REDACTED **FOR PUBLIC INSPECTION**

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
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

MOTION OF AT&T CORP. FOR STAY OF PRICING FLEXIBILITY ORDER PENDING JUDICIAL REVIEW

Pursuant to Federal Communications Commission Rules 1.41 and 1.44(e), 47 C.F.R. §§ 1.41, 1.44(e), AT&T Corp. ("AT&T") respectfully moves for a stay of the Commission's *Pricing Flexibility Order*[1] pending judicial review of that Order.[2] As shown below, the circumstances surrounding the Order more than satisfy the applicable legal and equitable standards for grant of a stay pending judicial review.

[1] *Access Charge Reform, et al.*, CC Docket Nos. 96-262, et al., 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.). WorldCom ("WorldCom") is the petitioner in one of the three appeals of the Order (No. 99-1395). WorldCom joins in, and supports, AT&T's present motion for a stay.

First, AT&T is likely to succeed on the merits of its petition for review. Indeed, the Order is a sharp break with decades of consistent Commission precedent. Under the Communications Act, the Commission has always regulated the rate levels and rate structures of services offered by local exchange carriers ("LECs") with market power. Although the Commission concedes that the price cap LECs retain market power over interstate access charges, under the Order the Commission eliminates essentially all rate regulation from those services throughout an MSA upon a token showing of collocation by at least one competitor in a relatively small fraction of that MSA. The Order's pricing flexibility rules are thus not reasonably designed to ensure just and reasonable rates, and the Order is therefore unlawful under the Communications Act.

Second, in the absence of a stay, AT&T will suffer irreparable injury from the severe anticompetitive effects of the Order. By removing all rate regulation from LECs that continue to have market power, the Order perversely facilitates precisely the combination of predatory and monopoly pricing that the Commission has conceded these LECs have the power to employ. *See* Order ¶ 79; *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, ¶ 34 (1999) ("*Forbearance Order*"). Thus, as explained in the accompanying declaration of Robert Willig, incumbent LECs will be able to essentially freeze competitive entry in the access market at present levels, depriving purchasers of access like AT&T of the benefits of competition, such as lower rates and improved innovation and quality. AT&T has no legal remedy for these losses. Moreover, the Order's deregulation of monopoly access charges facilitates exclusionary pricing practices that will also irreparably harm competing providers of access services (like AT&T) and, to the extent that competitive entry is thereby thwarted, the public interest. By contrast, the effect of a stay upon the LECs would be minimal. The D.C. Circuit has set November 30, 2000, for oral argument on AT&T's petition for review, and therefore a stay would last at most only a matter of months.

This stay motion is all the more urgent because not only BellSouth, but now also Verizon and SBC, have petitions for pricing flexibility pending before the Commission that together encompass the vast majority of major, mid-sized, and even smaller cities in the United States. As a result, essentially nationwide deregulation of special access services is imminent. Because BellSouth's special access petition is deemed granted unless the Commission acts by December 18, 2000, AT&T asks that the Commission rule on this stay motion expeditiously so that, if necessary, AT&T may file a stay motion with the D.C. Circuit on or about December 4, 2000.

BACKGROUND

The Order provides for the elimination of rate regulation from the LECs' monopoly access services in two "phases." In Phase I, a price cap LEC may (1) offer contract tariffs and (2) file both contract tariffs and tariffs that offer volume and term discounts on one day's notice. A price cap LEC eligible for Phase I relief will thus no longer be subject to the rate averaging requirements that the Commission has used to ensure that LEC rates are not unreasonably discriminatory. *See* Order ¶ 122. The LECs' contract tariffs, moreover, will be entirely free of price cap regulation, thus eliminating the Commission's principal method of ensuring that such services are offered at "just and reasonable" rates. In Phase II, the Commission removes *all* rate structure and price cap rules for the services at issue throughout the particular MSA, and the price cap LEC is permitted to file tariffs on only one day's notice. *See* *id.* ¶ 155. Thus, upon receiving Phase II relief, the LEC will face regulation virtually identical to that now applied to "non-dominant" carriers (*i.e.*, those that lack market power altogether).

Under the Order, Phase I and Phase II relief for various services may be awarded upon the satisfaction of certain so-called "competitive triggers." With respect to special access services (except for channel terminations to end users), Phase I relief is available when a price cap LEC can demonstrate that competitors have collocated 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. The Order also 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.

