IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

Docket No. 96-3321 (and consolidated cases)

IOWA UTILITIES BOARD, et al.,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION, et al.,

Respondents.

MOTION FOR A PARTIAL STAY OF THE MANDATE

Pursuant to Fed. R. App. P. 41, AT&T Corp., WorldCom, Inc., Sprint Corporation and Competitive Telecommunications Association respectfully move for a stay of the portion of this Court's mandate that vacates the Federal Communications Commission's ("FCC" or "Commission") implementation of § 252(d) of the Telecommunications Act of 1996 (the "Act" or "1996 Act"). A stay would preserve the longstanding status quo in the telecommunications industry and eliminate the necessity of costly, disruptive proceedings until the United States Supreme Court reviews the FCC's rules and definitively determines if these costly proceedings are required. Conversely, a stay will have no adverse effect on any substantial public interest. This Court has routinely stayed its own decisions in such circumstances. *See, e.g., Warren v. Fanning*, No. 90-2832/2833, 1992 WL 14321 (8th Cir. Jan. 23, 1992); *Hill v. Lockhart*, 939 F.2d 544 (8th Cir. 1991). It should do so here as well.[1/]

1/ Movants note that, in its Motion for Partial Stay, the FCC represents that it is "authorized to state that Verizon Communications (the product of the merger between GTE and Bell Atlantic) and SBC Communications, while not necessarily endorsing every statement in [the FCC's] motion, do not oppose the relief requested in [that] motion." The relief movants request is identical to that requested by the FCC.

In its decision of July 18, 2000, this Court invalidated an important part of the FCC's Total Element Long Run Incremental Cost (" TELRIC") standard that binds state commissions when they establish prices for interconnection, network elements, and other arrangements (and that binds federal district courts in their review of state commission decisions). Because the FCC's rules require rates to be based on the costs of a hypothetical network, the Court held that the rules were, in this respect, contrary to the Act's plain language. At the same time, this Court endorsed the use of an incremental cost methodology, and rejected the claims of the incumbent local exchange carriers ("ILECs") that TELRIC is unlawful because it uses forward-looking rather than historical costs and because it does not include the "costs" of universal service subsidies.

It is currently unclear how implementation of this Court's decision would affect rate levels for network elements, interconnection, and transport and termination. Movants believe that the result could be new pricing methodologies that will produce rates at least as favorable as those produced by the FCC's TELRIC methodology. By contrast, the incumbents have publicly stated that implementation of this Court's decision will increase rates.

The one thing that is certain at this juncture, however, is that immediate implementation of this Court's decision would severely disrupt the industry, require new federal and state proceedings, impose immense burdens on movants and state utility commissions, and retard the emergence of competition in local markets. The entire pricing structure for the sharing of local networks under the 1996 Act would have to be re-examined. The effect of immediate enforcement of this Court's mandate would thus be to usher in a period of debilitating instability in local markets, and force local competitors and regulatory authorities to divert their energies to the massive new round of proceedings that this Court's decision will require. Specifically, extensive proceedings would have to occur at the FCC to determine what the new binding federal pricing rules should be (with the near certainty of appellate review). Until the FCC adopts new rules, federal district courts would have to attempt to independently determine whether agreements on review meet as yet undetermined pricing standards. State commissions would similarly be required independently to determine the pricing standard they will apply in matters now pending before them that have statutorily-imposed deadlines, and to determine how to apply those methodologies to state-specific facts. Movants and others might thus be required to develop new cost models, or modify existing models, rather than use the cost models that have been developed under TELRIC and refined (at great expense) over the past four years. The scope of that burden would be enormous because most of the initial interconnection agreements established under the 1996 Act are now expiring, and a second major round of state commission arbitrations and pricing determinations has begun. Moreover, if these proceedings conclude before the Supreme Court ultimately determines the lawfulness of the FCC's TELRIC methodology, and if the Supreme Court reinstates the portion of TELRIC invalidated by this Court, then these costs will have to be born twice – once when all parties present cost models that they deem in compliance with this Court's reading of the Act, and a second time when the process is redone to conform to the reinstated pricing rules.

