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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

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

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Reform of Access Charges Imposed by Competitive Local Exchange Carriers	)	

OPPOSITION OF AT&T CORP. TO TDS METROCOM, INC., PETITION FOR STAY PENDING RECONSIDERATION

Pursuant to Section 1.45(d) of the Commission's rules, 47 C.F.R. § 1.45(d), AT&T Corp. ("AT&T") submits this opposition to the Petition for Stay Pending Reconsideration of the Commission's Seventh Report and Order and Further Notice of Proposed Rulemaking[1] filed by TDS Metrocom, Inc. ("Metrocom") on June 28, 2001.

As stated at the outset of Metrocom's petition (pp. 1-2), Metrocom's petition is filed to support and urge the Commission to grant the emergency petition for stay previously filed by MPower Communications Corp. and North County Communications, Inc. on June 18, 2001 ("the MPower Stay Petition"). MPower and North County subsequently filed an emergency motion for stay of the Commission's *CLEC Access Charge Reform Order* with the United States Court of Appeals for the District of Columbia Circuit. That motion for stay was opposed by the Commission as well as by AT&T and Sprint on the grounds that there was no likelihood that the CLEC petitioners would succeed on the merits of their challenges to the Commission's *CLEC*

[1] *See* Seventh Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, FCC 01-146, CC Docket No. 96-262, ¶¶ 98-104 (rel. April 27, 2001) ("*CLEC Access Charge Reform Order*").

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List A B C D E

Access Charge Reform Order and no basis for the claim of the CLEC petitioners that they will suffer irreparable harm in the absence of a stay. Moreover, both the Commission and AT&T and Sprint showed that a stay would cause injury to the IXCs and would be clearly contrary to the public interest. Copies of the opposition filed by the Commission and by AT&T and Sprint are attached hereto as Exhibits 1 and 2, respectively.

On July 3, 2001, the Court of Appeals denied the petition for stay filed by MPower and North County. A copy of the Court's order is attached hereto as Exhibit 3. For the same reasons stated in the Commission's opposition to the previous petition for stay filed by MPower and North County, the Commission should deny Metrocom's petition for stay. For the most part, the claims raised by Metrocom track the claims made by MPower and North County that were rejected by both the Commission and the Court of Appeals. Moreover, the one claim that might be considered to be new – Metrocom's claim that as a result of a computer glitch the Commission did not consider its reply comments – does not come close to justifying the issuance of a stay. As an initial matter, the mere fact that Metrocom's reply comments were misdocketed does not mean that they were not reviewed and considered. In any event, it is beyond reasonable dispute that the Commission considered the matters addressed in Metrocom's reply comments and elected only to establish a narrow exception to the general rule with which Metrocom takes issue.[2]

Finally, Metrocom's petition for stay should also be denied as untimely. Metrocom did not file its request for a stay until over two months after the Commission released its *CLEC Access Charge Reform Order* even though all of the matters raised in its petition for stay should

[2] A further ground for denial is the amorphous nature of the requested relief which does not provide the Commission with any standard for determining what CLECs are "similarly situated."

have become fully apparent at that time. Further, Metrocom did not file its request for stay until over a week after the Commission's *CLEC Access Charge Reform Order* went into effect, and Metrocom made no mention of its intent to file a stay request in its petition for reconsideration of that Order. In these circumstances, there is no excuse for Metrocom's untimely stay request.

Respectfully submitted,

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July 5, 2001

Metrocom Petition at iii. Metrocom has also not presented sufficient evidence to establish irreparable harm.

Certificate of Service

I, Mark Trocinski, hereby certify that on this 5th day of July, 2001, that I caused a true and correct copy of the foregoing Comments of AT&T Corp., to be served on the following by hand-delivery and first class mail to the following addresses:

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/s/ Mark Trocinski
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Exhibit 1

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBA CIRCUIT

MPower Communications Corp.	)	
	)	
and	)	
	)	
North County Communications, Inc.,	)	
	)	
Petitioners	)	No. 01-1280
	)	
v.	)	
	)	
Federal Communications Commission,	)	
	)	
Respondent	)	

SUBSTITUTE RESPONSE OF THE FEDERAL COMMUNICATIONS COMMISSION TO PETITIONERS' EMERGENCY MOTION FOR STAY PENDING JUDICIAL REVIEW, OR, IN THE ALTERNATIVE, FOR EXPEDITED CONSIDERATION

INTRODUCTION

Almost two months after the Federal Communications Commission released its Seventh Report and Order in *Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, CC Docket No. 96-262, FCC 01-146 (released April 27, 2001) (the "*Order*"),[1] and two days after the *Order* became effective, petitioners MPower Communications Corp. and North County Communications, Inc. ("CLEC petitioners") filed an emergency motion for a stay of the *Order* pending judicial review.

The motion – filed on behalf of two competitive local exchange carriers ("CLECs") among the hundreds of CLECs affected by the *Order* – does not satisfy any

[1] A copy of the *Order* is located at tab A in the appendix of materials submitted by petitioners along with their motion.

of the four requirements for this Court to issue a stay.[2] In particular, the CLEC petitioners' arguments on the merits ignore much of the pertinent analysis and discussion in the FCC's *Order*, and, in any event, are unavailing. Furthermore, their claims of irreparable harm are at best overstated and may have no merit at all.[3] Notably, the CLEC petitioners' crucial assertion that they will lose revenues that cannot be recovered if they do not obtain a stay but nevertheless prevail on the merits ignores the authority of the Court in appropriate cases to require an agency to undo what was wrongfully done by virtue of a prior order. *See Natural Gas v. FERC*, 965 F.2d 1066, 1073 (D.C. Cir. 1992) (*citing United Gas Improvement Co. v. Callery Properties, Inc.*, 382 U.S. 223, 229 (1965)).

BACKGROUND

Local exchange carriers ("LECs") provide telephone service to subscribers in their service areas and exchange access service to long-distance companies. Exchange access connects a LEC's subscribers with long-distance or interexchange carriers ("IXCs") to permit those subscribers to make and receive long-distance calls. Without access, an IXC would be unable to furnish long-distance service. An IXC pays access charges to the LEC at each end of a call (the origination end and the termination end), as a cost of doing business that is passed on to long-distance customers as part of the rates they pay the IXC.

[2] In addition, as we show briefly below, the motion and its filing satisfy few, if any of the requirements for emergency motion practice in this Court.

[3] In the alternative, the CLEC petitioners ask for expedited review. Although the FCC has no interest in delaying this case, the CLEC petitioners have not justified expedited review under the applicable standards. *See* D.C. Circuit Handbook of Practice and Internal Procedures (2000), at 33.

The FCC has long regulated interstate access service to ensure that the charges for such service are just and reasonable. A result of this regulation has been a steady reduction in interstate access charges and, consequently, in the rates IXCs charge for interstate long-distance services. *See Order* at ¶ 8.

The Commission's access charge rules and policies originally contemplated competition only in long-distance service, and presupposed the continuation of monopoly local exchange services. With the adoption of the Telecommunications Act of 1996, however, competitive providers of local exchange service (CLECs) have entered many markets and have offered exchange access as well as local exchange service. The Commission originally required the CLECs to file tariffs offering access services to IXCs, but it largely left them free of rate regulation on the assumption that their small positions in their markets would not permit them to charge unreasonable rates.

As sound as that assumption was with respect to the CLECs' local service offerings, it has not worked for access services. Whereas individual telephone subscribers can choose a CLEC over an incumbent LEC ("ILEC") on the basis of price and other considerations, an IXC has no choice but to use the services of all the LECs in order to be able to provide long-distance service to all subscribers. An IXC needs access both to the party originating a call and to the party that is called. The CLECs soon discovered this market reality, and many of them imposed high access charges in order to recover a large part of their costs while charging low local exchange service rates in order to win subscribers. The IXCs' complaints about this development were the genesis of the order on review.

IXCs such as AT&T and Sprint pay access charges on a per-minute basis to the CLEC petitioners. Before the *Order* and its accompanying rule, 47 C.F.R. § 61.26 (the "Rule"), became effective, the CLEC petitioners tariffed and charged access rates of approximately seven cents per minute of use ("MOU"). Petitioners' Emergency Motion ("Motion") at 4. As the CLEC petitioners acknowledge, their access rates "are, and have always been, materially higher than the access rates charged by their chief competitors, large ILECs such as Verizon." *Id.* at 5.