The Commission established somewhat higher collocation thresholds for channel terminations. For those services, Phase I relief is available when competitors have collocated in 50 percent of the wire centers in an MSA 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. *Id.* ¶ 150. The channel termination "trigger" does not require any further showings – *i.e.*, the LEC is not required to show that any of the collocated carriers actually provide service to a single customer over their own channel termination facilities.

With respect to switched access services, the Commission determined that LECs could obtain Phase I relief upon a showing that competing LECs in aggregate offer service, using either exclusively their own facilities or their own facilities in combination with unbundled loops, to 15 percent of the customer locations in the relevant MSA. Order ¶¶ 108, 113.

The Commission also determined that the pricing relief granted on satisfaction of the triggers would be available on an MSA-by-MSA basis. Thus, Phase I and Phase II relief are available *throughout* an MSA, even though the trigger requires a showing of collocation in only a fraction of the MSA. As the Commission acknowledged, the decision to grant MSA-wide Phase I relief based on collocation in a small fraction of the wire centers created 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." *Id.* ¶ 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. The Commission nevertheless concluded that MSA-wide relief for both Phase I and Phase II was appropriate, largely because of the administrative convenience of such geographic relief. *Id.*; *see also id.* ¶ 155.

Thus, upon receiving Phase II relief, the Commission regulates 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 relief 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 Forbearance Order* ¶ 11 (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 is required to file tariffs (whereas nondominant LECs are merely permitted to file tariffs for their interstate access services). *Order* ¶ 151.

The Commission issued the Order on August 27, 1999, and AT&T, MCI WorldCom Inc. ("WorldCom"), and Time Warner Telecom Inc. ("Time Warner") filed petitions for review in the United States Court of Appeals for the D.C. Circuit shortly thereafter. *MCI WorldCom, Inc.* v. *FCC*, Nos. 99-1395 *et al.* (D.C. Cir.). AT&T did not immediately seek a stay of the Order because, at that time, no party had yet filed a petition for pricing flexibility relief. Instead, AT&T and WorldCom sought expedited review in the court of appeals, and the court has scheduled argument for 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 MSAs 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. Under the Commission's rules, BellSouth's special access petition will be deemed granted if the Commission's Common Carrier Bureau takes no action by December 18, 2000.

On November 17, 2000, Verizon, Southwestern Bell Telephone Company, Pacific Bell, and Ameritech filed their own equally broad petitions for pricing flexibility for special access services. Together the petitions now pending before the Commission seek pricing flexibility (in most cases, Phase II) for MSAs containing virtually every major, mid-sized, and even smaller city in the United States outside the Qwest region.[3] This is consistent with the LECs' prior claims that they already qualify for Phase I relief in 45 of the top 50 markets, and Phase II relief in 35 of the top 50 markets.[4] Because of the extreme "bright-line" nature of the Commission's special access triggers, and the extremely low threshold established for relief, essentially *nationwide* deregulation of the ILECs' monopoly access services is imminent.

ARGUMENT

The Commission considers four criteria in evaluating motions to stay its orders: (1) the likelihood of success on the merits in the appeal of that order; (2) the threat of irreparable harm absent a stay; (3) the degree of injury to other parties if a stay is granted; and (4) the public interest. *See AT&T* v. *Ameritech*, Memorandum Opinion and Order, No. E-98-41, at ¶¶ 13-14 (June 30, 1998) ("*Qwest Order*"); *Virginia Petroleum Jobbers Ass'n* v. *Federal Power Comm'n*, 259 F.2d 921 (D.C. Cir. 1958). "[N]o single factor is necessarily dispositive," and the Commission and the courts thus grant a stay where there are "serious questions going to the

[3] For example, Verizon seeks relief in 43 MSAs, including New York, Philadelphia, Washington, Boston, Pittsburgh, Baltimore, and such smaller cities as Binghamton, New York and Altoona, Pennsylvania. Pacific Bell seeks relief in San Francisco, San Jose, Los Angeles/Long Beach, Orange County, Oakland, and San Diego. SWBT seeks relief in 15 MSAs, including Houston, Dallas/Fort Worth, San Antonio, and St. Louis. Ameritech seeks relief in over 20 MSAs, including Chicago, Cleveland, Milwaukee, and Indianapolis.

[4] Special Access Fact Report, at 9, 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 (filed Jan. 19, 2000).

merits" and the "balance of hardships tip[s] sharply" in favor of a stay. *Qwest Order* ¶ 14 (internal quotation marks and citation omitted).