In sharp contrast to the disruption and harm that would be imposed were a stay denied, entry of a stay will impose no harm on any third parties or the public interest. The stay will merely maintain the status quo that has long applied in the industry. Indeed, it will merely maintain the status quo this Court itself put in place eighteen months ago when, on remand from the Supreme Court, this Court rejected the ILECs' request to withhold issuance of the mandate and thereby ensured that the FCC's TELRIC methodology would be the binding federal rule during the pendency of this appeal. The Court should now continue that course by staying its mandate pending Supreme Court review. If the Supreme Court ultimately affirms this Court's reading of the 1996 Act, any rates adopted while the stay is in effect can be made subject to a "true up" or similar relief that would make whole the ILECs or competitive carriers (depending on whether rates subsequently decrease or increase).

Maintenance of the status quo is particularly warranted because the Supreme Court is virtually certain to grant certiorari to conclusively resolve the validity of the FCC's TELRIC rules. AT&T and WorldCom intend to petition for certiorari, and understand that the FCC and the United States, and GTE and the incumbent local exchange carriers will also separately seek review. As this Court has observed, the Supreme Court has already granted certiorari to review the Fifth Circuit decision that upheld the lawfulness of TELRIC under a sister provision of the 1996 Act. *See Texas Office of Pub. Util. Council v. FCC*, 183 F.3d 393 (5th Cir. 1999), *cert. granted sub nom. GTE Serv. Corp. v. FCC*, 120 S. Ct. 2214 (2000). The same factors that led the Supreme Court to grant review in the Fifth Circuit case are applicable here. Further, the questions decided by this Court have so much intrinsic importance for the nation's economy that the Supreme Court is likely to grant review of this Court's invalidation of the FCC's rules, just as it did when this Court invalidated the rules on jurisdictional grounds. *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 397 (1999) (recognizing that the 1996 Act "profoundly affects a crucial segment of the economy worth tens of billions of dollars").

Finally, there is a substantial possibility that the Supreme Court will disagree with this

Court and uphold the FCC's TELRIC rule in its entirety under the deferential *Chevron* standard. Although this Court concluded that the statute mandates that rates be based on the cost of providing *the* actual network element used by a new entrant, the FCC concluded that TELRIC does so by calculating the cost the incumbent will bear in the marketplace today to replace the amount of the element used by the new entrant. TELRIC thus measures the cost of "the entire quantity of the network element provided." *In re Implementation of the Local Competition Provisions in the Telecommunication Act of 1996*, First Report and Order, 11 F.C.C.R. 15499, ¶ 690 (1996) ("Local Competition Order"). Given that the 1996 Act's pricing provisions "give rate-setting commissions broad methodological leeway; [and] say nothing about the 'method employed' to determine a particular rate," *see AT&T Corp.*, 525 U.S. at 423 (Breyer, J., dissenting in part), movants respectfully submit that the Supreme Court will ultimately agree that the FCC's TELRIC methodology is permissible under the Act.

STATEMENT OF THE CASE

As this Court is aware, this case concerns the validity of FCC regulations implementing the 1996 Act. "Foremost" among these regulations are those that are the subject of this stay request – the regulations implementing the provisions of the Act that govern the prices an incumbent can charge to "share its network with competitors." *AT&T Corp.*, 525 U.S. at 371. Movants thus seek a stay of this Court's decision invalidating one of the central components of the FCC's element pricing methodology – the requirement that prices for leasing network elements be calculated by determining what it would cost an efficient competitor today to construct facilities that perform the functions of the leased element.

The Act requires that the leasing rates be " just, reasonable and nondiscriminatory" and "based on the cost . . . of providing the . . . network element." 47 U.S.C. §§ 251(c)(3), 252(d)(1). The Act also directs regulators to eschew "rate-of-return" ratemaking, pursuant to which rates are based on establishing the appropriate return on a firm's past investments. *Id.* After considering the relative advantages of different rate-making methodologies, the FCC adopted a variant of a forward-looking costing methodology it called the "Total Element Long Run Incremental Cost" or "TELRIC," methodology. Local Competition Order ¶ 672. A key feature of TELRIC is that it sets rates by calculating the costs a carrier would incur constructing and providing an element today that performs efficiently the functions of the leased element. *Id*. ¶¶ 678-679. The FCC adopted TELRIC because, in its view, it was more likely than any alternative methodology to "drive retail prices to their competitive levels" by setting costs at levels firms would face in a competitive market, *id*. ¶ 679, and so "give[s] appropriate signals to producers and consumers and ensure[s] efficient entry and utilization of the telecommunications infrastructure." *Id*. ¶ 630.

