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January 10, 2017

By Hand Delivery And ECFS

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, DC 20554

Re: ***AT&T Corp. v. Great Lakes Communications Corp.*, Docket No. 16-170, File No. EB-16-MD-001**

Dear Ms. Dortch:

AT&T Corp. ("AT&T") submits for filing the **Public Version** of its Supplemental Brief in support of its Formal Complaint against defendant Great Lakes Communication Corp. Consistent with the Commission's rules and the June 2, 2016 Protective Order entered by the Commission Staff, AT&T has redacted all confidential and highly confidential information from the **Public Version**, which it is filing by hand and ECFS.

AT&T is also filing by hand with the Secretary's office hard copies of both the **Highly Confidential** and **Confidential Versions** of the submission. In addition, copies of all versions of the submission are being served electronically on GLCC's counsel. Electronic courtesy copies are also being provided to the Commission's Enforcement Bureau.

Please contact me if you have any questions regarding this matter.

Sincerely,

Michael J. Hunseder

Enclosures

Sidley Austin (DC) LLP is a Delaware limited liability partnership doing business as Sidley Austin LLP and practicing in affiliation with other Sidley Austin partnerships.

cc: Joseph P. Bowser, Counsel for Defendant
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PUBLIC VERSION

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

In the Matter of **AT&T CORP.** ***v.*** **GREAT LAKES COMM. CORP.**	**File No. EB-16-MD-001**

SUPPLEMENTAL BRIEF OF AT&T CORP.

Pursuant to the parties' agreement and the Commission's December 13, 2016 email, Complainant AT&T Corp. ("AT&T") submits this supplemental brief in support of its Formal Complaint (the "Complaint") against Defendant Great Lakes Communication Corp. ("GLCC"), and in response to discovery produced by GLCC in this proceeding.

I. INTRODUCTION

As previously explained in AT&T's briefs, the Commission's rules require GLCC (i) to provide a tariffed direct connection at rates no higher than those of CenturyLink or, (ii) at the very least, to permit AT&T to install direct trunks without unreasonable conditions. *See, e.g.*, AT&T Reply Legal Analysis at 4-6; *id.* at 6-8; 13-15; AT&T Legal Analysis at 13-19; *id.* at 23. AT&T has demonstrated in this proceeding that GLCC has violated these rules. GLCC eliminated from its access tariff the option for flat-rated, direct trunked transport, and thus its access service is not functionally equivalent to that of CenturyLink, which does provide such a service in its access tariff. Further, contrary to the Commission's *PrairieWave* order, 23 FCC Rcd. 2556, ¶ 27 (2008), GLCC has refused to permit direct trunking, except via negotiations, where it has demanded a premium price or other unreasonable conditions.

In discovery, GLCC has now produced (in substantially all cases, for the first time)

contracts with other carriers in which it has negotiated direct connection rates. That evidence clearly demonstrates that GLCC, by virtue of its refusal to abide by the Commission's rules to provide or permit direct connections, has been able to extract unreasonable price premiums. This is precisely the kind of conduct that the Commission sought to prevent when it required CLECs to benchmark their rates to the functionally equivalent service offered by (in the case of access stimulating CLECs) the lowest priced price cap LEC.[1]

At the traffic volumes stimulated by GLCC, the rate for transport using a direct connection, priced at CenturyLink's tariffed rates, would be about **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** As such, if GLCC abided by the Commission's rules (or if IXCs could freely chose the transport provider), GLCC's transport rates, whether tariffed or negotiated, could not exceed these levels. *See CLEC Access Order* ¶ 37. However, because GLCC has refused to provide or permit direct connections except on terms that it has dictated, IXCs have faced a Hobson's choice: either use the tariffed transport services provided by Iowa Network Services ("INS"), which have been priced at about 0.9 cents per minute during much of the relevant period, or negotiate a direct connection arrangement with GLCC. Because GLCC knows that, once it refuses to provide or permit such

