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September 22, 2003

VIA ELECTRONIC FILING AND ELECTRONIC MAIL

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

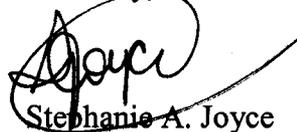
Re: Emergency Petition for Stay, Triennial Review Order, FCC 03-36

Dear Ms. Dortch:

Attached please find the Sage Telecom, Inc. for Emergency Petition for Stay of Commission order FCC 03-36 in Docket 01-338, the *UNE Triennial Order*. Sage requests that the agency act on this petition by September 29, 2003, and will deem failure to act a rejection on the merits.

All counsel of record have been served with this petition in accordance with the attached Certificate of Service as required by the Commission's rules.

Sincerely,



Stephanie A. Joyce
Counsel for Sage Telecom, Inc.

Attachment

cc: All counsel of record

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of

**Review of the Section 251 Unbundling
Obligations of Incumbent Local Exchange
Carriers**

CC Docket No. 01-338

**Implementation of the Local Competition
Provisions of the Telecommunications
Act of 1996**

CC Docket No. 96-98

**Deployment of Wireless Services Offering
Advanced Telecommunications Capability**

CC Docket No. 98-147

**EMERGENCY PETITION
FOR STAY OF ORDER**

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Dated: September 22, 2003

SUMMARY

The *UNE Triennial Order* (“*TRO*”) must be stayed in accordance with settled principles of administrative law that require the Federal Communications Commission (“FCC”) to make reasoned judgments based on the record in an open notice-and-comment rulemaking. The *TRO* is marred by extraordinary and unprecedented violations of settled procedure, and as a result creates outcomes that are arbitrary, capricious, and extremely vulnerable to reversal.

The *TRO* includes provisions, specifically the rules to which Sage collectively refers as the “Loop Deregulation” rules, Sections 51.319(a)(1, 2 & 3), that are both procedurally and substantively defective. These rules, adopted largely on the basis of late-filed submissions, establish a heretofore unseen FCC regulatory regime that preempts state authority and effectively encourage incumbent local exchange carriers (“ILECs”) to deploy loop technology that will substantially degrade the services of competitive carriers (“CLECs”). As Sage explains more fully herein, the fact that these rules were not before the Commissioners in anything resembling their current form prior to their “adoption” on February 20, 2003, renders them unsupportable as a matter of administrative law. Moreover, they effect a clear violation of Sage’s rights to due process.

In addition, the Loop Deregulation rules will create severe and immediate harm to Sage and other similarly situated CLECs. That is, as of the October 2 effective date of the *TRO*, the FCC’s new rules empower ILECs to make changes in their unbundled loops such that CLECs will lose access to existing Integrated Digital Loop Carrier (“IDLC”) and will be relegated to the inferior Universal DLC, inevitably resulting in service degradation. Stay of these rules, by contrast, will simply preserve the regulatory regime that has been in place since 1996. Settled

administrative precedent, which favors retaining the status quo rather than implementation of new and harmful rule changes, therefore supports a stay of these rules at this time.

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**EMERGENCY PETITION
FOR STAY OF ORDER**

By its undersigned counsel, and pursuant to Rules 1.41 and 1.44(e) of the Commission’s Rules, 47 C.F.R. §§ 1.41, 1.44(e), Sage Telecom, Inc. (“Sage”) hereby petitions the Commission to stay certain portions of the *Report and Order and Order on Remand and Further Notice of Proposed Rulemaking* (FCC 03-36) and accompanying rules released in the above-captioned proceedings on August 21, 2003, as amended by an “Errata” released by the FCC on September 17, 2003¹ (hereinafter “TRO”). In this Order, the Commission concluded its “Triennial Review” of the obligation imposed on incumbent local exchange carriers (“ILECs”)

¹ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, FCC 03-227 (rel. Sept. 17, 2003).

by the Telecommunications Act of 1996² to provide competitive carriers with access to Unbundled Network Elements (“UNEs”).

Specifically, Sage seeks a stay of the TRO’s provisions that define which mass market loops must be unbundled by ILECs for use by carriers such as Sage.³ As detailed in this Petition, implementation of the rules would allow – and indeed provides a strong incentive – for ILECs to deploy technologies in their networks that would degrade the quality and limit the utility of the UNE-based services that Sage provides its end user customers. This obviously is an unintended consequence of the Commission’s rules, but one that would inflict immediate and irreparable harm to Sage if the new rules are implemented. Sage believes that this unintended consequence stems from the unprecedented and highly irregular procedures employed by the Commission throughout the Triennial Review proceeding – including the adoption of radical new theories of jurisdiction, substantive rule changes through “errata,” and *ex parte* conduct that patently violated the Administrative Procedure Act, all of which have resulted in rules that impose harm on Sage and other affected carriers without due process of law. Had the Commission conducted its proceeding in accordance with law, there would have been ample opportunity for affected parties to debate these rules in an open forum, and these unintended consequences could have been avoided. The Commission chose not to proceed in a lawful manner, however, and now a stay of the Loop Deregulation provisions of the *TRO* is necessary to prevent irreparable harm to Sage and similarly situated carriers.

This Petition is submitted on an emergency basis, requesting the Commission’s immediate attention. If the Commission does not act to stay the *TRO* by September 29, 2003,

² Pub. L. No. 104-104, 110 Stat. 56 (1996), *codified at* 47 U.S.C. §§ 151 *et seq.* (“1996 Act”).

³ 47 C.F.R. § 51.319 (a)(1, 2 & 3) (“Loop Deregulation” rules).

Sage will consider such inaction to constitute a rejection of this Petition. If this Petition is rejected by the Commission, Sage intends to seek appropriate relief before the United States Court of Appeals for the Eighth Circuit.⁴

BACKGROUND

This section provides information regarding Sage Telecom, Inc., an overview of the Commission's Loop Deregulation rules, and how those rules adversely affect carriers that provide service via unbundled loops.

