

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

In the Matter of	)	
	)	
Special Access Rates 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
	)	

**OPPOSITION OF  
BIRCH, BT AMERICAS, INTEGRA, AND LEVEL 3**

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Pursuant to Section 1.115(d) of the Commission’s rules,<sup>1</sup> Birch Communications, Inc., BT Americas Inc., Integra Telecom, Inc., and Level 3 Telecommunications, LLC (collectively, the “Joint CLECs”), through their undersigned counsel, hereby submit this opposition to the application for review (“AFR”) filed on October 24, 2014 by the United States Telecom Association (“USTelecom”) in the above referenced proceeding.<sup>2</sup>

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<sup>1</sup> 47 C.F.R. § 1.115(d).

<sup>2</sup> Application for Review of the United States Telecom Association, WC Docket No. 05-25, RM-10593 (filed Oct. 24, 2014) (“AFR” or “Application”). USTelecom seeks review of the Wireline Competition Bureau’s (“Bureau’s”) September 15, 2014 Order on Reconsideration, which we refer to as the “*Reconsideration Order*.” See *Special Access for Price Cap Local Exchange Carriers et al.*, Order on Reconsideration, 29 FCC Rcd 10899 (WCB 2014). We refer to the Commission’s December 11, 2012 Report and Order and Further Notice of Proposed Rulemaking as the “*Data Request Order*” and “*Data Request FNPRM*,” respectively. See *Special Access for Price Cap Local Exchange Carriers et al.*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012). Finally, we refer to the Bureau’s September 18, 2013 Report and Order as the “*Data Request Implementation Order*.” See *Special Access for Price Cap Local Exchange Carriers et al.*, Report and Order, 28 FCC Rcd 13189 (WCB 2013).

## I. INTRODUCTION AND SUMMARY

USTelecom's AFR is nothing more than a cynical, meritless delay tactic designed to prevent the Commission from conducting a timely, comprehensive analysis of the market for special access services. It should be summarily denied.

To begin with, USTelecom's AFR is procedurally defective. Section 5(c)(5) of the Communications Act and Section 1.115(c) of the Commission's rules prohibit a party from filing an AFR based on questions of fact or law on which a delegated authority has not had an opportunity to pass. Because the AFR includes arguments that neither USTelecom nor any other party has presented to the Bureau, the AFR flatly violates this prohibition. Recognizing this problem, USTelecom urges the Commission to waive its procedural requirements or to treat the AFR as a petition for reconsideration. But either of these approaches would require the Commission to depart from its precedent, and USTelecom has provided no basis for it to do so.

Furthermore, even if the Commission considers the AFR to be procedurally sound, it should reject it on the merits. USTelecom's claims notwithstanding, collecting one year of data (rather than two) will enable the Commission to comprehensively evaluate the special access market and will not result in arbitrary and capricious decision making. USTelecom wrongly asserts that the Commission held in the *Data Request Order* that two years of data are "essential" to conduct a proper analysis. In fact, the Commission merely sought comment in the *Data Request FNPRM* on whether it should conduct panel regressions based on two years of data, and it never held in the *Data Request Order* that doing so was essential. Indeed, USTelecom's largest members opposed the Commission's proposal, arguing that it is unlikely that the agency can conduct a reliable regression analysis for the special access market under any circumstances, but especially where it analyzes two years of data. The Commission should reject USTelecom's

newfound belief that collecting two years of data is the only way for the Commission to lawfully proceed.

Finally, contrary to USTelecom's assertions, the Bureau's modification to the data request in the *Reconsideration Order* falls squarely within the scope of authority delegated to the Bureau in the *Data Request Order*. In the *Data Request Order*, the Commission unequivocally stated, "[t]o 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." That is *exactly* what the Bureau has done here.

