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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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01-91

[redacted]

April 25, 2001

Magalie Roman Salas, Secretary
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W., Room TW-B-204
Washington, D.C. 20554

Dear Ms. Salas:

Enclosed please find an original and six (6) copies of the Motion of WorldCom, Inc. for Stay Pending Judicial Review or Alternatively, for a Delay of Implementation Date. We also enclose six (6) copies of the Notice of Appeal that WorldCom filed today in the D.C. Circuit Court.

Sincerely,

Marc A. Goldman

Enclosures

rec'd 0+6

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APR 25 2001

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

[redacted]

In the Matter of Application by Verizon New England, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Massachusetts	CC Docket No. 01-09

MOTION OF WORLDCOM, INC., FOR STAY PENDING JUDICIAL REVIEW OR, ALTERNATIVELY, FOR A DELAY OF IMPLEMENTATION DATE

Pursuant to Rules 1.41 and 1.44(e) of the Commission's Rules, 47 C.F.R. §§ 1.41, 1.44(e), WorldCom, Inc. ("WorldCom") respectfully requests that the Commission stay its order granting Verizon-Massachusetts ("Verizon") authorization to provide long distance service in the Commonwealth of Massachusetts starting on April 26, 2001,[1] pending judicial review of that Order. Alternatively, the Commission should amend the *Order* to delay the time Verizon may enter its in-region long distance market for one month, from April 26 until May 28, to allow the D.C. Circuit the opportunity to address WorldCom's request for a stay of this Commission's Order. As shown below, WorldCom more than satisfies the applicable legal standards for grant

[1] *In re Application of Verizon New England Inc., Bell Atlantic Communications Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), and Verizon Global Networks Inc., For Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-09, Memorandum Opinion and Order, FCC 01-130 (Apr. 16, 2001) ("*Order*").

of a stay pending judicial review.[2]

The Commission authorized Verizon to provide long distance service in Massachusetts notwithstanding grave reservations about whether the unbundled local switching pricing in Massachusetts reflects the cost of providing switching as required by law. Thus, the Commission acknowledged that Massachusetts' rates for unbundled local switching are more than double the rate recently determined to be cost-based by the Commission in its orders approving in-region long distance entry in Texas, Kansas and Oklahoma, and similarly acknowledged other evidence demonstrating that Massachusetts is allowing Verizon to recover more than double its costs of providing switching. Yet the FCC – in a sharply divided decision in which one commissioner dissented, and the commissioner who cast the deciding vote expressed "grave misgivings" about the Commission's approach – nevertheless declined to consider this evidence. In the words of the Chairman, who also expressed misgivings about the result, the Commission felt "constrained" to accept Verizon's switching rates because they were similar to temporary rates that had been put in place in New York in 1997 and accepted by the FCC as cost-based in 1999. The FCC concluded this fact left it no choice, even though it understood that New York was only weeks away from modifying those very rates because New York itself had previously concluded that misrepresentations by Verizon had rendered them suspect. It was arbitrary and capricious for the Commission to treat its outdated New York finding as conclusive based on the very different record it was presented with here.

Verizon currently controls over 95% of the residential local exchange business in

[2] Because of the irreparable harm it will suffer if this stay is not granted promptly, WorldCom intends to seek a stay of this Order at the D.C. Circuit on April 30 if the Commission has not granted this motion prior to that date.

Massachusetts.[3] The unrebutted evidence on the record proved that Verizon's pricing of unbundled network elements allows it to maintain this monopoly grip on the Commonwealth's residential telephone market. The Commission dismissed this evidence too as irrelevant, again concluding that its 1999 decision to accept the New York switching rates trumped all other arguments against the rates in Massachusetts. This too was arbitrary and capricious agency action.

By authorizing long distance competition before unlawful barriers to local entry have been eliminated, the FCC has caused the very irreparable harm to local and long distance competitors, as well as to the public, that it was the purpose of section 271 to prevent. If the *Order* remains in effect, Verizon will be able to use its monopoly control of the local market immediately to gain a significant and unfair advantage over WorldCom in the long distance market – it will be able to sell its customers a bundled package of local and long distance services that WorldCom is unable to provide because of non-cost-based unbundled network element pricing. The damage to WorldCom will be irreparable. If the *Order* is ultimately reversed, WorldCom will not be able to measure or recover the substantial long distance revenue it has lost. Nor is there any way to calculate the loss to WorldCom's potential local residential business that would result absent a stay of an order that prematurely removes Verizon's only incentive to open Massachusetts' local market to competition. By contrast, the grant of a stay during the relatively brief period required to determine whether section 271's requirements have

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[3]WorldCom Reply Comments, Attachment A, Reply Declaration of A. Daniel Kelley and David M. Nugent, ¶ 3 (filed Feb. 28, 2001). Unless otherwise specified, all referenced Comments and ex parte filings are on the record in *In re Application of Verizon New England Inc., et al. for Authorization to Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 01-09.

in fact been satisfied will not cause Verizon any harm that could remotely offset the harms that would result from the denial of a stay. Rather, it would simply continue for several months the status quo that now exists in Massachusetts.

