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

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THE UNITED STATES TELECOM ASSOCIATION'S REPLY IN SUPPORT OF APPLICATION FOR REVIEW

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THE UNITED STATES TELECOM ASSOCIATION'S
REPLY IN SUPPORT OF APPLICATION FOR REVIEW

I. SUMMARY AND INTRODUCTION

The one-year data collection ordered by the Bureau cannot be reconciled with the Commission's determination in the *Data Collection Order* that it needs two years of data to undertake "a comprehensive evaluation of competition in the special access market."[1] The Commission concluded that such a comprehensive evaluation is a necessary predicate for making any changes to its special access rules 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."[2] The United States Telecom Association's ("USTelecom") Application for Review is in no way meant to delay the Commission's current information collection process; rather, the Application challenges the Wireline Competition Bureau's decision to collect only one year's worth of data as in conflict with the *Data Collection Order* and beyond the Bureau's delegated authority by departing from the Commission's instruction to

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

2 *Id.* ¶ 29.

collect two years of data. Although the Office of Management and Budget ("OMB") refused to approve a two-year data collection, the Commission must consider the effect of OMB's actions on its desired regulatory approach. The Commission should grant USTelecom's Application, resolve the conflict between the *Data Collection Order* and the Bureau's *Reconsideration Order*,[3] and ensure that it collects sufficient data to analyze all forms of competition in the special access marketplace.

The various arguments advanced in support of the Bureau's decision by Sprint Corporation ("Sprint"), Alaska Communications Systems ("ACS"), and the Joint CLECs fail to grapple with these issues.[4] To the contrary, their arguments are based on a misreading of the *Data Collection Order* and an inverted view of the chain of authority at the Commission. In particular, Sprint and the Joint CLECs are reduced to arguing that the Commission did not mean what it said when it directed a two-year data collection, a contention that ignores the plain language of the *Data Collection Order*. Put simply, the Bureau does not have the discretion to read the Commission's directions as mere suggestions. Nor do they gain any traction from the fact that the Commission, in the Further Notice of Proposed Rulemaking ("FNPRM"), is considering alternative approaches to *evaluating* the data it has directed the Bureau to collect. As the Commission has made clear, *collecting* two years of data is a necessary predicate to that comprehensive evaluation.

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[3] *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*").

[4] Comments of Alaska Communications Systems, WC Docket No. 05-25 (filed Nov. 10, 2014); Opposition of Sprint Corporation to the Application for Review of the United States Telecom Association, WC Docket No. 05-25 (filed Nov. 10, 2014); Opposition of Birch, BT Americas, Integra, and Level 3 ("Joint CLECs"), WC Docket No. 05-25 (filed Nov. 10, 2014).

The Commission would be acting unlawfully if it were to proceed to judgment with a limited information collection without pausing to consider the effect of OMB's decision on the Commission's desired regulatory approach. The Commission "ratifying" the *Reconsideration Order* – as Sprint recommends – would not cure this problem because the Bureau did not even acknowledge the conflict between the one-year data collection authorized in the *Reconsideration Order* and the two-year data collection required in the *Data Collection Order*. Accordingly, the Commission should grant the Application to ensure it has an adequate record upon which to rely when analyzing the special access marketplace. By failing to do so, the Commission puts into legal jeopardy any new rules it may seek to adopt.

Because USTelecom and its members support the Commission's efforts to collect promptly comprehensive high capacity services data, its "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."[5] Indeed, USTelecom and several of its members have advocated consistently for the Commission to undertake a data collection. Rather than seeking delay by filing the Application, as some commenters allege,[6] USTelecom is attempting to give the Commission the earliest opportunity to cure the obvious conflict between its *Data Collection Order* and the Bureau's *Reconsideration Order* and to ensure that the Commission has an adequate record upon which to rely in making any changes to its special access rules.

In addition, the Application is procedurally sound. USTelecom raised its concerns about the Bureau's action at its first opportunity, and its Application alleged a conflict between the

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5 USTelecom Application at 3.

