ORIGINAL
FILE COPY

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October 17, 1996

Mrs. Blanca S. Bayó
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Florida Public Service Commission
2540 Shumard Oak Boulevard
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RE: Docket Nos. 960833-TP, 960846-TP and 960916-TP
AT&T, MCI and ACSI Arbitrations with BellSouth;

Docket No. 960757-TP MFS Arbitration with BellSouth; and

Docket No. 961150-TO Sprint Arbitration with BellSouth

Dear Ms. Bayó:

Enclosed is an original and fifteen copies of BellSouth Telecommunications, Inc.'s Notice of Order of the Eighth Circuit Court of Appeal's Order Granting Stay Pending Judicial Review and Request for Relief, which we ask that you file in the captioned matters.

A copy of this letter is enclosed. Please mark it to indicate that the original was filed and return the copy to me. Copies have been served to the parties shown on the attached Certificate of Service.

Sincerely,

J. Phillip Carver (BW)

J. Phillip Carver

Enclosures

cc: All parties of record
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R. G. Beatty
William J. Ellenberg II

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BEFORE THE FLORIDA PUBLIC SERVICE COMMISSION

In re: Petitions by AT&T Communications of the Southern States, Inc., MCI Telecommunications Corporation, MCI Metro Access Transmission Services, Inc., American Communications Services, Inc. and American Communications Services of Jacksonville, Inc. for arbitration of certain terms and conditions of a proposed agreement with BellSouth Telecommunications, Inc. concerning interconnection and resale under the Telecommunications Act of 1996	Docket No. 960833-TP Docket No. 960846-TP Docket No. 960916-TP
MFS COMMUNICATIONS COMPANY, INC. Petition for Arbitration Pursuant to 47 U.S.C. § 252(b) of Interconnection Rates, Terms, and Conditions with BELLSOUTH TELECOMMUNICATIONS, INC.	Docket No. 960757-TP
Petition by Sprint Communications Company, L.P., for Arbitration of Interconnection with BellSouth Telecommunications, Inc., under the Telecommunications Act of 1996	Docket No. 961150-TP
	Filed: October 17, 1996

NOTICE OF ORDER OF THE EIGHTH CIRCUIT
COURT OF APPEAL'S ORDER GRANTING STAY
PENDING JUDICIAL REVIEW AND REQUEST FOR RELIEF

COMES NOW, BellSouth Telecommunications, Inc. ("BellSouth"), by and through its undersigned attorneys, and files this Notice of the Eighth Circuit Court of Appeal's Order Granting Stay Pending Judicial Review (the "Order") and Request for Relief. BellSouth respectfully requests that the Florida Public Service Commission (the "Commission") take administrative notice of the

Order as well as its implications for each of the arbitrations that are currently pending before the Commission[1] as well as for those that may be brought before the Commission at some future date.[2] BellSouth further requests that the Commission grant it the relief sought herein.

I. BACKGROUND

On October 15, 1996, the United States Court of Appeals for the Eighth Circuit (the "Eighth Circuit") entered its "Order Granting Stay Pending Judicial Review" of portions of the Federal Communications Commission's ("FCC") First Report and Order in Docket No. 96-98. (A copy of that Order is attached hereto as Attachment "1".) In that Order, the Eighth Circuit

> grant[ed] the petitioners' motion to stay the FCC's pricing rules and the 'pick and choose' rule contained in its First Report and Order[8] pending a final decision on the merits.
>
> (8) The stay pertains only to §§§ 51.501-51.515 (inclusive), 51-601.51.611 (inclusive), 51.701-51.717 (inclusive), § 51.809 and the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.

Order, p. 14. (All page citations are to Attachment 1.)

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[1] Currently pending before the Commission are the arbitration requests of MFS, AT&T, MCI, ACSI and Sprint. The hearing on MFS' request was held on August 27, 1996. The hearing in the consolidated docket for AT&T, MCI and ACSI took place on October 9 through 11, 1996. The request of Sprint is set to be heard on December 3 and 4, 1996.

[2] This Notice discusses the effect of the stay on the full range of issues that are currently being arbitrated before this Commission. Obviously, not all issues will be germane to every arbitration request or to all parties.

The basis for the Eighth Circuit's holding was its analysis of the FCC's rules compared to the requirements set forth in the Telecommunications Act of 1996 (the "Act"). In Section IIA of its Opinion, the Court found that the petitioners (the parties appealing the FCC's Order and seeking a stay) were likely to succeed on the merits of this appeal. Specifically, the Eighth Circuit held that it was likely that the petitioners would prevail on their arguments that the Act did not give the FCC the jurisdictional authority to mandate to the states rules on pricing. Thus, the Court stated:

> Because we believe that the petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service, we think that it is unnecessary at this time to address the remaining theories which the petitioners use to challenge the legality of the FCC's pricing rules.

Id., at 9.

Next, the Court engaged in a discussion of whether or not the petitioners would suffer irreparable harm if a stay were not granted. It found that the FCC's pricing rules, including the "pick and choose" rule, would irreparably injure the states and the incumbent local exchange companies ("ILECs") because the "pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the 'pick and choose' rule will operate to further undercut any agreements that are actually negotiated or arbitrated." Id. at 10.