Here, all four factors weigh heavily in favor of a stay pending judicial review. There is a strong likelihood that the D.C. Circuit will vacate the Order on review. In addition, AT&T, new entrants in the access markets, consumers, and the public interest will each suffer substantial and irreparable harms in the absence of a stay. By contrast, BellSouth and other potential petitioners under the Order face no comparable threat of harm if they continue to offer service under the longstanding price cap regime for a short time longer.

I. THE ORDER IS LIKELY TO BE REVERSED ON APPEAL.

Petitioners are likely to succeed on the merits of their petitions for review in the D.C. Circuit. The Commission's triggers are unlawful under the Communications Act because they are not reasonably designed to ensure just and reasonable rates. Indeed, the triggers result in effective deregulation of price cap LEC access services at a time when the LECs concededly retain market power for those services. Instead of requiring (as it had for thirty years) the existence of real, substantial competition before relaxing the core regulatory safeguards that prevent the LECs from exercising market power, the Commission permits such deregulation based on a series of defined "triggers" that bear no rational connection to the existence of competitive constraints on the LECs' ability to abuse their admitted monopoly power. The Commission's collocation-based triggers are also arbitrary and unlawful because the relief granted is on an MSA-wide basis, even though the triggers reflect conditions in only a small geographic portion of the MSA. Instead of offering any persuasive analysis of competitive conditions to support this radical new approach to deregulation, the Commission improperly justified the triggers based almost solely on its own administrative convenience.

In their briefs to the Court of Appeals, AT&T, WorldCom, and Time Warner have set forth the many reasons why the Order's "competitive triggers" are unlawful and should be vacated. *See* Petitioners' Brief at 24-45; Petitioners' Reply Brief at 2-19. Although AT&T cannot repeat that entire discussion here, the principal reasons why the triggers are unlawful are as follows.

1. The Commission's reliance on collocation-based triggers for special access is wholly arbitrary and contrary to the Communications Act. The mere fact that a single competitor has collocated equipment in a wire center is not indicative of any particular level of competition. Indeed, such collocation is entirely consistent with that collocator having a tiny (or even nonexistent) market share in that wire center. Competitors with tiny market shares would not realistically be able to put any competitive pressure on access charges, even within the affected wire center. Thus, the Commission's trigger leaves open the possibility that LECs will qualify for pricing flexibility when they retain unfettered ability to abuse their bottleneck control of access facilities. The trigger is therefore unlawful, because it is not reasonably designed to ensure just and reasonable access charges. *Farmers Union Cent. Exchange, Inc.* v. *FERC*, 734 F.2d 1486, 1510 (D.C. Cir. 1984).

2. Even if the mere existence of competitive facilities indicated robust and effective competition (which they do not), the Commission's triggers are not even a reliable measure of competitive facilities. The Order states simply that "incumbent LECs [must] 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." Order ¶ 82. The scope and capacity of those facilities, however, like the competitor's market share, are totally irrelevant under the Commission's triggers. Thus, the competitive triggers are

entirely consistent with competitors possessing facilities that are capable of serving only a small fraction of the customers even in that wire center – a result that is wholly arbitrary and unlawful.

Equally important, the Commission's triggers ignore the fact that new entrants often own only their own entrance facilities, while a larger share of the revenue in interstate access comes from interoffice transport, which is not nearly as competitive.[5] In other words, the dedicated access triggers permit essentially full deregulation of all of the components of special access other than channel terminations – *i.e.*, entrance facilities, direct-trunked transport, and the flat-rated portion of tandem switched transport (*see* Order ¶ 93) – at a time when the incumbent LEC retains monopoly, bottleneck control over most of those facilities. The use of a single collocation figure to measure relief for these dedicated services thus unlawfully ignores significant differences in the competitiveness of various markets. *See Forbearance Order* ¶ 28 (noting that the proposed BOC methodology "places disproportionate weight on entrance facilities . . . where competitive entry has been the greatest" and "tends to obscure the BOC petitioners' dominance over such service offerings as . . . interoffice transport"). That oversight has important consequences, because as long as the incumbent retains bottleneck control over any portion of the access link, it retains market power over the end-to-end service. *See* Willig Decl. ¶¶ 13-16, 28-37.

3. The alternative trigger under the Order, which is based on collocation in wire centers representing a certain percentage of the incumbent's revenues in the relevant MSA, is even more arbitrary. The fact that the wire centers account for a certain percentage of the incumbent's revenues is entirely consistent with the collocators having a tiny market share and a

[5] *See Forbearance Order* ¶ 28; *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order, 15 FCC Rcd. 3696, ¶ 348 (1999) ("*UNE Remand Order*").

negligible competitive presence in those wire centers. This alternative trigger thus permits pricing flexibility by showing collocation in an even smaller percentage of wire centers (*i.e.*, less than 15% or 50%), even though competitors in those wire centers have minuscule market shares and extremely limited competitive facilities.