BACKGROUND

The Modification of Final Judgment ("MFJ") barred the Bell Operating Companies ("BOCs") from providing long distance services so long as there was a "substantial possibility" that they could use local telephone monopolies to impede competition in long distance services. *United States v. American Tel. & Tel. Co.*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd*, 460 U.S. 1003 (1983). As the D.C. Circuit held, the MFJ rested on the premise that so long as a BOC "enjoyed a monopoly on local calls," it would "ineluctably leverage that bottleneck control in the interexchange (long distance) market," thereby harming long distance competitors and consumers. *United States v. Western Electric Co.*, 969 F.2d 1231, 1238 (D.C. Cir. 1992). Unless long distance carriers can ubiquitously provide alternatives to a BOC's local services, a BOC that is allowed to offer long distance service will gain an immediate monopoly over the many customers who desire to obtain local and long distance services from a single source.

In the Telecommunications Act of 1996, Congress enacted a new subchapter of the Communications Act that seeks to open local telephone markets to competition by granting BOC competitors the right to access essential local facilities and to share in the economies of scale and scope that the BOCs enjoy. In particular, sections 251 and 252 of the Act require BOCs, *inter alia*, to allow would-be competitors to access the elements of their networks on "rates, terms, and conditions" that are "just, reasonable, and nondiscriminatory" and "based" on the "costs" the BOC incurs in "providing" the element. 47 U.S.C. §§ 251(c)(3), 252(d)(1). Because it is economically and technically infeasible, at least in the near term, to serve all of the customers served by the BOCs over cable or other alternative networks, the only way in which any firm can today establish broad-based, mass-market alternatives to the BOC's local exchange and exchange access services is through the leasing of combinations of these "unbundled network elements" (called the "UNE-Platform" or "UNE-P"). The two central elements that a competitor must lease in order to provide UNE-P service are the wire from the BOC's switch to the customer's home and the switch itself.

The 1996 Act also codified the core of the MFJ's long distance restriction by enacting section 271. *See BellSouth Corp. v. FCC*, 162 F.3d 678, 689 (D.C. Cir. 1998).[4] Section 271 bars each BOC from providing long distance services unless and until the local market is irreversibly open to competition. Specifically, section 271 requires that prior to long distance entry, the BOC must show both (1) that it has "fully implemented" the foregoing requirements of sections 251 and 252 and the rest of the statutory "competitive checklist" and (2) that the BOC's entry into the long distance market is otherwise consistent with the public interest. 47 U.S.C. §§ 271(c)(2)(B) & (d)(3)(A). As the FCC has previously held, Congress prohibited BOC entry into the long distance market prior to full implementation of these statutory requirements because the BOC otherwise would have an "unfair advantage" over long distance competitors in, *inter alia*, providing "combined packages" of local and long distance services to customers who desire this "one-stop shopping." *See AT&T Corp. v. Ameritech*, 13 F.C.C.R. 21438, ¶ 8 (1998). *See also In re Access Charge Reform*, CC Docket No. 96-262, First Report and Order, 12

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[4] *See also In re Application of Ameritech Michigan To Provide In-Region, InterLATA Services in Michigan*, CC Docket No. 97-137, 12 F.C.C.R. 20543, ¶¶ 85, 391 (1997) ("*Michigan Order*") ("Although Congress replaced the MFJ's structural approach, Congress nonetheless acknowledged the principles underlying that approach – that BOC entry into the long distance market would be anticompetitive unless the BOC's market power in the local market was first eroded by eliminating barriers to entry.").

F.C.C.R. 15982, ¶ 278 (1997) (BOC long distance entry before local market is open reinstates the anticompetitive incentives that historically repressed competition in the long distance market).

Most pertinently for present purposes, the FCC has held that efficient local entry cannot occur and that BOCs will have these "unfair advantages in the provision of long distance and bundled [local and long distance] services" unless competitors can lease BOC network elements at rates that represent the same economic costs that the BOC incurs when it uses these network elements in offering its own local services.[5] The FCC thus held that it will not grant a BOC long distance authority unless: (1) the BOC demonstrates through detailed cost studies that its network element rates represent the BOCs' economic costs; and (2) the rates allow "efficient [local] entry" to occur. *Michigan Order* ¶ 287.

In Massachusetts, there is virtually no use of unbundled network elements to provide service to residential customers.[6] Indeed, apart from the minority of the Commonwealth's residents fortunate enough to have access to cable telephony services, there is virtually no residential competition whatsoever. The reason is that Massachusetts' unbundled network element rates – and in particular the rate for unbundled local switching – are not cost-based and, as a result, preclude competitors from receiving sufficient margins to offer alternatives to Verizon's local services.

The record in particular showed that Verizon's switching rate is more than double the rate the Commission recently approved in Kansas, Oklahoma and Texas, where the local BOC

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[5] *Michigan Order* ¶ 287.