Furthermore,

> As we explained above, we are persuaded that, absent a stay, the proxy rates would frequently be imposed by the state commissions and would result in many incumbent LECs suffering economic losses beyond those inherent in the transition from a monopolistic market to a competitive one...In this case, the incumbent LECs would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned, and we believe that the incumbent LECs would be unable to fully recover such losses merely through their participation in the market. Moreover, the petitioners' potential loss of consumer goodwill qualifies as irreparable harm...For the foregoing reasons, we believe that the petitioners have adequately demonstrated that they will be irreparably harmed if a stay of the FCC's pricing rules is not granted.

Id., at 11-12.

Thus, the Eighth Circuit found that the FCC's pricing rules, including the proxy rates, because they do not allow for a consideration of embedded costs and because they require the use of a hypothetical rather than an ILEC's actual network, result in rates that are artificially low and do not allow the ILECs to recover their costs. Id., at 4. As a result, the Court entered its Stay Pending Judicial Review.

In its testimony filed in the arbitrations currently pending before this Commission, BellSouth has set forth its position that many of the FCC's rules, including those related to pricing, are contrary to the terms of the Act and that, if this Commission were given the opportunity, it would be appropriate for the Commission to reject those rules. The Eighth Circuit's Order staying the pricing and "pick and choose" provisions of the rules now presents this Commission with such an opportunity. BellSouth therefore respectfully requests, as described in more detail below, that the Commission reject those parts of the FCC's rules that have been stayed and, instead, enter rulings consistent with Congress' intent as expressed in the Act and as described in BellSouth's testimony.

II. DISCUSSION

A. TELRIC Pricing Rules

As noted above, in the Court's discussion of the FCC's TELRIC costing methodology, it referred with approval to the petitioning ILECs' arguments that the TELRIC method is improper because it does not consider embedded costs and it requires the use of a hypothetical "most technologically efficient" network. The Court also indicated that the same infirmities existed with respect to the FCC's proxy rates. The Court thus found that the ILECs would be irreparably harmed if these portions of the rules were not stayed. Therefore, not only does this Order free this Commission from the FCC's mandate that the Commission use both the FCC's TELRIC costing methodology and, until it reviews TELRIC cost studies, the FCC's proxy rates, but the Order also provides guidance to the Commission as to how to review BellSouth's costs and set rates in a manner that will pass judicial muster.

In considering the costs of an ILEC, a Commission must take into consideration all of the ILEC's actual costs, including its embedded costs. And, in so doing, the Commission must consider the actual network deployed by the ILEC, not some hypothetical version. To do otherwise would be to invite reversal by a reviewing court. Accordingly, BellSouth is currently in the process of developing cost studies that will, in accordance with the Eighth Circuit's opinion, reflect all of its costs for all of the unbundled elements that will be offered for sale to Alternate Local Exchange Companies ("ALECs"). BellSouth will submit these studies to the Commission for its consideration immediately upon the conclusion of the study process.

Until such time as it can file appropriate cost studies, BellSouth respectfully requests that the Commission order an interim rate for all of the relevant unbundled elements. The Eighth Circuit has indicated its belief that the FCC's proxy rates do not allow ILECs to recover all of their costs and are thus inappropriate. BellSouth, however, would not object to the imposition of rates above the proxy rates for the interim period during which new cost studies are developed and considered by this Commission. BellSouth believes that such an interim rate would be appropriate if, once the Commission has determined the long term rates for the elements in question, it applies those rates back to the date of imposition of the interim rates. All of the parties, both BellSouth and the ALECs, will be kept whole by a true-up process that applies these final rates to the elements purchased from BellSouth by the ALECs during the interim period. This procedure will allow the ALECs to begin business immediately, with the corresponding benefits that competition brings, while ensuring that neither party benefits from the possibility that the interim rates do not accurately reflect BellSouth's costs in providing the elements in question. A similar procedure should be used for interim prices where the FCC did not mandate proxies.

B. Geographic Deaveraging

Another portion of the FCC's pricing rules that has been stayed is Rule 51.507, which requires, in part, geographic deaveraging. Consequently, BellSouth believes that the Commission should not require any such geographical deaveraging. To order such deaveraging would give BellSouth's competitors an unfair advantage based on historical value of service and universal service pricing principles, rather than on any legitimate basis. This Commission has priced local service so that subscribers in urban areas pay more for that service than do subscribers in rural areas. This pricing is based on a value of service principle (the urban subscribers can call more persons in their local calling area, so they should pay more) as well as on the need, based on universal service concept, to subsidize the higher cost rural service. While these principles were well suited for an era of monopoly telephone service, they do not work in a competitive environment. If BellSouth were required to geographically deaverage the rates for its unbundled elements, it would have to offer those elements to its competitors at the lowest rates in those very areas, i.e., urban areas, where BellSouth's end user rates are the highest. This would create an unfair advantage to the ALECs, who would then be able to offer lower prices not because they are more efficient than BellSouth, but because of historical pricing policies.