Under the Communications Act and the Commission's implementing regulations, CLECs unilaterally set the rates for their access services by filing tariffs. And, "absent an agreement to the contrary or a finding by the Commission that the rate is unreasonable," IXCs are required to pay the published rate for tariffed CLEC access services. In its *Order*, the Commission noted that many CLECs charge access rates that "on the average, are well above the rates that ILECs charge for similar service." *Order* at ¶ 22.

The Commission explained that the CLECs' ability to charge above-market rates is due to two principal factors: "First, although the end user chooses [its] access provider . . . the access charges are paid by the caller's IXC . . . ." *Order* at ¶ 31; *see also Order* at ¶ 28 (describing particular "difficulties presented by the case of terminating access, where the called party is the one that chooses the access provider, but it neither pays for terminating access service, nor does it pay for, or choose to place, the call"). In this situation, since the end user does not have to pay the access charges, it has no incentive to choose to take service from the LEC that offers the lowest access charge. *Order* at ¶ 31.

The second factor is that the "the Commission has interpreted section 254(g)"[4] – which addresses carriers' universal service obligations – "to require IXCs geographically to average their [long-distance service] rates and thereby to spread the cost of both originating and terminating access over all their end users." *Order* at ¶ 31. As a result. "IXCs have little or no ability to create incentives for their customers to choose CLECs with low access charges." *Id.* Furthermore, an IXC can achieve access to an end user only through the CLEC that end user has selected as a carrier. As the Commission explained, "once an end user decides to take service from a particular LEC, that LEC controls an essential component of the system that provides interexchange calls, and it becomes the bottleneck for IXCs wishing to complete calls to, or carry calls from, that end user." *Order* at ¶ 30.

The Commission found that many CLECs have taken advantage of that environment to charge IXCs unreasonable access rates, thereby profiting from the available arbitrage opportunity. *Order* at ¶ 34. The Commission identified a number of harmful consequences resulting from the CLECs' actions. It noted that competition in the long-distance market may be distorted as "some CLECs" inappropriately may "shift onto the long distance market . . . a substantial portion of [their] start-up and network build-out costs." *Order* at ¶ 33; *see also id.* at ¶¶ 22, 39, 59. In addition, the Commission

[4] 47 U.S.C. § 254(g) provides: "Within 6 months after February 8, 1996, the Commission shall adopt rules to require that the rates charged by providers of interexchange telecommunications services to subscribers in rural and high cost areas shall be no higher than the rates charged by each such provider to its subscribers in urban areas. Such rules shall also require that a provider of interstate interexchange telecommunications services shall provide such services to its subscribers in each State at rates no higher than the rates charged to its subscribers in any other State."

stated that the absence of a competitive market for access service "may promote economically inefficient entry into the local markets." *Order* at ¶ 33.

The Commission also expressed concern about the response to the current situation by IXCs, who have primarily exercised self-help. *Order* at ¶ 23. The Commission stated:

> We are concerned that the IXCs appear routinely to be flouting their obligations under the tariff system. Additionally the IXCs' attempt to bring pressure to bear on CLECs has resulted in litigation both before the Commission and in the courts. And finally, the uncertainty of litigation has created substantial financial uncertainty for parties on both sides of the dispute. This uncertainty, in turn, poses a significant threat to the continued development of local service competition, and it may dampen CLEC innovation and the development of new product offerings.

Id. See also Order at ¶ 25.

In order to address the problems arising from CLEC access charges and the IXCs' responses to those charges, the Commission requested and received comments from parties on all sides of the issues.[5] In this proceeding, some IXCs requested that the Commission "immediately set CLEC tariffed rates at or near the rates of the ILEC operating in the CLEC's service territory." *Order* at ¶ 36. In contrast, "citing their high start-up costs and greater per-minute cost of providing service, many CLECs have argued that they should be permitted to tariff rates at whatever level, in their view, is necessary to recovery their costs." *Id.*

The Commission acknowledged that it was necessary to limit the extent to which CLECs exercise their monopoly power, *see Order* at ¶ 39, but it was "reluctant to flash-cut CLEC access rates to the level of the competing ILEC," since an immediate dramatic

[5] In fact, the Commission has requested and received comments on these issues in several proceedings. *See Order* at ¶ 1 n.1 (describing proceedings).

reduction in access revenues would be disruptive to many CLECs. *Order* at ¶ 37. Accordingly, the Commission adopted an interim benchmark scheme, which set maximum access rates that CLECs may impose through their tariffs. The initial benchmark is 2.5 cents per MOU, and it is scheduled to reduce over a transition period of several years to the level of the ILEC rates. 47 C.F.R. § 61.26(b), (c); *Order* at ¶¶ 3, 4, 45.

The benchmark rate in effect at any given time in the transition is the highest rate a CLEC may file in a tariff unless the ILEC in the market for which the tariff is filed has a rate that is above the benchmark. In that case, the CLEC may file a tariff up to the ILEC rate. A CLEC unwilling to file a tariff at the benchmark (or ILEC) rate may not file an access tariff at all, but must negotiate with individual IXCs to establish access charges.

In addition, the rule provides that a CLEC beginning to serve customers in a Metropolitan Statistical Area ("MSA") where the CLEC has not previously served customers may not tariff an access rate higher than the rate charged by the competing ILEC in that MSA, without reference to any transition benchmarks. 47 C.F.R. § 61.26(d).

In arriving at the initial benchmark of 2.5 cents, the Commission stated that it drew "support for th[e] initial benchmark level from a consensus solution submitted by parties on both sides of the present dispute." *Order* at ¶ 50. Specifically, the Association for Local Telecommunications Services ("ALTS") – an organization that "represents over '200 companies that build, own, and operate' competitive facilities-based networks," *see*

Order at ¶ 50 - - and WorldCom, a major IXC, had suggested 2.5 cents per minute as a reasonable starting benchmark rate in some markets.[6]

At the end of the four-year transition – unless the FCC in the meantime has adopted more general rules to govern intercarrier compensation – CLECs would be limited to ILEC rates or rates negotiated with individual IXCs.

The Commission released its *Order* on April 27. The CLEC petitioners did not seek reconsideration of the *Order*. Instead, on May 25, 2001 several CLECs - - but apparently not the CLEC petitioners – submitted an ex parte letter to the Commission, in which they requested a stay on the grounds that these CLECs would not be able to bill access charges on an MSA-specific basis. Letter from Jonathan E. Canis to Magalie R. Salas, dated May 25, 2001, at 1.[7] Then, on June 18, 2001, two days before the *Order* was to become effective, the CLEC petitioners filed an emergency petition with the Commission to stay its *Order*, asking for a ruling by June 20. The CLEC petitioners moved their proceedings to this Court on June 22, requesting an emergency stay even though the *Order* already had become effective.[8]

---

[6] "While ALTS suggests a different timeframe for reducing the safe harbor limit over time, we find its support for the initial rate to be a fair indicator of its reasonableness." *Order* at ¶ 50.

[7] A copy of the letter is located at tab B in the appendix of materials submitted by the CLEC petitioners along with their motion.

[8] The CLEC petitioners served only the FCC and the Justice Department, even though the IXCs were vitally interested in this matter. They also did not call agency counsel, as required by Rule 18(a)(2) of the Rules of this Circuit. Nor have they explained why they manufactured the emergency situation by asking for a stay almost two months after release of the order on review and then arbitrarily picking June 29 as the deadline for the Court to act. June 29 is a meaningless date under the *Order*, which took effect on June 20. The CLEC petitioners assert that they were "specifically instructed" by the FCC not to file a stay motion. The FCC, of course, has no authority to "instruct" a party not to

ARGUMENT

A party seeking a stay of agency action must demonstrate that: (1) it will likely prevail on the merits; (2) it will suffer irreparable harm unless a stay is granted; (3) other interested parties will not be harmed if a stay is granted; and (4) grant of a stay will further the public interest. *E.g.*, *Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc.*, 559 F.2d 841, 843 (D.C. Cir. 1977). In this case, however, the CLEC petitioners are not simply seeking a stay that would preserve the status quo. Instead, they are seeking suspension of an order that already has taken effect without providing any justification for not having sought relief earlier.

The Court should be particularly circumspect about granting the sort of affirmative injunctive relief that petitioners seek. Such a drastic and disruptive remedy "should be used sparingly and only in the most critical and exigent circumstances" where "the applicants' right to relief [is] indisputably clear." *Graddick v. Newman*, 453 U.S. 928, 937 (1981) (Powell, J., in chambers) (internal quotations omitted). The CLEC petitioners have not come close to showing that they have an "indisputably clear" right to extraordinary injunctive relief.

I. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS

The CLEC petitioners raise five challenges to the Commission's *Order* and accompanying Rule. Implicit in their claims is the assumption that they have the right to continue to take advantage of arbitrage opportunities in the Commission's former access charge regime. The existence of those opportunities – and the CLEC petitioners' goal of continuing to profit from them – is inconsistent with the pro-competition goals of the

exercise its equitable options, and the CLEC petitioners have not identified how or when they received such instructions.

1996 Act. *Order* at ¶¶ 33-34. As a full and fair reading of the *Order* demonstrates, none of the CLEC petitioners' claims has any merit.

1. The CLEC petitioners first claim that the Commission's benchmark access rates were chosen arbitrarily; they argue that the Commission relied upon flawed data, that there was no basis for the 2.5 cent benchmark; and that there was no justification for the rate of annual reductions. Motion at 7-8. These arguments are based upon a misreading of the Commission's *Order*.

The Commission gathered information from "several sources" in developing its understanding of CLEC access rates, and concluded that the "best, most comprehensive information available" was submitted by IXCs. *See Order* at ¶ 47. The CLEC petitioners should not be heard to complain about the Commission's methods since, below, neither they nor any other CLECs submitted "any data to justify their rates" and "relied upon generalized assertions that their rates are justified by higher costs." *Order* at ¶ 46 n.104.[9]

More importantly, the CLEC petitioners ignore the Commission's analysis of the data and its reasoning for adopting an initial benchmark of 2.5 cents per MOU. *Order* at ¶¶ 48-50. The Commission selected this benchmark on the basis of its review of the tariffed access rates being charged to AT&T, Sprint and WorldCom, elaborating that "[t]his rate is within the current range of rates, but represents an appreciable reduction in the tariffed rate for many CLECs." *Order* at ¶ 49. Furthermore, as noted above and discussed below, the initial 2.5 cents per MOU benchmark was supported by parties on

[9] The CLEC petitioners have not remedied this flaw in their emergency motion to this Court. Neither affidavit nor any of the accompanying materials provide specific details about current costs or the costs they say they will incur in upgrading their billing equipment.

both sides of the dispute, including an association that represents more than 200 CLECs. The initial benchmark is reasonable and well supported in the record.

The CLEC petitioners' complaint that the Commission did not justify the annual reductions in the benchmark is similarly unfounded. On the record below, the Commission could have "flash cut" the CLEC access rates to the rates of incumbent LECs. It adopted the transitional approach in order "[t]o avoid too great a disruption for competitive carriers," such as the CLEC petitioners. *Order* at ¶ 4; *see also id.* at ¶ 6 ("We intend to allow CLECs a period of flexibility during which they can conform their business models to the market paradigm that we adopt herein"). The transition down to ILEC levels over four years is both generous to the CLECs and reasonable as a means of achieving important regulatory goals. *See Order* at ¶ 37.

2. The CLEC petitioners' next assertion is that the Commission ignored CLECs' actual costs in setting the benchmark, and that this error is both inconsistent with how access rates are set for other carriers and a departure from past orders dealing with CLEC access rates. Motion at 9-10.

This claim overlooks the fact that "the Commission has interpreted the [1996 Act] as directing the Commission to refrain – whenever possible – from applying to CLECs the legacy, cost-based regulations long applicable to the access services of ILECs." *AT&T v. Business Telecom, Inc.*, EB Docket No. 01-001, 002, FCC 01-185 (May 30, 2001) ("*BTI Order*"), at ¶ 18.[10] Consistent with that interpretation, the Commission at first left CLEC access charges free of rate regulation. *Order* at ¶ 8. When that market-based approach failed to produce just and reasonable access charges, the Commission

[10] A copy of the *BTI Order* is located at tab F in the appendix of materials submitted by petitioners along with their motion.

took action in this proceeding to address the market anomaly identified in the IXCs' complaints. The FCC fully explained the change and its justification. *See Greater Boston Television Corp. v. FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970).

The FCC did not ignore the CLECs' costs. Recognizing that a CLEC should be permitted to set rates that recover its costs, the FCC held only that it was "necessary to constrain" the extent to which a CLEC can exercise "monopoly power and recover an excessive share of [its] costs" from "IXC access customers – and, through them, [from] the long-distance market generally." *Order* at ¶ 39. The Commission designed its transition plan to effect that constraint.

3. In a related claim, the CLEC petitioners assert that the Commission's *Order* arbitrarily equates CLEC and Tier 1 ILEC costs, and that this comparison is inconsistent with other Commission orders, including its recent *BTI Order*. Their reliance upon the *BTI Order*, *see* Motion at 11 n.5, is misplaced. It is telling that the CLEC petitioners fail to cite to a specific page or paragraph of the *BTI Order* to support their claim that the "FCC recently credited" their argument that "CLECs can be far more closely compared to NECA and other independent ILECs" than toTier 1 ILECs. In the *BTI Order*, a complaint proceeding with a record that contained "gaping holes," the Commission stated that, for the purposes of calculating the damages a CLEC was obligated to pay for charging an unreasonable access rate of 7.1823 cents per minute, "although the 'fit' is far from exact, BTI bears at least some resemblance to a small, urban ILEC, given its size, business operations, and service areas." *BTI Order* at ¶ 56. More importantly, as noted above, the Commission concluded in the *BTI Order* – as it did in this *Order* – that a CLEC's costs are not relevant in the particular circumstance of determining reasonable

access rates, given the market anomalies identified in that decision as well as in the *Order*.

4. The CLEC petitioners' claim that Rule 61.26(d), which requires CLECs to pay ILEC rates immediately when entering a new area to offer service, was adopted without notice and an opportunity for comment. Motion at 12. The claim of surprise is frivolous. In the Notice of Further Proposed Rulemaking that culminated in the issuance of this *Order*, the FCC sought comments on how it should regulate CLEC access rates, including a proposal that an appropriate benchmark would be "the incumbent LEC rate in the area served by the CLEC." *Fifth Report and Order and Further Notice of Proposed Rulemaking, Access Charge Reform*, 14 FCC Rcd 14221, 14344 (¶ 247) (1999) ("*Fifth Report and Order*"). In addition, a number of IXCs in their comments requested that the Commission "immediately reduce CLEC access charges to the rates charged by incumbent LECs." *Order* at ¶ 61.

The fact that the Commission adopted the IXCs' recommendation of "immediate" reduction to ILEC levels only for new market areas not currently served by a competitive carrier does not render the Commission's action a "complete surprise." Motion at 12. It is well settled that "an agency satisfies th[e] notice requirement if the final rule is a 'logical outgrowth' of the proposed rule." *Arizona Public Service Co. v. EPA*, 211 F.3d 1280, 1299 (D.C. Cir. 2000). Here, the CLECs were given notice in the *Fifth Report and Order* that they might be required to charge no more than the prevailing ILEC rate. That the Commission applied this rule only in "new MSAs" does not establish that petitioners did not have notice or an opportunity to comment.

5. The CLEC petitioners' final claim on the merits is that the *Order* and accompanying rule impose billing requirements that they are unable to meet. Motion at 13-14. The *Order* does no such thing. It only requires that CLECs charge an IXC no more than 2.5 cents per MOU in areas in which a CLEC already operates, and it allows a CLEC to charge a higher rate in a rural area or in any area where an ILEC charges more than 2.5 cents per MOU. The Commission does not require billing changes to effectuate its program. If a CLEC is unable to send out bills that reflect different rates, it is free to charge the same 2.5 cents per MOU rate throughout the country. A CLEC in the circumstances claimed by petitioners also has the option of upgrading its equipment in order to charge more than that amount in areas where it is permitted to do so. CLECs also would have the option of sending out bills that informed IXCs of the number of minutes for which they were being charged, leaving it to the IXCs – subject to CLEC review – to calculate the amounts due under the applicable charge per MOU. In any event, petitioners do not cite any authority to support their claim that a Commission order is arbitrary and capricious simply because a carrier has to expend funds in order to implement a change in the Commission's regulations.

II. PETITIONERS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY

The CLEC petitioners claim they will suffer a number of economic injuries in the absence of a stay. As detailed below, the CLEC petitioners' claims are without merit. Moreover, it is "well settled that economic loss does not, in and of itself, constitute irreparable harm." *Wisconsin Gas Co., et al.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985); *see also Virginia Petroleum Jobbers Association v. FPC*, 259 F.2d 921, 925 (D.C.Cir.1958) ("The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm"). As this Court elaborated in *Wisconsin Gas*, "[m]ere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." 758 F.2d at 674.