4. The collocation-based trigger for channel terminations is also patently unlawful. As the Commission readily acknowledges, competing carriers rarely ever undertake the expensive process of deploying their own channel termination facilities, because each channel termination serves only one customer (whereas traffic can be aggregated over trunk-side transport facilities). *Id.*; *see also UNE Remand Order* ¶¶ 182-87. The Commission's only response to this difficulty is simply to require higher collocation thresholds. The channel termination triggers do not require the LEC to demonstrate the existence of *any* alternative channel termination facilities anywhere in the MSA. In other words, the triggers grant the LECs essentially full deregulation of monopoly channel termination facilities at a time when the competitors in that MSA may literally have no competing channel termination facilities at all. That is the height of arbitrariness. Order ¶ 103 (acknowledging the "shortcomings" of the trigger); Willig Decl. ¶¶ 35-36.

5. Last but certainly not least, the Commission grants relief on an MSA-wide basis, even though the trigger requires a showing of competitive facilities in only a portion of the MSA. Such relief permits the unfettered exercise of market power in the remaining portions of the MSA where there is no competitive entry, and the triggers are unlawful for this reason as well.

The Commission's consistent position in previous orders has been that in the telecommunications market, each point-to-point market constitutes a separate, relevant geographic market.[6] Moreover, the Commission has consistently held that, in analyzing competitive issues, point-to-point markets may be grouped together only when such a grouping "aggregates those consumers with similar choices regarding a particular good or service in the same geographical area."[7] In direct contradiction of this basic principle, the Order permits unfettered pricing flexibility in geographic markets – MSAs – that lump together customers who purportedly have at least some semblance of competitive alternatives with those who concededly do not. *See* Order ¶ 81 ("investment in transmission facilities associated with collocation arrangements is largely specific to a location; the competitive LEC's facilities cannot, for the most part, easily be removed and used elsewhere . . .").

This error also has important consequences, because the Commission's MSA-wide relief facilitates – indeed, invites – exclusionary pricing practices on the routes in the MSA where the incumbent faces the threat of further competitive entry, while the incumbent can simultaneously raise generally applicable rates to monopoly levels with impunity. *See* Willig Aff. ¶¶ 17-19 ("existence of substantial facilities-based competition in one area cannot constrain the price of special access services in another area that is not subject to such competition"). Thus, the Commission's triggers facilitate precisely the combination of monopoly and exclusionary pricing practices that the Commission has conceded a LEC with market power can employ. *Forbearance Order* ¶ 34.

---

[6] *See In re Application of NYNEX Corp. Transferor, and Bell Atlantic Corp. Transferee, for Consent to Transfer Control of NYNEX Corp. and its Subsidiaries*, Memorandum Opinion and Order, 12 FCC Rcd. 19985, ¶¶ 54-56 (1997) ("*Bell Atlantic NYNEX Merger Order*"); *In re Application of WorldCom, Inc. and MCI Communications Corp. for Transfer of Control of MCI Communications Corp. to WorldCom, Inc.*, Memorandum Opinion and Order, 13 FCC Rcd. 18025, ¶ 166 (1998) ("*MCI WorldCom Merger Order*").

[7] *Bell Atlantic NYNEX Merger Order* ¶¶ 54-56; *MCI WorldCom Merger Order* ¶ 166.

The Commission's appellate brief does not answer any of these points. Instead, the Commission makes essentially two arguments to the court of appeals, both of which are meritless.

First, the Commission's argument that the Order represents merely incremental change analogous to previous tweakings of the price cap system is simply incorrect. *See* FCC Br. at 19-23. To the contrary, 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 (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. Therefore, the notion that this sweeping deregulation of dominant access providers is "incremental," "modest," and "limited" is unsustainable. FCC Br. at 18-23.

Second, the FCC's basic defense of the collocation-based triggers is that they somehow indicate that the access market is "contestable." FCC Br. at 30-31. That is not the rationale given in the Order, however, and courts do not accept "appellate counsel's *post hoc* rationalization of an agency decision." *North Carolina Utils. Comm'n* v. *FERC*, 42 F.3d 659, 663 (D.C. Cir. 1994); *SEC* v. *Chenery*, 318 U.S. 80, 87 (1943).