To avoid this result, BellSouth urges the Commission not to geographically deaverage the rates for unbundled elements until such time as BellSouth is able to rebalance its end user rates. Once this occurs and all competitors can compete on the same relative basis, BellSouth would have no objection to geographic deaveraging of rates for unbundled elements.

C. Rebundling of Unbundled Elements

In Rule 51.315, the FCC required ILECs to provide unbundled elements that can be rebundled by ALECs to replicate existing ILEC services or to create new services. The Eighth Circuit's

Order does not stay this provision, and thus ALECs may continue to rebundle unbundled network elements. The Order does, however, stay those portions of the FCC's rules that mandate how such unbundled elements, and thus the rebundled unbundled elements, will be priced (FCC Rules §§51.01 through 51.515). Accordingly, the Commission should find that ALECs can no longer rebundle local switching and loops to recreate local service and pay the providing ILEC merely the sum of the TELRIC based rates for those elements. This aspect of the Eighth Circuit's Order presents the Commission with the opportunity to set the rate for such a rebundling of unbundled elements at an appropriate level.

Since such a rebundling results in the creation of a service that, in all relevant respects, is substantially the same as the service that the ILEC provides at retail to its end users, the ALEC is, in effect, reselling the ILEC's retail service. Section 252(d)(3) of the Act provides that, when an ALEC resells a retail service, it should pay for the retail rate for such service, less the costs avoided by the ILEC as a result of such resale. To the extent that the rebundled unbundled elements sold by ALECs will be substantially the same as the ILEC's retail services[3], the ALEC is, in effect, merely reselling a retail service under another name. Under such a circumstance, the resale pricing

[3] For example, if an ALEC rebundles local switching and a loop, it recreates, in substantial form, the local service provided to end users by the ILEC.

rules should apply and the ALEC should pay the ILEC the latter's retail rates less avoided costs.[4]

D. Local Switching and Vertical Services

In a related matter, FCC Rule 51.319 provides, *inter alia*, that the local switching unbundled element includes all of the vertical features that the switch in question is capable of providing. Although this section of the Rules has not been stayed, the manner in which the FCC has sought to price the switching unbundled element has been stayed.

BellSouth therefore requests that the Commission reject the FCC's proposal that the local switching element, including all vertical features, be priced at TELRIC. Instead, this Commission should recognize that vertical features are themselves retail services and thus should be priced at the resale pricing standard of retail price less avoided costs. To do otherwise would ignore the Act's requirement that resold services be priced in this manner.

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[4] In addition, since the ALEC has, by means of unbundled elements, merely duplicated, in substantial respect, the retail local service of the ILEC, such a rebundled element should be considered resale of the ILEC's local service for joint marketing purposes as well. Therefore, the prohibition against joint marketing by AT&T, MCI and Sprint of long distance service with BellSouth's resold local service, as set forth in § 271(e) of the Act, should apply to any situation in which one of these three carriers rebundles switching and loops as a substitute for resale of BellSouth's local service.

E. Resale - Avoided Costs

The Eighth Circuit likewise stayed the effectiveness of Sections 51.601- 51.611 of the FCC's Rules, which contain standards for the calculation of a wholesale discount to be applied to the retail rates of services provided by an ILEC and offered for resale to other companies. The Act requires that:

> [A] State commission shall determine wholesale rates on the basis of retail rates charged to subscribers...., excluding the portion attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier.

47 U.S.C. §252(d)(3).

In spite of this clear and unambiguous standard, the FCC incorrectly concluded that the wholesale discount should be calculated on the basis of "costs that reasonably can be avoided when an incumbent LEC provides a service for resale..." FCC Rules, §51.609(b). The FCC also improperly concluded that "avoided costs are those that an incumbent LEC would no longer incur if it were to cease retail operations and instead provide all of its services through resellers." FCC Order at ¶ 911.

BellSouth has consistently maintained that the FCC has turned the wholesale pricing standard on its head, and for this reason, has submitted a wholesale discount calculation which complied with the standard in the Act, as well as a discount calculation which followed the methodology in the FCC's rules. Now that the Order and Rules have been stayed, the Commission can and should apply the "avoided cost" standard contained in the Act. BellSouth is the only party which has provided a wholesale discount calculation which follows the Act. BellSouth submits that its proposal should be adopted.

F. <u>Transport and Termination of Traffic</u>

Some parties have asked that the Commission direct that a "bill and keep" methodology be implemented for the exchange of local calls between their networks and the network of BellSouth. The Act provides that:

> [A] State commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless- (i) such terms provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls.

47 U.S.C. §252(d)(2).

The Act goes on to explain that it is not intended to preclude the "mutual recovery of costs through the offsetting of reciprocal obligations, including arrangements that <u>waive</u> mutual recovery (such as bill-and-keep arrangements)... . " 47 U.S.C. § 252 (d)(2)(B)(i).