In striking down a portion of the FCC's TELRIC methodology (in particular Rule 51.505(b)(1)), this Court did not take issue with the agency's judgment that that methodology will produce rates that will best accomplish the goals of the Act. The Court nevertheless concluded that that particular portion of the FCC's TELRIC rule is "contrary to the Act's plain language." *Iowa Utils. Bd. v. FCC*, No. 96-3321, ___ F.3d ___, 2000 WL 979117, at *3 (8th Cir. July 18, 2000). Specifically, this Court concluded that the statutory requirement that rates be "based on the cost . . . of providing *the* interconnection or network element," *id.* (emphasis in original) (quotation and citation omitted), could not be squared with the portion of TELRIC it invalidated. *Id.* at *4.

REASONS FOR GRANTING A STAY

A partial stay of the court's mandate pending consideration of a petition for a writ of certiorari should be granted when the moving party can show that "the certiorari petition would present a substantial question and that there is good cause for a stay." Fed. R. App. P. 41(d)(2)(A). Here there is plainly good cause for a stay, because immediate implementation of the mandate would cause immense disruption that may well ultimately prove to be unnecessary and wasteful. And there are plainly substantial questions on the merits. Indeed, the Supreme Court has already granted certiorari to address the lawfulness of the FCC's TELRIC methodology in a related context. Thus, this Court should grant a stay to preserve the status quo pending the filing of a petition for certiorari, as it has routinely done in the past. *See, e.g.*, *Hill v. Lockhart, supra*; *Warren v. Fanning*, *supra*.

A. The Equities Overwhelmingly Favor A Stay.

The equities overwhelmingly favor maintaining the status quo until the Supreme Court has had a chance to pass upon this Court's invalidation of the FCC's pricing rules.[1/] The regime established by these FCC pricing regulations has, in substance, been in effect continually over the last four years. When this Court previously struck down these regulations it did so solely on the ground that the FCC lacked jurisdiction to enact them, and did not preclude the states from adopting any pricing method – including TELRIC. *Iowa Utils. Bd. v. FCC*, 120 F.3d 753 (8th Cir. 1997), *aff'd in part and rev'd in part sub nom. AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). Most states soon announced that they would independently choose TELRIC as the

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2/ "[T]he preservation of th[e] status quo is an important factor favoring a stay." *See, e.g., Houchins v. KQED, Inc.*, 429 U.S. 1341, 1346 (1977) (Rehnquist, J., in chambers).

method for pricing network elements. *See* Paul W. Garnett, *Forward-looking Cost Methodologies and the Supreme Court's Takings Clause Juris-Prudence*, 7 CommLaw Conspectus 119, 132 (1999) (at least 35 states announced their intent to adopt TELRIC). Since the Supreme Court's decision reinstating the FCC's pricing rules, every state Commission has been required to implement TELRIC. Competitors across the country are thus currently implementing business plans based upon leasing network elements priced according to that methodology, state commissions are in the midst of a second round of proceedings to establish the price of network elements and services based on that methodology, and federal courts are reviewing proceedings already completed to assure that they are in compliance with that methodology. Displacing the FCC's rules now would thus cause enormous short-term disruption – with a significant risk that any action undertaken will have to be reversed if the Supreme Court reinstates the FCC's rules.

1. The risk of needless disruption and expense. Immediate implementation of the mandate will trigger massive new rounds of regulatory proceedings. If the mandate issues now and this Court remands the pricing issues to the FCC, the Commission would be forced to divert its resources from the many matters currently before it and undertake a major new rulemaking proceeding to implement this Court's decision. That proceeding – which would involve the filing of thousands of pages of comments by hundreds of parties – would take months to complete. Even then, it would not achieve the certainty or clarity needed for competition to emerge in local markets because the FCC's new rule would almost certainly be subject to another protracted judicial challenge.