In the Order, the FCC did not even consider the question whether the access market is contestable, much less make the extensive factual findings that would be necessary to reach such a conclusion. The only rationale that the Commission offered in the Order was that, where competitors had deployed "sunk" facilities, incumbent LECs would find it difficult to engage in *predatory* pricing, at least on the routes where sunk facilities already existed. Order ¶ 80. That analysis (whatever it merits) has nothing to do with the very different question whether the access market is "contestable" – *i.e.*, whether competitors could enter quickly and easily because of low entry barriers and high elasticity of demand. *See* IIA Areeda, Hovenkamp & Solow, *Antitrust Law* 160-61 (1995).

In fact, there is every reason to believe, based on the Commission's consistent findings in numerous proceedings, that the access market is not remotely "contestable." Indeed, in the only order in which the FCC did consider in detail the nature of entry barriers in this market (the *UNE Remand Order*), it found – on an extensive factual record – that entry is prohibitively expensive in the vast majority of cases. *See UNE Remand Order* ¶¶ 182-87, 355-56, 359 (1999); *see also Forbearance Order* ¶ 21 (conceding that LECs continue to have market power in these markets).

AT&T is thus likely to succeed on the merits of its appeal, and the Order is likely to be vacated.

II. THE BALANCE OF EQUITIES ALSO STRONGLY FAVORS A STAY.

The balance of equities and the public interest also weigh heavily in favor of a stay. The Order's triggers remove all rate regulation from services over which the incumbents concededly still have market power. As a result, the triggers perversely give the incumbent LECs the means to choke off the further development of competition through predatory, exclusionary pricing (while charging monopoly rates in the remainder of the affected MSAs). The triggers will thus result in irreparable harm to AT&T and others. In addition, with essentially nationwide deregulation imminent, the prospect of reimposing price cap regulation if the court of appeals vacates the order would be enormously burdensome to the Commission, the parties, end-user customers, and perhaps the courts as well. By contrast, the harm to BellSouth and other incumbents from a stay would be minimal. The stay would likely be of short duration, given that oral argument is scheduled for November 30, 2000, and a decision can be expected soon thereafter.

1. The Commission's triggers, by design, perversely allow incumbent LECs to essentially freeze competitive entry at present levels. Once an incumbent obtains Phase I relief, the incumbent can effectively thwart the further spread of competition by offering predatory and exclusionary rates on any point-to-point route within the MSA where the incumbent faces the threat of competition. *See* Willig Decl. ¶¶ 53-58; Order ¶ 79. As long as the incumbent retains control over any portion of the point-to-point route – and as the Commission

found on this record, the incumbent almost always controls channel termination facilities and often much of the interoffice transport used by its competitors (*Forbearance Order* ¶ 28) – the incumbent retains market power over the end-to-end service. Thus, Phase I relief allows the very predatory pricing that the Commission has found the LECs have the ability to employ. *Forbearance Order* ¶ 34.

This freezing of access competition results in irreparable harm. Long distance carriers like AT&T have relied on the limited competitive entry that has so far occurred to lower their access expenses (and thus lower their long distance bills to customers). The prospect of continued competitive entry in the access market promises to provide additional reductions in long distance carriers' access expenses as well as improved quality and efficiency from carriers that at least partially provide service over their own facilities through collocation arrangements. The triggers stop that progress right in its tracks. Long distance carriers have no legal remedy for the loss of reduced access charges and increased efficiencies that would have resulted from increased competition. *See* Willig Decl. ¶ 58; *see, e.g.*, *Ross-Simons of Warwick* v. *Baccarat Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) ("substantial injury that is not accurately measurable" is irreparable, and collecting cases); *Multi-Channel TV Cable Company* v. *Charlottesville Quality Cable Operating Company*, 22 F.3d 546, 551-52 (4th Cir. 1994). Similarly, the ILECs' access competitors (which include AT&T and WorldCom) will suffer harm to their goodwill, reputation, and relationships with actual and potential access customers in ways that that cannot be readily compensated by damages. *See, e.g., Duct-O-Wire Co.* v. *U.S. Crane, Inc.*, 31 F.3d 506, 509-10 (7th Cir. 1994) (injury irreparable where plaintiff established that "it will lose sales and the opportunity to maintain and develop relationships with existing and potential customers"); *Rent-A-Center, Inc.* v. *Canyon Television and Appliance Rental, Inc.*, 944 F.2d 597, 602 (9th Cir. 1991); *Gateway Eastern Ry. Co.* v. *Terminal R.R. Ass'n*, 35 F.3d 1134, 1140 (7th Cir. 1994).