The FCC had interpreted this language to allow state commissions to impose bill-and-keep arrangements on the parties to an arbitration where the traffic was anticipated to be roughly in balance between two networks. FCC Rules, Section 51.713(b). Moreover, the FCC's rules authorize state commissions to presume that the traffic exchanged between two networks is roughly balanced. FCC Rules, Section 51.713 (c). These provisions are a part of the pricing rules stayed by the Court. This Commission may now reject the FCC's erroneous construction of the Act and set mutual and reciprocal rates for the transport and termination of local traffic based on all relevant costs.

G. Reciprocal Compensation

In its Rules, the FCC also created a presumption that reciprocal compensation be symmetrical based on the costs of the larger of the two interconnecting companies unless the smaller of the two companies, or a carrier other than an incumbent LEC proves that its costs were higher. FCC Rules, Section 51.711. Obviously, it would be sheer coincidence if this rate actually reflected the cost incurred by the smaller company. Since this rule is a part of the pricing rules which have been stayed, this Commission is now free to, and should, determine each company's actual costs in setting rates for the exchange of local traffic in any arbitration which it is called upon to decide.

Along this same line, the FCC Rules create a presumption that all calls handed to a competing ALEC are switched through a tandem even if they are not and require that the ALEC be compensated accordingly. FCC Rules §51.711 (a)(3). In other words, the FCC's view of symmetry means that an ALEC would be entitled to receive the incumbent's transport and termination charge, including tandem switching, interoffice transport, and end office termination, even if the ALEC performed no tandem switching function. This Commission should ensure that ALECs recover only their actual costs of terminating calls, i.e., that they be permitted to recover for tandem switching only when traffic is actually routed through their tandem.

H. Access Charges

The FCC's rules prohibited, in the context of unbundled switching, the application of access charges to "purchasers of telephone exchange or exchange access services." FCC Rules, §51.515(a). Instead, the FCC provided for the temporary assessment of 75% of the residual interconnection charge and the Carrier Common Line Charge upon telecommunications carriers purchasing unbundled switching elements "for interstate minutes of use traversing such unbundled elements..." FCC Rules §51.515(b). In light of the important role that the revenues generated by access charges have played and continue to play in the support of universal service, this Commission should now affirm that access charges continue to apply when an ALEC purchases unbundled switching and uses it for either intrastate or interstate toll traffic.

I. Commercial Mobile Radio Service (CMRS)

The FCC rules provide that a CMRS provider, such as a cellular carrier, pending the conclusion of a new agreement between an ILEC and the CMRS provider, may receive on a reciprocal basis the same rate it currently pays to the incumbent LEC for the completion of landline to mobile calls. FCC Rule, §51-717(b). The Rules also provide that "telecommunications traffic between a LEC and a CMRS provider that, at the beginning of the call, originates and terminates within the same Major Trading Area,..." is local telecommunications traffic. FCC Rule, §51-701(b)(2). Both of these rules are among the provisions stayed by the Eighth Circuit. This Commission should reject both of these interpretations of the Act if a relevant request is made by a CMRS provider.

J. Availability of the Provisions of Agreements

In addition to the pricing provisions discussed above, the Court stayed Section 51-809 of the FCC's Rules. This provision requires an incumbent LEC to make available to any ALEC the same rates, terms and conditions for any interconnection, service, or network element arrangement contained in any agreement approved by a state commission. The Court found that the FCC had likely expanded its jurisdiction beyond that granted by the Act. The term "rate" is not contained in §252(I) of the Act, which section addresses the general availability of agreements to other carriers. The Court concluded that if ALECs had the ability to "pick and choose" rates from other agreements that the "whole methodology for negotiated and arbitrated agreements would thereby be destabilized." Order at 5. In other words, no agreement would ever be final. Any time an incumbent LEC negotiated a rate lower than that contained in earlier agreements, then all ALECs would presumably demand the lower rate. The benefits of entering into binding agreements would be lost. In the end this provision would impair a LEC's ability to negotiate agreements with other ALECs. This Commission should reject such a requirement, although it should allow parties to negotiate "most favored nation" clauses among themselves if they so desire.

III. CONCLUSION

For the reasons described more fully above, BellSouth respectfully requests that this Commission reject the pricing and pick and choose aspects of the FCC's Rules and instead apply the terms of the Act as proposed by BellSouth. Specifically BellSouth requests that the Commission grant the relief sought in the various portions of this pleading, including but not limited to the setting of interim rates for unbundled elements while BellSouth prepares its cost studies.

Respectfully submitted this 17th day of October, 1996.

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CERTIFICATE OF SERVICE
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CERTIFICATE OF SERVICE
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J. Phillip Carver (BD)
J. Phillip Carver

Attachment "1"

Federal Communications Commission; United States of America,

Respondents.

Submitted: October 3, 1996

Filed: October 15, 1996

Before BOWMAN, WOLLMAN, and HANSEN, Circuit Judges.

HANSEN, Circuit Judge.

