephone Company Facilities*, 7 FCC Rcd 7369, 7373 (1992), *recon.*, 8 FCC Rcd 127 (1993), *rev'd in part and remanded in part, Bell Atlantic Telephone Cos. v. FCC*, 24 F.3d 310 (D.C. Cir. 1993) (*Special Access Expanded Interconnection Order*). In 1992, the Commission adopted rules that enabled CAPs to "collocate" their equipment at a LEC's wire centers and to interconnect their facilities there with the LEC's network. 7 FCC Rcd at 7372. These rules were the first of a series of FCC "expanded interconnection" orders providing opportunities for interstate access competition against the LECs.

B. Regulatory Framework.

(1) Price Cap Regulation.

Even before the Commission imposed collocation obligations on LECs, it had modified the regulation of LECs' interstate access charges in a manner that granted the LECs substantial

[2] A POP is the physical point where an IXC connects its network with a local exchange carrier's (LEC's) network. An interstate call typically moves from the customer premises to the LEC's end office (this portion of the call may be referred to as channel termination), from the end office to the serving wire center (this portion may be referred to as interoffice transport), and then from the serving wire center to the POP (this may be referred to as entrance facilities).