In addition, Phase II relief will permit the incumbents to raise access charges to monopoly levels. Indeed, in the Order the Commission expressly acknowledged that incumbent would likely raise access charges upon receiving pricing flexibility relief. Order ¶ 142. Because these increased costs must be passed onto customers, and because long-distance service is highly price sensitive, such increased costs will inevitably suppress demand for AT&T's services. AT&T has no obvious legal remedy for the revenues and profits AT&T would be forced to forego as a result of this suppression. *See* Willig Decl. ¶¶ 59-61.

2. Increased access charges will also cause even more severe harm because in some cases the LECs seeking pricing flexibility have been awarded the authority to offer their own competing long distance services under Section 271 of the Act. 47 U.S.C. § 271. *See* Willig Decl. ¶¶ 63-68; *see also* Stock Decl. ¶ 17. For example, Verizon and SBC have pending petitions in which they seek relief in MSAs in New York and Texas where they already have long distance authority, and other LECs can be expected to seek Section 271 relief in the near future. When incumbent LECs have authority to offer long distance service, they have the incentive and the ability to execute price squeezes against their unaffiliated long distance competitors. The Commission's price cap system already allows the incumbents to set access charges above economic cost, and that facilitates a price squeeze, because the incumbent incurs only the economic cost of access while the unaffiliated carriers who depend on the incumbent's access services experience the incumbent's inflated access charges as a real cost. Willig Decl. ¶¶ 64-65. With the removal of price caps, incumbents would be free to raise access charges even further, to monopoly levels, and thereby exacerbate the harms from a price squeeze. *Id.* ¶ 66.

3. The radical nature of the Order's deregulation of monopoly access services is confirmed by the pending petitions for pricing flexibility relief. For example, as BellSouth's petitions and supporting documentation make clear, it continues to control the vast majority of the access market throughout its region, and yet it may immediately qualify for Phase II relief for special access services – *i.e.*, total elimination of rate regulation – in virtually every city of any significance in its region. For example, despite AT&T's aggressive efforts to reduce its expenses for these services, **REDACTED** percent of AT&T's access payments in the MSAs for which BellSouth sought relief in its petition for pricing flexibility for special access and dedicated transport are paid to BellSouth itself. Between January and October 2000, approximately **REDACTED** percent of AT&T's payments for special access, and 100 percent of AT&T's payments for dedicated transport, in all of BellSouth's MSAs were made to BellSouth. Stock Decl. ¶ 4. Similarly, in the MSAs that are the subject of BellSouth's switched access pricing flexibility petition, AT&T makes **REDACTED** percent of its switched access payments to BellSouth itself, and only **REDACTED** percent of those payments to other providers of switched access. *See id.* ¶ 9. Thus, the Order's triggers would give BellSouth unfettered pricing flexibility at a time when the presence of competitors is so minimal that they are clearly unable to put any competitive pressure on BellSouth's rates. *See also id.* ¶¶ 5-8, 10-12.

Moreover, as permitted under the Order's unlawful triggers, BellSouth's petition contains no evidence that competitors could today serve even a significant fraction of the customer locations in the relevant MSAs. The BellSouth petition encompasses MSAs in all nine states in its region. For approximately two-thirds of those MSAs (38 out of 60), BellSouth contends that it has met the trigger for Phase II relief for special access and dedicated transport. It also claims Phase II relief for channel terminations in almost half of those MSAs (26 out of

60). In the overwhelming majority of instances, however, BellSouth relied on the Commission's alternative revenue-based trigger to assert that it has met the pricing flexibility test. For 31 of the 38 MSAs in which BellSouth claims that it is entitled to Phase II relief for special access and dedicated transport, it invoked the revenue test because it could not meet the somewhat more rigorous percentage-of-wire-centers test. For the same reason, in 24 of the 26 MSAs in which BellSouth seeks Phase II relief for channel terminations, it relied on the revenue test.