In the interim, states and private parties would also have to reexamine their pricing methodologies in light of this Court's order without guidance from the FCC – a situation the Supreme Court described as "surpassing strange." *AT&T Corp.*, 525 U.S. at 378-79 n.6. New entrants, ILECs, state commissions, and federal courts in every state have labored for several years now to implement the FCC's TELRIC methodology and generate state-specific prices for the hundreds of individual rate elements contemplated by the interconnection and unbundling obligations of the 1996 Act. Because most of the initial interconnection agreements are now expiring and because telecommunications costs change over time as new technologies become available, movants, state commissions and federal courts around the country are now poised to revisit these rate issues in scores of new proceedings, many of which are subject to the Act's highly expedited deadlines. Absent a stay, all of the work that has gone before will have to be revisited.

This process is already proving to be enormously chaotic and threatens to break down entirely. New entrants and ILECs have not been able to agree on the meaning of this Court's decision – much less on how to appropriately implement it. Many state commissions are seeking guidance on its meaning. A number have sought comment on whether existing proceedings should be stayed.[1/] Some states have suspended cost dockets, reasoning that they currently do not know how to proceed.[1/] Others, recognizing the need to set rates to ensure that the competitive process moves forward, are attempting to push forward without knowing exactly

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3/ *See* Declaration of David N. Porter in Support of WorldCom, Inc.'s Motion for a Partial Stay of the Mandate ¶ 5 ("Porter Declaration") (Arizona, Florida, New Jersey, North Carolina, New York and Oregon).

4/ *See* Porter Declaration ¶ 5 (Oregon, Iowa, and Nebraska).

what rules to apply.[5] In these states, the incumbents have argued that if the proceedings do move forward, existing cost models will have to be withdrawn and new cost models submitted.[6] But this is no small undertaking.

5/ *See* Porter Declaration ¶ 5 (California, New Jersey, New York, North Carolina, and Washington).

6/ *See* Porter Declaration ¶¶ 6-8.

The model developed by MCI (now a WorldCom operating company) and AT&T, for example, took over four years to develop.[1/] And that model was, comparatively, relatively straightforward, implementing basic principles of network engineering. Models that parties will claim are necessary to comply with this Court's decision would be at least as complex and costly to develop. Indeed, every cost model – including those generated by the incumbents for these and other proceedings – has literally hundreds of inputs which must be chosen and entered into the model.[1/] Each of these inputs, which includes factors such as equipment purchase costs, cost of capital, depreciation, and operations, maintenance, and corporate overhead expenses, must be determined appropriately for the hundreds of rate elements the model must calculate. Thus, although a model that measures forward-looking costs in the manner this Court contemplated may require both different costing methodology equations and different values for many of the inputs, such a model would be no less complex than the modeling that has already occurred under the

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7/ *See* Porter Declaration ¶ 7.

8/ Because it is impossible to calculate the cost of service on a customer-by-customer basis, any type of rate-making procedure requires the use of cost models. Thus, for example, when state commissions set retail rates, they do so based on cost models submitted by the incumbents. Similarly, during the period the FCC's cost rules were vacated, even those incumbent LECs advocating rates based on historic, or embedded, cost, submitted cost models in support of their proposed rates.

existing TELRIC rules.[1/]

9/ *See* Porter Declaration ¶¶ 7-9.

Once the parties develop and refine their competing new models, the new models will have to be presented to state commissions. An entire costing proceeding, including discovery, presentation of testimony, and briefing would have to occur. Only at this point could the state commission choose the model it will use to set costs. And once a model is chosen, each of the inputs must be evaluated. If the commission concludes that some of the inputs must be adjusted, the model must be re-run before rates can be calculated and adopted.[1/]

In short, during the period in which this Court's decision is under review, it would impose an enormous burden on state commissions to attempt to complete the work necessary to adopt rates that purport to conform with that decision. The process of attempting to do so will have caused the parties to have spent millions of dollars, and commissions to have invested thousands of hours. Indeed, the scope of disruption and the extent of the cost may be even greater, for incumbents may well argue that prior interconnection agreements will need to be reopened and amended to comply with the new pricing rules.