6 Sprint Opposition at 1, 3, 9; ACS Comments at 4-5; Joint CLECs Opposition at 2, 4-5.

Bureau's action and the *Data Collection Order*. Even if the Bureau lacked an opportunity to pass on USTelecom's arguments, which is not the case, the Commission can and should consider USTelecom's arguments now via whichever procedural vehicle it deems appropriate. The public interest would be served by ensuring the Commission has an adequate record basis for any new rules instead of pressing ahead without considering the change in regulatory circumstances.

II. THE BUREAU'S *RECONSIDERATION ORDER* CONFLICTS WITH THE COMMISSION'S *DATA COLLECTION ORDER*.

USTelecom explained in the Application that the one-year data collection ordered by the Bureau conflicts with the Commission's direction in the *Data Collection Order* to collect two years of data.[7] As the Commission noted, two years of high capacity services data were necessary to undertake "a comprehensive evaluation of competition in the special access market."[8] A two-year data collection, the Commission found, is superior to a one-year collection because two years' worth of data will enable the Commission "to observe and better understand how and why competition has evolved over time and, therefore, where potential competition exists."[9] By limiting the collection to only a single year, the Bureau's *Reconsideration Order* conflicts with the *Data Collection Order* by failing to provide the Commission with the requisite data to conduct the comprehensive evaluation of special access competition that the Commission said it would undertake.

The Joint CLECs second guess the Commission by arguing that a one-year snapshot of data should be sufficient for the Commission's purposes in this proceeding.[10] This argument

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7 USTelecom Application at 5-8.

8 *Data Collection Order* ¶ 13.

9 *Id.* ¶ 29.

10 Joint CLECs Opposition at 9-13.

flies in the face of the Commission's analysis in the *Data Collection Order*. In that order, the Commission stated that it "will collect two years' worth of data for market structure, price, and demand" because having "only one year's worth of data" would be inadequate to conduct a comprehensive assessment of special access competition.[11] That determination is not contradicted by the fact that the Commission may have employed various approaches to measuring competition in other contexts. What the Commission may have done elsewhere has no bearing on its explicit finding *in this proceeding* that a comprehensive evaluation of the special access market necessitates two years of data.[12] Even the Joint CLECs candidly acknowledge that a comprehensive market analysis is "more difficult with one, rather than two, years of data."[13]

The Joint CLECs' arguments about the Commission's future use of regression analysis in conducting its market analysis are a red herring.[14] The Commission directed the Bureau to collect two years of data, and the Bureau is not at liberty to disregard that directive. That is all that matters at this juncture. Moreover, the Commission's statements in the FNPRM and the comments of USTelecom's members about panel regressions were made in the context of how to analyze the data that is ultimately collected. They have no bearing on the temporal scope of the data that the Commission ordered to be collected.[15] That the Commission did not resolve in the *Data Collection Order* the appropriate use of regressions – an issue on which the Joint CLECs

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11 *Data Collection Order* ¶ 28.

12 Joint CLECs Opposition at 10.

13 *Id.* at 13.

14 *Id.* at 10-12.

15 FNPRM ¶¶ 71, 28 n.62 (seeking comment on whether it should "supplement[] a structural market analysis with econometrically sound panel regressions" and how it should improve its regression efficiency).

place great significance – is not surprising, given that the issue is pending in the FNPRM.[16] It certainly does not alter the Commission's determination that two years of data was required for whatever regressions it may ultimately decide to undertake, if any, in conducting its comprehensive market analysis.

The Joint CLECs also ignore that, according to the D.C. Circuit, an agency has an "obligation to acknowledge and account for a changed regulatory posture" before taking final action.[17] Here, OMB's action has changed the regulatory posture, and the Commission must acknowledge the change and consider how it affects this proceeding. The Joint CLECs attempt to defend the use of a single year of data to adopt new special access rules and argue that the Commission has no obligation to reconsider its approach in light of OMB's actions,[18] but that argument fails because agencies have a duty to take into account changed regulatory circumstances.