## II. BACKGROUND

In 2002, before it was acquired by SBC, AT&T filed a petition for rulemaking alerting the Commission that "the Bells are fleecing special access customers nationwide, and, by doing so, are reaping shocking windfalls."<sup>3</sup> AT&T cited, among other things, the fact that incumbent LECs had "maintained or even *raised*" their rates in the geographic areas where they had been granted Phase II pricing flexibility and had used "anticompetitive" lock-up commitments that "remove even the possibility that market forces could constrain the Bells' market power."<sup>4</sup> AT&T's petition led the FCC to initiate this proceeding, which has now been pending for nearly a decade.<sup>5</sup>

After being acquired by SBC, AT&T joined its new incumbent LEC colleagues in their efforts to delay or prevent the FCC from remedying the market failures that AT&T once

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<sup>3</sup> AT&T Corp., Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593, at 8 (filed Oct. 15, 2002).

<sup>4</sup> *Id.* at 11, 21-22 (emphasis in original).

<sup>5</sup> See *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) ("*Special Access NPRM*").

lamented. Even after at least four rounds of comments and reply comments,<sup>6</sup> two voluntary industry-wide data requests,<sup>7</sup> and a decade's worth of *ex partes*, the incumbent LECs have maintained the position that the record in this proceeding is inadequate to support Commission action. They have insisted that the Commission must conduct a mandatory data request<sup>8</sup>—a step that the Commission has never deemed necessary when adopting competition and pricing rules for the very services and facilities at issue here in the past.<sup>9</sup>

Now that the Commission is finally poised to follow through with its data collection, the incumbent LECs have shifted their advocacy to *opposing* the mandatory data request. In a transparent and opportunistic effort to delay this proceeding even further, USTelecom now argues—for the first time—that any Commission action will be unlawful unless it is based on a data collection that encompasses *two* years of industry data.

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<sup>6</sup> See *Data Request FNPRM; Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd 13638 (2009); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, 22 FCC Rcd 13352 (2007); *Special Access NPRM*.

<sup>7</sup> *Competition Data Requested in Special Access NPRM*, Public Notice, 26 FCC Rcd 14000 (2011); *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd 15146 (2010).

<sup>8</sup> See, e.g., Letter from Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 1 (filed July 31, 2012) (“The Commission needs to receive data from all participants in the marketplace for [special access] services, including cable companies and other providers that are offering competitive alternatives to ILEC special access. The Commission should be explicit in its data request that responses are mandatory and that there will be remedies for those that do not respond.”); Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 11 (filed Mar. 28, 2012) (arguing that “if the Commission is determined to move forward with this rulemaking proceeding, it should promptly issue new data requests”).

<sup>9</sup> See, e.g., *Unbundled Access to Network Elements et al.*, Order on Remand, 20 FCC Rcd. 2533 (2005) (“*TRRO*”), *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

The Commission must not allow itself to be manipulated into further delay. As explained below, the AFR is fatally flawed as a matter of process and substance. The Commission should therefore summarily deny the petition and proceed with the important work of concluding its analysis of the special access market.

### **III. THE APPLICATION FOR REVIEW IS PROCEDURALLY DEFECTIVE.**

The AFR is procedurally flawed in several obvious respects. USTelecom was clearly aware of these defects, yet it chose not to fix them. The Commission should therefore reject the AFR without reaching the merits of the Application.

#### **A. The AFR Violates Section 5(c)(5) of the Communications Act and Section 1.115(c) of the Commission's Rules.**

Section (5)(c)(5) of the Communications Act states that “[n]o . . . application for review shall rely on questions of fact or law upon which the [delegated authority that took the underlying action] has been afforded no opportunity to pass.”<sup>10</sup> The Commission incorporated this provision into Section 1.115(c) of its rules, which provides 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.”<sup>11</sup> Neither USTelecom nor any other party has previously made the arguments presented in the AFR in this proceeding, and the AFR thus violates Section 5(c)(5) of the Act and Rule 1.115(c).

*First*, neither USTelecom nor any other party has argued that reliance on one year of data would prevent the Commission from undertaking a comprehensive review of the special access market or that reliance on one year of data would be arbitrary and capricious. There is no question that USTelecom *could* have raised these arguments. For example, on December 9,

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<sup>10</sup> 47 U.S.C. § 155(c)(5).

<sup>11</sup> 47 C.F.R. § 1.115(c).