[1] As the Commission explained, under its regulatory regime, IXCs are compelled to transport access stimulation traffic to CLECs like GLCC, and IXCs cannot block that traffic or pass on the higher costs imposed by GLCC to the specific calling parties that place the calls. *See* In re Establishing Just & Reasonable Rate, 22 FCC Rcd. 11629, ¶¶ 1, 5 (2007); Seventh Report and Order, *CLEC Access Charge Reform*, 16 FCC Rcd. 9923, ¶¶ 30-34 ("*CLEC Access Order*"). Because of these rules, GLCC effectively has "bottleneck monopolies" over the traffic generated by its "Free Calling Provider" ("FCP") partners. *Id.* ¶ 34. To limit CLECs' ability to exploit these bottleneck monopolies, the Commission has imposed a benchmark regime that precludes CLECs from tariffing charges above the rates of an appropriate ILEC. *See CLEC Access Order*, ¶¶ 2-63; *see also Connect America Order*, 26 FCC Rcd. 17663, ¶ 689 (2011) (it is appropriate to use lowest-priced price cap LECs as a benchmark when CLECs engage in access stimulation because of the large traffic volumes).

[2] *See* AT&T Complaint, ¶ 59; Habiak Decl. ¶¶ 20-21. Although GLCC claims that the rate for such a service would be somewhat higher, even doubling the rate would mean **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]**

an arrangement, IXCs have no choice but to use INS's tariffed service, GLCC has been able to leverage its bottleneck monopoly, and obtain prices substantially above the tariffed rates of CenturyLink, which is contrary to the Commission's CLEC access rules. Accordingly, even though the benchmark rate for transport under the Commission's rules should be about **[[BEGIN CONFIDENTIAL]]** [redacted] **[[END CONFIDENTIAL]]** GLCC **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** Further, as the Commission has found, such price premiums are ultimately borne by all consumers of long distance and wireless services. *Connect America Order* ¶ 663.[3]

II. DISCUSSION

A. GLCC's Exploitation Of Its Bottleneck Monopoly.

The Commission found in 2001 that CLECs have the "ability to impose excessive access charges" because (i) IXCs that pay access charges "ha[ve] little practical means of affecting the caller's choice of provider (and even less opportunity to affect the called party's choice of provider)," (ii) the Commission requires IXCs to deaverage their rates, leaving IXCs with "little

[3] The most notable exception involved **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

or no ability to create incentives for their customers" to avoid LECs with high access charges. *CLEC Access Order* ¶ 31. Further, the Commission has precluded IXCs from blocking calls to access stimulating CLECs, and thus IXCs are generally compelled to complete the calls at issue. While the Commission has since imposed requirements on CLECs to preclude such misconduct, GLCC nonetheless has continued to use its control over access to its local exchange to extract significant premiums for a direct connection service, charging rates well above the CenturyLink benchmark rate of **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** (AT&T Compl. ¶ 59).

B. GLCC's Direct Connection Agreements.

In response to the discovery requests that AT&T propounded in this proceeding, GLCC has produced copies of direct connection agreements that it has with a number of carriers.[4] GLCC has also provided written responses discussing, among other things, the rates offered under those agreements over time.[5] As that discovery demonstrates, GLCC has **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[4] See GLCC's Objections and Responses to AT&T's Discovery Requests (Highly Confidential Version) (dated November 18, 2016) ("GLCC's Responses") at 6-7; *see also* GLCC_ATT_034936-944; GLCC_ATT_051676-769.

[5] *Id.* at 17-21.

[6] By entering into these agreements, GLCC necessarily believes that it has the legal authority to bypass INS's network for terminating calls. Yet, in a recent Commission filing, GLCC and its counsel stated that the Commission's "existing orders require traffic to flow through [centralized equal access] providers" like INS. Comments of GLCC, *et al.*, WC Docket No. 16-363 (Dec. 2, 2016). **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted]

[[END HIGHLY CONFIDENTIAL]]

[10] *See* GLCC's Response at 21. *See also* AT&T's Reply Legal Analysis at 15 and related cites discussing **[[BEGIN CONFIDENTIAL]]** **[[END CONFIDENTIAL]]**

[redacted]

[redacted]

[11] *See* **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** (GLCC_AT&T_051715-27) at GLCC_ATT_051715.

[12] *Id.* at GLCC_ATT_051718.

[13] *Id.*

[14] More specifically, because the rates paid to GLCC **[[BEGIN HIGHLY CONFIDENTIAL]]** **[[END HIGHLY CONFIDENTIAL]]**

[17] *See* E-mail from J. Bowser to B. McAleenan and M. Hunseder, dated December 12, 2014. Notably, in the District Court proceeding, AT&T had served a document request for "[a]ll documents relating to the routing of long distance traffic (including without limitation long distance traffic originated by wireless carriers or callers) that was not routed to Great Lakes via the network of INS." *See id.* However, GLCC did not produce its **[[BEGIN HIGHLY CONFIDENTIAL]]** **[[END HIGHLY CONFIDENTIAL]]** until a few weeks ago.