[6] Less than 0.3% of the Commonwealth's residential consumers receive UNE-P service. *See Order* ¶ 41 n.112 (8000 residential UNE-P customers).

purchases the same switches that Verizon purchases in Massachusetts. It is also double Verizon's own switching rates in Pennsylvania, and more than double the rates in other states where rates permit competition to develop.[7]

Given the weight of this evidence, it is not surprising that every participant in the administrative proceeding that addressed pricing (other than the Massachusetts DTE and Verizon itself) concluded that Verizon's pricing was not cost-based, and urged the Commission to reject the application on that ground.[8] Most notably, the Department of Justice, whose recommendation is entitled to "substantial weight," 47 U.S.C. § 271(d)(2)(A), determined that there is little use of UNE-P in Massachusetts and that there is "substantial reason to believe" that this is caused by Verizon's failure "to make certain network elements available to competitors at cost-based prices." *DOJ Eval.* at 17. It was especially critical of the fact that "there is no underlying documentation to show . . . that the new rates are cost based in Massachusetts." *Id.* at 20. The Massachusetts Attorney General similarly urged that the application be rejected because "unrebutted evidence suggest[s] that Verizon's UNE switching prices were excessive, not TELRIC-based, and created a price squeeze that served as a barrier to entry for competitors."[9]

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[7]*See, e.g.,* WorldCom April 5, 2001 Ex Parte Filing (attachment); *Order*, Dissenting Statement of Commissioner Tristani, at 2.

[8]*See* Mass. Attorney General Evaluation at 8 (filed Feb. 6, 2001); AT&T Corp. Comments (filed Feb. 6, 2001); Sprint Corp. Comments at 8-11 (filed Feb. 6, 2001); Ass'n of Communications Enterprises Comments at 13-15 (filed Feb. 6, 2001); WorldCom Comments (filed Feb. 6, 2001); Evaluation of the United States Department of Justice, *In re Application of Verizon New England Inc., et al. To Provide In-Region, InterLATA Services in Massachusetts*, CC Docket No. 00-176 at 17 (filed Oct. 27, 2000) ("*DOJ Eval.*"). *See also* Evaluation of the United States Department of Justice, at 3 n.9 (filed Feb. 21, 2001) (adopting Oct. 27, 2000 filing).

[9]Mass. Attorney General April 11, 2001 Ex Parte Filing at 1.

The Commission disputed none of this but, as if against its own better judgment, felt constrained to allow Verizon into its long distance market anyway, based on an insupportable sense of the force of its own outdated precedent. With all but one Commissioner expressing serious concerns about Verizon's switching costs, the Commission concluded that Verizon nevertheless held a trump card: the rates were the same as New York's 1997 rates, and in 1999 the FCC had found those rates to be cost-based in granting Verizon-New York's section 271 application.[10] Therefore, in the FCC's view, the only issue properly before it was whether "Verizon can demonstrate that its switching costs in Massachusetts are the same or higher than in New York." *Order* ¶ *22.* Concluding that the costs are essentially the same, the Commission accepted the rates as cost-based. *Id.* ¶ 27. The discussion of pricing, which appears at *Order* ¶¶16-42, accordingly contains no discussion of Verizon's switching costs or the extent to which those costs are reflected in its rates.

In a separate statement Chairman Powell acknowledged that concerns about the switching rate were not "idle," and qualified his affirmance with various "caveats," but in the end concluded he was "constrained" to accept the rates because they were the same as New York's.[11] Commissioner Ness, who cast the deciding vote, indicated she did so "with trepidation," "[n]otwithstanding serious reservations about Verizon New England's pricing of unbundled network elements," and with "significant misgivings" about the legality of the

[10] *In re Application of Bell Atlantic New York for Authorization to Provide In-Region, InterLATA Services in New York,* CC Docket No. 99-295, Memorandum Opinion and Order, 15 F.C.C.R. 3953 (2000) ("*NY Order*"), *aff'd, AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[11] *Order*, Separate Statement of Chairman Powell, at 2.

Commission's approach to its pricing evaluation.[12] She warned that "[p]arties should be forewarned that they should not rely on outdated rates in future applications." *Id.* at 2. Commissioner Tristani dissented outright, concluding that:

> By allowing Verizon simply to mirror rate levels set four years ago in another state and subject to imminent revision, the Commission has undermined the rigor of its 271 process. . . . The record that supported Verizon's New York 271 application in 1999, based on a pricing docket completed in 1997, is not adequate to support Verizon's case in Massachusetts today. The New York Public Service Commission (NYPSC) is expected to revise the New York rates this summer, after it completes its review of additional information regarding the cost of unbundled local switching. The NYPSC adopted the current rates at a time when there was comparatively little experience with TELRIC pricing. Since the New York application was adopted, however, the Commission has acquired additional information about the pricing of switching in particular. The applications that the Commission has approved since that time reflected rates for the per-line, per-month cost for switching, transport and signaling that – based on WorldCom's usage assumptions – are roughly half of New York's rates. . . . At a minimum, such comparisons support the need for additional information to ensure that the Massachusetts switching rate is within the range that reasonable application of TELRIC principles would produce.

Order, Dissenting Statement of Commissioner Tristani, at 1-2.

Moreover, in reaching its conclusion, the FCC majority did not dispute that it was economically impossible for any carrier that needed to lease these overpriced network elements to compete with Verizon, since the margin between a market retail rate and the price of the network elements was far too small to allow competitors to operate without losing money on each customer they serve. The FCC held that this fact is irrelevant because problems with the competitive margin might be caused by low retail rates, and not high element prices. Although this was plainly not the case in Massachusetts, where retail rates are high, not low,[13] the

[12] *Order*, Separate Statement of Commissioner Ness, at 1.