A. Description of Sage Telecom, Inc.

Sage Telecom is a competitive local exchange carrier dedicated to serving residential and small business customers primarily in rural and suburban areas with a full range of local and long distance services. Sage offers a variety of calling plans, including its Home Choice Plan for residential customers, which includes unlimited local calling, long distance, and features such as Caller ID, Call Waiting and Call Forwarding. Founded in 1996 by seasoned telecom professionals, Sage Telecom has become one of the fastest growing residential competitive local exchange carriers in the country. It currently serves over 500,000 residential and small business customers in ten states – Arkansas, California, Indiana, Kansas, Michigan, Missouri, Ohio, Oklahoma, Texas, and Wisconsin – and is continuing to expand. Sage's customer base is 94% residential overall, with nearly 75% living in rural and suburban areas. Over 25% of Sage's customers live in counties with fewer than 100 people per square mile. In providing these services, Sage directly competes exclusively within the operating territory of SBC Communications ("SBC") in the states where it does business, although Sage anticipates competing against other Bell companies as it continues to expand.

⁴ In a lottery conducted by the Judicial Panel on Multidistrict Litigation on September 16, 2003, the Eighth
... *continued*

Sage provides its competitive services using the Unbundled Network Element Platform (“UNE-P”), which is comprised of a series of unbundled network elements that Sage purchases from SBC. In the *TRO*, the FCC preserved the UNE-P, and for the most part has handed to the state regulatory commissions the job of conducting an “impairment” analysis that will determine whether the UNE-P should be limited to any extent within their relevant states. In so doing, the FCC noted that “in our judgment, the record before us does not contain sufficiently granular information and the states are better positioned than we are to gather and assess the necessary information.”⁵ In addition to the rules on UNE-P promulgated by the FCC, Sage’s use of the UNE-P is also governed by rules adopted by a number of state commissions, most notably those of Texas, Michigan and Illinois, which, after conducting extensive hearings, have adopted specific rules that promote the use of UNE-P to bring competitive choice to residential and small business markets, particularly in rural and suburban areas.

As a UNE-P carrier, Sage does not directly provide broadband service, and does not purchase broadband UNEs from any ILEC. Rather, Sage provides telephony and dial-up Internet access services that require access to a particular loop technology. Sage is thus directly and adversely affected by the FCC’s Loop Deregulation rules. The rules, and their adverse impact on Sage, are described in the following sections.

B. The Commission’s Loop Deregulation Rules

The Commission’s Loop Deregulation rules are be codified at 47 C.F.R. §§ 51.319(a)(1, 2 & 3). The stated purpose for these rules is to provide new incentives for ILECs to deploy fiber and packet-switching technology in the loop (*i.e.*, the “last mile” of the ILECs’

Circuit was selected as the venue to hear applications for review of the *TRO*.

⁵ *TRO*, FCC 03-36, at ¶ 188.

networks, which provides the connection from the ILEC network to the end user customer's home or office). These rules are extremely technical and rely on regulatory distinctions never used before, by the FCC or any other regulatory body. In short, ILECs are relieved of the obligation to provide unbundled fiber-based loops to their competitors under certain conditions. For example, for newly-built loops that consist 100% of optical fiber cable (known as fiber-to-the-home or "FTTH" loops), ILECs are not required to unbundle any part of the loop; and for FTTH loops that are already in service, ILECs are required only to unbundle a low-bandwidth channel for a single voice circuit.⁶ For "hybrid" loops that are part optical fiber and part copper, ILECs must continue to offer as UNEs the "features, functions and capabilities" that are based on "Time Division Multiplexing," or "TDM," but are not obligated to unbundle any other features, functions or capabilities of the loop.⁷ Regulation based on TDM versus non-TDM functions has never been used before, by any regulatory body, and is a highly important distinction that deserved a much more thorough analysis than was afforded in this proceeding. Predictably, the rule is inconsistent with other Commission policies and is inherently harmful to CLECs.

It is not overly simplistic to say that the focus of the Loop Deregulation rules is to continue to provide competitive carriers with unbundled access to the voice-grade narrowband functionalities typically provided over "copper" parts of ILEC loops, but not to the broadband functionalities associated with the "fiber" parts. Sage is not debating the policy goals that the Commission is attempting to accomplish with this regulatory scheme. However, the unique regulatory structure adopted by the Commission effectively encourages ILECs to deploy certain

⁶ ILECs are completely relieved of any obligation to unbundle FTTH loops if there is a copper loop available that runs to the same customer location. If not, for FTTH loops that have already been constructed, ILECs must provide an unbundled 64 kilobit circuit (equivalent to a single telephone line). For new FTTH construction, there is no unbundling requirement in any case.

⁷ *TRO*, FCC 03-36, at ¶ 296.

types of equipment and technologies as part of the *TRO*'s deregulatory focus. These technologies are inherently unsuited to Sage's services. It is this crucial rule amendment that creates severe problems for Sage and other competitive carriers – even if they do not provide broadband services or seek to purchase “non-TDM”-based UNEs from the ILECs.

Specifically, most ILECs today deploy their hybrid fiber/copper loops using what is known as Integrated Digital Loop Carrier technology, or “IDLC.” Essentially, these IDLC systems take telephone transmissions that originate as analog signals from the customer's phone, convert them to a digital signal, and convey that signal in an unbroken digital stream from the end of the copper part of the loop directly to the ILEC switch. This means that between the customer and the switch, there is one analog/digital conversion. This way of handling traffic is not offered to CLECs under the FCC's Loop Deregulation rules, however. Rather, CLECs can obtain only an inferior version of hybrid loops, called Universal Digital Subscriber Line, or “UDLC,” which ILECs provision differently for CLECs than for themselves. While ILECs continue to use the preferable IDLC technology (rather than UDLC) for their own services in many areas, they are required neither to provision UDLC in the same manner as they do for themselves nor to provision competitors' services through the use of IDLC equipment.⁸

The Commission explains that:

We recognize that providing unbundled access to hybrid loops served by . . . Integrated DLC systems, may require incumbent LECs to implement policies, practices, and procedures different from those used to provide access to loops served by Universal DLC systems. . . . Even still, we require incumbent LECs to provide requesting carriers access to a transmission path over hybrid loops served by Integrated DLC systems. We recognize that in most cases this will be either through a spare copper facility or through the availability of Universal DLC systems.⁹

⁸ These disparate provisioning standards flatly violate the nondiscriminatory mandates of Section 251. 47 U.S.C. § 251(c)(3). *See also* 47 C.F.R. § 51.311(b) (as amended).

⁹ *TRO*, FCC 03-36, at ¶ 297 (footnotes omitted).

