

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

In the Matter of)	
)	
Special Access for Price Cap Local Exchange Carriers;)	WC Docket No. 05-25
)	
AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

**APPLICATION FOR REVIEW OF
THE UNITED STATES TELECOM ASSOCIATION**

Jonathan Banks
Robert Mayer
607 14th Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-7300

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I. SUMMARY AND INTRODUCTION

The United States Telecom Association (“USTelecom”) and its members support the Commission’s efforts to collect comprehensive high capacity services data.¹ The special access marketplace “is highly competitive and is growing more so,” which a comprehensive information collection will confirm.² Furthermore, because the marketplace is dynamic and complex – with many categories of buyers and sellers, technologies, and products – comprehensive data are critical to the Commission’s assessment of special access competition, including both actual and potential competition.

In the *Data Collection Order*, the Commission expressly noted its intent to undertake “a comprehensive evaluation of competition in the special access market” and extolled the need for

¹ See, e.g., Letter from Glenn Reynolds, Vice President, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, at 1 (Dec. 1, 2010).

² See, e.g., Letter from Glenn Reynolds, Vice President, USTelecom, to Marlene Dortch, Secretary, FCC, WC Docket No. 05-25, at 2 (June 4, 2014).

a “comprehensive data collection” in order to conduct that evaluation.³ The Commission also recognized that it lacked sufficient data to analyze competition in the special access marketplace or to adopt any new special access rules.⁴ Accordingly, to enable a comprehensive marketplace analysis and to fill the gaps in with available information about actual and potential competition, the Commission *ordered the collection of special access data for two calendar years*.⁵ The Commission emphasized that a two-year data collection would be far superior to the collection of data for only a single year because it would enable the Commission “to observe and better understand how and why competition has evolved over time and, therefore, where potential competition exists.”⁶

In the *Reconsideration Order*, the Wireline Competition Bureau (“Bureau”) chose a different course.⁷ Specifically, in response to the refusal of the Office of Management and Budget (“OMB”) to approve a two-year data collection under the Paperwork Reduction Act (“PRA”),⁸ the Bureau limited the collection of high capacity services data to only a single year, 2013. In so doing, however, the *Reconsideration Order* conflicts with the Commission’s *Data*

³ *Special Access for Price Cap Local Exchange Carriers*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, ¶¶ 1, 13, 66 (2012) (“*Data Collection Order*”).

⁴ *Id.* ¶¶ 69, 78.

⁵ *Id.* ¶¶ 27-29.

⁶ *Id.* ¶ 29.

⁷ *Special Access for Price Cap Local Exchange Carriers*, Order on Reconsideration, WC Docket No. 05-25, RM-10593, DA 14-1327, 2014 WL 4555595 (WCB Sept. 15, 2014) (“*Reconsideration Order*”). The *Reconsideration Order* was published in the Federal Register on September 26, 2014. See 79 Fed. Reg. 57811.

⁸ See Notice of Office of Office of Management and Budget Action, OMB Control No. 3060-1197 (Aug. 15, 2014), http://www.reginfo.gov/public/do/PRAViewICR?ref_nbr=201311-3060-001#.

Collection Order, exceeds the Bureau's delegated authority, and threatens to undermine the Commission's goals for the data collection effort.

USTelecom shares the Commission's desire to collect high capacity services data and to do so promptly.⁹ Indeed, USTelecom's members are preparing to submit their 2013 high capacity services data in December 2014 consistent with the Commission's time schedule and are not seeking to delay that submission. However, given the obvious conflict between the Commission's determination that a comprehensive review of the special access marketplace required the collection of data covering two years and the *Reconsideration Order*'s limitation of the effort to only one year, the Commission must consider alternative approaches to obtaining the necessary data on high capacity services competition that are consistent with the limitations imposed by OMB. Under the circumstances, the Commission should issue a notice seeking comment on alternative approaches that would enable the Commission to view recent trends in the special access marketplace, such as collecting sample data from 2014 that the Commission could compare with 2013 data by means of statistical testing.