These cases have been consolidated in this circuit by the September 11, 1996 order of the Judicial Panel on Multidistrict Litigation, Docket No. RTC-31, pursuant to Rule 24 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation. See 28 U.S.C. SS 2112(a)(3) (1994). Numerous petitioners have moved this court for a stay pending judicial review of the Federal Communications Commission's First Report and Order.(1) The FCC promulgated the rules and regulations in its First Report and Order pursuant to its reading of its statutory duty to implement the local competition provisions of the Telecommunications Act of 1996 (the Act).(2) This court granted a temporary stay on September 27, 1996, pending oral argument. After hearing oral argument on October 3, 1996, from representatives of the concerned parties, we have decided to stay the operation and effect of only the pricing

(1)First Report and Order, Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, CC Docket No. 96-98 (Aug. 8, 1996) [hereinafter First Report and Order].
(2)Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (to be codified as amended in scattered sections of 47 U.S.C.).

provisions(3) and the "pick and choose" rule(4) contained in the FCC's First Report and Order pending our final determination of the issues raised by the pending petitions for review.

I.

In the Telecommunications Act of 1996, Congress enacted a plan to alter the monopolistic structure of local telephone service markets with an injection of competition. The Act effectively opens up local markets by imposing several new obligations on the existing providers of local telephone service in those markets. The Act refers to the current local providers as "incumbent local exchange carriers" (incumbent LECs). See 47 U.S.C.A. SSSS 251(c), (h), 252(j) (West Supp. May 1996). Among other duties, the Act requires incumbent LECs (1) to allow other telecommunication carriers (such as cable television companies and current long-distance providers) to interconnect with the incumbent LEC's existing local network to provide competing local telephone service (interconnection); (2) to provide other telecommunication carriers access to elements of the incumbent LEC's local network on an unbundled basis (unbundled access); and (3) to sell to other telecommunication carriers, at wholesale rates, any telecommunications service that the incumbent LEC provides to its retail customers (resale). Id. SS 251(c).

To accomplish these directives, the Act places a duty on incumbent LECs to privately negotiate, in good faith, comprehensive

(3)The pricing provisions refer to First Report and Order, Appendix B-Final Rules SSSS51.501-51.515 (inclusive), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive) and to the default proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.
(4)The "pick and choose" rule refers to First Report and Order, Appendix B-Final Rules SS51.809.

agreements with other telecommunication carriers seeking to enter the local market. See id. SSSS 251(c)(1), 252(a). If the incumbent LEC and the carrier seeking entry are unable to reach a negotiated agreement, either party may petition the respective state utility commission to conduct a compulsory arbitration of the open and disputed issues and arrive at an arbitrated agreement. See id. SS 252(b). The final agreement, whether arrived at through negotiation or arbitration, must be approved by the state commission. Id. SS 252(e)(1). Certain portions of the Act also require the FCC to participate in the Act's implementation. See, e.g., id. SSSS 251(b)(2), (d)(1), (e), 252(e)(5). The FCC's regulations pertaining to the Act form the heart of the controversies at bar.

On August 8, 1996, the FCC released its First Report and Order in which it published its comments and rules regarding the local competition provisions of the Act. The petitioners in this consolidated proceeding, consisting, at the moment, primarily of incumbent LECs and state utility commissions, argue that the FCC exceeded its authority in promulgating these rules. While several of the petitioners object to the FCC's regulations in their entirety, others specifically challenge the FCC's rules regarding the prices that an incumbent LEC may charge an incoming competitor for interconnection, unbundled access to network elements, and resale of its services.

Despite the different approaches, it is clear that all of the petitioners object principally to the FCC's pricing rules. One such rule is a mandate from the FCC that state commissions employ the "total element long-run incremental cost" (TELRIC) method to calculate the costs that an incumbent LEC incurs in making its facilities available to competitors. See First Report and Order, Appendix B-Final Rules SSSS 51.503, 51.505. After applying the TELRIC method and arriving at a cost figure, the state commissions, acting as arbitrators, must then determine the price that an incumbent LEC may charge its competitors, based on the TELRIC driven cost figure. See id.

Many of the incumbent LECs object to the TELRIC method for two reasons. First, it does not consider their "historical" or "embedded" costs (costs that an incumbent incurred in the past) in calculating the cost figure to be used to determine the rates. See id. SS 51.505(d)(1). Second, it requires that an incumbent LEC's cost be measured as if the incumbent were using the most efficient telecommunications technology currently available, regardless of the technology presently employed by the incumbent and to be used by the competitor. See id. SS 51.505(b)(1). The incumbent LECs argue that the TELRIC method underestimates their costs and results in prices that are too low. The incumbent LECs maintain that these low prices would effectively require them to subsidize their competitors and thereby threaten the viability of the LECs' own businesses.