By largely omitting UDLC from the definition of UNE loops, and by failing to require ILECs to engineer and deploy UDLC in the same manner in which they use it themselves, the *TRO* creates irreparable harm for Sage and other competitive carriers, as described in the following section.

In addition, in those cases where FTTH loops are in place and “spare copper” loops to the same location are available, the Commission’s rules force competitive carriers onto those copper loops. As discussed below, this creates a separate, but likewise extremely damaging, set of problems for competitive carriers, especially in the rural areas served by Sage.

C. How Sage Is Harmed by the FCC’s Loop Deregulation Rules

As discussed above, IDLC – the most common technology for hybrid loops in use by ILECs today – takes an analog signal from the customer premises, converts it to a digital signal at the end of the copper portion of the loop, and carries the call in digital format directly to the ILEC switch. There is therefore one conversion from analog to digital in the entire call path to the ILEC switch. In contrast, a call carried over UDLC technology starts as an analog signal at the customer premises is converted to a digital signal at the point where the copper segment of the loop ends, and is converted back to an analog signal at the ILEC central office prior to reaching the CLEC switch. This process requires a minimum of three conversions between analog and digital signals.

The difference in the number of analog/digital conversions is critical. Because UDLC technology as provisioned by ILECs to CLECs omits the digital control signal, it requires additional conversions, which significantly degrades the CLECs’ service. Not only is this result inconsistent with the FCC’s purported pro-broadband policy, but it contravenes international

engineering standards. Where the new rule is intended to guarantee competitive access to TDM-compatible loops,¹⁰ it actually is technically incompatible with TDM.¹¹

The Commission's Loop Deregulation rules provide one alternative to UDLC: if a "spare" copper loop is available, the ILEC may move the competitive carrier to that loop. While this would eliminate the UDLC problems listed above, it would create its own problems. Specifically, most "spare" loops are spare because they have been discarded by the ILEC when new hybrid fiber/copper loops or FTTH loops have been installed. These loops are not a reliable alternative for CLECs, in that, as provisioned by ILECs, they do not provide the full capabilities of UDLC technology – capabilities that the ILECs deploy for their own services. In addition, many of these copper loops – particularly those deployed in rural areas – are too long to allow reliable transmission speeds of the dial-up modem traffic that is important to nearly half of Sage's customers.

It is not Sage's intent in this Petition to provide an extensively detailed technical analysis of the harm that the Loop Deregulation rules will inflict on competitive carriers. Rather, this is precisely the kind of technical debate that should have taken place among affected parties, on the record, during the Triennial Review proceeding. Such debate did not occur, however, because the Commission disregarded the most basic requirements of the Administrative Procedure Act, and established its Loop Deregulation rules in an apparent last-minute, backroom deal with selected parties. Sage addresses the procedural and substantive infirmities of the *TRO* in more detail below.

¹⁰ See *TRO*, FCC 03-36, at ¶ 289.

¹¹ International Telecommunications Union ("ITU") standards specify that modem protocols v.90 and v.92 are operable only over IDLC configurations, which were designed to require 1 and only 1 conversion from an analog to a digital signal. These are the two most widely used protocols used for dial-up modems in the United States.

As a result of this inherently flawed process, the Loop Deregulation rules reflect a disconnect between the Commission's stated policies, and the irreparable harm that will occur if these rules are implemented. Moreover, because the Commission has preempted state regulators, and has chosen to have these rules take effect immediately, rather than through the nine-month state proceedings that will be used to implement most of the other *TRO* rules, the Commission has ensured that this harm will be immediate, and cannot be ameliorated by state regulators. As discussed below, the Loop Deregulation rules are badly broken, and reflect the badly broken rulemaking process in which they were created. These deficiencies compel grant of Petitioner's request for stay.

ARGUMENT

In reviewing a Petition for Stay, the Commission has followed the precedent of the United States Court of Appeals for the District of Columbia Circuit.¹² Thus, the Commission will 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 if a stay is issued.¹³ As demonstrated below, Sage's case satisfies each prong of this standard.¹⁴

¹² See *In re Virgin Islands Tel. Corp.*, 7 FCC Rcd. 4235, ¶ 13 (1992).

¹³ See *Washington Metro. Area Transit Comm'n. v. Holiday Tours, Inc.*, 559 F.2d 841, 842-43 (D.C. Cir. 1977). See also *TCI TKR of Georgia, Inc.*, 15 FCC Rcd 445 (2000).

¹⁴ The D.C. Circuit has emphasized that these factors relate on a "sliding scale," such that when "the arguments for one factor are particularly strong, an injunction may issue even if the arguments in other areas" are less compelling. See *Serono Labs v. Shalala*, 158 F.3d 1313, 1317 (D.C. Cir. 1998). This is particularly true where, as here, a stay request simply seeks to preserve the *status quo* pending judicial review. Indeed, the Commission itself has indicated that a stay maintaining the *status quo* should be granted "when a serious legal question is presented, if little harm will befall others if the stay is granted and denial of the stay would inflict serious harm." *Florida Publ. Serv. Comm'n.*, 11 FCC Rcd. 14324, 14325-26 & n.11 (1996). See also *Holiday Tours*, 559 F.2d at 844 ("An order maintaining the *status quo* is appropriate when a serious legal question is presented, when little if any harm will befall other interested persons or the public and when denial of the order would inflict irreparable injury on the movant. . . . [Such relief is available] whether or not movant has shown a mathematical probability of success.").

II. PETITIONER IS LIKELY TO SUCCEED ON THE MERITS

As Sage discusses below, the Loop Deregulation rules and related text of the *TRO* are fatally flawed by logical inconsistencies, untested and radical new theories of jurisdiction, and unprecedented violations of the Administrative Procedure Act¹⁵ and due process.¹⁶ These myriad and multifaceted failings present a strong likelihood that the rules will be reversed on appeal.