The Joint CLECs' further contention that any new special access rules would rest upon substantial evidence cannot be reconciled with the Commission's determination that a two-year data collection is necessary to address the "insufficient evidence in the record upon which to base general or categorical conclusions as to the competitiveness of the special access market."[19] The Joint CLECs even go so far as to suggest that the Commission can adopt rules without any data at all. That is hardly surprising. The Commission has noted that its past efforts to compile a record in this proceeding "have been impeded by the failure of some parties to produce

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16 Joint CLECs Opposition at 10-11.

17 *Portland Cement Ass'n v. EPA*, 665 F.3d 177, 187 (D.C. Cir. 2011).

18 Joint CLECs Opposition at 13-15.

19 *Data Collection Order* ¶ 69.

information clearly documenting their claims that special access rates are unreasonable."[20] A comprehensive data collection would show that there are many competitive alternatives available to customers today and that competitors have planned new sources of supply. Yet, incredibly, the Joint CLECs point to the Commission's laborious efforts to establish lawful Section 251 unbundling rules as support for their contention that the Commission can conduct this proceeding without ever obtaining data it has sought from the industry for years.[21] Given that it took almost a decade and four court cases to resolve the legal disputes over unbundling obligations, that process hardly constitutes a model that the Commission should emulate in adopting special access rules. The Commission therefore risks acting arbitrarily and capriciously if it presses ahead without pausing to ensure it has the information it needs to adopt any new special access rules, notwithstanding the assurances by the Joint CLECs and Sprint to the contrary.

III. THE BUREAU EXCEEDED ITS DELEGATED AUTHORITY BY LIMITING THE DATA COLLECTION TO A SINGLE YEAR.

USTelecom also explained in the Application that the Bureau exceeded its delegated authority because the Commission did not authorize the Bureau to change the time period for which high capacity services data was to be collected.[22] Indeed, the Commission instructed the Bureau to implement "the requirements of the [*Data Collection Order*]" and to take action that is "consistent with the terms of [that order]."[23] The goal of the *Data Collection Order* was "to

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20 Opposition of the Federal Communications Commission to Petition for Writ of Mandamus, *In re COMPTEL*, No. 11-1262, at 2 (D.C. Cir. filed Oct. 6, 2011).

21 Joint CLECs Opposition at 15 n.41.

22 *Id.* at 8-10.

23 *Data Collection Order* ¶¶ 30, 52.

ensure a comprehensive and detailed data collection" by collecting two years of data.[24] As explained above, limiting the collection of high capacity services data to only one year will not result in a comprehensive record that the Commission determined was necessary to conduct its market analysis of special access competition.[25] By taking action inconsistent with the *Data Collection Order*, the Bureau exceeded its delegated authority.

Sprint, ACS, and the Joint CLECs insist that the Bureau acted within the scope of its delegated authority because the Commission authorized the Bureau to amend the data collection and implement the *Data Collection Order*.[26] However, altering the period of time for which high capacity services data must be collected was not within the scope of the Bureau's delegation. Indeed, of the specific tasks that the Commission delegated to the Bureau, the Commission stated that "[a]ll such actions must be consistent with the terms of [the *Data Collection Order*]."[27] None of the parties opposing USTelecom's Application explains how a decision by the Bureau to require the collection of data for a single year is "consistent with" the Commission's decision to require two years of data.

Furthermore, Sprint, ACS, and the Joint CLECs ignore that the Commission instructed the Bureau that any change to the data collection must "ensure it reflects the Commission's needs as expressed in [the *Data Collection Order*]."[28] Because the Commission specifically determined that it needed high capacity services data for two years, the Bureau's decision to limit the data collection to only one year exceeded its delegated authority. Although the Commission

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24 *Id.* ¶ 53.

25 USTelecom Application at 5-8.

26 Sprint Opposition at 5-7; ACS Comments at 3; Joint CLECs Opposition at 15-17.

27 *Data Collection Order* ¶ 52.

28 *Id.*

instructed the Bureau to proceed with the data collection approved by OMB, there is no reason to believe that the Commission anticipated that OMB would not approve a two-year data collection when doing so would undermine the stated purpose of the *Data Collection Order*.