[13] In this regard, WorldCom had informed the Commission that it was providing UNE-P based residential service in two states with lower retail rates than Massachusetts – Illinois and Michigan.

Commission nonetheless stated that because it was unwilling to consider retail rates, it also was unwilling to consider whether competitors could participate in the local market. *Id.* ¶ 41.

In its public interest inquiry the FCC again refused to undertake any analysis of whether the local market was open, concluding instead that since it had found Verizon satisfied the checklist requirements, no further inquiry into the matter was permitted. *Id.* ¶ 234. As to the unrebutted evidence that there was in fact no residential competition in the majority of the Commonwealth, and no prospect of any competition developing, the Commission offered only speculation that "individual competitive LEC entry strategies might explain a low residential customer base," *id.*, even though the record contained uncontradicted evidence that competitors were to the contrary eager to enter the Massachusetts residential market using unbundled network elements, and would do so but for the unlawfully high network element prices. The Commission made no effort to address previous Orders which had held that the market inquiry it declined to make here was at the very heart of its responsibilities in addressing section 271 applications.

ARGUMENT

When reviewing stay motions, the Commission traditionally has followed the standards articulated by the D.C. Circuit. *See In re Virgin Islands Tel. Corp.*, CC Docket No. 90-124, 7 F.C.C.R. 4235 ¶ 13 (June 19, 1992). The Commission may grant a stay when (1) the movant is likely to prevail on the merits; (2) the movant will likely suffer irreparable harm absent a stay; (3) others will not be harmed if a stay is issued; and (4) the public interest will not be harmed. *See Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977) ("WMATC"); *In Re TCI TKR of Georgia, Inc.*, DA 00-406, Memorandum Opinion and Order, 15 F.C.C.R. 4451 ¶ 2 (2000). This case readily satisfies those standards.

I. APPELLANTS ARE LIKELY TO SUCCEED ON THE MERITS.

The basic purpose of § 271 is easily stated. Because a BOC could otherwise monopolize the provision of packages of local and long distance services, Congress barred each BOC from offering long distance service until such time as it is just as easy and economical for competing carriers to offer local telephone services throughout a state as it is for a BOC to offer long distance service. In particular, Congress recognized that the intense competition in the long distance services market meant that any BOC can immediately obtain wholesale long distance services at prices that represent the long run incremental cost of providing the service, and that the BOC can then provide retail long distance competitively by reselling the wholesale services. Congress similarly recognized that no carrier could immediately establish ubiquitous alternatives to the local facilities of BOCs, and that there are many parts of the nation where it will take years or decades to do so. Congress thus barred BOCs from providing long distance service unless and until they have allowed competitors to access the essential local facilities that they control – the unbundled network elements – at cost-based rates.

Section 271 thus bars the grant of long distance authority to a BOC unless and until the FCC has determined both: (1) that the BOC is making unbundled network elements available at rates that are based on the BOC's "cost" of providing the element (47 U.S.C. §§ 271(c)(2)(B)(ii), 252(d)(1)), and has "fully implemented" the rest of the competitive checklist, and (2) that the grant of authority is otherwise consistent with the public interest. § 271(d). In granting the Massachusetts application without considering the overwhelming weight of evidence proving that Verizon's switching rates were *not* cost-based, and holding that it is irrelevant whether broad-based local residential competition can develop in the state, the FCC violated these requirements, and departed without reasoned explanation from its prior decisions that interpreted them.

A. Massachusetts' Switching Rates Are Not Cost-Based.

Congress could not have made it clearer that the FCC cannot grant a BOC long distance authority unless the FCC first determines that the BOC has fully implemented all of the requirements of the "competitive checklist" of section 271(c)(2)(B). One of these requirements is that the BOC provide "nondiscriminatory access to network elements on an unbundled basis . . . on rates, terms, and conditions that are . . . in accordance with the . . . requirements of this section and section 252," 47 U.S.C. § 251(c)(3), which in turn requires that wholesale prices be "based on the cost" of "providing the . . . network element." *Id.* § 252(d).

The appropriate pricing of leased elements is perhaps the single most important issue in local telephone competition regulation. Pricing is the lynchpin of local competition because the most substantial economic barrier to competitive entry is the BOCs' control over extensive bottleneck facilities which, in many areas, competitive local exchange carriers ("CLECs") are unable to duplicate. *See Michigan Order* ¶ 386; *Local Competition Order* ¶¶ 10-11.[14] Congress understood that it was not enough merely to require BOCs to lease these facilities. Congress also required BOCs to lease unbundled elements to CLECs at cost-based rates, for if a BOC charges network element rates that exceed the costs the BOC itself incurs in using the elements, the result is a predatory "price cost" squeeze that forecloses entry. *Local Competition Order* ¶¶ 618, 630. As the FCC has held, "[n]ew entrants cannot compete effectively if . . . the price of unbundled network elements precludes efficient entry by not allowing new entrants to take

[14] *In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket 96-98, First Report and Order, 11 F.C.C.R. 15499, ¶¶ 10-11 (1996) ("*Local Competition Order*").

advantage of the incumbent's economies of scale, scope and density." *Michigan Order* ¶ 21.