A. **The FCC Bases Its Rules On a Radical New Legal Theory that Allows It To Take Exclusive Jurisdiction Over Particular Facilities, Regardless of Whether They Carry Interstate Traffic**

The Loop Deregulation rules present a radical new regulatory approach that has not been subject to judicial review: for the first time, the Commission claims exclusive jurisdiction over the type of facility deployed by the ILEC, regardless of whether it carries local or interstate traffic. The Commission then eliminates any ILEC obligation to unbundle the facility, effectively preempting state authority to require unbundling. Moreover, the facilities over which the Commission now claims exclusive and preemptive jurisdiction include all fiber loops, and all hybrid fiber/copper loops. The record in the Triennial Review proceeding indicate that, in the territory served by SBC, these two categories of loops comprise *almost 50% of all loops*.¹⁷

In addition, the Commission's Loop Deregulation scheme takes effect immediately upon the effective date of the *TRO*: October 2, 2003, unless the order is stayed. By contrast, the *TRO* delegates most other UNE decisions to the states, to be considered in proceedings to be conducted over the next nine months. Thus the immediate effectiveness of the

¹⁵ 5 U.S.C. §§ 551 *et seq.* (West 2001).

¹⁶ *See* U.S. CONST. AMEND. V.

Loop Deregulation rules, in conjunction with the removal of state regulatory authority to detect and ameliorate any adverse impact over time, makes a compelling case for stay.

In establishing this preemptive regulatory scheme, this Commission is reversing its position on the jurisdictional structure of the Telecommunications Act of 1996. In the *TRO*, the Commission states that “[w]e find that states do not have plenary authority under federal law to create, modify or eliminate unbundling obligations.”¹⁸ The Commission then goes even further, stating that state regulatory commissions also lack authority *under their own state telecommunications statutes* to enact unbundling rules that are inconsistent with the Commission’s.¹⁹ These statements are a repudiation of the findings that the Commission made in its 1996 Order implementing the Act.²⁰ In that Order, the Commission recognized that the Act created a new, dual-jurisdictional system in which both the states and the Commission shared authority in implementing the Act’s local competition provisions. The Commission in 1996 expressly noted that the Telecommunications Act granted state regulators authority to define unbundled network elements:

State commissions may identify network elements to be unbundled, in addition to those elements identified by the Commission, and may identify additional points at which incumbent LECs must provide interconnection, where technically feasible. * * * The actions taken by a state will significantly affect the development of local competition in that state.²¹

This Commission has reversed that position, eliminating any role of state regulators in defining IDLC-fed circuits as unbundled network elements — this type of loop

¹⁷ Written *ex parte* filing of WorldCom, filed in CC Docket No. 01-338 on December 12, 2002, at 4 n.9 (cited by the Commission, *TRO*, at ¶ 291, n.839).

¹⁸ *TRO*, FCC 03-36, at ¶ 187.

¹⁹ *TRO*, FCC 03-36, at ¶ 194.

²⁰ *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd. 15499 (1996) (“*Local Competition Order*”).

²¹ *Local Competition Order*, 11 FCC Rcd. at 15567-68, ¶¶ 136-37 (1996).

constitutes 50% of loops in SBC territory (and likely a similar proportion across the rest of the country) and was deployed by ILECs when the Commission first considered this issue in 1996.²² Thus, it is clear that the FCC expressly considered and rejected an approach that would have omitted these loops from Section 251 unbundling obligations. The *TRO* provides no explanation for reversing the Commission’s position on this critical issue, a failure that by itself constitutes reversible error.²³

Indeed, in attempting to justify its Loop Deregulation rules, the Commission claims that authority is conferred by Section 706 of the Telecommunications Act of 1996, which directs the Commission to “encourage the deployment” of advanced telecommunications services.²⁴ Yet the Commission chooses to ignore the express language of Section 706, which states:

The Commission **and each State commission** with regulatory jurisdiction over telecommunications services shall encourage the deployment on a reasonable and timely basis of advanced telecommunications capability to all Americans (including, in particular, elementary and secondary schools and classrooms) by utilizing, in a manner consistent with the public interest, convenience and necessity, price cap regulation, regulatory forbearance, measures that promote competition in the local telecommunications market, or other regulating methods that remove barriers to infrastructure investment.²⁵

The Commission is therefore taking a statutory provision that expressly grants state regulators authority over broadband deployment, and is using it to justify its attempt to grab exclusive jurisdiction over up to 50% of the loops in the country, preemptively deregulating those loops

²² Indeed, in 1996, the Commission specifically required the unbundling of the high bandwidth and packet switching functions of loops. *Local Competition Order*, 11 FCC Rcd. at 15691-92, ¶¶ 380-84.

²³ See *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 57 (1983).

²⁴ 1996 Act, § 706. The Commission posits that it gains its authority to preemptively deregulate fiber and packet facilities through § 706’s direction to encourage deployment of broadband services, in combination with § 251(d)(2)’s provision that, in defining UNEs, the commission must consider “at a minimum” the “necessary” and “impair” standards. *TRO*, FCC 03-36, at ¶¶ 234, 286, 288.

²⁵ 1996 Act, § 706(a) (emphasis added).

and eliminating the states' ability to adopt their own loop deployment policies. Sage believes that the Commission's interpretation of the Telecommunications Act of 1996 is invalid on its face,²⁶ and will compel reversal of the *TRO*'s Loop Deregulation rules.

B. The Process Leading to the Adoption of the Loop Deregulation Rules Was Marked By Unprecedented Violations of the Administrative Procedure Act

Section 553 of the Administrative Procedure Act ("APA") requires that agency rulemakings include adequate opportunity for comment and are made on the basis of the public record. *See* 5 U.S.C. § 553(b)-(d) (West 1996). As the Supreme Court has explained, "not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational."²⁷ Failure to comply with these requirements "leads in the direction of arbitrary decision-making."²⁸ These requirements are especially crucial where, as here, an agency is adopting substantial changes to an existing rule; agencies are "obligated to explain [their] reasons for" adopting such changes.²⁹

Rules not promulgated in accordance with these procedures therefore warrant *vacatur*.³⁰ Likewise, courts will stay agency orders for which the record demonstrates failure to adhere to APA rulemaking requirements.³¹

²⁶ Further proof of the Commission's unprecedented jurisdictional power grab is found in another new jurisdictional theory that appears for the first time in the *TRO*. In it, the Commission states that, when states undertake their nine-month proceedings to implement the new *TRO* rules, they (1) are doing so exclusively under federal authority that is delegated to the states *by the Commission*, (2) have no unbundling authority under the 1996 Act, and (3) have no authority to implement their own state statutes if the outcome would be inconsistent with FCC regulations. *TRO*, FCC 03-36, at ¶¶ 186-87.

²⁷ *Allentown Mack Sales and Service v. NLRB*, 522 U.S. 359, 374 (1998) (vacating procedural guidelines for polling employers as to union support within the enterprise).