The CLEC petitioners' principal claim of irreparable harm is that the *Order* has required them to file new tariffs at rates substantially below their prior rates, and that, even if they prevail on appeal, their lost revenues are unrecoverable. Motion at 14-15. This claim is without merit because it ignores the legal principle that "an agency, like a court, can undo what is wrongfully done by virtue of its prior order." *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965); *Natural Gas Clearinghouse* v. *FERC*, 965 F.2d 1066 (1992).

Before the *Order* became effective, the CLEC petitioners had filed tariffs at rates of approximately seven cents per minute for access service. The *Order* required the CLEC petitioners to file new tariffs at substantially lower rates (no higher than 2.5 cents a minute, with some exceptions), or to remove their tariffs altogether and proceed under contracts negotiat[illegible] with the IXCs. If this Court were to agree with the CLEC petitioners after briefing on the merits and set aside the *Order*, the FCC could authorize the CLEC petitioners to file tariffs imposing a retroactive surcharge on the IXCs for the period in which the *Order* had been in effect. The Court itself, in issuing its decision, could make clear that such relief would be appropriate to carry out its mandate, even if the agency otherwise might lack the authority to allow rates to be set retroactively. Accordingly, any temporary loss of revenues by the CLEC petitioners does not amount to an irreparable injury.

The CLEC petitioners' other claims of irreparable injury are similarly without merit. They assert that the *Order* "requires" them to bill at "multiple, separate" rates within a state, and their alleged inability to do so places them in " immediate and continuing violation of the *Order*," subjecting movants to "possible FCC forfeitures." Motion at 16. This contention is based upon a misreading of the *Order*, which does not requiring billing changes to implement its program. As explained above, the CLEC petitioners could immediately comply with the *Order* by charging a single uniform rate of 2.5 cents per minute.

The CLEC petitioners also complain that they will have to spend money to update their billing systems, that these expenditures are unrecoverable should they prevail in their appeal, and, consequently, that these unrecoverable compliance costs constitute irreparable harm. If a petitioner seeking to stay an administrative order could satisfy the irreparable harm requirement merely by identifying compliance costs, this Court would face the prospect of reviewing every significant administrative order on a stay motion. That is not the law.[11]

The CLEC petitioners assert as an additional irreparable injury that, as a result of their lost revenues due to the lower access rates imposed by the *Order*, they will experience a reduction in resources that will jeopardize their expansion plans. This claim

[11] Even if compliance costs could establish irreparable harm under some set of circumstances, the CLEC petitioners have not presented sufficient evidence to demonstrate that their compliance costs will be substantial, let alone so drastic as to constitute irreparable injury. The affidavits submitted by the CLEC petitioners are vague on this point, and do not provide the Court with enough specific information about compliance for the Court to weigh this claimed injury against the injury to IXCs and the damage to the competitive marketplace described by the Commission in the *Order*.

is simply another version of their first claimed injury, and suffers from the same flaw that the CLEC petitioners may be able to recover any lost revenues should they ultimately prevail on appeal. Furthermore, the CLEC petitioners have been on notice since at least 1999 that the Commission was considering proposals to reduce CLEC access rates, a factor they could have taken into account when preparing their business plans. Indeed, in a regulated industry all common carriers face the risk that their rates may someday be found unlawful.

Finally, the CLEC petitioners claim that in response to the decreased revenues they will receive as a result of the *Order*, they will have no choice but to raise the rates at which they provide local services to their end users, which will cause them to lose customers to their incumbent competitors. However, the *Order* does not by its terms require CLECs to raise their end user rates. In any event, the CLEC petitioners have no right to any competitive advantages resulting from the old regime, and their loss of an arbitrage opportunity is not a cognizable injury.

III. A STAY IS NOT IN THE PUBLIC INTEREST, AND WOULD INJURE A NUMBER OF THIRD PARTIES

The CLEC petitioners' claim of irreparable harm also must be balanced against the injury to other parties if a stay is granted and must be reconciled with the public interest. A stay would perpetuate excessive CLEC access charges that undeniably injure all the IXCs and their long-distance customers. A stay also would leave in place distorted market signals that may encourage CLECs to enter markets for the wrong reasons and with the wrong customer emphasis. The Commission correctly found that the public interest in vigorous but rational competition would be served by the action it took here. The Court should give great weight to the Commission's public interest determination.

CONCLUSION

For the reasons stated herein, this Court should deny the request for stay.

Respectfully submitted,

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June 26, 2001

01-1280

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

MPower Communications Corp., et al., Petitioners,

v.

Federal Communications Commission, Respondent.

Certificate Of Service

I, Sharon D. Freeman, hereby certify that the foregoing "Motion of Federal Communications Commission For Leave To File Substitute Response To Motion For Stay" and "Substitute Response of the Federal Communications Commission To Petitioners' Emergency Motion For Stay Pending Judicial Review, Or, In the Alternative, For Expedited Consideration" were served this 26th day of June, 2001, by postage, except where indicated, to the following persons at the addresses listed below:

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Exhibit 2

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

MPower Communications Corp.,	)	
	)	
and	)	
	)	
North County Communications, Inc.	)	
	)	No. 01-1280
Petitioners,	)	
	)	
v.	)	
	)	
Federal Communications Commission	)	
	)	
Respondent.	)	

OPPOSITION OF AT&T AND SPRINT TO
<u>MOTION FOR STAY PENDING JUDICIAL REVIEW</u>

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ATTORNEYS FOR SPRINT CORPORATION

JUNE 26, 2001

Pursuant to Rule 27 of the Federal Rules of Appellate Procedure, Intervenors AT&T Corp. ("AT&T") and Sprint Communications Company ("Sprint") submit the following opposition to the so-called emergency motion for stay filed by petitioners MPower and North County.

INTRODUCTION

An absolutely essential requirement for obtaining a stay of an agency order is a showing of irreparable harm, and petitioners have utterly failed to meet their heavy burden of establishing such injury. The harms that they allege are nothing more than the routine losses of revenue that the losing side in any agency ratemaking proceeding has the ability to allege. Moreover, in the unlikely event that the Court were to reverse the FCC's *Order*[1] on the grounds alleged by petitioners and were to require the FCC to permit competitive local exchange carriers ("CLECs") to charge more than the maximum rates established in the *Order*, the FCC could make the petitioners whole by authorizing them to file tariffs which impose a retroactive surcharge for the difference between their prior tariffed rates and the maximum rates set forth in the *Order*.

There is likewise no merit to petitioners' claim that they will suffer irreparable harm in the absence of a stay as a result of their alleged inability to comply with the law. With respect to their existing service territories (the only areas relevant to petitioners' claims that the terms of the *Order* place them in immediate noncompliance with the law), the *Order* does not *require* CLECs to charge different rates in different MSAs. Petitioners could thus immediately comply with the terms of the *Order* by charging a uniform 2.5 cent rate throughout each state, and it is undisputed that CLEC billing systems can comply with that requirement.

The petitioners are similarly unlikely to succeed on the merits of their claims. The FCC had ample basis for concluding that petitioners were exploiting their bottleneck monopolies and that,

[1] Seventh Report and Order, *Access Charge Reform*, CC Docket 96-262 (April 27, 2001) ("*Order*").

as a consequence, their rates for access, which are many times the levels charged by the incumbent carriers, were unjust and unreasonable. This is particularly so given that petitioners' rates for their competitive services have uniformly been at or below the rates charged by their competitors and that the CLECs have consistently refused to produce any credible evidence that would substantiate a claim that their higher rates for access are cost-justified.

Petitioners' challenge to the specific 2.5 cent benchmark rate is similarly lacking in merit. The FCC, which reasonably concluded that petitioners should prospectively charge no more than the prevailing incumbent rate in any market, nevertheless allowed the petitioners to charge up to 2.5 cents per minute (or more, in some cases) in their existing markets as a transitional subsidy. The 2.5 cent rate was thus adopted as a concession to the petitioners' alleged financial difficulties, and it was the rate that the trade association for the CLEC industry, the Association for Local Telecommunications Services ("ALTS"), represented by the same counsel as petitioners, proposed in response to the FCC's fourth request for comments. In view of the extensive record compiled in this matter, petitioners' arguments that they did not have sufficient notice, like their other arguments, are simply not credible and in no way justify entry of the requested stay.

FACTUAL BACKGROUND

The Industry

Intervenors AT&T and Sprint are interexchange carriers ("IXC") providing long distance telecommunications services in competition with other IXCs. In order to provide a complete end-to-end long distance service, IXCs must purchase exchange access services from local exchange carriers ("LECs") at each end of the long distance call. Until recently, all local exchange services in a particular geographical area were provided by a single LEC, known as the incumbent LEC ("ILEC"), whose access rates were closely regulated by the FCC. *See, e.g.,* *Order* ¶ 41 & n.93.