Thus, while it left to states the authority to adjust prices in light of "'local technological, environmental, regulatory and economic conditions'" (*Michigan Order* ¶ 291(citation omitted)), the FCC determined it was "critical . . . to establish among the states a common, pro-competition understanding of the pricing standards." *Local Competition Order* ¶ 618. The FCC accordingly adopted a forward looking measure of cost called TELRIC. Because "[d]etermining cost-based rates has profound implications for the advent of competition in the local markets and for competition in the long distance market" (*Michigan Order* ¶ 287), the FCC has repeatedly held that it cannot and will not grant a section 271 application unless it independently determines that the BOC "has in fact . . . priced . . . unbundled network elements . . . in accordance with the pricing requirements set forth in section 252(d)." *Id.* ¶ 282.

Prior to the decision granting SBC's section 271 applications in Kansas and Oklahoma which is currently being challenged at the D.C. Circuit on pricing grounds,[15] the Commission followed two principles in making pricing determinations in section 271 proceedings. *See, e.g.*, *NY Order* ¶ 237; *Texas Order* ¶ 91.[16]

First, the FCC held that to be "cost-based," rates had to be supported by cost studies proving that the rates in fact represent the cost of providing the leased elements, taking into account the particular circumstances present in each state. The FCC thus specifically held that

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[15] *In re Joint Application by SBC Communications Inc. for Authorization to Provide In-Region, InterLATA Services in Kansas and Oklahoma,* CC Docket No. 00-127, Memorandum Opinion and Order, FCC 01-29 (Jan. 2000) *("KS/OK Order"), pet'n for review pending, E.Spire Communications v. FCC*, Nos. 01-1084 et al. (D.C. Cir. filed 2001).

[16] *In re Application by SBC Communications Inc. for Authorization to Provide In-Region, InterLATA Services in Texas*, CC Docket No. 00-65, Memorandum Opinion and Order, 15 F.C.C.R. 18354 (2000) ("*Texas Order*").

each state is "oblig[ed] . . . to determine prices on its own," and for the FCC "to conduct [its] review," a BOC must include in its application detailed information concerning how unbundled network element prices were derived. *Michigan Order* ¶ 291.

Second, the FCC held that it is critical whether the BOC's rates in fact allow competitive entry. The FCC held that "it is not the label that is critical in making our assessment of checklist compliance, but rather what is important is that price reflect TELRIC principles and result in fact in reasonable, procompetitive prices." *Michigan Order* ¶ 290. "Because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit efficient entry." *Id.* ¶ 287.

The FCC has now abandoned both of these principles without any explanation. The FCC has found that a BOC has satisfied the Act's pricing requirements without relying on any evidence that shows that its critical UNE switching prices are based on its costs. In its advocacy supporting its application, Verizon never once attempted to show through cost studies or analysis of its switching costs that its switching prices were based on the costs it incurs in providing switching. Nor did it ever attempt to rebut the substantial evidence on the record that Verizon's rates were over *double* its costs. *See Order*, Dissenting Statement of Commissioner Tristani, at 2. Specifically, CLECs showed that in other states where rates were based on defensible cost-studies (and where Bell Companies purchase the same switches that Verizon purchases at similar prices), the switching rates were half of Verizon's. They showed that using the very same methodology that New York used to set the rate adopted by Massachusetts, but substituting a more complete and recent sample of switch purchases, the rate would be half of Massachusetts'. They showed that even using the FCC's own calculation of switching costs (used for the purpose of establishing universal service subsidies), the rate would be half of Massachusetts'.[17]

The Commission did not even attempt to harmonize these record facts with its conclusion that Massachusetts' rates were cost-based. Indeed, if there were really any doubt that the Commission well understands that Massachusetts' switching rates do not fairly reflect its costs, it was laid to rest three days after it published the *Order*, when it released another local competition order in which it established a national cost-based switching rate for purposes of reciprocal compensation payments between carriers. There the Commission set switching rates at less than one-tenth of a cent for each minute of switch use to reflect cost and establish the correct incentives for local competition.[18] The Massachusetts rates for use of the very same switches were *five times* higher than that, averaging one-half cent for each minute of use.

Notwithstanding these facts, with one commissioner dissenting and another expressing "significant misgivings" about the Commission's approach, by one vote the Commission approved the application based entirely on the fact that the rate in question was the same as the rate previously approved in New York, and, according to the Chairman, "we cannot properly reject an application from one state that is consistent with precedent [from another state]." *Order*, Separate Statement of Chairman Powell, at 2. Thus the Commission concluded that so

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[17] *See* Tristani Statement (summarizing evidence); WorldCom Comments (filed Feb. 6, 2001) Attachment A, Declaration of Chris Frentrup ("Frentrup Decl."). The FCC refused to consider its own switching cost calculations on the ground that the rates were generated for use in a proceeding in which the Commission relied on them to compare costs among states. *Order* ¶ 32. But as part of that proceeding, the FCC calculated the cost of switching, based on its own extensive review of switching contracts. Its refusal to consider the results of that study here was arbitrary and capricious.