But heedlessly charging ahead with a limited information collection without pausing to consider the effect of OMB's actions on the Commission's desired regulatory approach – as the *Reconsideration Order* does – is not a lawful option. *First*, limiting the collection of high capacity services data to just a single year will not provide the Commission with the requisite data to conduct the comprehensive analysis of competition in the special access marketplace that the Commission has said it will undertake. The *Data Collection Order* was premised upon the Commission's plan to collect two years of data so that it could analyze actual and potential competition in the special access marketplace and assess the need for any changes to its special

⁹ See Remarks of FCC Chairman Tom Wheeler COMPTEL Fall Convention & Expo – Dallas, TX, October 6, 2014, at 3.

access rules. The *Reconsideration Order* guts the Commission’s plan and thereby undermines the agency’s objectives for the collection effort and its ability to use whatever high capacity services data it does collect in adopting new rules.

Second, the Bureau exceeded its delegated authority when it limited the scope of the data collection to a single year. Although the Commission delegated limited authority to the Bureau to conduct the information collection, the scope of that delegation did not extend to changing the time period for which high capacity services data was to be collected.

Third, the Commission risks engaging in arbitrary and capricious decision making if it were to adopt new special access rules based on a one-year snapshot of data. Indeed, proceeding with a constrained information collection – and without considering at the outset the changes in the legal and factual landscape resulting from OMB’s actions – would reflect a patent failure to engage in reasoned decision making. And, given the Commission’s own pronouncements, any rules as the Commission might ultimately adopt from such a process likely would lack substantial evidence.

For the foregoing reasons, and consistent with Section 1.115 of the Commission’s rules, the Commission should grant review of the Bureau’s *Reconsideration Order* and issue a notice seeking public comment on alternative approaches – including statistical sampling – that would comply with the PRA and fulfill the goal of the *Data Collection Order* of providing the Commission with a comprehensive data set with which to analyze the special access marketplace.¹⁰

¹⁰ The FCC’s rules provide that “[n]o application for review will be granted if it relies on questions of fact or law upon which the designated authority has been afforded no opportunity to pass.” 47 C.F.R. § 1.115(c). Here, the Bureau plainly had the “opportunity to pass” on the obvious tension between its limited information collection and the *Data Collection Order* before it ever issued the *Reconsideration Order*. Even if that were not the case, the Commission should

II. THE COMMISSION SHOULD GRANT REVIEW OF THE BUREAU'S ORDER LIMITING THE COLLECTION OF HIGH CAPACITY SERVICES DATA TO A SINGLE YEAR.

A. A One-Year Snapshot Of Data Will Not Provide The Commission With A Basis To Conduct A Comprehensive Evaluation Of All Forms Of Special Access Competition.

The marketplace for high capacity services including special access is highly dynamic. In order to assess competition in a marketplace such as this, the Commission has to look not only at competitive alternatives available to customers today but also at new sources of supply that competitors have planned or that are likely to become available going forward. Indeed, consistent with how U.S. antitrust agencies treat dynamic marketplaces, the Commission has refused to rely upon static market share information in the context of enterprise broadband services.¹¹

(footnote cont'd.)

excuse any failure to present these arguments to the Bureau as within the public interest or treat USTelecom's application as a petition for reconsideration. *See Application of Duchossois Commc'ns Co. of Maryland, Inc. (Assignor) & Liberty Broad. of Maryland, Inc. (Assignee)*, 10 FCC Rcd 6688, ¶ 12 (1995) (“[W]here new material introduced at the Commission review level may undermine the basis of the earlier decision, the public interest in reviewing that material may outweigh the public interest in the orderly administration of the Commission's business fostered by 47 U.S.C. § 155(c)(5) and 47 C.F.R. § 1.115”); *Side by Side, Inc. Toledo, Ohio*, 27 FCC Rcd 11132, 11132, ¶ 1 (EB 2012) (“Consistent with the procedural requirements of Section 1.115(c) of the Rules, we will treat Side by Side's Application for Review as a petition for reconsideration and consider herein the new facts and arguments offered by Side by Side”).