2013, a coalition of small purchasers of special access services filed a petition for reconsideration of the Bureau's *Data Request Implementation Order*. In the petition, the purchasers argued that the Commission should "eliminate any requirement to provide data prior to calendar year 2012" and that "to the extent Small Purchasers are required to submit any data, the requirement should apply to calendar year 2013 data, not calendar year 2012 data."<sup>12</sup>

USTelecom declined to oppose this petition even though it now claims that the approach endorsed in the petition (*i.e.*, reliance on one year of data, at least for some respondents) would be unlawful. In fact, the only party that filed an opposition to the small purchasers' petition argued that, if the Commission were to permit the purchasers to submit only 2013 data, it *must* make the same change for all respondents.<sup>13</sup> Even when presented with this proposal, which is essentially indistinguishable from the modification that the Bureau eventually made in the *Reconsideration Order*, USTelecom remained silent.

*Second*, neither USTelecom nor any other party has previously argued that the Bureau lacks the authority under the *Data Request Order* to modify the data request to encompass data from a single year instead of two years. Again, there is no question that USTelecom *could* have made this argument. The Office of Management and Budget ("OMB") issued its Notice of Action approving the data request on August 15, 2014.<sup>14</sup> Therein, OMB publicly stated that its approval was conditioned on several modifications, one of which was as follows: "Where data sought for 2010 and/or 2012, [the Commission must] only require the reporting of data for a

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<sup>12</sup> Small Purchasers Coalition, Petition for Blanket Exemption or, in the Alternative, Petition for Reconsideration, WC Docket No. 05-25, RM-10593, at 9 (filed Dec. 9, 2013).

<sup>13</sup> See Opposition of ITTA, WC Docket No. 05-25, *et al.*, at 6-7 (filed Jan. 14, 2014).

<sup>14</sup> Notice of Office of Management and Budget Action, OMB Control No. 3060-1197 (Aug. 15, 2014).

single year, and use the most recent year (*i.e.*, calendar year 2013).”<sup>15</sup> The Bureau spent the next month working on the *Reconsideration Order*, which it issued on September 15, 2014.

However, USTelecom failed to file a single *ex parte* during the intervening month arguing that such a modification would exceed the Bureau’s delegated authority.

**B. USTelecom Has Provided No Basis for the Commission to Waive Its Procedural Requirements or Treat the AFR as a Petition for Reconsideration.**

Recognizing that its AFR is procedurally flawed, USTelecom suggests that the Commission can either (1) waive the prohibition on filing AFRs that rely on facts or law not previously raised, or (2) treat the AFR as a petition for reconsideration. Neither course of action is consistent with either sound administrative practice or Commission precedent.

USTelecom is a large trade association, it is represented by experienced counsel, and its members include some of the largest telecommunications carriers in the world. Even after failing to raise its arguments prior to the Bureau’s adoption of the *Reconsideration Order*, USTelecom was fully able to present them to the Bureau in a petition for reconsideration of the *Reconsideration Order*.<sup>16</sup> However, USTelecom chose not to do so, attempting instead to circumvent the process, and apparently hoping that the Commission’s rules would not apply to it.

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<sup>15</sup> *Id.*

<sup>16</sup> *See* 47 C.F.R. § 1.429 (“Where action was taken by a staff official under delegated authority, the petition may be acted on by the staff official or referred to the Commission for action.”). In the AFR, USTelecom also asserts that the Commission should consider “alternative approaches” to collecting one year of data, “including statistical sampling.” AFR at 4; *see also id.* at 13 (arguing that “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”). But the Commission already fully considered and rejected USTelecom’s arguments in favor of statistical sampling in the *Data Request Order*. *See Data Request Order* ¶¶ 24-25. If USTelecom wanted the Commission to “revisit its views” on that issue (as it asks the agency to do now), it should have filed a petition for reconsideration of that order. The deadline for filing such petitions has long since passed, and USTelecom’s presentation of those arguments is therefore untimely.

The Commission should not countenance this blatant refusal to comply with the agency’s procedures.