[18] *Implementation of the Local Competition Provision in the Telecommunications Act of* 1996, CC Docket No. 96-98; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68 Statement of Chairman Michael K. Powell (Apr. 19, 2001) (rate capped at $0.0007/minute of use).

long as rates in another state which had at one time been found to be lawful "are still in effect," the Commission has no choice but to accept them as cost-based in another state, even in the face of overwhelming evidence to the contrary that was not on the record when the Commission previously considered the rate. *Order* ¶ 27. In the Commission's view, the *only* factor it could consider before conclusively accepting a previously approved rate is whether the two states have similar geographies and rate structures. *Id.* This was so, the Commission concluded, even though New York was in fact just weeks away from changing its switching rates, thus making the FCC's finding that Verizon-Massachusetts satisfied the competitive checklist turn entirely on the fortuity that the 90-day review period for the Massachusetts section 271 application concluded shortly before, rather than shortly after, New York adjusted its rates.

The Commission's rationale is arbitrary, capricious and contrary to law. To begin, it is a complete and unexplained departure from its previous rulings on this issue. In earlier section 271 applications, the Commission required that each state is "oblig[ed] . . . to determine prices on its own." *Michigan Order* ¶ 291. In its recent *Kansas-Oklahoma Order*, the Commission departed from this rule, concluding that a state may rely on rates in another state with similar geography and rate structure. But in that order the Commission held that such evidence would establish only a *rebuttable* presumption of compliance *"in the appropriate circumstances."* *KS-OK Order* ¶ 82 n.244 (emphasis added). Competitors could then rebut that prima facie case and demonstrate that circumstances exist which should lead the Commission not to rely on the other state's rates.

Here, the Commission has gone further still, again without explaining its change of heart, and ruled that the existence of approved rates in one state is *conclusive and irrebutable proof* that rates in another state with similar geography and rate structures are cost-based, no matter how overwhelming the record evidence to the contrary that the rates in fact are greatly in excess of the BOC's cost. *See Order* ¶ 22 ("Under this standard, Verizon's October 13th rates will be found to be TELRIC-compliant if Verizon can demonstrate that its switching costs in Massachusetts are the same or higher than in New York."). It was only for that reason that the Chairman believed that he was "constrained to approve the rate." *Order*, Separate Statement of Chairman Powell, at 2.

But the Commission's dilemma was entirely of its own making, resulting from application of an irrational irrebutable presumption that conclusions made at one place and at one time based on one record must inexorably apply in a different place in a different time on a different record. No adjudicative body treats its own fact-based conclusions with such blind reverence. To the contrary, it is the height of arbitrary and capricious rulemaking for an agency to act in disregard to the record before it in such a manner. While the decision approving New York rates obviously is relevant to an assessment of Verizon Massachusetts' similar rates, it simply cannot be dispositive.

Here, two closely-related sets of considerations make the Commission's refusal to consider any evidence that Verizon's rates are not cost-based especially irrational.

First, as previously indicated, there was overwhelming evidence on the record that Massachusetts' rate was fully *double* a true cost-based rate. The Bell companies all purchase the same switches from the same few switch vendors. Switch prices do not vary across the country, and neither should switching rates.[19] The same switches do not cost Verizon twice as much to

[19] As the Commission correctly noted, there should be small differences in switching rates based on population density, but the record makes clear that such differences could account for only differences in the range of a few percentage points. *See Order* ¶ 25 (5% difference between New York and Massachusetts). *See generally Federal-State Joint Board on Universal Service*, CC

purchase and operate in Massachusetts as they do in Pennsylvania, or twice as much as SBC spends in Texas, Kansas, Oklahoma, or throughout its Ameritech region. The Commission failed to explain how Massachusetts' rates could be cost-based when it had just recently found rates half of Massachusetts' cost-based in Texas, Kansas and Oklahoma. Reliance on the observation that the Commission expects rates to fall within a "reasonable range" of each other, *see Order* ¶ 20, 27, hardly justifies such a discrepancy: rates that vary by more than 100% when they are based on costs that ought to be virtually identical obviously have not fallen within "a reasonable range." It is no wonder that the Commission never tried to show that there really was a relationship between Massachusetts' rates and its costs.

Second, even a cursory glance at the proceedings at which New York set its rates in 1997 (and at the FCC's rationale for accepting those rates in 1999) should have led the Commission to conclude that the rate was not a reliable reflection of costs given what was known in 2001 when the FCC approved the Massachusetts rate.

To begin, the New York State Public Service Commission ("NYPSC") was under the erroneous impression, based on Verizon's misrepresentation, that large switch discounts are not routinely given to switch purchasers.[20] Neither the NYPSC nor the FCC had any way to know the significance of that error when they approved the rate. *Id.* at 10. The record in

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Docket No. 96-45, Ninth Report and Order and Eighteenth Order on Reconsideration, 14 FCC Rcd 20432, 20455 et seq. ¶¶ 41 et seq. (1999) (setting out small differences in switching costs).

[20] *See Order Denying Motion to Reopen Phase 1 and Instituting New Proceeding*, Case No. 95-C-0657, at 9 (NYPSC Sept. 30, 1998) (*New York Rehearing Pet'n*) ("our analysis also made judgments that relied on assumptions regarding the level of vendor discounts, and the newly available information . . . might have had a bearing on those judgments").