With the passage of the Telecommunications Act of 1996, Congress adopted new policies designed to encourage a new class of competitive carriers to compete against the ILECs in the provision of local exchange services. In addition to providing local exchange services to their end-user customers in competition with the ILECs, CLECs also provide exchange access services to the IXCs, including both originating access by which a call is transported from the calling party's premises to the IXC's network, and terminating access by which a call is transported from the IXC's network to the called party's premises. Although CLECs could set their access rates by means of intercarrier agreements negotiated between the CLEC and the IXC, most CLECs have chosen to provide access services pursuant to tariffs filed with the FCC. In contrast to the access rates of the ILECs, however, CLEC access rates have not been closely regulated by the FCC.

The Unique Characteristics Of The Market For CLEC Access Services

Unlike the local exchange services that CLECs offer to end users in competition with the ILECs and other CLECs, the exchange access services that CLECs provide to IXCs are not subject to any effective competitive constraints. As a practical matter, the CLEC is the sole means by which an IXC can obtain access to that CLEC's end-user customers. If an IXC wishes to provide long distance service to those customers, therefore, it must purchase originating access service from the CLEC, and if the IXC wishes to complete calls from its other customers to that CLEC's customers, it must purchase terminating access from that CLEC. Accordingly, the CLEC possesses "a series of bottleneck monopolies over access to each individual end user" which it serves. *Order* ¶ 30.

In addition to these bottleneck monopolies, the FCC has found that the market for access services is subject to certain market failures which further preclude market forces from limiting the access rates charged by a CLEC. First, although the end user chooses an access provider by choosing a local exchange carrier, the end user is indifferent to the amount charged by the CLEC for access because that charge is imposed on the IXC rather than on the CLEC's end-user customer. *Order* ¶ 31. Second, IXCs have been required to charge the same price for long distance services to all their customers within a particular geographic area, thereby precluding the IXCs from shifting the burden of high CLEC access rates to those end-user customers whose CLEC imposes an unreasonably high access rate. *Id.* Finally, in the case of terminating access service, the recipient of a long distance call does not pay for the call at all, and thus has no market incentive to care what its CLEC charges to the IXCs for terminating access service. *Id.* ¶ 28. As a result, market forces do not "prevent CLECs from exploiting the market power in the rates that they tariff for switched access services." *Id.* ¶ 34.

The CLEC Scheme To Require IXCs To Subsidize Their Efforts To Compete With ILECs

Taking advantage of their bottleneck monopoly power over IXC access to their end-user customers, a number of CLECs have adopted a strategy pursuant to which the IXCs effectively subsidize the CLECs' efforts to compete with the ILEC in the provision of local exchange services and, in many cases, to compete against the IXCs in provision of long distance services. Under this scheme, the CLEC files tariffs with the FCC which set access rates at levels far higher than the access rates charged by the ILEC in the same local market. For example, as petitioners themselves admit, their tariffed rates for switched access service are "up to ten times" higher than the rate charged by the ILEC providing the same access service in the same local market.[2]

[2] Emergency Motion for Stay at 5. *See also Order* ¶¶ 22, 47 (finding CLEC access rates over 9 cents per minute as compared to ILEC access rates below 1 cent per minute); *AT&T Corp. v. Business Telecom, Inc.*, File No. EB-01-MD-011, ¶ 32, (rel. May 30, 2001) ("*BTI Order*") (finding that the access rate of one CLEC "was more than 15 times higher" than the ILEC serving the same local market).

By imposing such outrageously high rates for access in their FCC tariffs, the CLECs not only support inefficient operations, they generate cash needed to subsidize their efforts to compete against the ILECs, whose access rates are closely regulated by the FCC. For example, in one recent case the FCC found that a CLEC that was charging IXCs up to 15 times more for access services than the ILEC which was its principal competitor, while at the same time it was offering to end users rate discounts of 15 to 25 percent below the ILEC's rates for local exchange service.[3] Indeed, a number of CLECs have even offered end users cash payments or credits on their bills based on a percentage of the access revenues generated by the end user's long distance traffic.[4]

The IXCs' Efforts To Curtail The CLEC Access Charge Scheme

Faced with such price gouging by many CLECs, IXCs have attempted a number of approaches to bring the problem under control. For example, beginning in 1998, AT&T has made it clear to the CLEC community that it did not wish to purchase their high-priced access services, although AT&T did attempt to negotiate with CLECs engaged in this behavior to reach off-tariff inter-carrier agreements with reduced access rates. When such negotiations failed, AT&T deliberately refrained from ordering access services from CLECs with excessive rates. In addition, through letters and other written and oral communications, AT&T instructed CLECs about its policy and directed them to cease routing traffic to AT&T's network.

Further, in October 1998, AT&T filed a petition for declaratory ruling with the FCC requesting a declaratory ruling that "existing law, policy and regulation does not require IXCs to

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[3] *See BTI Order* ¶¶ 31-32.

[4] *See id.* ¶ 42 (finding that BTI offered customers "a cash payment or credit of up to 24% of BTI's access revenues generated by the customers' toll traffic").

purchase tariffed access services from CLECs."[5] In that petition, AT&T explained that many CLECs were refusing to enter into negotiations with AT&T and showed that the Communications Act and FCC precedent supported AT&T's right to refuse to purchase such high-priced access services.

AT&T and Sprint also argued that the rates being charged by the CLECs for IXC access to the CLECs' end-user customers were unjust and unreasonable under the Communications Act and should be limited by the FCC to a level no higher than the access rate established by the ILEC in the same local market – the market-clearing rate that the CLEC would have to meet if the provision of access services were a competitive market.

The FCC's CLEC Access Charge Reform Order.

In its 1999 notice of further proposed rulemaking initiating the *Order*, the FCC solicited comments on how it should regulate or constrain CLEC access rates, including proposals for the mandatory detariffing of CLEC interstate access rates and proposals to establish a "benchmark" at which CLEC access rates would be "presumptively just and reasonable."[6] Among the rates suggested by the FCC as an appropriate benchmark was "the incumbent LEC [access] rate in the area served by the CLEC." *Id.* ¶ 247. The FCC further requested comments on whether such a benchmark should vary depending on such factors as whether the CLEC served both high-cost and low-cost areas. *Id.* ¶ 248.

In their comments in response to the FCC's notice of further proposed rulemaking, the trade association for the CLEC industry, ALTS, represented by the same counsel as petitioners in this

[5] AT&T Petition for Declaratory Ruling, *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63, at 5 (filed Oct. 23, 1998).

[6] *See, e.g.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, *Access Charge Reform*, 14 FCC Rcd 14221, ¶¶ 246-247 (1999) ("*Fifth Access Reform Order*").

case, filed a proposal to establish an interim benchmark of 2.5 cents per minute for CLEC tariffed access charges.[7] In addition, a number of individual CLECs filed comments on this issue specifically endorsing the ALTS proposal.

In its *Order*, the FCC agreed with the IXCs that the CLECs have "a series of bottleneck monopolies over access to each individual end user" whom they serve and that there was "ample evidence" that many CLECs have been "exploiting the market power" created by that bottleneck monopoly by charging IXCs "unreasonable access rates." *Order* ¶¶ 30, 34.[8] In an effort to curtail the CLECs' abuse of their bottleneck monopoly, the FCC ordered that all CLEC access rates be reduced to the access rate charged by the ILEC serving the same local market. *See id.* ¶ 45. As an interim transition measure, however, the FCC permitted CLECs with higher access rates to charge rates up to 2.5 cents per minute in their existing markets – the benchmark rate proposed by ALTS, the CLEC trade association. *See id.* ¶¶ 45, 50 This higher benchmark is to be decreased over a three-year period to the rate charged by the ILEC in the same local market. *See id.* ¶ 52. Further, in two situations – CLECs serving high-cost rural areas, and CLECs serving areas where the ILEC has an access rate higher than 2.5 cents per minute – the FCC authorized, *but did not require*, CLECs to charge more than the 2.5 cent benchmark. *See, e.g., id.* ¶¶ 45, 73-81. Finally, in order to avoid creating an artificial incentive for CLECs to enter additional markets in a potentially inefficient manner, the FCC determined that CLECs entering *new* markets must charge no more than the competing ILEC rate for access to the CLEC's customers. *See id.* ¶ 58.

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[7] *See Order* ¶ 50 (describing ALTS' 2.5 cents per minute "safe harbor" proposal).