For example, based on BellSouth's filing, in the Asheville, North Carolina MSA, 11% of the wire centers allegedly command 75% of BellSouth's special access and dedicated transport revenues. Because 75% exceeds the Phase II revenue trigger, BellSouth contends that its special access and dedicated transport services should by fully deregulated in that MSA, even though 89% of the wire centers do not have even one collocator that uses its own transport. Similarly, in the Mississippi "outside the MSA" area, although only 2.4% of wire centers have collocators using non-BellSouth transport, because these wire centers supposedly account for 30% of the revenues for special access and dedicated transport, BellSouth claims entitlement to Phase I relief, despite the fact that more than 97% of the wire centers in the "outside the MSA" area have no competitive presence. And in the Gainesville, Florida MSA, 16.7% of wire centers have a collocator with non-BellSouth transport, leaving 73.3% of the wire centers non-competitive. Yet, because these few wire centers purportedly account for more than 90%, respectively, of BellSouth's channel termination and special access/dedicated transport revenues, BellSouth claims entitlement to Phase II deregulation for these services throughout the MSA. If granted the relief it seeks, BellSouth would be treated essentially as a nondominant carrier – free to offer these services outside of price cap regulation and access charge rate structure rules – despite the undisputed fact that it continues to possess market power for these services.

4. Pricing flexibility relief will also inevitably result in substantial and irreparable harms to third parties and the public interest in the absence of a stay. Once the Commission has let the genie out of the bottle – *i.e.*, once the Commission has lifted rate regulation from the LECs' monopoly services, thus facilitating the unimpeded exercise of market power – putting the genie back in the bottle if the Order is vacated will be an unusually complex (if not impossible) process that will have a negative impact on countless third parties caught in the middle. As noted earlier, the petitions currently pending before the Commission would result in essentially *nationwide* pricing flexibility. Once such relief is granted, the incumbents will quickly enter into hundreds if not thousands of contract tariffs and other targeted pricing arrangements with thousands of individual end-user customers across the country. If the D.C. Circuit vacates the Order, those arrangements would have to be undone, and the previously applicable tariffed rates reimposed. Given the petitioners' likelihood of succeeding on the merits of their claims, it would be unduly burdensome and unfair to the thousands of affected third parties, and to the public interest, to allow such parties to be whipsawed into and then out of the radical regime of pricing flexibility contemplated by the Order.

5. BellSouth and the other potential petitioners for pricing flexibility relief, however, would suffer only minimal harm from a stay, if any. These LECs have no grounds to claim that their current rates are not just and reasonable. Moreover, the Court has scheduled oral argument for November 30, 2000, and a decision from the court can be expected shortly thereafter. Accordingly, the stay would likely last only a matter of months. For all of these reasons, the balance of equities weighs heavily in favor of a stay.

CONCLUSION

For the foregoing reasons, the Commission should grant the Motion of AT&T Corp. for a Stay Pending Judicial Review.

Respectfully submitted,

James P. Young

GENE C. SCHAERR
JAMES P. YOUNG
MICHAEL L. POST
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8141

MARK C. ROSENBLUM
PETER H. JACOBY
JUDY SELLO
AT&T CORP.
295 North Maple Avenue
Basking Ridge, NJ 07920
(908) 221-4243

Counsel for AT&T Corp.

Thomas F. O'Neil III
William Single, IV
Jeffrey A. Rackow
WorldCom, Inc.
1133 19th St., NW
Washington, DC 20036
(202) 736-6933

November 21, 2000

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

DECLARATION OF CHARLES E. STOCK

Pursuant to 28 U.S.C. § 1746, Charles E. Stock deposes and states as follows:

1. My name is Charles E. Stock. I am a Manager for AT&T Corp. In that capacity, I am responsible for reviewing the interstate access filings for price cap local exchange carriers ("price cap LECs"), including BellSouth Telecommunications Corp. ("BellSouth").

2. I am submitting this Declaration in support of the motion of AT&T for a stay of the Commission's *Pricing Flexibility Order* pending judicial review. As described below, although competition is slowly beginning to emerge, price cap LECs such as BellSouth continue to have a virtual monopoly in the markets for special access and dedicated transport

services, and for switched access services. Consequently, granting BellSouth the pricing flexibility permitted by the *Pricing Flexibility Order* will enable it to use its market power to inflict irreparable harm on AT&T, alternative providers of access services, and consumers.[1]

I. EFFECTIVE COMPETITION DOES NOT YET EXIST IN THE MARKETS FOR SPECIAL ACCESS SERVICES AND SWITCHED ACCESS SERVICES.

3. During recent years, some carriers have begun to provide access services – either special access and dedicated transport, or switched access services – as an alternative to price cap LECs such as BellSouth. However, competition in both access markets in the BellSouth region remains extremely limited, and is insufficient to act as an effective constraint on BellSouth's pricing behavior.