The cases that USTelecom cites as support for its argument that the Commission should disregard its procedural requirements or treat its challenge to the *Reconsideration Order* as a petition for reconsideration are inapposite.<sup>17</sup> First, USTelecom relies on *Duchossois* for the proposition that the Commission can consider new arguments in an AFR when doing so will be in the public interest. But in *Duchossois*, the Commission merely found that it would be in the public interest to consider “new evidence” in support of “serious allegations” that called into question the basis of the underlying Bureau-level order.<sup>18</sup> The Commission has distinguished applications for review that present “new evidence” from those in which the applicant “merely attempts to add new arguments . . . , consideration of which would not serve the public interest.”<sup>19</sup> USTelecom presents only “new arguments”—not “new evidence”—here.

Second, USTelecom relies on *Side by Side* to argue that the Commission should treat the AFR as a petition for reconsideration. In *Side by Side*, the Enforcement Bureau treated an application for review of an adjudicatory order as a petition for reconsideration under Section 1.106 of the Commission’s rules.<sup>20</sup> However, that rule—entitled “Petitions for reconsideration in

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<sup>17</sup> See Application for Review at 4, n.10.

<sup>18</sup> See *Application of Duchossois Commc’ns Co. of Maryland, Inc. (Assignor) & Liberty Broad. Of Maryland, Inc. (Assignee)*, 10 FCC Rcd 6688, ¶ 12 (1995).

<sup>19</sup> *In the Matter of Request for Waiver of the Competitive Bidding Rules as Set Forth in Part I, Subpart Q of the Commission’s Rules and the Bid Withdrawal Rule as Set Forth in Section 90.1007 of the Commission’s Rules*, Memorandum Opinion & Order, 14 FCC Rcd 12044, ¶ 3 & n.14 (1999) (emphasis added).

<sup>20</sup> See *Side by Side, Inc. Toledo, Ohio*, 27 FCC Rcd. 11132, ¶ 1 & n.6 (EB 2012) (citing 47 C.F.R. § 1.106).

non-rulemaking proceedings”—does not apply to rulemaking proceedings such as this one.<sup>21</sup>

USTelecom fails to identify a single instance in which the Commission has treated an application for review as a petition for reconsideration in a rulemaking proceeding. And even if there were a mechanism available for the Commission to do so, its use would not be warranted here because, as discussed above, USTelecom was undoubtedly aware of the procedural infirmities in its filing, yet it chose not to fix them.

#### **IV. THE APPLICATION FOR REVIEW LACKS SUBSTANTIVE MERIT.**

The mandatory data request will provide the Commission with arguably the most thorough factual record it has compiled in any rulemaking proceeding in its history. There is no question that the Commission will be able to conduct a comprehensive evaluation of competition in the special access market using the 2013 data sought in the data request, and reliance on that data will not result in arbitrary and capricious decision making. In addition, the Bureau was well within the scope of its delegated authority when it implemented OMB’s modification to the data request. Thus, even if the Commission finds the AFR to be procedurally sound (which it is not), it should reject the AFR on the merits.

##### **A. The Data Request Will Provide the Commission with Sufficient Information to Conduct a Comprehensive Analysis of the Market for Special Access Services.**

USTelecom argues that reliance on a single year of data will preclude the Commission from conducting a comprehensive analysis of the market for special access services as contemplated in the *Data Request Order*, and thereby result in arbitrary and capricious decision making. This is simply incorrect.

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<sup>21</sup> 47 C.F.R. § 1.106.

1. Contrary to USTelecom’s Claims, The Commission Did Not Hold That Collecting Two Years of Data Is the Only Way to Measure Competition.

In prior proceedings, the Commission has measured the level of competition in relevant markets by using a variety of different approaches, most importantly its “traditional market power framework.”<sup>22</sup> In employing these approaches, the Commission generally defines the relevant product and geographic markets, identifies participating firms, and evaluates evidence regarding market shares and other factors, such as substitutability and elasticity of demand.<sup>23</sup> These steps do not require the collection of time series data or a regression analysis. Indeed, the Joint CLECs are unaware of a single proceeding in which the Commission has held that its analysis of competition in a market must include a regression analysis to be sufficiently reliable.