²⁸ *United States v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (vacating FDA packaging rule for failure to comply with 5 U.S.C. § 553).

²⁹ *State Farm*, 463 U.S. at 57.

³⁰ 5 U.S.C. § 706(2)(A). *See also United States v. Garner*, 767 F.2d 104, 120 (5th Cir. 1985) (vacating federal loan regulation promulgated without adequate agency analysis); *International Brotherhood of Teamsters v. United States*, 735 F.2d 1525, 1531 (D.C. Cir. 1984); *United States Steel Corp. v. EPA*, 649 F.2d 572, 575-76 (8th Cir. 1981) (reversing and remanding rules promulgated without notice and comment).

The *TRO* fails in several respects to comply with these APA requirements. Both as a global matter and with respect to discrete portions of the order, the Commission conducted this proceeding with scant regard for the strictures of Section 553. Accordingly, reversal of the order – especially the Loop Deregulation rules – is warranted and appropriate, militating in favor of immediate stay.

1. *The Loop Deregulation rules were not written when the item was voted, and in fact were largely written during the “Sunshine” period following adoption of the TRO, with input from a few selected parties.*

The Commission’s adoption of the *TRO* – and particularly the Loop Deregulation rules – occurred without its members having been provided with a valid draft of the order or the rules. On the day the Commission voted the *TRO*, both Commissioner Copps and Commissioner Adelstein complained that they were being forced to vote on an item that, in large part, had not yet been written.³² The votes of all the Commissioners under such circumstances were grounded in little more than general policy concepts, and proposed rules filed by a single party to the proceeding – this cannot be deemed the product of “reasoned decisionmaking.”³³

Moreover, it is unprecedented for an agency to delay release of an order by *more than six months* after its substance had been adopted. Petitioner is unable to find any remotely analogous precedent involving so great a delay. Given the incomplete nature of the order at the time it was voted – as described by Commissioners Copps and Adelstein – and the unprecedented delay and *ex parte* contacts prior to its release, it is dubious at best that the

³¹ See *Cleveland Elec. Illuminating Co. v. EPA*, 572 F.2d 1150, 1155-56 (6th Cir. 1978) (quoting earlier order staying sulfur dioxide emissions rule due to substantial procedural infirmities raised in petitions for review).

³² “We are voting on this item before we have seen a draft reflecting the latest cuts. ... But I am very uncomfortable voting on this item before the offices have seen the draft order, because as we all know, the devil is in the details.” Separate Statement of Commissioner Jonathan S. Adelstein (Feb. 20, 2003). “I am unable to fully sign on to decisions without reservations until there is a final written product.” Press Statement of Commissioner Michael J. Copps (Feb. 20, 2003). Available at <<http://www.fcc.gov>>.

Commissioners' basis for voting on February 20 bears any relation to the text that was released on August 22. The statements of several of the commissioners on the day the item was voted make this clear: As noted above, Commissioners Copps and Adelstein both expressed their concern that the Loop Deregulation rules were not fully drafted, and the details not fully disclosed, at the time of voting. In addition, Commissioner Martin, one of the three-vote majority that supported the Loop Deregulation rules, stated that "we endorse and *adopt in total* the High Tech Bandwidth Coalition's proposals for the deregulation of fiber to the home and fiber used with new packet technology."³⁴ That statement is inaccurate, however. Not only are the Loop Deregulation rules that were relied on in the August 22 order significantly different from the HTBC-proposed rules cited on February 20, but they are directly contradictory in several major respects.³⁵ From the information available in the public record of this proceeding, it is therefore clear that the Loop Deregulation rules were not drafted when the vote was taken on February 20, 2003, and that the commissioners had either no information on the details of the rules, or had a misunderstanding of the rules at the time they voted the item. This dramatic breach of procedural protocol severely undermines the legitimacy of the order and may in itself result in full reversal. Stay of the Loop Deregulation rules should therefore issue immediately.³⁶

³³ See *Allentown*, 522 U.S. at 374; *Garner*, 767 F.2d at 117.

³⁴ *Commissioner Kevin J. Martin's Press Statement on the Triennial Review* at 1 (Feb. 20, 2003) (emphasis in original). Available at <<http://www.fcc.gov>>.

³⁵ Compare written *ex parte* filing of HTBC, filed in CC Docket No. 01-338 on February 7, 2003, Section entitled "HTBC's First Rule Modification," proposed Rule § 51.319(a)(1), stating that high capacity loops other than DS1 and DS3 are available as UNEs, but excluding dark fiber, with TRO, Rule §§ 51.319(a)(1), (2)(ii), (4) & (5), which *do* restrict high capacity UNEs to DS1 and DS3 loops; and Rule § 51.319(a)(6), which specifically *includes* dark fiber loops as UNEs.

³⁶ See *Cleveland Electric*, 572 F.2d at 1155-56.

2. *The Commission held dozens of ex parte meetings to draft substantive Loop Deregulation rules after the item was adopted.*

The record in this proceeding indicates that the Commission continued to hold private meetings with industry representatives after the *TRO* was purportedly adopted on the merits. To be precise, 34 submissions appear between the date of adoption – February 20, 2003 – and the date of release – August 22, 2003.³⁷ Marked from the date on which the item was subject to public notice pursuant to the Government in the Sunshine Act,³⁸ a total of 58 *ex partes* were invited by the staff.³⁹ These record entries demonstrate two key infirmities in the *TRO*, and particularly in the Loop Deregulation rules: (1) the substance of the rules was entirely unsettled at the time they were adopted; and (2) the Commission wrote the substantive rules with substantial and largely undisclosed help from individual companies during the “Sunshine period,” while other affected parties were excluded from the rulemaking process.

As Petitioner discusses above, there is substantial evidence that the commissioners did not know what the Loop Deregulation rules were when they voted the item. This conclusion is further confirmed by evidence that Commission Staff invited, and apparently relied on, so much post-approval input from interested parties. These *ex parte* letters and comments only underscore the fragility of the item as a substantive and procedural matter at the time of its February 20 adoption. Moreover, they demonstrate that the actual “process” of promulgating the order occurred long after the vote had already occurred.

Equally troubling is the fact that the substance of the Loop Deregulation rules and other aspects of the *TRO* were developed in closed meetings with third parties hand-picked by

³⁷ See the proceeding docket at <http://gullfoss2.fcc.gov/cgi-bin/websql/ecfs/comsrch_v2.hts>.