A. Special Access and Dedicated Transport Services

4. BellSouth is the only available provider of special access and dedicated transport services in most circumstances. For example, despite AT&T's aggressive efforts to reduce its expenses for these services, **REDACTED** percent of AT&T's access payments in the MSAs for which BellSouth sought relief in its petition for pricing flexibility for special access and dedicated transport (CCB/CPD File No. 00-20) are paid to BellSouth itself. Between January and October 2000, approximately **REDACTED** percent of AT&T's payments for special access, and 100 percent of AT&T's payments for dedicated transport, in all of the MSAs in the BellSouth region were made to BellSouth.

[1] My testimony in this Declaration will focus on BellSouth, because BellSouth is the only CLEC that has filed petitions for pricing flexibility for special access and dedicated transport and for switched access services since the Commission issued the *Pricing Flexibility Order*. However, based on my knowledge of the industry, I believe that my conclusions concerning the lack of competition in the access markets are equally applicable to regions served by other price cap LECs. For example, each of the Regional Bell Operating Companies received **REDACTED** percent of the payments that AT&T made for dedicated transport, and between **REDACTED** and **REDACTED** percent of the payments that AT&T made for special access, between January and October 2000 for the MSAs in their regions. Similarly, my discussion in Part II of the ability and incentive of BellSouth to inflict irreparable harm would apply to any price cap LEC that sought the relief permitted by the *Pricing Flexibility Order*.

5. The lack of competitive pressures in the market for special access and dedicated transport is further reflected in BellSouth's pricing behavior. Although BellSouth is free to set its rates for these services at any level as long as they do not exceed the applicable price cap ceiling, BellSouth has consistently priced these services at or near the price cap level. For special access services and channel terminations provided to end users, BellSouth's price cap index is 58.0507, and its actual price index is 58.0444. For high capacity dedicated transport, BellSouth's service band index upper limit is 66.3127, and its actual service band index is 63.1550.[2]

6. Furthermore, although the Commission's *Pricing Flexibility Order* gave price cap ILECs the flexibility to deaverage special access and dedicated transport rates into seven zones per study area, BellSouth has not done so. Instead, BellSouth's prices for special access and dedicated transport are identical, or virtually identical, in all three rate zones, which represent the degree of deaveraging permitted for these services within a study area under earlier Commission orders issued before the *Pricing Flexibility Order*. For example, BellSouth's DS-3 rates are identical across Zones 1, 2 and 3 in every study area. BellSouth's DS-1 channel termination rates show only slight variation across zones, with Zone 1 at $150, Zone 2 at $156, and Zone 3 at $161 in every study area.

7. Some CLECs have made efforts to enter the market for special access services and dedicated transport as alternatives to BellSouth as a provider of these services. The availability of these providers, however, remains extremely limited. As previously stated, despite AT&T's attempts to find lower-cost providers of these services, only **REDACTED** percent of AT&T's payments for these services went to providers other than BellSouth.

[2] These price cap indices were obtained from BellSouth Transmittal No. 558, filed July 27, 2000 and effective August 11, 2000, TRP IND-1, lines 899, 340.

8. BellSouth also dominates the market for channel terminations. Approximately **REDACTED** percent of AT&T's expenses for channel terminations in the BellSouth region are made to BellSouth.

B. Switched Access Services

9. There is similarly little competition in the market for switched access services in the BellSouth region. For example, in the MSAs that are the subject of BellSouth's petition for pricing flexibility in CCB/CPD File No. 00-21, AT&T makes **REDACTED** percent of its switched access payments to BellSouth itself, and only **REDACTED** percent of those payments to other providers of switched access.

10. Like its pricing of special access and dedicated transport, BellSouth's pricing of switched access services reflects the lack of effective alternative providers – and the absence of competitive pressures on BellSouth's pricing. For common line services, all of BellSouth's prices for SLC rates, PICC rates and CCL rates are set at the maximum allowable level. For traffic-sensitive services, BellSouth's price cap index is 34.2184, and its actual price index is 34.2150. For tandem-switched services, BellSouth's service band index upper limit is 106.1760, and its actual service band is 104.0941.[3]

11. BellSouth also has failed to take advantage of the flexibility granted in the *Pricing Flexibility Order* to deaverage tandem-switched transport rates into seven zones per study area. Indeed, BellSouth's rates for tandem-switched transport and tandem switching are identical in all three rate zones in each of the five study areas where BellSouth has sought pricing flexibility for switched access services. Those rates represent the degree of deaveraging within a study area allowed by the Commission prior to the *Pricing Flexibility Order*.

[3] *See* BellSouth Transmittal No. 558, *supra*, TRP IND-1, lines 299, 310.