IV. THE FURTHER NOTICE WILL NOT PROVIDE A VEHICLE TO CURE THE LACK OF COMPREHENSIVE DATA ON SPECIAL ACCESS COMPETITION.

ACS's argument that USTelecom's concerns about the Bureau's failure to collect comprehensive high capacity services data can be addressed in the context of the FNPRM misunderstands what is at issue in the FNPRM.[29] In the FNPRM, the Commission sought comment on its decision to make a one-time assessment of competitive conditions in the special access market.[30] The Commission stated that this market assessment would be done "[i]n combination with the comprehensive data collection described in the" *Data Collection Order*.[31] However, the Commission acknowledged that some commenters believed "that a one-time, multi-faceted market analysis is not necessary or appropriate at this time."[32] The Commission urged these commenters "to propose alternate actions that the Commission could take in the near future to obtain a more complete understanding of competitive conditions for special access services."[33]

Contrary to ACS's contention, the FNPRM will not provide an opportunity to cure the lack of comprehensive high capacity services data because the Commission did not propose to

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29 ACS Comments at 3-5.

30 FNPRM ¶ 66.

31 *Id.*; *see also id.* ¶ 78 ("The record makes clear that we are unlikely to be able to conduct a comprehensive market analysis—and thus are unlikely to be able to evaluate the impact of the suspended rules on the reasonableness of special access rates, terms and conditions or develop improved ones—without the data similar to that described above and a more detailed review of competitive conditions in the special access market than has been possible to date.").

32 *Id.* ¶ 79.

33 *Id.*

revisit – and did not seek comment on whether to revisit – its decision to conduct a comprehensive market analysis or its determination that a comprehensive data collection was necessary for that analysis.[34] Thus, the FNPRM takes as a given that the Commission will have two years of data to conduct its proposed method of market analysis.

Now, however, the constraints imposed by OMB require the Commission to initiate a process to consider alternative approaches to collecting comprehensive data that would allow the Commission to undertake its proposed market analysis.[35] Unless the Commission considers alternative approaches, its options will be limited in making any changes to its special access rules.

Notwithstanding unfounded claims to the contrary, USTelecom is not seeking to delay the collection of high capacity services data.[36] USTelecom made this point clear in its Application, noting that "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."[37] Nevertheless, it is in no one's interest for the industry and the Commission to go through the time and expense of gathering, collecting, and reporting data that will not meet the Commission's needs in analyzing the high capacity services market or in adopting new special access rules.[38]

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34 ACS Comments at 3.

35 USTelecom Application at 13-14.

36 Sprint Opposition at 1, 3, 9; ACS Comments at 4-5; Joint CLECs Opposition at 2, 4-5.

37 USTelecom Application at 3.

38 USTelecom takes no position on ACS's request that it be exempt from any further data collection. *See* ACS Comments at 5-7.

V. THE PROCEDURAL OBJECTIONS ARE MERITLESS.

The Joint CLECs and Sprint raise two procedural objections to the Application in an attempt to insulate the Bureau's decision from review. These arguments are meritless.

First, the Joint CLECs argue that the Application should be dismissed because the Bureau had no opportunity to pass on USTelecom's arguments.[39] As USTelecom explained, however, the Application identifies the obvious tension between the *Data Collection Order* and the *Reconsideration Order*. The Bureau should have been aware of – and could have addressed – such tension before limiting the data collection to a single year.[40]

Nevertheless, the Joint CLECs erroneously assert that USTelecom could have raised its arguments in response to the Small Purchasers Coalition's petition for reconsideration of the Bureau's *Data Request Implementation Order*.[41] USTelecom had no duty to take a position on this petition or the merits of the Commission's decision to collect two years of data. A party is not required to defend a Commission decision in response to a petition for reconsideration in order to preserve its ability to challenge whether the Bureau faithfully implemented that decision.