It simply makes sense to delay this massive new round of proceedings until the Supreme Court has ultimately decided the lawfulness of the FCC's TELRIC methodology. If the Supreme Court ultimately reinstates the vacated portion of the FCC's TELRIC rule – which, for purposes of evaluating harm must be assumed, *see Barnes v. E-Sgs, Inc. Group Hospital Medical & Surgical Ins. Plan*, 501 U.S. 1301, 1302 (1991) – then the massive disruption required by this Court's ruling will have been unnecessary. The FCC and state commissions will have been forced to divert their limited resources from other pressing public policy challenges to engage in

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10/ *See* Porter Declaration ¶¶ 7-9.

an ultimately unnecessary effort to reexamine the pricing structures under the 1996 Act. Movants and other private parties will have diverted millions of dollars to ultimately fruitless proceedings, and will have no means to recoup that cost. And competition in local markets will be hamstrung by competitors' uncertainty as to what pricing rules will apply. Moreover, carriers and state commissions would be forced (in a matter of months) to go through a second drastic overhaul to bring interconnection agreements back into conformity with the FCC's rules. *See, e.g., Houchins,* 429 U.S. at 1346 (stay to preserve the status quo is "preferable to forcing the applicant to develop new procedures which might be required only for a short period of time"). Conversely, if the mandate is stayed, and this Court's ruling is ultimately upheld, then a single, orderly transition can occur once the law is definitively settled. In the interim, the incumbents will merely continue to abide by the current rules until such time as the legality of those rules has been decided. If this Court's ruling is ultimately upheld, state commissions can use well-established "true up" procedures to account for any differences between the current rates kept in place pending Supreme Court review and the new rates that this Court's ruling may ultimately require.

Absent a stay, there will be a comparable disruption of judicial proceedings across the country. The 1996 Act provides that federal district courts have exclusive jurisdiction to review interconnection agreements to ensure that they comply with the Act and with the FCC's regulations. Many such appeals have been initiated; many of those have been fully briefed and are awaiting decision.[1/] Each of these courts would have to attempt to determine whether rates

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11/ Movants are involved in cases in various stages of judicial review. At least three cases involving pricing issues are pending in the courts of appeals. *See MCI Telecommunications Corp. v. BellSouth Telecommunications, Inc.*, No. 00-13505-F (11th Cir.); *Michigan Bell Telephone Co. v. MCI Telecommunications Corp.*, No. 00-1091 (6th Cir.); *US West Communications, Inc.*

contained in agreements conform to the Act's requirements, without the benefit of FCC rules that implement this Court's decision. If the Supreme Court were to reinstate the FCC's rules, every agreement that had been struck down because the costs were calculated based on TELRIC would have to be reinstated. For this reason as well, a stay to maintain the status quo pending a final decision on the merits is warranted.

2. Disruption of the § 271 Process. A disruption of the status quo will also impose a second category of harm. All indications are that over the coming months incumbent local

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v. Thoms, No. 99-2589 (8th Cir.). At least thirteen such cases are pending in the district courts. *See US West Communications, Inc. v. Hix*, No. 97-D-152 (D. Colo.); *AT&T Communications of the Southern States v. GTE-Florida, Inc.*, 4:97-CV-300-RH (N.D. Fla); *GTE v. MCI Telecommunications Corp.*, No. 4:97cv211 (N.D. Fla.); *BellSouth Telecommunications, Corp. v. MCI Telecommunications, Corp.*, No. 4:99cv448 (N.D. Fla.); *Illinois Bell Telephone Co. v. Miller*, No. 98-2686 (N.D. Ill.); *MCI Telecommunications Corp. v. Bell Atlantic-Massachusetts*, No. 98-CV-12375 (D. Mass.); *MCI Telecommunications Corp. v. Bell Atlantic-Maryland*, No. 00-CV-1518 (D. Md.); *MCI Telecommunications Corp. v. Bell Atlantic-New York*, No. 97-CV-1680 (N.D.N.Y.); *Ohio Bell Telephone Co. v. Glazer*, No. 99-074 (S.D. Ohio); *MCI Telecommunications, Corp. v. Bell Atlantic-Pennsylvania, Inc.*, No. 97-1857 (M.D. Pa.); *Bell Atlantic-Pennsylvania v. Pennsylvania Public Utility Comm'n*, 99-5391 (E.D. Pa.); *MCI Telecommunication Corp. v. BellSouth*, No. 97-616 (M.D. Tenn.); *GTE v. Wood*, No. 97-078 (S.D. Tex.); *US West Communications, Inc. v. AT&T Corp.*, No. 99CV621 (D. Utah). The status of each of these cases will be seriously disrupted by a change in the status quo should this case not be stayed.