[8] *See also id.* ¶ 39 ("Given the unique nature of the market in which the IXCs purchase CLEC access, . . . we conclude that it is necessary to constrain the extent to which the CLECs can exercise their monopoly power and recover an excessive share of their costs from their IXC access customers – and through them, the long distance market generally"); ¶ 59 (same).

ARGUMENT

I. PETITIONERS ARE NOT LIKELY TO SUCCEED ON THE MERITS

In ruling on a stay motion, the Court must assess whether the "stay applicant has made a strong showing that he is likely to succeed on the merits." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Indeed, this Court does not even consider the other stay requirements where "there is little likelihood that [the movant] will succeed on the merits of any of its claims." *Tenacre Found. v. INS*, 78 F.3d 693, 694 (D.C. Cir. 1996). Moreover, the particular questions that form the basis of petitioners' request for a stay "involve policy determinations in which the agency is acknowledged to have expertise." *WorldCom Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001). In light of this Court's reluctance "to second guess the FCC's policy judgment" in matters relating to the regulation of a carrier's rates, "so long as it comports with established standards of administrative practice," *id.* at 458, the stay motion should be denied.

A. Petitioners' Challenge To The Benchmark Rates Selected By The FCC Is Baseless, Regardless of Whether CLEC Costs Might Exceed ILEC Costs.

Petitioners' challenge to the FCC's benchmark rate of 2.5 cents per minute is both remarkable and wrong. Petitioners' claim is remarkable because the specific benchmark level chosen by the FCC – i.e., 2.5 cents per minute – was proposed by ALTS, the trade association for the CLECs, including petitioner Mpower, which claimed to be an "active member" of ALTS that "participates on its operating and policy boards" and that "substantially contributed to and agrees with the majority of ALTS' comments." Comments of MGC at iv (Oct. 29, 1999); *see* ALTS Comments, at 4-6 (Jan. 11, 2001) (setting forth benchmark proposal). Moreover, this rate was specifically championed by petitioners' counsel.

Petitioners' claims are wrong because the FCC had more than an ample basis to conclude that CLECs should not be allowed to charge IXCs more than the prevailing ILEC rate for switched access service. In particular, the FCC's determination that a CLEC's costs of providing access cannot justify higher access charges to IXCs is clearly consistent with the Act's pro-competitive principles. Firms operating in competitive (or even concentrated) markets do *not* set their prices based on their costs, but rather according to market conditions and market signals.[9] Thus, the FCC properly determined that "it is highly unusual for a competitor to enter a market at a price dramatically above the price charged by the incumbent, absent a differentiated service offering." *Order* ¶ 37. In this situation, the FCC determined that the Act's purposes were best served by a mechanism that would "drive CLEC rates down toward the level charged by the ILECs, thereby bringing them toward the model of a competitive market, in which new entrants can successfully enter only at or below the prevailing market price." *Id.* ¶ 59; *see id.* ¶ 45. Because the FCC was attempting to ensure that CLEC access rates would be similar to those set in a properly functioning market for access services, it properly and reasonably determined that CLEC costs could not justify charging IXCs rates for access service above the prevailing market rate charged by the incumbent LEC. *Order* ¶¶ 28-45, 59.[10]

The FCC was also correct in concluding that in a competitive market CLEC rates should be at or below the incumbent's rates. Indeed, the major flaw in the FCC's decision is that it did not *immediately* direct that all CLEC rates be reduced to ILEC rates. Instead, the FCC decided to

[9] *See also BTI Order* ¶ 31 ("according to fundamental economic principles, in a properly functioning competitive market, the access rates of [a CLEC's] primary access competitors would have been a substantial factor in [the CLEC's] setting of its own access rates").

[10] For these reasons, the cases cited by the CLECs regarding the FCC's orders for rates of payphones are wholly inapposite. *See* Mot. at 8 (citing *Ill. Pub. Telecomm. Ass'n v. FCC*, 117 F.3d 555 (D.C. Cir. 1997) and *MCI Telecomm. Corp. v. FCC*, 143 F.3d 606 (D.C. Cir. 1998)). In those cases, the FCC determined that the rate for the calls at issue *should* be cost based. *Id.* at 608-09; *Ill. PTA*, 117 F.3d at 563. For that reason, this Court reversed certain portions of the orders where the FCC departed from that view without adequate explanation. *Id.* at 563-64; *MCI*, 143 F.3d at 608-09. In the *Order*, by contrast, the FCC concluded that the requirement in Section 201(b) that rates not be unlawful or unreasonable did not demand that access charges be cost-based. Rather, where the market clearing price is lower, the FCC fully explained why economically efficient rates should be equal to or lower than that price.

authorize CLECs to charge rates (generally 2.5 cents per minute) above the market clearing price. In AT&T's view, this constitutes nothing more than an unlawful subsidy from the IXCs and their customers. That being the case, petitioners should certainly not be heard to complain that the amount of the subsidy is too small. In no event was the FCC required to grant petitioners an even *greater* subsidy than the 2.5 cent rate.

Moreover, there is no merit to Petitioners' complaint that the level of the subsidy was not based on specific data relating to CLEC costs. As this Court held in reviewing a prior FCC order on access reform, the "FCC must provide a rational basis when setting a number for a standard, but it is not held to a standard of perfection." *WorldCom*, 238 F.3d at 461. Consequently, assuming that any benchmark rate above the market clearing price is appropriate, the FCC is not required to identify that rate with "pinpoint precision," *id.* at 462, and it is therefore unlikely that petitioners will succeed in their challenge of the FCC's 2.5 cent benchmark rate.

Further, even if it could be argued that the FCC should have considered in detail CLEC specific costs in determining the level of the subsidy benchmark rate, no such data was contained in the record, which is the fault of the CLECs, not the FCC. The FCC presented CLECs with numerous opportunities to present such data – data which are solely within their possession – and even specifically issued a public notice requesting that CLECs provide additional information regarding their rates.[11] Not one CLEC, however, "submitted, in this proceeding, any data to justify their rates." *Order* ¶ 46 n.104.[12] As this Court has held, where "petitioners withheld the very cost data that would have enabled the Commission to establish precise, cost-based rates,"

[11] *See* Public Notice, Docket 96-262 (rel. Dec. 7, 2000).

[12] While Mpower asserts in its supporting affidavit that it studied its costs, it never submitted in evidence a copy of its cost study. Moreover, the cost showing that Mpower's cost consultants presented in evidence in the *BTI Order* was found by the FCC to be "so riddled with conceptual flaws and factual errors as to be of minimal evidentiary value." *BTI Order* ¶ 48.

any claim that the precise benchmark rate selected by the FCC is unlawful must be rejected. *See Cable & Wireless v. FCC*, 166 F.3d 1224, 1233 (D.C. Cir. 1999).

For similar reasons, petitioners' related claim (at 10) that the FCC improperly "equated CLEC and Tier 1 ILEC costs" is well off the mark. The FCC's *Order* never claimed that CLECs' costs are equivalent to those of any type of incumbent LEC. Rather, the *Order* determined that CLEC costs are simply irrelevant. That conclusion is consistent with each of the FCC's prior and subsequent orders, including the *BTI Order*.[13] In all events, this Court has squarely held that an order cannot be arbitrary for failing to be consistent with a future order – rather, only the future order can be arbitrary.[14] Thus, even if there were some inconsistency, that would not provide any basis for issuing a stay.

B. The FCC Provided CLECs With Adequate Notice.

Petitioners' claim (at 12) that the *Order* adopted a so-called "new MSA exception" without providing adequate notice is frivolous. Under the well-established precedent of this Court – which petitioners do not even discuss – an agency's final rule is valid so long as it is a "logical

[13] Petitioners grossly misstate the FCC's holding in the *BTI Order* in claiming that the FCC there "found . . . that CLECs *most closely* resemble small urban ILECs (i.e., NECA carriers)." Mot. at 11 (emphasis added). The FCC held nothing of the sort. *See BTI Order* ¶ 56. To the contrary, the FCC expressly adopted the same market-based view described above that found that CLECs "would have needed to consider [incumbent LEC access charges] in pricing [their] access services." *BTI Order*, ¶ 33; *see id.* ¶¶ 18-21, 31 (citing *Order* ¶¶ 30-32, 34, 37, 41, 45, 46). Additionally, the *BTI Order* did *not* find, as petitioners allege, that the CLEC in that case (much less CLECs generally) "closely resemble[d]" NECA carriers. Rather, solely to determine the damages to which AT&T was entitled the *BTI Order* merely concluded that, if the 2.5 cents per minute benchmark in the *Order* were correct, then the lowest band of rates charged by NECA carriers was the closest backward approximation of the CLEC's reasonable rate. *See BTI Order* ¶ 56.