For similar reasons, the petitioners also object to the FCC's proxy rates, which are to be used by the state commissions if they elect not to employ the TELRIC method to set prices. See id. SSSS 51.503(b)(2), 51.513, 51.705(a)(2), 51.707. The incumbent LECs argue that these proxy rates do not accurately reflect their costs and are artificially low. In addition to the rules regarding TELRIC and the proxy rates, the petitioners object to several other FCC regulations that pertain to the pricing of intrastate telephone service.(5)

(5)The state utilities commissions take issue with the "deaveraging" rule requiring them to establish different rates in at least three different geographic areas within each state. See id. SS51.507(f). Many of the incumbent LECs also challenge the FCC's wholesale rate rules, asserting that the FCC's mandated method for calculating these rates, as well as its interim wholesale rates, result in rates that are also too low and threaten the incumbent LECs' viability. See id. SSSS51.607, 51.609, 51.611.

Some of the petitioners also seek to stay the FCC's so-called "pick and choose" rule, id. SS 51.809, with which the FCC purports to implement SS 252(i) of the Act. Section 252(i) requires an LEC to make available any interconnection, service, or network element contained in an approved agreement to which it is a party to any other telecommunications carrier upon the same "terms and conditions" as those provided in the agreement. Here again, price becomes a key issue. When the FCC promulgated its rule, it expanded the statutory language of SS 252(i) to include "rates, terms, and conditions." Id. SS 51.809 (emphasis added). The petitioners' objection is that the rule would permit the carriers seeking entry into a local market to "pick and choose" the lowest-priced individual elements and services they need from among all of the prior approved agreements between that LEC and other carriers, taking one element and its price from one agreement and another element and its price from a different approved agreement. Moreover, if an LEC and Carrier A, for example, reach an approved agreement, and then the LEC and a subsequent entrant, Carrier B, agree in their agreement to a lower price for one of the elements or services provided for in the LEC's agreement with Carrier A, Carrier A will be able to demand that its agreement be modified to reflect the lower cost negotiated in the agreement with Carrier B. Consequently, the petitioners assert that the congressional preference for negotiated agreements would be undermined because an agreement would never be finally binding, and the whole methodology for negotiated and arbitrated agreements would be thereby destabilized.

II.

We consider the following four factors in determining whether a stay is warranted: (1) the likelihood that a party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. See Arkansas Peace Ctr. v. Dep't of Pollution Control, 992 F.2d 145, 147 (8th Cir. 1993), cert. denied, 114 S. Ct. 1397 (1994); Wisconsin Gas Co. v. F.E.R.C., 758 F.2d 669, 673-74 (D.C. Cir. 1985), cert. denied, 476 U.S. 1114 (1986). Applying these factors to the case at hand leads us to conclude that a stay pending final review of the FCC's pricing and "pick and choose" rules is justified.

A.

In evaluating the likelihood of the petitioners' success on appeal, we note that the petitioners "need not establish an absolute certainty of success." Population Inst. v. McPherson, 797 F.2d 1062, 1078 (D.C. Cir. 1986). Instead, as the actual terms of the test indicate, the petitioners must show that they are "likely" to succeed on the merits. Here, the petitioners allege primarily that the FCC exceeded its jurisdiction by imposing national pricing rules for what is essentially local service. They argue that the text and the structure of the Act give the States, not the FCC, authority over the pricing of intrastate telephone service. After evaluating the contentions of all of the interested parties, we believe that the petitioners present a strong argument that is sufficient to satisfy the first prong.

Historically, the state commissions have determined the rates for intrastate communications services. See Communications Act of 1934, §§ 2(b), 47 U.S.C. §§ 152(b) (1994). Subsection 252(d), which indicates that state commissions have the authority to determine "just and reasonable rates" necessary to implement the local competition provisions of the Act, appears consistent with that past practice. This subsection, entitled "Pricing standards," makes no mention of FCC rules on pricing. Moreover, subsection 252(c)(2) directs state commissions to "establish any rates for interconnection, services, or network elements according to subsection (d) of this section." Again, no reference is made to FCC regulations regarding rates. By contrast, where Congress intended for the state commissions to follow FCC rules in arbitrations, it expressly said so. In subsection 252(c)(1), the Act requires state commissions to ensure that their resolutions of arbitrated disputes comply with both section 251 and with the regulations that the FCC is specifically authorized to issue under section 251. But nowhere in section 251 is the FCC specifically authorized to issue rules on pricing. The sections of the Act that directly authorize the state commissions to establish prices are devoid of any command requiring the state commissions to comply with FCC pricing rules (or, for that matter, authorizing the FCC to issue any pricing rules). This absence indicates a likelihood that Congress intended to grant the state commissions the authority over pricing of local telephone service, either by approving or disapproving the agreements negotiated by the parties, or, when the parties cannot agree, through compulsory arbitration, thereby preserving what historically has been the States' role.

We are mindful of the FCC's contrary interpretation of the Act. The FCC asserts that subsection 251(d)(1), when read together with subsection 252(c)(1), authorizes the FCC to establish rules regarding pricing. Subsection 251(d)(1) directs the FCC to complete the promulgation of regulations pursuant to its duties under section 251 by August 8, 1996. The FCC also urges us to read the general provisions of subsection 251(c) together with subsection 252(d) (the pricing standards) and conclude that these portions of the Act supply the FCC with the power to issue pricing rules.