telephone companies in over a dozen states may seek permission to enter their long-distance markets based on claims that they have satisfied the "competitive checklist" included in § 271 of the Act. 47 U.S.C. § 271(c)(2)(B). One of the most critical checklist items requires the FCC to certify that the incumbent is leasing elements in accordance with the pricing provision of the Act. 47 U.S.C. § 271(c)(2)(B)(ii). Until the status of the FCC's rules is finally determined, the § 271 process will be afflicted by precisely the same crippling uncertainty that state commissions and federal courts will face. And if incumbents were granted § 271authority on the basis of rates that do not conform with and are higher than those mandated by the FCC's TELRIC methodology, incumbent carriers will be able to leverage their local monopolies into the long distance arena at a time when new entrants cannot effectively compete. This would cause new entrants to suffer the very irreparable harm that it was the purpose of § 271 to prevent, and there will be no mechanism to undo this harm if the Supreme Court subsequently upholds TELRIC in its entirety.

B. There is a Reasonable Probability That the Supreme Court Will Grant Certiorari and Reverse This Court's Decision.

The Supreme Court is extremely likely to grant review of this Court's decision, and in all events is certain to review the merits of TELRIC. The Court has already granted certiorari in *Texas Office of Public Utility Counsel v. FCC*, in which the Fifth Circuit upheld the lawfulness of the FCC's TELRIC methodology under a related provision in the Act. In addressing that challenge, the Fifth Circuit explicitly rejected the incumbents' arguments that the plain language of the Act – in that case § 254(b)(4) – precluded the use of the Commission's "'most efficient' methodology." 183 F.3d at 412-13. Given that the Supreme Court is already reviewing the validity of the FCC's TELRIC methodology in that case, it is virtually certain that it will review this Court's decision as well, to allow it to consider together all of the substantive arguments made in relationship to the Act's pricing requirements.

The likelihood that review will be granted is strengthened further by the fact that this Court's decision to invalidate Rule 505(b)(1) conflicts with federal court and state commission decisions holding that the 1996 Act permits the use of a forward-looking cost methodology based on the costs of an efficient provider. *See, e.g., GTE South Inc. v. Morrison*, 6 F. Supp. 2d 517, 529 (E.D. Va. 1998) (upholding the decision of the Virginia State Corporate Commission to use a forward-looking methodology with the same "most efficient technology" approach mandated by the FCC), *aff'd*, 199 F.3d 733 (4th Cir. 1999); *Bell Atlantic-Delaware, Inc. v. McMahon*, 80 F. Supp. 2d 218, 235 (D. Del. 2000) (upholding rates set by Delaware commission which "voluntarily adopted the Local Competition Order's TELRIC methodology even though that portion of the Local Competition Order had never gone into effect"); *AT&T Communication of* *the Southwest, Inc. v. Southwestern Bell Tel. Co.*, 86 F. Supp. 2d 932, 941, 948 (W.D. Mo. 1999) (same).[1/]

Finally, the same factors that led the Supreme Court to review this Court's prior decision suggest that review will almost certainly be granted. The 1996 Act was "an unusually important legislative enactment," *Reno v. ACLU*, 521 U.S. 844, 857 (1997), that "profoundly affects a crucial segment of the economy worth tens of billions of dollars." *AT&T Corp.*, 525 U.S. at 397. The Act was intended to "fundamentally restructure[] local telephone markets" to permit competition for the first time. 525 U.S. at 371. Because of the enormous importance of the Act to the national economy and the centrality of the Act's pricing standards, the Supreme Court saw