¹¹ *See Petition of AT&T Inc. for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services; Petition of BellSouth Corporation for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Its Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd 18705, ¶¶ 23 & 96 (2007), *aff'd sub nom. Ad Hoc Telecom. Users Committee v. FCC*, 572 F.3d 903 (D.C. Cir. 2009); U.S. Dep't of Justice & Federal Trade Comm'n, *Horizontal Merger Guidelines*, § 5.2 (2010), <http://www.justice.gov/atr/public/guidelines/hmg-2010.pdf> (“[R]ecent or ongoing changes in market conditions may indicate that the current market share of a particular firm either understates or overstates the firm's future competitive significance.”). Under the Merger Guidelines, potential entry by committed entrants is deemed sufficient “to deter or counteract the competitive effects of concern” where such entry is “rapid enough” to ensure that no meaningful anticompetitive effect would result from the merger.” *Id.* §§ 9.0, 9.1.

Consistent with that precedent, the Commission in the *Data Collection Order* refused to conduct a “simple market share or market concentration analysis.”¹² Instead, the Commission recognized the need to conduct a “comprehensive data collection” that would allow the agency to conduct a “market analysis” in a manner that would “best assist the Commission in evaluating market conditions for special access services and determining what regulatory changes, if any, are warranted in light of that analysis.”¹³

To enable a comprehensive evaluation of competition in the market, the Commission ordered the collection of high capacity services data for two calendar years. According to the Commission, this two-year approach was vastly superior to the collection of data for only a single year because “a two year period between observations is more likely to include changes in the relevant variables than a one year period.”¹⁴ Furthermore, data for a two-year period “allows for an analysis that controls for factors that may vary widely across geographic areas, but not within a given geographic area (e.g., entry factors such as building codes or soil quality).”¹⁵

Of particular importance, as the Commission recognized, is the need to “assess potential competition” – an assessment that was predicated on the Commission “obtaining structural, pricing, and demand data over a two-year period to observe and better understand how and why competition has evolved over time and, therefore, where potential competition exists.”¹⁶

According to the Commission, the collection of “historical data” over a two-year period, “which

¹² *Data Collection Order* ¶ 67.

¹³ *Id.* ¶ 66.

¹⁴ *Id.* ¶ 27.

¹⁵ *Id.* ¶ 28.

¹⁶ *Id.* ¶ 29.

could be used to predict potential competition, is consistent with Commission precedent, as well as that of the U.S. antitrust agencies.”¹⁷

Nevertheless, the Commission did not take steps following OMB’s decision limiting the collection to one year to consider the impact of that constraint on its ability to engage in a comprehensive evaluation of the special access marketplace, much less how best to proceed with such an analysis of actual and potential special access competition under that restriction. Instead, the Bureau merely limited the data collection to a single year, 2013. The Bureau did so without acknowledging or resolving the obvious inconsistency between such a limited data collection and the Commission’s order requiring two years of high capacity services data in order to conduct a comprehensive market analysis.¹⁸ Nor did the Bureau explain how a single year of data would allow the Commission “to undertake econometric modeling to estimate the effect of competition from facilities-based providers, among other things, on the prices of special access services.”¹⁹ That is likely because the single data point that was adopted for the data collection effort will leave the Commission incapable of performing a multi-faceted market analysis or assessing adequately the impact of potential competition in the special access market, particularly when 2013 data will be stale by the time the Commission is ready to use it. Thus, proceeding down the path charted by the Bureau in its *Reconsideration Order* would leave the Commission again without sufficient data necessary to analyze adequately the need for any new special access rules.²⁰

¹⁷ *Id.*

¹⁸ *See Reconsideration Order* ¶ 10.

¹⁹ *Data Collection Order* ¶ 68.