We recognize that courts must give deference to an agency's reasonable interpretation of an unclear statute. See Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 843-45 (1984). In this case, however, we believe that the petitioners have a better than even chance of convincing the court that the FCC's pricing rules conflict with the plain meaning of the Act, in which case the court would not be bound by Chevron deference and would be entitled to overturn the agency's interpretation. See id. at 842 ("If the intent of Congress is clear, that is the end of the matter, for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."); id. at 844 (indicating that courts should not give controlling weight to regulations that are contrary to the statute). In this, our first look at the issue, we are skeptical that the FCC's roundabout construction of the statute could override what, at first blush, appears to be a rather clear and direct indication in subsections 252(c)(2) and 252(d) that the state commissions should establish prices.

Moreover, we have serious doubts that the FCC's interpretation of the Act constitutes the straightforward or unambiguous grant of intrastate pricing authority to the FCC sufficient to qualify as an exception to the provisions of subsection 2(b) of the Communications Act of 1934, 47 U.S.C. SS 152(b) (1994). See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 377 (1986). Subsection 2(b) provides that "nothing in this Chapter shall be construed to apply or to give the [FCC] jurisdiction with respect to . . . charges, classifications, practices, services, facilities, or regulations for or in connection with intrastate communications service." 47 U.S.C. SS 152(b) (1994). In Louisiana, the Supreme Court determined that in order to overcome subsection 2(b)'s limits on the FCC's jurisdiction with respect to intrastate communications service, Congress must "unambiguously" or "straightforwardly" either modify subsection 2(b) or grant the FCC additional authority. 476 U.S. at 377. We acknowledge that portions of the Telecommunications Act of 1996 expressly grant the FCC authority over some aspects of intrastate telephone service. See, e.g., 47 U.S.C.A. SS 251(e) (West Supp. May 1996) (FCC authority regarding numbering administration). We have been unable, however, to find such an express grant of authority to the FCC over the pricing of intrastate telephone service, nor does there appear to be a modification of subsection 2(b).(6) The combination of these omissions indicates a sufficient likelihood that the petitioners will succeed on the merits of their appeal. We, of course, remain open to being persuaded that the FCC's read is the correct one when full briefing and argument on the merits have been concluded.

Because we believe that the petitioners have demonstrated that they will likely succeed on the merits of their appeals based on their argument that, under the Act, the FCC is without jurisdiction to establish pricing regulations regarding intrastate telephone service, we think that it is unnecessary at this time to address the remaining theories which the petitioners use to challenge the legality of the FCC's pricing rules.

B.

With respect to the likelihood of irreparable harm, the petitioners initially assert that their interest in productive ongoing negotiations and arbitrations regarding the implementation of the Act will be irreparably harmed if the FCC's pricing regulations are not stayed. They argue that the competitors seeking entry into the local phone markets will refuse even to consider prices that are higher than the FCC's proxy rates and will simply hold out for the proxy rates that the States will feel obligated to impose in their arbitrations. In this manner, the proxy rates effectively establish a price ceiling, an observation recognized by the FCC itself, which inevitably confines and restricts the give and take characteristic of free negotiations and arbitrations. The state commissions specifically argue that the FCC's pricing regulations effectively undermine their authority,

(6)In fact, we are told that a provision which specifically modified subsection 2(b) was expressly rejected by Congress before the bill was passed. See S. 652, 104th Cong., 1st Sess. SS101(c) (1995).

and if not stayed, the rules will disrupt the predictability and continuity of the existing regulatory system. The state commissions explain that the FCC pricing rules essentially handcuff their discretion in determining the just and reasonable rates in arbitrations required under subsection 252(d)(1).

In order to demonstrate irreparable harm, a party must show that the harm is certain and great and of such imminence that there is a clear and present need for equitable relief. See Packard Elevator v. I.C.C., 782 F.2d 112, 115 (8th Cir. 1986), cert. denied, 484 U.S. 828 (1987) (quoting Wisconsin Gas, 758 F.2d at 673-74). The FCC asserts that the petitioners' allegations of irreparable harm are merely speculative and that there is no certainty that its proxy rates will ever be applied to the petitioners. We are persuaded, however, by the petitioners' evidence that the negotiations preferred by the Congress are already breaking down due to the competitors' desire to hold out for the FCC's proxy rates. Moreover, given the time constraints under the Act, some state commissions have already felt obliged to impose the proxy rates in their arbitrations. These experiences indicate that the FCC's pricing rules will derail current efforts to negotiate and arbitrate agreements under the Act, and the "pick and choose" rule will operate to further undercut any agreements that are actually negotiated or arbitrated. The inability of the incumbent LECs and the state commissions to effectively negotiate and arbitrate agreements free from the influence of the FCC's pricing rules, including the "pick and choose" rule, will irreparably injure the interests of the petitioners. If the FCC's rules are later struck down, it will be extremely difficult for the parties to abandon the influence of their previous agreements that were based on the national pricing rules and to recreate the atmosphere of free negotiations that would have existed in the absence of the FCC's dictated presumptive prices. Without a stay, the opportunity for effective private negotiations will be irretrievably lost. We initially believe that this result would be contrary to Congress's intent that these matters be resolved through negotiation and/or arbitration.