Massachusetts to the contrary precisely quantified the scope of the error.[21]

Moreover, in 1997 New York (and the FCC) had to rule based on an incomplete record consisting of two "seriously flawed" cost studies, *New York Rehearing Pet'n* at 3, and without the benefit of the far more sophisticated cost-studies now available. It also was unable to compare its conclusions to the conclusions reached by other state commissions, since it was one of the first commissions to set rates. Indeed, it was the lack of more reliable information which led New York to delay its reconsideration of switching rates until 2001, *id.* at 10, and led it to label its switching rates "temporary." *Id.* at 12. Since 1997, other state commissions, including Pennsylvania, Illinois, Michigan, Texas and Kansas, have relied on more recent data to adopt switching rates that are effectively about one-half or less than the New York rates. Nor was New York or the FCC able to compare its conclusions to those reached by the FCC itself in its universal service proceeding. Thus the NYPSC was able to sample only 33 switches purchased in 1993 and 1994 in concluding that switches cost $193 per line. But by October 2000, when the Massachusetts DTE approved Verizon's new rates, the FCC had analyzed 1,085 switch purchases dating from 1989-1996, and the undisputed record evidence before the FCC was that using the very same methodology used by the NYPSC in 1997, switches cost on average $117 per line. All of this information was on the record in this Massachusetts proceeding.[22] None of it was on the record in the New York proceeding.

When the FCC approved Verizon's New York application, moreover, it did so based on the NYPSC's commitment to revise the rate, as well as on the reasonableness of the NYPSC's

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[21] *See* Frentrup Decl. ¶¶ 6-7.

[22] Frentrup Decl. ¶¶ 10-16.

original conclusion that the rates were cost based given the evidence available to it at the time it approved them. *NY Order* ¶ 245. The Commission "stress[ed] that we place great weight on the New York Commission's active review and modification of Bell Atlantic's proposed unbundled network element prices," *id.* ¶ 238, and concluded that a grant was appropriate only because the NYPSC "'appropriately exercised its power to take account of conditions in New York' when it determined switching costs." *Id.* ¶ 245 (quotation and citation to NYPSC omitted).

None of these factors apply to consideration of Massachusetts rates today. Massachusetts did not adopt the rate as "temporary" subject to modification because of acknowledged defects. Moreover, one of the "conditions in New York" to which the NYPSC and the FCC referred was the fact that existing UNE rates in New York "provid[e] ample margin to competitors even at their present levels." *New York Rehearing Pet'n* at 12. The unrebutted evidence here is that Massachusetts' rates erect an unpassable barrier to competition.[23] And when the D.C. Circuit approved the FCC's New York decision, it too observed how closely linked the FCC's judgment was to the record of the New York case, cautioning that rates would often need to be adjusted to reflect newly discovered information. *AT&T Corp. v. FCC*, 220 F.3d 607, 617 (D.C. Cir. 2000). Even Verizon itself, in a filing brought to the FCC's attention, recently acknowledged that "over three years of regulatory evolution, additional data, and thoughtful consideration of alternative

[23] As the record before the FCC in Massachusetts makes clear, this is partly because retail rates in the two states are different, and partly because greatly increased switch usage since the time of the New York Order make errors in the usage-sensitive switching rate far more significant today than at the time of the *New York Order*. WorldCom Reply Comments in CC Docket No. 00-176 (filed Nov. 3, 2000), Attachment C, Joint Reply Declaration of A. Daniel Kelley and Richard A. Chandler ¶ 4.

approaches" rendered the old New York switching rates unreliable today.[24]

It was the overwhelming weight of *these* factors, and not "merely because [the New York] rates are under some form of challenge or review," *Order* ¶ 31, that should have led the Commission at least to consider other evidence that the rates are not cost-based. Nor is the Commission's repeated assertion that its *N.Y. Order* was correctly decided at the time, *see, e.g.*, *Order* ¶¶ 31, 33, an answer to this claim. The issue is not whether in 1999 the FCC correctly concluded that based on the evidence before it then (and based on the evidence on the NYPSC record closed in 1996) the New York switching rates were cost-based. Instead, the question is whether in 2001, based on the evidence on the record *in this proceeding*, it was reasonable for the FCC to conclude that those same rates fairly reflect the cost of switching in Massachusetts today. All evidence proves that it was not. WorldCom is likely to succeed on the merits in showing that the FCC's failure even to consider that evidence is reversible error.[25]

B. The FCC Erroneously Failed To Consider Whether Massachusetts' Rates Permit Competition to Develop.

WorldCom is also likely to succeed in proving that the FCC erred in failing to consider whether Massachusetts' unbundled network element pricing constituted an unpassable barrier to entry that will keep ubiquitous local residential competition from developing in Massachusetts. The Commission had previously insisted that "because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition, we cannot conclude that the checklist has been met if the prices for interconnection and unbundled elements do not permit

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[24] Initial Post-Hearing Brief of Verizon-New York, Inc. in Case 98-C-1357 (NYPSC, Feb. 16, 2001).

[25] Although it is unnecessary for purposes of this stay motion, in its appeal WorldCom intends to show that the FCC also erred in concluding that Verizon's loop rates are cost-based.

efficient entry." *Michigan Order* ¶ 287. If rates do not permit competitors to enter the market, that powerfully suggests that the rates are not cost-based.