²⁰ *Id.* ¶ 69, n.154 (finding it “necessary to supplement the existing record to ensure that we are able to adopt rules that are data-driven and reflective of market conditions”).

Limiting the data collection to only a single year suffers from other flaws, as the Commission itself has acknowledged. For example, a single year of data would not allow the Commission to control for “differences in deployment between different geographies” that “may be due to differences in factors such as building codes, climate, or soil quality.”²¹ Moreover, with “only one year’s worth of data,” the Commission “will be less able to associate particular factors with levels of deployment.”²² “In addition, the need to include large numbers of controls unnecessarily reduces regression efficiency relative to a regression that relies on data from more than one time period.”²³ Regrettably, the collection of high capacity services data under the *Reconsideration Order* suffers from the very flaws the Commission sought to avoid in the *Data Collection Order*.

At bottom, the *Reconsideration Order* cannot be reconciled with the Commission’s decision rejecting a snapshot one-year data collection. It would leave the Commission without the data necessary to conduct the comprehensive analysis of competition in the special access marketplace it directed or provide an evidentiary basis upon which to ground any new special access regulations. Under the circumstances, the Commission should grant USTelecom’s application for review of the *Reconsideration Order*.

B. The Bureau Lacked Delegated Authority To Alter The Period of Time For Which High Capacity Services Data Must Be Collected.

The Bureau’s decision limiting the collection of high capacity services data to only a single year also exceeded its delegated authority. The Commission charged the Bureau with implementing “the requirements of the [*Data Collection Order*]” so long as the Bureau’s actions

²¹ *Id.* ¶ 28.

²² *Id.*

²³ *Id.* n.62.

are “consistent with the terms of [that order].”²⁴ In delegating authority to the Bureau, the Commission emphasized that its “goal is to ensure a comprehensive and detailed data collection.”²⁵ As explained above, limiting the collection of high capacity services data to only one year will not result in a “comprehensive and detailed data collection” necessary for the Commission to conduct its comprehensive analysis of special access competition.

The Commission did not delegate to the Bureau the authority to alter the period of time for which high capacity services data must be collected. Rather, the Commission delegated “limited authority” to the Bureau “to review and modify this collection, consistent with the authority delegated in section III.D” of the *Data Collection Order*.²⁶ In section III.D, the Commission directed that any changes to the information collection made by the Bureau must “ensure it reflects the Commission’s needs as expressed in [the *Data Collection Order*]” and that the Bureau’s actions “must be consistent with the terms of [the *Data Collection Order*].”²⁷ By limiting the collection of data to only one year, the Bureau ran afoul of both these directives.

To be sure, the Commission stated: “To the extent the Bureau cannot obtain Office of Management and Budget approval for some portion of the data collection, we direct the Bureau to proceed with the remainder of the collection.”²⁸ However, the Commission reasonably expected that the Bureau would only proceed with collecting information that “reflects the Commission’s needs as expressed in this Report and Order.”²⁹ The Commission’s “needs,” as

²⁴ *Id.* ¶¶ 30, 52.

²⁵ *Id.* ¶ 53.

²⁶ *Id.* ¶ 30.

²⁷ *Id.* ¶ 52.

²⁸ *Id.* ¶ 52 n.111.

²⁹ *Id.* ¶ 52.

explained above, required two years of high capacity services data, not one. Indeed, the Commission cautioned the Bureau that it was not at liberty to make fundamental changes to the collection of high capacity services data even if doing so was necessary to satisfy OMB.³⁰ The Commission could not delegate to the Bureau the authority to shorten the time period for which high capacity services data must be collected when the Commission previously determined that a two-year period is required and that a one-year snapshot would be inadequate. Accordingly, the Bureau's decision to embrace a one-year information collection exceeded the scope of its delegated authority.

C. The Commission Risks Engaging In Arbitrary And Capricious Decision Making If It Were To Adopt New Rules Regulating The Special Access Marketplace Based On Only One Year Of Data.