Unsurprisingly, the Commission did not reach that holding in this proceeding either. To be sure, the Commission *sought comment* in the *Data Request FNPRM* on whether it should “go[] further” than a traditional market power analysis by “supplementing the analysis with econometrically sound panel regressions.”<sup>24</sup> And it sought to collect two years of data in order to control for certain factors in this proposed regression analysis and to improve its “regression efficiency.”<sup>25</sup> However, the Commission never *held* in the *Data Request Order* that the proposed regressions, let alone the enhancements to the regressions that time series data might afford, were

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<sup>22</sup> See, e.g., *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, Memorandum Opinion and Order, 25 FCC Rcd 8622, ¶¶ 41-45 (2010) (“*Phoenix Order*”), *aff’d*, *Qwest Corp. v. FCC*, 689 F.3d 1214 (10th Cir. 2012); *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662, ¶¶ 23-26 (2007) (“*AT&T/BellSouth Order*”).

<sup>23</sup> See *Phoenix Order* ¶ 42; *AT&T/BellSouth Order* ¶ 24.

<sup>24</sup> *Data Request FNPRM* ¶ 71.

<sup>25</sup> *Data Request Order* ¶¶ 27-29 & n.62.

essential to properly measure the level of competition in the special access marketplace.

USTelecom's assertions to the contrary are simply wrong.<sup>26</sup>

Indeed, in response to the Commission's proposal, USTelecom's largest members argued that it is highly unlikely that a regression analysis would yield reliable results under any circumstances, but especially where it is based on two years of data. AT&T argued that "it is far from clear whether an econometrically sound regression can be developed given the nature of the marketplace and relevant data."<sup>27</sup> AT&T argued further that regressions are especially unlikely to result in a reliable analysis where the agency relies on only two years of data: "*[i]n many cases, there will be no relevant changes to observe [between 2010 and 2012],*" and "*even if the Commission could make some valid observations about changes between 2010 and 2012, the Commission cannot assume that such observations would be a reliable guide for future regulation.*"<sup>28</sup> For its part, Verizon claimed that "*[a] model based solely on data limited to two points in time can capture only the characteristics of the marketplace at those times.*"<sup>29</sup> In describing the state of the record, Verizon observed that "there is *little or no support* for the Commission to rely exclusively or primarily on an econometric model."<sup>30</sup> These statements flatly contradict USTelecom's assertion in the AFR that regression analysis of two years of data is reliable and even essential.

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<sup>26</sup> See AFR at 12.

<sup>27</sup> Comments of AT&T, WC Docket No. 05-25, RM-10593, at 21 (Feb. 11, 2013).

<sup>28</sup> *Id.* at 28-29 (emphasis added).

<sup>29</sup> Comments of Verizon, WC Docket No. 05-25, RM-10593, at 8 (Feb. 11, 2013) (emphasis added).

<sup>30</sup> Reply Comments of Verizon, WC Docket No. 05-25 *et al.*, at 3 (Mar. 12, 2013) (emphasis added).

Nor is USTelecom correct in asserting—again, contrary to its own members’ previous statements in this proceeding<sup>31</sup>—that the only way to properly assess potential competition is by analyzing two years of data. In the *Data Request Order*, the Commission made clear that regression analysis was only “one way” to measure potential competition.<sup>32</sup> This statement is consistent with the Commission’s assessment of potential competition by means *other than* analyzing time series data in past proceedings.<sup>33</sup>

Indeed, it bears emphasizing that a comprehensive set of data for calendar year 2013 will enable the Commission to conduct a highly reliable analysis of the market for special access services. It can do so by utilizing its market power standard. As the Commission has explained,

It is well established that the assessment of a carrier’s individual market power requires a thorough analysis, which traditionally begins with a delineation of the relevant product and geographic markets, and then considers market characteristics, including market shares, the potential for exercise of market power, and whether potential entry would be timely, likely, and sufficient to counteract the exercise of market power.<sup>34</sup>

The 2013 data can be used in each step of this analysis. For example, pricing information will assist the Commission in defining relevant markets.<sup>35</sup> Information regarding the number of

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<sup>31</sup> See, e.g., Comments of Verizon, WC Docket No. 05-25 *et al.*, at 4 (Feb. 11, 2013) (arguing that an analysis “based solely on historical snapshots of the marketplace . . . cannot adequately predict how competition will develop”); *id.* at 10 (stating that alternative sources of information, such as RFPs and network maps, can “specifically shine a light on market participants’ future plans to offer special access services”).