Yet here the Commission did not deny that the Massachusetts rates are so high that no competitor could economically compete in the states using leased elements, or that virtually no residential competition using leased elements exists in the Commonwealth because of UNE prices. Instead, without adequate explanation, the FCC reversed course and concluded that it is irrelevant "whether a competitor can make a profit by entering the market" and whether efficient entry can occur. *Order* ¶¶ 234-235.[26] It therefore refused even to consider the competitive effect of Verizon's prices in assessing whether the rates are cost-based. WorldCom is likely to succeed on the merits and establish that this ruling is arbitrary, capricious and contrary to the law.

For the same reason, the Commission's conclusion that granting Verizon's section 271 application furthered the public interest is arbitrary and capricious. Even if the competitive checklist had been met, section 271 requires the FCC separately to determine whether long distance authority is consistent with the public interest. *See* 47 U.S.C. § 271(d)(3)(C). That inquiry requires the FCC to consider whether the local market is irreversibly open, and the FCC consistently maintained that the "focus" of the public interest inquiry must be "the status of

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[26] The Commission misreads its own precedent, and states that its previous reference to "efficient entry" was simply meant to be a synonym for "cost-based rates," so that once it has determined that rates are cost-based, it need no longer concern itself with whether entry is possible. *Order* ¶ 42. But the very sentence it the *Michigan Order* to which it refers expressly states that pricing must permit entry "because the purpose of the checklist is to provide a gauge for whether the local markets are open to competition."

An identical error infects the *KS/OK Order*, which is currently before the D.C. Circuit on this ground. *KS/OK Order* ¶ 92; *see also id.* ¶ 65. In that Order as well, the Commission violated its duty of reasoned decision making by departing from its prior holdings without any reasoned explanation. *See, e.g., AT&T Corp. v. FCC*, 236 F.3d 729, 737 (D.C. Cir. 2001); *Bell Atlantic Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996).

market-opening measures in the relevant local exchange market." *Michigan Order* ¶ 385. As the FCC stated in the New York and Texas Orders, in its public interest determinations it "must review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open." *Order* ¶ 233. Because "efficient competitive entry into the local market is vitally dependent upon appropriate pricing of the checklist items" (*Michigan Order* ¶ 281), competitive pricing obviously is "a relevant concern in [the FCC's] public interest inquiry under Section 271(d)(3)(C)." *Michigan Order* ¶ 288.

Here, however, the FCC has abandoned its previous conclusion that pricing is a public interest concern. Instead, with stunning circularity, the FCC, having just concluded that it would not consider whether rates are a barrier to entry in making its checklist determination that the rates are cost-based, refused to consider that same question under the public interest test, on the ground that checklist compliance alone establishes "that barriers to competitive in the local markets have been removed." *Order* ¶ 234. That effectively reads the public interest inquiry out of the statute.

The net result of the FCC's checklist and public interest holdings is to authorize precisely what section 271 is designed to prevent: grants of BOC long distance authority without any consideration of whether there can be effective statewide local competition. Here, Verizon has been allowed to enter the long distance market in Massachusetts without the Commission ever addressing the question whether the local residential telephone market is in any meaningful way "open to competition." In short, the section 271 analysis in the *Order* is entirely divorced from the competitive analysis that is required by section 271's terms and purposes, and by the FCC's own prior decisions. For this reason as well WorldCom is likely to succeed on the merits in proving that the FCC's order is arbitrary, capricious and otherwise contrary to law.

II. A STAY WOULD AVOID IRREPARABLE HARM TO APPELLANTS AND SERVE THE PUBLIC INTEREST.

It irreparably harms long distance carriers, and subverts the public interest, to allow a BOC to provide long distance service before its local markets have been opened and there can be broad-based alternatives to the BOC's local services in that state. *See AT&T Corp. v. Ameritech Corp.*, File No. E-98-41, Memorandum Opinion and Order, 13 F.C.C.R. 14508 (1998) (granting "standstill order"). The FCC's decision to allow Verizon to enter the Massachusetts long-distance market while its local markets remain tightly shut causes grave and irreparable harm to competitors in three respects. It will also harm the public interest.

First, by prematurely granting Verizon's application, the *Order* will cause WorldCom to lose revenues and profits that it will never be able to recover.[27] This is so because many consumers prefer to obtain local and long distance service from a single source, and the *Order* gives Verizon the ability to provide those bundled services to residential customers while WorldCom cannot. Harker Decl. ¶¶ 19-21. Because WorldCom will not be able to recoup its losses from either Verizon or the FCC if the *Order* is later vacated, there is no possibility of "adequate compensatory . . . relief at a later time." *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir 1985). In this regard, it is well settled that where, as here, unrecoupable losses will result from such "unfair competition" it epitomizes irreparable harm, *see Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929, 952 (D.C. Cir. 1976), not "mere economic injuries" from competition. *See WMATC*, 559 F.2d at 843 nn.2-3.

Second, even if WorldCom ultimately is able to enter the local market in Massachusetts

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[27] *See* Declaration of Victoria D. Harker (Attached) ("Harker Decl.") ¶¶ 4 19-21.