Not only did the Bureau exceed its delegated authority, but the *Reconsideration Order* threatens to undermine any future special access rules the Commission may adopt in this proceeding. It would be arbitrary and capricious for the Commission to proceed with an information collection without ensuring that the information collected will provide an adequate record upon which to base any new rules governing the provision of special access services.

1. The Commission Must Consider Whether Changed Circumstances Warrant A Changed Regulatory Approach.

It is a basic principle of administrative law is that an agency cannot proceed with a regulatory approach that has been fatally undermined by subsequent events. Instead, an agency must take into account changed circumstances and adapt its regulatory approach to the new

³⁰ *Id.* ¶ 52 n.112 (“... even if the PRA process suggested that it would be less burdensome to collect special access facilities deployment at the census block level, it would not be consistent with this Report and Order for the Bureau to amend the data collection to require census block information rather than location-by-location information required by paragraph 31 about such facilities”).

environment.³¹ Charging ahead without taking into account changes in the factual and legal landscape is the epitome of arbitrary and capricious agency action.

Here, the Commission must reconsider its regulatory approach in light of OMB's decision to modify dramatically the Commission's plan to collect comprehensive high capacity services data. Specifically, the Commission must consider whether OMB's approval of a limited data collection will provide an adequate foundation upon which to base special access rules or whether a change in the agency's proposed approach is warranted. If the Commission were to fail to do so and ultimately adopts new rules regulating special access services based on marketplace data that is insufficient to assess actual and potential competition, its decision would be subject to challenge as arbitrary and capricious. Thus, going forward with a limited information collection in response to OMB without considering the impacts on this proceeding – as the *Reconsideration Order* does – is not a lawful option.

2. New Special Access Rules Adopted Based On Only One Year Of Competitive Data Would Lack Substantial Evidence.

Another bedrock principle of administrative law that an agency cannot adopt new rules in the absence of substantial evidence.³² “Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and requires more than a

³¹ See, e.g., *Bechtel v. FCC*, 10 F.3d 875, 880 (D.C. Cir. 1993) (explaining that an agency must “evaluate its policies over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would”); *Am. Trucking Ass'ns, Inc. v. Atchison, Topeka & Santa Fe Ry Co.*, 387 U.S. 397, 416 (1967) (“Regulatory agencies do not establish rules of conduct to last forever; they are supposed, within the limits of the law and of fair and prudent administration, to adapt their rules and practices to the Nation's needs in a volatile, changing economy.”); *NBC v. United States*, 319 U.S. 190, 225 (1943) (explaining that the Commission cannot retain a rule “[i]f time and changing circumstances reveal that the ‘public interest’ is not served by application of the Regulation[.]”).

³² 5 U.S.C. § 706(2) (requiring courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . unsupported by substantial evidence”).

scintilla but less than a preponderance of evidence.”³³ “When applied to rulemaking proceedings, the substantial evidence test is identical to the familiar arbitrary and capricious standard, which requires the Commission to specify the evidence on which it relied and to explain how that evidence supports the conclusion it reached.”³⁴

The Commission has acknowledged that a comprehensive data collection is necessary to provide a record basis for the adoption of any new special access rules. In the *Data Collection Order*, the Commission recognized that “there is insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market.”³⁵ As a result, the Commission concluded “that a one-time, multi-faceted market analysis, performed in conjunction with a comprehensive data collection,” was an essential predicate to the adoption of new special access rules.³⁶ And, critical to conducting a “comprehensive market analysis” is two years of high capacity services data that provide a “more detailed review of competitive conditions in the special access market than has been possible to date.”³⁷ However, with only one year of data, the Commission will lack the very information it insisted that it needs to adopt any new special access rules.

II. THE COMMISSION MUST CONSIDER ALTERNATIVE APPROACHES TO COLLECTING HIGH CAPACITY SERVICES DATA IN LIGHT OF THE

³³ *S. Carolina Pub. Serv. Auth. v. FERC*, No. 12-1232, 2014 WL 3973116 (D.C. Cir. Aug. 15, 2014).