The petitioners also argue that the FCC's pricing rules will force the incumbent LECs to offer their services to requesting carriers at prices that are below actual costs, causing the incumbent LECs to incur irreparable losses in customers, goodwill, and revenue. The FCC contends that its pricing rules, in particular its proxy rates, are merely an option for the parties and the state commissions to consider, and consequently the petitioners cannot make a showing that the harm is certain and imminent, as required in Packard Elevator, 782 F.2d at 115. As we explained above, we are persuaded that, absent a stay, the proxy rates would frequently be imposed by the state commissions and would result in many incumbent LECs suffering economic losses beyond those inherent in the transition from a monopolistic market to a competitive one. We are mindful of the precedents that declare that "economic loss does not, in and of itself, constitute irreparable harm," Wisconsin Gas, 758 F.2d at 674, and that "revenues and customers lost to competition which can be regained through competition are not irreparable." Central & S. Motor Freight Tariff Ass'n v. United States, 757 F.2d 301, 309 (D.C. Cir. 1985), cert. denied, 474 U.S. 1019 (1985). Both of these propositions, however, rest on the assumption that the economic losses are recoverable. The threat of unrecoverable economic loss, however, does qualify as irreparable harm. See Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994); Airlines Reporting Co. v. Barry, 825 F.2d 1220, 1227 (8th Cir. 1987). In this case, the incumbent LECs would not be able to bring a lawsuit to recover their undue economic losses if the FCC's rules are eventually overturned, and we believe that the incumbent LECs would be unable to fully recover such losses merely through their participation in the market. Moreover, the petitioners' potential loss of consumer goodwill qualifies as irreparable harm. See

Multi-Channel TV Cable Co. v. Charlottesville Quality Cable Operating Co., 22 F.3d 546, 552 (4th Cir. 1994) (holding that the possibility of permanent loss of customers to a competitor or the loss of goodwill satisfies the irreparable injury prong). For the foregoing reasons, we believe that the petitioners have adequately demonstrated that they will be irreparably harmed if a stay of the FCC's pricing rules is not granted.

C.

In assessing whether others will be harmed if the court grants the stay, we acknowledge that our decision, either way, will unavoidably adversely affect the interests of either the incumbent LECs or their potential competitors. If we decide to grant the stay, we recognize that the companies seeking entry into the local telephone markets will have to negotiate and arbitrate their agreements without the added leverage of the FCC's pricing rules, and assuming that the FCC's rules were later upheld, they would likely renegotiate the terms of their agreements. The inconvenience of this scenario, however, is outweighed by the harm and difficulties of its alternative, discussed in the previous section. In other words, we think that it would be easier for the parties to conform any variations in their agreements to the uniform requirements of the FCC's rules if the rules were later upheld than it would be for the parties to rework agreements adopted under the FCC's rules if the rules were later struck down. Consequently, we conclude that any harm that other parties may endure as a consequence of imposing a stay is outweighed by the irreparable injury that the petitioners would sustain absent a stay.

D.

The FCC argues that a stay would not promote the public interest because it would not maintain the status quo and it would block the road to competition in local telephone service markets. We reject both contentions. Before the FCC published its regulations pursuant to the Act, several incumbent LECs, potential competitors, and state utility commissions were all working together to implement the local competition provisions of the Act. The Act's system of private negotiation backed by state-run arbitration was operating without the input from the FCC. A stay would preserve the continuity and stability of this regulatory system -- a system that has initially proved to be successful. The FCC asserts that without its pricing regulations in effect, the incumbent LECs will be able to exert their superior bargaining power over their potential competitors and impose unreasonable rates for their services. This argument ignores the empirical success that private parties and the state commissions have had in implementing the local competition provisions of the Act.(7) It also denigrates the proven ability of the state commissions to prevent incumbent LECs from charging excessive rates for their services. The Act requires rates to be just and reasonable and it authorizes state commissions to enforce these requirements. Presently, 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.

III.

Having concluded that the petitioners satisfy the four

(7)We note that some states, Connecticut, Florida, and Iowa in particular, have already established rates based on local conditions and are already involved in opening up their local markets to competition under both the federal Act and state statutes which foreshadowed the new federal law. Moreover, the FCC-imposed rate for Iowa is substantially higher than the state-set rate which was based on the full record from a contested case proceeding, while in Florida, the FCC proxy rate is substantially lower than the state-set rate.

requirements for granting a stay, we grant the petitioners' motion to stay the FCC's pricing rules and the "pick and choose" rule contained in its First Report and Order(8) pending a final decision on the merits.

Upon the filing of this order, the stay imposed by our order of September 27, 1996, is dissolved, and is replaced by the stay imposed by the terms of this order.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

(8)The stay pertains only to SSSS51.501-51.515 (inclusive), 51.601-51.611 (inclusive), 51.701-51.717 (inclusive), SS 51.809, and the proxy range for line ports used in the delivery of basic residential and business exchange services established in the FCC's Order on Reconsideration, dated September 27, 1996.