<sup>32</sup> *Data Request Order* ¶ 29 (emphasis added).

<sup>33</sup> See, e.g., *Phoenix Order* ¶ 42 (evaluating “whether potential entry could occur in a timely, likely, and sufficient manner to counteract the exercise of market power”); *AT&T/BellSouth Order* ¶ 24 (considering “whether entry conditions are such that new competitors could likely enter and defeat any attempted post-merger price increase”).

<sup>34</sup> *Phoenix Order* ¶ 28.

<sup>35</sup> For example, where the price for product A is significantly higher than the price for product B even where A and B are both offered to the same customers, this is evidence that

“Connections” owned by and “Dedicated Services” sold by the different service providers will assist the Commission in determining market shares. And, information regarding the types of services competitors provide via their own physical connections to end users and competitors’ build/buy guidelines will enable the Commission to assess whether potential entry would be timely, likely, and sufficient to counteract exercise of market power in the future. Moreover, a single year of data would also enable the Commission to conduct useful regressions, if it chooses to do so. USTelecom correctly notes that the Commission sought to collect two years of data in order to control for certain factors in its proposed regression analysis and to improve its “regression efficiency.”<sup>36</sup> The Commission can, however, draw useful and valid conclusions from an analysis of one year’s worth of data. For example, the Commission could compare prices and entry levels in different geographic areas (*e.g.*, downtown urban areas versus suburban areas) to assess the effect of customer density on prices and entry. It could also compare prices in areas subject to different levels of competitive entry to assess the effect of different numbers of competitors on prices. To be sure, these analyses are somewhat more difficult with one, rather than two, years of data, but they could well be quite informative, even if based on one year of data.

2. Reliance on One Year of Data Will Not Be Arbitrary and Capricious.

The precedent cited by USTelecom provides no basis for concluding that reliance on one year’s worth of data would result in arbitrary and capricious decision making. *First*, USTelecom contends that the Commission must “reconsider its regulatory approach” in light of “changed

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customers do not view B as a substitute for A. Absent other evidence to the contrary, the logical inference is that B should not be included in A’s product market.

<sup>36</sup> *Data Request Order* ¶¶ 27-29 & n.62.

circumstances,” *i.e.*, OMB’s decision to approve the data request with modifications.<sup>37</sup>

However, in support of this claim, USTelecom points only to cases supporting the undisputed principle that the Commission must adapt its policies to marketplace developments on an ongoing basis and respond when its “predictive judgments” are not borne out.<sup>38</sup> This obligation is not implicated by OMB’s modification of the data request. The Commission was well aware that OMB might impose modifications, and it proactively prepared for this possibility by directing the Bureau to “proceed with the remainder of the collection” if it were to occur.<sup>39</sup>

*Second*, USTelecom claims that new rules based on an analysis of one year of data would fail the “substantial evidence” test, stressing that an agency must “specify the evidence on which it relied and . . . explain how that evidence supports the conclusion it reached.”<sup>40</sup> But there is no

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<sup>37</sup> AFR at 10-11.

<sup>38</sup> *Id.* at 11, n.31 (citing *Bechtel v. FCC*, 10 F.3d 875 (D.C. Cir. 1993); *Am. Trucking Ass’ns, Inc. v. Atchison, Topeka & Santa Fe Ry Co.*, 387 U.S. 397, 416 (1967); *NBC v. United States*, 319 U.S. 190, 225 (1943)).

<sup>39</sup> If anything, the cases that USTelecom cites support the need for the Commission to update its outdated special access regulatory framework. Among other things, the Commission must assess the extent to which price caps effectively constrain incumbent LEC rates for DS1 and DS3 services, something the Commission has committed to do ever since the expiration of the CALLS Plan in 2005. *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Low-Volume Long-Distance Users; Federal-State Joint Board On Universal Service*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, ¶ 166 (2000) (“[A]fter the five-year term we can re-examine the issue to determine whether competition has emerged to constrain rates effectively.”). In addition, the Commission must reevaluate the incumbent LECs’ existing grants of pricing flexibility, which remain in effect even though the Commission has found that the pricing flexibility triggers are not a reliable means of identifying competition. *See Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd 10557, ¶ 5 (2012).