[18] *See* **[[BEGIN HIGHLY CONFIDENTIAL]]** **[[END HIGHLY CONFIDENTIAL]]**

[19] *See MetroPCS Wireless, Inc. v. Community Voice Line, LLC*, No. JFM-11-501, 2012 WL 1901484, at *5 (D. Md. May 24, 2012). Wireless carriers are not subject to the same rate averaging requirements as wireline long distance providers. **[[BEGIN HIGHLY CONFIDENTIAL]]** **[[END HIGHLY CONFIDENTIAL]]**

[20] *See* **[[BEGIN HIGHLY CONFIDENTIAL]]** **[[END HIGHLY CONFIDENTIAL]]** (GLCC_ATT_051742-54).

[redacted] **[[END HIGHLY CONFIDENTIAL]]**

C. GLCC's Refusal To Permit A Direct Connect Without Price Premiums Or Provide A Direct Connect At The Appropriate Benchmark Rate Is Unlawful, And Allows GLCC To Charge Unreasonable Price Premiums.

There is no economic justification for the rates that GLCC has charged in connection with most of its direct connection agreements. In many of those agreements, **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** makes clear that there is no cost justification for the higher rates contained in most of GLCC's direct connection agreements.

Rather, GLCC's ability to extract such premiums is purely the result of its ability to exploit its bottleneck monopoly by refusing to offer a direct connection agreement on reasonable terms. The Commission's benchmarking rules were put in place to prevent such conduct.[22] But those rules are thwarted if the CLEC can avoid them by simply failing to tariff the "functionally

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[21] *See* note 18, *supra*. **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]**

[22] It is not necessarily unlawful for a CLEC and an IXC to negotiate a contract with an above-benchmark rate – which ordinarily would occur in circumstances not present here, such as the CLEC's provision of a "superior quality of access service." *CLEC Access Order* ¶ 43. Here, GLCC's ability to extract a premium above the benchmark arises from its refusal to offer or permit a direct connection. Thus, regardless of whether GLCC's agreements with these carriers are themselves unlawful (an issue the Commission need not address), the agreements are strong evidence that, absent enforcement of the Commission's rules, GLCC can extract substantial price premiums.

equivalent" service. In its discovery response, GLCC notes that **[[BEGIN HIGHLY CONFIDENTIAL]]** [redacted] **[[END HIGHLY CONFIDENTIAL]]** However, all that proves is that direct connection (as opposed to tandem switched transport) is the functionally equivalent service.[23]

D. Enforcing The Commission's Rules Is Necessary To Prevent GLCC's Misconduct.

GLCC has consistently sought to exploit its bottleneck monopoly and extract an unjustified premium from AT&T. AT&T has consistently resisted those efforts, and has pressed forward with the claims set forth in its Complaint that GLCC's conduct is unlawful. As AT&T has previously explained in detail, the Commission's existing rules require GLCC to allow direct connections to its end office facilities, and to benchmark its rates for that service to CenturyLink's rates for such service. *See* AT&T Legal Analysis Part I; AT&T Reply Legal Analysis Part I. As the evidence relating to GLCC's direct connection agreements makes clear, the appropriate way to prevent GLCC from continuing to exploit its bottleneck monopoly, and thereby extract significant premiums for merely agreeing to permit IXCs and other carriers to directly connect to its network, is for the Commission to enforce those rules.

[23] Further, the fact that "most IXCs other than AT&T mutely paid the charges when billed" in no way justifies or takes away from the fact that GLCC's direct connect agreements contain substantial price premiums that can be sustained only by GLCC's rule violations. *AT&T Corp. v. FCC*, 841 F.3d 1047, 1054 (D.C. Cir. Nov. 18, 2016). Rather, these other carriers apparently made "silent decisions not to incur the cost of litigation," and chose to settle with GLCC rather than litigate. *Id.*

PUBLIC VERSION

Respectfully submitted,

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Dated: January 10, 2017

Counsel for AT&T Corp.

Appendix A

Highly Confidential Materials Omitted