³⁸ 5 U.S.C. § 552b.

³⁹ *Id.*

Staff. These meetings occurred after listing of the Sunshine agenda and were initiated by Commission invitation; unsolicited comments were rejected.⁴⁰ These invitees enjoyed a demonstrably substantial role in crafting the revised unbundling rules, as indicated in the *ex partes* on file. These contacts during the Sunshine period included one written filing and one meeting from the High-Tech Bandwidth Coalition (“HTBC”) – which drafted proposed Loop Deregulation rules. The HTBC’s only involvement in the proceeding concerned the Loop Deregulation rules. In addition, there were contacts during the Sunshine period by Corning and Alcatel – both members of the HTBC – as well as nine contacts from Verizon, and one from BellSouth – both strong proponents of, and beneficiaries of, the Loop Deregulation rules.

It is thus apparent that the FCC operated under substantial influence during the drafting process, tending to a conclusion that the *TRO* represents “an abdication of regulatory authority to the regulated.”⁴¹ This level of post-adoption delay and lobbying by a select few participants is unprecedented, and is highly prejudicial to the other parties that participated in the proceeding. This kind of “capture” of a regulatory body by a few special interests is precisely what the APA and the Sunshine period prohibition were designed to prevent.

Such regulatory capture has also been deemed by the courts to be a fundamental abrogation of an expert agency’s statutory duty to provide reasoned, expert analysis.⁴² In fact, the Fifth Circuit recently vacated a portion of the Commission’s *CALLS Order*⁴³ on this

⁴⁰ The docket in this proceeding includes scores of post-Sunshine submissions labeled “Not for staff inspection. Submission was received during the Sunshine Agenda period[.]” See <http://gullfoss2.fcc.gov/cgi-bin/websql/ecfs/comsrch_v2.hts>. See also 47 C.F.R. §§ 1.1203 (prohibiting Commission consideration of late-filed submissions), 1.1204(10) (allowing consideration of submissions requested of a party by the FCC).

⁴¹ *U.S.A. Group Loan Svcs., Inc. v. Riley*, 82 F.3d 708, 714 (7th Cir. 1996) (discussing impropriety of agency accession to party comments in a negotiated rulemaking under 5 U.S.C. § 556).

⁴² See *Riley*, 82 F.2d at 714.

⁴³ *Access Charge Reform*, CC Docket Nos. 96-262 *et al.*, Sixth Report and Order, 15 FCC Rcd. 12962 (2000).

ground.⁴⁴ In that case, the Commission had chosen \$650 million as the proper amount of a Universal Service Fund to be created through end user payment of access charges, based solely on one filing by a group of commenters. The Fifth Circuit vacated that decision, concluding that the FCC “failed to exercise sufficiently independent judgment” on this matter and failed to “provide some explanation as to why it found one study more persuasive than the other.”⁴⁵ Because the HTBC Loop Deregulation approach similarly was adopted “in total” with extensive post-Sunshine input from selected proponents of the rules, it too is likely to be deemed an improper abdication of agency authority and vacated. In light of the critical impact of these new rules on Sage and other competitors, and the *TRO*’s clear vulnerability to reversal, the Court should enter a stay to prevent their causing needless harm to the telecommunications industry and American consumers.

3. *The Commission just released a substantial amendment to the Loop Deregulation Rules via “errata,” which constitutes a substantive rule change without record evidence.*

The Commission effected a wholesale change to the loop unbundling provision in Rule 51.319(a) in an “errata” without benefit of additional comment or deliberation. In a release dated September 17, 2003, the Commission re-wrote the unbundling rule for fiber-to-the-home (“FTTH”) loops. Where previously the definition of FTTH loops included only residential loops, the Errata deleted the word “residential” to render the definition applicable to any fiber optic cable to a premises.⁴⁶ Without question, this amendment constitutes a substantive rule change, one for which no additional comment was invited and no Commission analysis appears.

⁴⁴ *Texas Ofc. of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001).

⁴⁵ 265 F.3d at 328.

⁴⁶ *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Errata, FCC 03-227, ¶ 37 (rel. Sept. 17, 2003).

This action is nothing short of outrageous and patently violates the APA's rulemaking requirements. As an initial matter, an errata can hardly be deemed the product of "reasoned decisionmaking" accompanied by "an adequate explanation" of their basis and content.⁴⁷ Moreover, an agency decision that substantially changes a previously released rule must provide some explanation for doing so⁴⁸ – an opportunity that an errata simply does not afford. Finally, the FCC's use of the erratum privilege in this instance fundamentally to re-write Rule 51.319(a) is an improper circumvention of the APA's notice-and-comment requirements in 5 U.S.C. § 553(c). Accordingly, the Loop Deregulation rules, which include the errata change, must be stayed.

C. The Loop Deregulation Rules Violate Due Process by Taking Effect Immediately, and Denying State Regulators the Ability to Ameliorate the Harm of the New Rules

The Loop Deregulation rules eliminate the ILECs' obligation to unbundle any fiber-based functionalities in accordance with the proposed rules submitted by HTBC in their February 7 and February 14 *ex parte* filings.⁴⁹ The *TRO* contains a finding of "no impairment" on a nationwide basis, and concludes that such technology may no longer be considered as an element appropriate for unbundling. As a result, this rule change is effective immediately with no opportunity for the "granular analysis" at state commissions that applies to elements deemed by the FCC as subject to unbundling, such as copper loops.⁵⁰ Sage therefore has no opportunity to demonstrate that the rule change effects a substantial impairment of its service. This portion

⁴⁷ *Garner*, 767 F.2d at 117-18.

⁴⁸ *See State Farm*, 463 U.S. at 57.

⁴⁹ *TRO*, FCC 03-336, at ¶ 288 & n.834.

⁵⁰ *E.g.*, *TRO*, FCC 03-36, at ¶¶ 328-340.

of the *TRO* therefore constitutes an unlawful abridgment of Sage’s due process rights and is subject to immediate stay and reversal.