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12/ Moreover, this Court's decision also creates an acknowledged conflict with the Ninth Circuit as to the lawfulness of the Commission's "additional combinations" rule. In striking down this rule, this Court acknowledged that the Ninth Circuit squarely held that it "necessarily follows from *AT&T* [*Corp. v. Iowa Utils. Bd.*] that requiring [the incumbent] to combine unbundled network elements is not inconsistent with the Act," *US West Communications v. MFS Intelenet, Inc*, 193 F.3d 1112, 1121 (9th Cir. 1999), *cert. denied*, 120 S. Ct. 2741 (2000), and noted that "the Eighth Circuit erred when it concluded that the regulation was inconsistent with the Act," *id.*; *see also MCI Telecommunications Corp. v. US West Communications*, 204 F.3d 1262, 1268 (9th Cir. 2000) (considering "whether a provision requiring combination violates the Act and concluding that "[t]he Supreme Court's interpretation of the Act makes absolutely clear that it does not"), *petition for cert. filed,* (U.S. Aug. 7, 2000) (No. 00-214). This acknowledged conflict is plainly worthy of the Supreme Court's review.

fit to grant review of this Court's prior invalidation of the FCC's pricing rules on jurisdictional grounds. There is likewise every reason to think the Court will believe it necessary to review this Court's substantive invalidation of those rules. These are important matters of national telecommunication policy, on which billions of dollars in investments depend.

There is also a significant possibility that once the Supreme Court grants the petition for certiorari, it will reinstate the FCC's pricing rules. The Commission's interpretation of the Act's pricing provisions for unbundled elements is reviewed under the deferential standard set forth in *Chevron*, under which the FCC's choices must be upheld unless "Congress has directly spoken to the precise question" and foreclosed the FCC's choice, or the FCC's reasoning was arbitrary. *Chevron, U.S.A., Inc. v. National Res. Def. Council, Inc.*, 467 U.S. 837, 842-43, 845 (1984). "Cost" is a term subject to a variety of meanings, and the Supreme Court has already concluded that the 1996 Act (including its cost provisions) is a "model of ambiguity." 525 U.S. at 397; *id.* at 423 (Breyer, J., dissenting and concurring) (concluding that the Act permits "broad methodological leeway" and "say[s] little about the 'method employed' to determine a particular rate"). The Court went on to conclude that such broad delegations were part and parcel of the congressional scheme, noting that "Congress is well aware that the ambiguities it chooses to produce in a statute will be resolved by the implementing agency." 525 U.S. at 397.

Against this backdrop, and considering this Court's holding that the text of the 1996 Act authorized the FCC to adopt an incremental forward-looking cost methodology generally, there is, at a minimum, a substantial possibility that the Supreme Court will affirm the FCC's TELRIC methodology in its entirety. This Court invalidated Rule 51.505(b)(1) on the basis of its understanding that the terms of § 252(d)(1), which require rates "based on the cost . . . of providing *the* interconnection or network element," meant that rates had to be calculated based on the forward-looking cost of the incumbent's actual network. But even if this reading of § 252(d)(1) is correct, the FCC's TELRIC rule is fully consistent with it. "Forward-looking cost methodologies, like TELRIC, are intended to consider the costs that a carrier would incur in the future." Local Competition Order ¶ 683. Thus, in the Local Competition Order, the FCC concluded that the forward-looking cost to the *incumbent* of "providing" a network element to a new entrant is the cost of replacing *that element* with the most efficient, least cost network element that could be used consistently with the configuration of the incumbent's existing wire centers. The FCC's TELRIC methodology does so by calculating the "forward-looking costs that can be attributed directly to the provision of services using *that element*, which includes a reasonable return on investment (i.e., 'profit'), plus a reasonable share of the forward-looking joint and common costs." *Id.* ¶ 673 (emphasis added). This is plainly a reasonable reading of the statutory language on which this Court's decision ultimately rested. *Chevron* requires no more. Thus, there is a significant prospect that the Supreme Court will not agree with this Court's conclusion that Congress spoke to the precise question at issue and allowed the use of a forward-looking methodology generally, but precluded the particular forward-looking methodology that "bas[es] the allowable charges . . . on what the costs would be if the ILEC provided the most efficient technology and in the most efficient confirmation available today utilizing its existing wire center locations. . . ." 2000 WL 979117, at *4.

CONCLUSION

The portion of the mandate invalidating Rule 51.505(b)(1) should be stayed.

Respectfully submitted,

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