³⁴ *Id.*

³⁵ *Data Collection Order* ¶ 69. Because of the lack of adequate data regarding competition in the special access marketplace, the Commission concluded that it had “an insufficient basis for us to identify reliable competitive showing rules for granting pricing flexibility in defined geographic areas going forward.” *Id.*

³⁶ *Id.*

³⁷ *Id.* ¶ 78; *see also id.* ¶ 80 (“The comprehensive data request described in the Report and Order above will identify and require submission of the data needed to implement any market analysis we adopt, including the specific analysis proposed in this Further Notice”).

LIMITED DATA COLLECTION APPROVED BY OMB.

OMB's approval of a limited data collection does not preclude the Commission from undertaking a comprehensive market analysis, which is a necessary predicate to any effort by the agency to fashion new special access rules. At this juncture, however, it is incumbent upon the Commission to consider alternative approaches that would comply with the PRA *and* allow the Commission to conduct a comprehensive evaluation of competition in the special access marketplace.

One alternative to collecting high capacity services data from only a single year would involve the collection of sample data from both 2013 and 2014. This approach presumably would not have raised the same PRA concerns identified by OMB about a multi-year collection of comprehensive high capacity services data.³⁸ However, given the upcoming deadline for the submission of 2013 data, the Commission's window to use sample data from two calendar years appears to have already passed.

Another alternative would be for the Commission to require the submission of sample data from 2014. For example, the Commission could order the submission of additional data from year-end 2014, either across the board or at least from a representative sample of different-sized markets across the country. With 2014 sample data in hand, the Commission could then

³⁸ To be sure, the Commission previously expressed concern about a data collection methodology based on sampling of locations or geographic areas, stating that such an approach "would be unlikely to substantially reduce provider burdens." *Data Collection Order* ¶ 24. However, the Commission should revisit its views about statistical sampling in light of the limitations imposed by OMB. Indeed, the Commission elected to use statistical sampling "to understand the evolution of competitive provider buildout of a connection to a specific end user's location." *Id.* ¶ 26. This approach could be employed for purposes other than "facilities deployment data" in order to provide the Commission with the requisite comprehensive data collection.

employ a random, statistical approach to analyzing special access data by comparing the limited 2014 data to the 2013 data that will soon be collected.

Random, sampling approaches are widely accepted methods of analysis, and, in this instance, such an approach would provide the Commission with data to conduct a comprehensive market analysis. Indeed, sample data from 2014 would provide the Commission with more recent and meaningful data, particularly given the recent increase in competition from cable operators, and also provide the Commission with more data to evaluate trends in particular markets. Consistent with the *Data Collection Order*, this approach would allow the Commission to observe “changes in the relevant variables,”³⁹ control “for factors that may vary widely across geographic areas,”⁴⁰ and “observe and better understand how and why competition has evolved over time and, therefore, where potential competition exists.”⁴¹

At bottom, OMB’s refusal to approve the information collection as originally proposed necessitates that the Commission embrace an alternative approach to collecting high capacity services data and complying with the PRA. The Commission can only lawfully do so by issuing a public notice seeking comment on an alternative approach.

III. CONCLUSION

USTelecom and its member companies support the Commission’s objectives to conduct a comprehensive analysis of special access competition and to obtain in a timely manner comprehensive market data to assess the need for any future regulation of special access services. Unfortunately, the *Reconsideration Order* cannot be reconciled with these objectives. The Commission should grant USTelecom’s application for review.

³⁹ *Id.* ¶ 27.

⁴⁰ *Id.* ¶ 28.

⁴¹ *Id.* ¶ 29.

Respectfully submitted,

**UNITED STATES TELECOM
ASSOCIATION**

By: /s/ Jonathan Banks _____

Jonathan Banks
Robert Mayer
607 14th Street, NW
Suite 400
Washington, D.C. 20005
(202) 326-7300

Dated: October 24, 2014