<sup>40</sup> AFR at 12 (citing *S. Carolina Pub. Serv. Auth. v. FERC*, No. 12-1232, 762 F.3d 41 (D.C. Cir. 2014)).

legitimate question as to whether the Commission could satisfy this standard. As discussed above, USTelecom’s newfound belief that an analysis of two years of data is *essential* to the Commission’s analysis is directly contrary to its largest members’ statements in this proceeding. And in any event, courts have routinely upheld Commission orders, including orders involving the very services and facilities at issue in this proceeding, that were adopted after no data collection at all.<sup>41</sup> The modified data request will provide the Commission with more than enough evidence to act here.

**B. The Modification of the Data Request Falls Squarely Within the Authority Delegated to the Bureau in the *Data Request Order*.**

In the *Data Request Order*, the Commission mandated that the Bureau proceed with the components of the data collection that are approved by OMB: “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.”<sup>42</sup> Separate and apart from this mandate, the Commission delegated to the Bureau the discretion to take actions needed to carry out five enumerated tasks.<sup>43</sup> The Commission stated that, in carrying out these delegated

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<sup>41</sup> See, e.g., *TRRO*, *aff’d*, *Covad Communications Co. v. FCC*, 450 F.3d 528 (D.C. Cir. 2006).

<sup>42</sup> See *Data Request Order* n.111.

<sup>43</sup> *Id.* ¶ 52 (“[W]e delegate limited authority to the Bureau to: (a) draft instructions to the data collection and modify the data collection based on public feedback; (b) amend the data collection based on feedback received through the PRA process; (c) make corrections to the data collection to ensure it reflects the Commission’s needs as expressed in this Report and Order; (d) issue Bureau-level orders and Public Notices specifying the production of specific types of data, specifying a collection mechanism (including necessary forms or formats), and setting deadlines for response to ensure that data collections are complied with in a timely manner, and (e) take such other actions as are necessary to implement this Report and Order. All such actions must be consistent with the terms of this Report and Order.”)

tasks, the Bureau's actions "must be consistent with the terms of this Report and Order."<sup>44</sup>

USTelecom now argues that in proceeding with the data collection as modified and approved by OMB to encompass one, rather than two, years of data, the Bureau (1) exceeded the scope of one of the tasks delegated to the Bureau, namely to "make corrections to the data collection to ensure it reflects the Commission's needs," and (2) violated the requirement that actions taken on delegated authority "be consistent with the terms of this Report and Order."<sup>45</sup>

There is no merit to this argument.

To begin with, it makes no sense to interpret the Commission's *mandate* that the Bureau proceed with the portions of the data collection approved by OMB as somehow restricted by the terms of the delegation of *discretionary* authority to the Bureau. The mandate is properly understood as entirely independent of the delegations of authority. Moreover, the whole point of delegations of authority is to grant the Bureau additional discretionary authority it would not otherwise have—such delegations do not place limitations on the Bureau's ability to carry out agency mandates.

But even if this were not the case, USTelecom's argument would have no merit since modifying the data collection to encompass one, rather than two, years of data both "ensure[s] that the data collection] reflects the Commission's needs as expressed in" the *Data Request Order* and is "consistent with the terms" of the *Data Request Order*. The Commission "needs" sufficient information to conduct a comprehensive, reliable analysis of the market, and, as explained above, one year of data is more than enough to accomplish that task. In addition, collecting one year of data is fully consistent with the *Data Request Order*. Again, the

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<sup>44</sup> *Id.*

<sup>45</sup> AFR at 8-10.

Commission never held in the *Data Request Order* that two years of data was a prerequisite to conducting a comprehensive analysis of the special access market. Rather, the Commission merely sought comment in the accompanying *FNPRM* on whether it should use two years of data to conduct a regression analysis as part of its market analysis.

## **V. CONCLUSION**

For the foregoing reasons, the Commission should summarily deny USTelecom's application for review and proceed with a comprehensive analysis of competition in the market for special access services.

*/s/ Thomas Jones* \_\_\_\_\_

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