1. *The APA requires that any entity at risk of substantial loss, whether by adjudication or rulemaking, must be afforded a meaningful opportunity to oppose an agency decision.*

It is bedrock administrative law that persons that may be adversely affected by an agency decision must have an opportunity to address the matter on the record. As the Supreme Court held in *Mathews v. Eldridge*, “[t]he essence of due process is the requirement that ‘a person in jeopardy of serious loss be given notice of the case against him and opportunity to meet it.’”⁵¹ The right to oppose potentially harmful agency action is a “fundamental requirement of due process” for which persons must have “the opportunity to be heard ‘at a meaningful time and in a meaningful manner.’”⁵² The right of participation is triggered where one “may be condemned to suffer grievous loss.”⁵³

Though more often invoked in the context of individual adjudication, due process is no less a concern in the context of a generalized rulemaking. Indeed, the rulemaking requirements of Section 553 of the APA exist as a safeguard for regulated entities whose interests are affected by agency decisions.⁵⁴ And while due process concerns will not arise where the strictures of Section 553 are followed,⁵⁵ an agency’s failure to engage in proper notice

⁵¹ 424 U.S. 319, 348 (1976) (quoting *Joint Anti-Fascist Comm. v. McGrath*, 341 U.S. 123, 171-72) (holding that Social Security benefits may not be terminated without a hearing).

⁵² *Id.* at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

⁵³ *Goldberg v. Kelly*, 397 U.S. 254, 263 (1970) (quoting *Joint Anti-Fascist Comm.*, 341 U.S. at 168)) (holding that aid to a low-income family may not be terminated without a hearing).

⁵⁴ See, e.g., *Vermont Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 524 (1978); *U.S. v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 758 (1972).

⁵⁵ *United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 246 (1973).

and comment in a rulemaking renders the entire proceeding a failure of due process.⁵⁶ Denying an entity the right of participation in a rulemaking certainly requires the same conclusion.

The Loop Deregulation rules violate Sage's procedural due process rights in two ways. First, as discussed above, the rules were substantially written after the record closed, with extensive input during the Sunshine period from selected parties that were proponents of the Loop Deregulation concept, constituting a violation of notice and comment procedure.⁵⁷ Secondly, as explained more fully below, these rules preclude affected parties from seeking review or intervention by the state commissions. They are therefore extremely vulnerable to reversal on this ground and thus should be stayed immediately.

2. *The TRO precludes state review of the implementation of Loop Deregulation, denying Sage the right of agency adjudication.*

The Loop Deregulation rules preemptively deregulate fiber-based loop facilities, and promote deployment of UDLC technology by ILECs. Thus, unlike most other network elements, state commissions have no right to review this issue, or to hold proceedings to determine if ILEC deployment of UDLC technology is causing harm to providers of competitive local services within their respective states. This decision substantially affects Sage's substantive rights without the opportunity for agency review. It effectively forces Sage to incur "grievous loss" without the right to adjudication.⁵⁸

This situation is closely analogous to those in which private persons are at risk of losing benefits.⁵⁹ In such instances, the Supreme Court has unequivocally held that parties due

⁵⁶ *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304-305 (1937) (invalidating telephone rates adopted on the basis of evidence not disclosed in the record).

⁵⁷ *See Ohio Bell*, 301 U.S. at 304-305; *Nova Scotia*, 568 F.2d at 249-49.

⁵⁸ *Goldberg*, 397 U.S. at 263. *See also Mathews*, 424 U.S. at 348.

⁵⁹ *See Mathews*, 424 U.S. at 348; *Goldberg*, 397 U.S. at 263.

process mandates some form of adjudication prior to the agency's action. *Id.* In the instant case, the Commission has deprived Sage of that right by federal fiat, which is no less a deprivation of due process. This action is reversible error, and will have an immediate and irreparable effect on Sage. Stay of the Loop Deregulation rules is therefore necessary.

D. The Loop Deregulation Rules Are Arbitrary and Capricious, In that They Directly Contravene the FCC's Explicitly Stated Policy Goals

It is an integral part of the Commission's Loop Deregulation rules that, while ILECs are not required to sell portions of their fiber-based infrastructure to competitors as UNEs, they are required – in almost all instances – to continue to provide UNEs for the provision of “Plain Old Telephone Service” (or “POTS”) so that UNE-P carriers and others can continue to provide competitive voice services to customers, even if those customers purchase broadband service from the ILEC.⁶⁰ For example, the Commission's new rules provide varying levels of deregulation, depending on the types of facilities that the ILECs deploy. The most complete deregulation is applied to deployment of fiber-to-the-home loops.⁶¹ Yet, even for the state-of-the-art FTTH loops that the ILECs have deployed to date, they are required to continue to provide a 64 kilobit channel to UNE-P carriers or other competitors so that they may continue to provide “POTS” telephone service to the end user.⁶² It is therefore an explicit part of the *TRO*'s regulatory scheme that the Loop Deregulation rules should not prevent UNE-P carriers from obtaining UNEs for POTS.

However, as Sage discusses above, the unbundling scheme adopted by the Commission rewards ILECs by allowing them to deny access to IDLC as part of the deregulatory

⁶⁰ The only exception to this rule applies when ILEC build new all-fiber loops directly to customer premises.

⁶¹ Rule 51.319(a)(3)(ii).

⁶² ILECs are required to provide this 64 kbps channel on their existing FTTH loops if there is no copper facility available by which a competitive carrier can reach the end user customer. Rule 51.319(a)(3)(ii)(C).

intent of the *TRO*. This new scheme degrades the quality of CLEC service, and severely impedes end users' dial-up access to the Internet. Further, it creates a contradiction in the *TRO* – preserving TDM access while providing ILEC incentives to render the service unattractive to end users – that clearly demonstrates that this outcome is an unintended consequence of the Loop Deregulation rules. It also shows that the rules are contrary to the Commission's stated public policy goals and public interest findings. This inherent inconsistency between the Commission's rules and its stated policy goals indicates that the rules are arbitrary and capricious.

III. PETITIONER WILL SUFFER IRREPARABLE HARM ABSENT A STAY

Absent a stay, Petitioner will suffer a variety of harms that cannot be remedied if the Commission's rules are ultimately vacated at some point in the future. As Sage discusses in Section C of the Background to this Petition, the Loop Deregulation rules allow the ILECs to eliminate the unbundling requirements imposed under Section 251 of the Communications Act – an extraordinarily strong incentive – if they convert the digital-based IDLC technology that is predominantly used today, into the inferior connectivity afforded over UDLC technology as ILECs provision it. If the ILECs take this incentive – and their enthusiastic support for the Loop Deregulation rules in the record of this proceeding indicates that they will – this technology change will degrade the service that Sage is able to offer its customers.