[14] *CHM Broad. Ltd. v. FCC*, 24 F.3d 1453, 1459 (D.C. Cir. 1994) ("the FCC is not bound retroactively by its subsequent decisions and need not explain alleged inconsistencies in the resolution of subsequent cases"); *Amor Family Broad. Group v. FCC*, 918 F.2d 960, 962 (D.C. Cir. 1990).

outgrowth" of the agency's proposals.[15] That standard is easily satisfied here. In its request for comments, the FCC made clear that it was considering a requirement that CLEC access rates immediately match those of the ILECs on a nationwide basis. *Fifth Access Reform Order* ¶ 247.[16] Accordingly, petitioners had ample notice – at least as long ago as 1999 – that they soon could be required to charge no more than the prevailing ILEC rate. The FCC's decision to apply that rule immediately only in "new MSAs" thus presents no notice problem whatsoever. *See Omnipoint*, 78 F.3d at 271 (agreeing that a rule is a logical outgrowth of the notice when the rule is "a compromise between the rule that was tentatively proposed and the rule that was tentatively rejected"). Any other result – which would require the FCC to issue a request for comments for a fifth time on this issue – would lead to "the absurdity that the agency can learn from the comments on its proposals only at the peril of starting a new round of commentary." *Chemical Waste*, 976 F.2d at 28.

C. The *Order* Does Not Require Immediate Changes To Billing Systems That Are Impossible To Meet.

Petitioners' claims (Mot. at 13-14) that the *Order* imposes billing requirements that "are presently impossible to meet" is simply untrue, and blatantly distorts what the *Order* in fact requires. The *Order* does not *require* a CLEC to impose different rates in each existing MSA in which the CLEC currently provides service. Rather, the *Order* requires that the CLECs charge an IXC no more than 2.5 cents per minute in existing MSAs, and permits – but does not require –

[15] *See, e.g.*, *Small Refiner Lead Phase Down Task Force v. E.P.A.*, 705 F.2d 506, 547 (D.C. Cir. 1983); *Chemical Waste Management, Inc. v. EPA*, 976 F.2d 2, 28 (D.C. Cir. 1992); *Omnipoint Corp. v. FCC*, 78 F.3d 620, 631-32 (D.C. Cir. 1996).

[16] Indeed, the "new MSA" rule is not in fact the exception, but the rule that is consistent with the FCC's determination that CLECs would match the prevailing market rate for access. The "exception" is in fact the 2.5 cents per minute benchmark that was granted to allow CLECs a "transition mechanism." *Order* ¶¶ 4, 37, 52, 58, 62.

a CLEC to impose higher rates for rural areas and for areas where the incumbent LEC charges more than 2.5 cents per minute. *Order* ¶¶ 45, 73-81.[17] No CLEC is *required* to change its billing system to take advantage of these exceptions. Rather, petitioners can fully comply with the *Order* by charging the same 2.5 cent rate throughout the country.

II. PETITIONERS WILL NOT SUFFER IRREPARABLE HARM IN THE ABSENCE OF A STAY.

"The basis for injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies." *Sampson v. Murray,* 415 U.S. 61, 88, (1974); *see Wisconsin Gas Co., et al.* v. *FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (applying *Sampson* test to request for stay of FERC order). In order for an injury to constitute irreparable harm, "the injury must be both certain and great." *Wisconsin Natural Gas*, 758 F.2d at 674. "It is also well settled that economic loss does not, in and of itself, constitute irreparable harm." *Id.* "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough." *Id.* Additionally, as this Court has often admonished, "revenues and customers lost to competition which can be regained through competition are not irreparable." *C. & S. Motor Freight Tariff Assoc.* v. *United States*, 757 F.2d 301, 308 (D.C. Cir. 1985). Petitioners have not come close to meeting their heavy burden of demonstrating irreparable harm under these standards.

A. The *Order's* Reduction of the Petitioners' Previously Tariffed Rates Does Not Constitute Irreparable Harm.

In an effort to establish that they will suffer irreparable harm in the absence of a stay, petitioners' principally claim that the *Order* required them to file new tariffs at rates substantially below their prior rates, and that this "lost revenue is unrecoverable" because they "have no cause

[17] Notably, it was the CLECs that urged the Commission to adopt an exemption for rural areas, and thereby to allow them to impose different access rates depending on the area being served.

of action against the FCC." Motion, pp. 14-15. This claim is baseless.

Prior to the effective date of the *Order*, both petitioners had tariffs on file with the FCC, at rates of approximately 7 cents per minute for switched access. The *Order* here at issue required petitioners either to file new tariffs at substantially lower rates (at rates no higher than 2.5 cents per minute, with some exceptions), or to detariff services altogether (proceeding only under contracts). In these circumstances, if this Court were to vacate the FCC's *Order* and the FCC were on remand to agree that petitioners should have been permitted to tariff rates above those set forth in the *Order*, it is well settled that the FCC could authorize the petitioners to file tariffs imposing a retroactive surcharge on the IXCs for the period in which the *Order* had been in effect for the difference between the rates filed in their current tariffs and the higher rates either the FCC or the Court ultimately concludes would have been proper. Thus, in the unlikely event that petitioners were to prevail on their claims, the lost revenues they would have suffered by revising their tariffs to reflect the maximum rates set forth in the *Order* would be remediable in the future, and do not constitute irreparable harm.

As the Supreme Court explained in affirming a retroactive rate adjustment imposed by the FERC's predecessor, "an agency, like a court, can undo what is wrongfully done by virtue of its prior order." *United Gas Improvement Co.* v. *Callery Properties, Inc.*, 382 U.S. 223, 229 (1965). The leading case applying that principle is this Court's decision in *Natural Gas Clearinghouse* v. *FERC*, 965 F.2d 1066 (1992) ("*NGC*"), which involved a situation markedly similar to the case at hand. *NGC* arose out of a dispute involving a tariff filed by Tarpon Transmission Company, a natural gas pipeline. Tarpon initially filed a tariff providing for gas transmission at a rate of 16.88 cents per Mcf, and the FERC let that tariff go into effect. That rate was subsequently challenged by certain shippers, and the FERC sustained those challenges, rejecting the 16.88 cent rate and requiring Tarpon to file revised tariff sheets setting forth a far lower rate of 4.02 cents per Mcf. Tarpon then sought judicial review, and this Court held that the FERC had failed adequately to explain why it had rejected the 16.88 cent rate.

On remand, the FERC changed its mind and adopted Tarpon's position that the 16.88 cent rate was just and reasonable. The FERC then permitted Tarpon to file a further revised tariff, which imposed a retroactive "12.86 cents per Mcf surcharge (16.88 cents minus the previously approved rate of 4.02 cents) to every Mcf of gas that Tarpon had transported" in the three year period that the 4.02 cent rate had wrongfully been imposed by the FERC. This time, the shippers petitioned for judicial review, claiming that the FERC did not have the authority to impose retroactive surcharges, and that the imposition of such surcharges violated the filed tariff doctrine because the shippers had shipped the gas under tariffs setting forth a rate of 4.02 cents per Mcf.

This Court squarely rejected the shippers' challenges. Applying *Callery*, this Court reasoned:

> If the FERC were prohibited from ordering recoupment of losses caused by its error in refusing to accept a proposed rate, later determined to be just and reasonable, the pipeline's primary right under the NGA to propose and collect a justified rate would be drastically curtailed . . . . Without such corrective power, pipelines would be substantially and irreparably injured by FERC orders, and judicial review would be powerless to protect them from much of the losses so incurred.

NGC, 965 F.2d at 1074-75.

The Court likewise rejected the shippers' claims that the retroactive surcharge violated the filed rate doctrine: "The filed rate doctrine simply does not extend to cases in which buyers are on adequate notice that resolution of some specific issue may cause a later adjustment to the rate being collected at the time." *NGC*, 965 F.2d at 1075. Because the shippers were on notice that Tarpon had lowered its previously tariffed rates under compulsion of an order it was challenging, the shippers had no right to rely on the filed rate doctrine to avoid the surcharges. *Id.*

Because petitioners could easily provide notices either in their tariffs or in their bills that they are complying with the benchmark rates under protest, and the FCC would thus have the power to permit petitioners to impose retroactive surcharges in the event it was later determined that their prior rates were lawful, petitioners cannot establish that they are "*certain*" to suffer irreparable harm as a result of the *Order*. "The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm." *Wisconsin Natural Gas*, 758 F.2d at 674.[18]

B. Petitioners' Claim That They Are At Peril Of Immediate Noncompliance With The Law Is Baseless.

Petitioners alternatively claim that the *Order* "requires" them to bill at "multiple, separate" rates within a state, and their alleged inability to do so places them in "immediate and continuing violation of the *Order*," subjecting them to "possible FCC forfeitures." This argument is based on a blatant mischaracterization of the requirements of the *Order*.

The *Order* imposes only *one* requirement on petitioners with respect to markets that they currently serve: the *Order* prohibits petitioners from charging more than 2.5 cents per minute. With respect to areas served by an ILEC that charges more than 2.5 cents per minute, petitioners are *permitted*, but are not *required*, to charge up to that ILEC's higher rate. No CLEC, therefore, would be in violation of law if it chose not to take advantage of that right, for whatever reason.

Thus, petitioners could immediately and fully comply with all of the terms of the *Order* by charging a single uniform rate of 2.5 cents per minute throughout the state, and it is undisputed that CLECs possess that capability. Further, as soon as they are able to do so, the *Order* permits

[18] Although the petitioners assert that the 2.5 cent rate is confiscatory, Motion at 15, neither they, nor any other CLEC, put any evidence of their costs into the record below. *Order* ¶ 46 n.104. Consequently, there is absolutely no evidence to support the petitioners' hyperbolic claims that they cannot recover their costs by charging a rate of 2.5 cents per minute – five times the rate charged by the ILECs.

CLECs to charge higher rates in certain existing markets, but petitioners' alleged inability temporarily to take advantage of that loophole hardly constitutes irreparable harm.[19]

C. Petitioners' Allegations of Unrecoverable Compliance Costs Do Not Establish Irreparable Harm.

Petitioners next argue that they will have to expend resources to update their billing systems to comply with the *Order*'s provisions, and that these unrecoverable compliance costs constitute irreparable harm. This argument is likewise without merit.

As Justice Scalia has observed, "complying with a regulation later held invalid almost always produces the irreparable harm of nonrecoverable compliance costs," and yet most administrative schemes do not even provide for pre-enforcement review. *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 221 (1994) (Scalia, J., concurring). If a movant seeking a stay of an administrative order could satisfy the irreparable harm prong on the basis of compliance costs, this Court would face the prospect of reviewing every significant administrative order on a stay motion, or on an expedited basis. That is not the law.

Moreover, even if compliance costs could establish irreparable harm in some extreme circumstances, petitioners have presented no factual basis for concluding that their compliance costs will be substantial, let alone so drastic as to constitute irreparable injury. North County's affiant does not address the issue of modifying that carrier's billing systems at all, and Mpower's affiant – who is an attorney, not an engineer – was willing to say no more than that "[i]t is not clear whether current systems can be adapted to function as the FCC envisions" and that such changes would be "expensive." Zuckerman Aff. ¶ 21. Consequently, so far as the record

[19] The *Order* does prohibit a CLEC from charging more than the ILEC in an area that the CLEC had not yet begun to serve at the time the *Order* went into effect. At worst, this aspect of the *Order* will require CLECs to delay entry into new markets if they need to update their billing systems. A delay in serving a future market, however, in no way places petitioners in peril of violating the law at present.

establishes, petitioners could modify their existing software within a few weeks. Moreover, it is far from clear why CLECs (which serve only limited, discrete markets) could not render bills manually in the few areas where the 2.5 cent rate would not apply. Petitioners' showing thus falls far short of demonstrating the existence of irreparable harm.

D. Petitioners' Remaining Claims Of Irreparable Harm Are Meritless.

Petitioners' remaining claims of irreparable harm are meritless. First, the claim that the lower access rates mandated by the *Order* will diminish the resources that petitioners have available to enter new markets, and thus jeopardize their entry plans, is simply a rehashed version of their first argument, and suffers from the same defect. Petitioners are free to enter new markets while charging the ILECs' access rates, and if they ultimately prevail on their claims, the FCC could authorize them to recoup their lost revenues through surcharges. As explained above, a delay in obtaining revenue is quintessentially the type of economic injury that does not constitute irreparable harm. Moreover, petitioners have been on notice since at least 1998 that the IXCs were challenging the lawfulness of their rates, and no reasonable CLEC should have based its entry plans on the assumption that they would be permitted indefinitely to continue assessing access rates that by their own admission are roughly 10 times the incumbent provider's rates. This is particularly so in that all common carriers face the risk that their rates may someday be found unlawful.

Second, petitioners allege that in response to the decreased access revenue they will receive by virtue of the *Order*, they will have no choice but to raise the rates at which they provide local services to their end users, and that as a result they will lose customers to the ILECs. To begin with, the *Order* does not by its terms require petitioners to raise their end user rates, and it would be highly surprising if they did so. Moreover, in the event petitioners did respond to the *Order* by raising their end user rates, they would be free to lower their rates and win back those customers if they prevailed in their appeal, and as this Court has held, "revenues and customers lost to competition which can be regained through competition are not irreparable." *Central & Southern Motor Freight*, 757 F.2d at 308.

III. AT&T AND SPRINT WILL SUFFER SIGNIFICANT HARM IF A STAY IS GRANTED.

Petitioners make the remarkable claim that IXCs such as AT&T and Sprint will not suffer significant harm from a stay, apparently on the ground that they could bring individual complaints challenging the lawfulness of each individual CLEC's rates under section 208 of the Act. This argument is sheer hypocrisy. In support of their request for a stay, petitioners claim that they would suffer irreparable harm if they were required to bring separate contract actions against hundreds of IXCs to recover their lost revenues in the event they prevail. Putting to one side the question whether such lawsuits by the CLECs would be necessary – AT&T and Sprint contend they would not be – a requirement that IXCs continue to incur excessive and anticompetitive access charges and then later engage in expensive and time-consuming litigation to seek to recoup those amounts from entities that might not have the ability to repay them clearly imposes a harm that is significant. Indeed, any contention to the contrary is simply not credible.

IV. THE PUBLIC INTEREST WOULD BE HARMED BY A STAY.

Although petitioners correctly state that the public interest "is served by a fully competitive market for local phone services," Motion at 19, they have a flawed notion of competition. As the FCC – the agency entrusted by Congress in this area with defining the public interest – concluded in the *Order*, fostering inefficient entry is harmful to the public interest. *Order* ¶¶ 33, 58. It therefore follows that if, as petitioners claim, they can profitably enter the market only by charging a significant class of customers (IXCs) prices that far exceed those of the existing supplier in the market, their entry is not in the public interest.

What petitioners unabashedly are seeking by the stay is to be able to continue to exploit their bottleneck monopolies by imposing exorbitant rates on captive IXCs, and to force IXCs, alone among the various classes of customers served by the petitioners, to subsidize their inefficient services. Although petitioners allege that as new entrants they do not enjoy the economies of scale of the large incumbents, in no other market do entrants attempt to recover their initial start-up costs by charging potential customers rates that are far in excess of the price charged by firms already in the market. Because there is no justification whatsoever for the CLECs' practice of recovering their alleged start up costs solely from the IXCs, the FCC was well within its rights in deciding to limit that subsidy. Indeed, it is AT&T's position that the FCC was required by law to eliminate immediately the subsidies in their entirety. In these circumstances, the public interest would clearly not be served by the issuance of a stay. Rather, a stay would only serve to continue to shield petitioners from the normal laws of economics, and would significantly harm the public interest.

CONCLUSION

Petitioners have not come close to meeting the requirements for a stay of an agency order. Accordingly, the emergency motion for stay should be denied.

AT&T CORP.

By: ______________________________

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June 26, 2001

Exhibit 3

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 01-1280 **September Term, 2000**

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FOR DISTRICT OF COLUMBIA CIRCUIT
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MPower Communications Corp. and North County Communications, Inc.,
Petitioners

v.

Federal Communications Commission and United States of America,
Respondents

AT&T Corporation, et al.,
Intervenors

BEFORE: Sentelle, Rogers, and Tatel, Circuit Judges

ORDER

Upon consideration of the emergency motion for stay pending judicial review or, in the alternative, for expedited consideration; the FCC's motion for leave to file substitute response to motion for stay; the lodged response; and the reply, it is

ORDERED that the motion for leave be granted. The Clerk is directed to file the lodged document. It is

FURTHER ORDERED that the motion for stay or expedition be denied. Petitioners have not satisfied the stringent standards required for either a stay pending court review, see Washington Metropolitan Area Transit Commission v. Holiday Tours, Inc., 559 F.2d 841, 843 (D.C. Cir. 1977); D.C. Circuit Handbook of Practice and Internal Procedures 32 (2000), or expedition. See Circuit Handbook at 33.

Per Curiam

HWR