As Sage explains above, currently over 94% of its customer base is residential, nearly 50% of whom use dial-up access to the Internet. If the ILECs convert existing lines from IDLC to UDLC, or if they continue to provide CLECs with UDLC that is inferior to what they themselves uses, the ILECs will inhibit Sage's customers from obtaining the full speeds and capabilities of their dial-up modems – speeds that were achievable when Sage's customers were

still served by the ILEC.⁶³ If the ILECs choose to implement UDLC only on a going-forward basis, new customers of Sage will be forced to suffer extreme degradation of their dial-up access. Either way, the utility of the service Sage is able to provide is severely degraded, and will result in loss of business and damage to Sage's strong reputation for providing innovative, high-quality service. Moreover, because the Loop Deregulation rules expressly allow ILECs to provide their own service over IDLC technology, they do not face the same service restrictions that they can impose upon their competitors. This kind of damage is immediate and irreparable – not simply economic loss that can be recouped after the Commission's rules are vacated in the future. Courts have recognized that unrecoupable losses resulting from such unfair competition are the epitome of irreparable harm.⁶⁴ In the instant case, such harm compels stay.

IV. NO OTHER PARTY WILL BE HARMED IF STAY IS GRANTED

Grant of a stay will maintain the status quo, and will preserve the regulatory environment that has been in effect since the Telecommunications Act of 1996 was implemented seven years ago. As the D.C. Circuit held in *Holiday Tours*, “an order maintaining the status quo is appropriate ... when little if any harm will befall other interested persons[.]”⁶⁵ No party can credibly argue that it is subject to irreparable harm by the continuation of the status quo, particularly when those carriers enjoy overwhelming market power in all relevant markets. Moreover, the Commission's Loop Deregulation rules are specifically intended to provide additional incentive to stimulate ILEC investment in fiber loops in the future. Because ILEC

⁶³ It is also likely that such conversions of existing circuits would violate the prohibition against ILECs unilateral action in disconnecting already connected UNEs in order to gain an anticompetitive advantage. See *AT&T Corp. v. Iowa Utilities Board*, 525 U.S. 366, 395 (1999).

⁶⁴ See *Holiday Tours, Inc.*, 559 F.2d at 843, n.2 (noting that the destruction of a business is an essential economic injury and not a “mere” economic injury that is insufficient to warrant a stay). See also *Independent Bankers Ass'n of Am. v. Smith*, 534 F.2d 921, 929 (D.C. Cir. 1976).

⁶⁵ 559 F.3d at 844.

network investment is the result of capital budgets that are determined significantly in advance of purchases, it cannot reasonably be found that ILECs are facing imminent harm if the Loop Deregulation rules are not implemented immediately.

In *Iowa Utilities Board v. FCC*, the U.S. Court of Appeals for the Eighth Circuit weighed the respective interests of parties advocating and opposing stay.⁶⁶ The Court found that, if the status quo were maintained via a stay, it would be easier for the parties to conform to the Commission's rules in the future if they were ultimately reinstated, rather than to implement the rules and undo them at a later date. Given that the Loop Deregulation rules would cause immediate harm to Sage's business, would disenfranchise state regulators, and would institute a radical new regulatory regime, the balance of harm in the instant case similarly militates in favor of stay.

V. STAY OF THE COMMISSION'S PATENTLY FLAWED AND ARBITRARY ORDER WILL SERVE THE PUBLIC INTEREST

In the *TRO*, the Commission made a national finding of no impairment on unbundled Local Switching (a critical component of the UNE-P),⁶⁷ but then ordered state regulators to review this finding on a more granular level. It based that finding, in part, on evidence in the record that, at the most, only 3% of residential telephone users were taking service from competitive local carriers.⁶⁸ Implicit in that finding is the conclusion that UNE-P is an important means of bringing competitive options to residential telephone users. This conclusion is further evidenced by the Commission's decision to preserve the ability of UNE-P

⁶⁶ 109 F.3d 418, 426 (8th Cir. 1996).

⁶⁷ *TRO*, FCC 03-36, at ¶ 419.

⁶⁸ *TRO*, FCC 03-36, at ¶ 438.

carriers and other carriers to have access to voice grade UNEs, even after ILECs have deployed broadband facilities.⁶⁹

These findings by the Commission acknowledge that the public interest is served by maintaining the ability of competitive carriers to provide voice service to residential users – as Sage does – and to maintain an active role of the states in implementing the unbundling rules to this effect. This constitutes a concession by the Commission that the unintended consequences of its Loop Deregulation rules would be harmful to the public interest.

Moreover, a stay would preserve the status quo, in which state regulators are able to oversee the implementation of the unbundling rules, and to ensure that they do not cause harm to the development of local competition within their states. In staying part of the Commissions' order implementing the 1996 Act, the U.S. Court of Appeals for the Eighth Circuit found that “[p]resently, we have no reason to doubt the ability of the state commissions to fulfill their duty to promote competition in the local telephone service markets and thus conclude that the public interest weighs in favor of granting a stay.”⁷⁰ Petitioner believes that a similar finding is warranted in this instance.

⁶⁹ *TRO*, FCC 03-36, at ¶ 296.

⁷⁰ *Iowa Utilities Bd.*, 109 F.3d at 427.

VI. CONCLUSION

Sage Telecom has demonstrated that it is likely to succeed on the merits, due to the Commission's unexplained deviation from its prior precedent, extraordinary violations of the APA, the introduction of unsound and unsupportable theories of preemptive jurisdiction, and other substantial flaws. In addition, Sage has shown that, if the Loop Deregulation rules (Rules 51.319(a)(1, 2 & 3)) are allowed to take effect, it will suffer irreparable harm. In contrast, if a stay is granted, other parties will not be harmed, and the public interest will benefit. Therefore, Sage's request for stay must be granted.

If the Commission does not grant the stay requested in this Petition by September 29, 2003, then Sage will consider this Petition rejected, and will seek the appropriate relief from the Federal Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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Dated: September 22, 2003

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I, Lori Williams, hereby certify that on this 22nd day of September, 2003, the foregoing Petition for Review and Corporate Disclosure Statement were served upon the following parties via First Class Mail:


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