The Joint CLECs further contend that USTelecom could have raised its concerns in the narrow window between OMB's decision and the Bureau's issuance of the *Reconsideration Order*.[42] But USTelecom did not have notice of how the Bureau would respond to the OMB's decision until it issued the *Reconsideration Order*, and, regardless, USTelecom had no obligation to address action taken by another arm of the federal government. USTelecom timely raised its

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39 Joint CLECs Opposition at 5.

40 USTelecom Application at 4-5 n.10.

41 Joint CLECs Opposition at 6.

42 *Id.* at 6-7.

concerns about the Bureau's decision to depart from the *Data Collection Order* after the Bureau issued the *Reconsideration Order*. Nothing more was required.

Even if the Bureau had no opportunity to pass on these arguments before issuing the *Reconsideration Order*, USTelecom has "present[ed] its concerns to the Commission so that the agency is afforded an opportunity to cure any defect."[43] The public interest would be served by addressing USTelecom's concerns now – via whichever procedural mechanism the Commission believes is appropriate – so the Commission can cure the defects in the Bureau's approach before it is too late. Contrary to the Joint CLECs' assertions,[44] the Commission has considered "new material" and "newly raised arguments" in applications for review,[45] and the FCC's bureaus have treated applications for review that raise new matters as petitions for reconsideration in rulemaking proceedings.[46] The Joint CLECs do not and cannot point to any precedent in which the Commission has held that it can only exercise such discretion in an adjudicatory proceeding as opposed to a rulemaking proceeding because the Commission has never drawn such a distinction.[47]

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43 *Freeman Eng'g Assocs., Inc. v. FCC*, 103 F.3d 169, 182 (D.C. Cir. 1997) (citing 47 U.S.C. § 405).

44 Joint CLECs Opposition at 8-9.

45 *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"); *Complaint of Lenora B. Fulani & Lenora B. Fulani for President*, 9 FCC Rcd 2258, ¶ 12 (1994) (considering "newly raised arguments" in application for review).

46 *See Paul J. Broyles Civic License Holding Co., Inc. c/o John S. Logan, Esq.*, Letter, 19 FCC Rcd 22043, 22043 (MB 2004) (treating application for review that "raised new matters" as a petition for reconsideration in a rulemaking proceeding).

47 The Joint CLECs assert in a footnote that USTelecom is making an untimely collateral attack on the *Data Collection Order* by arguing that the Commission should consider alternative

Second, Sprint's contention that none of USTelecom's arguments align with the factors in Rule 1.115(b)(2) is frivolous.[48] USTelecom's Application squarely implicates Rule 1.115(b)(2)(i)[49] by arguing that "the *Reconsideration Order* conflicts with the Commission's *Data Collection Order*, exceeds the Bureau's delegated authority, and threatens to undermine the Commission's goals for the data collection effort."[50] USTelecom's Application does not contain a cursory request for review without developed argument, which readily distinguishes this case from those cited by Sprint.[51]

In short, all of the arguments in USTelecom's Application are properly before the Commission. The Commission should grant review of the Bureau's decision.

(footnote cont'd.)
approaches, including statistical sampling, in light of OMB's action. *See* Joint CLECs Opposition at 7 n.16. To the contrary, USTelecom seeks review of the Bureau's *Reconsideration Order*, not reconsideration of the *Data Collection Order*. USTelecom is not precluded from arguing that the Commission must consider statistical sampling and other alternative approaches in light of the change in circumstances effected by OMB's action because the Commission has a "responsibility to reexamine its judgments as time goes by and circumstances change," *1998 Biennial Regulatory Review - Review of the Commission's Broadcast Ownership Rules and Other Rules Adopted Pursuant to Section 202 of the Telecommunications Act of 1996*, 13 FCC Rcd 11276, 11302 (1998), and courts have permitted collateral challenges to FCC rulemaking orders in light of changed circumstances, *see Geller v. FCC*, 610 F.2d 973, 978-79 (D.C. Cir. 1979); *Office of Commc'n of United Church of Christ v. FCC*, 911 F.2d 813, 815-816 (D.C. Cir. 1990).

48 Sprint Opposition at 4-5.

49 47 C.F.R. § 1.115(b)(2)(i) ("The action taken pursuant to delegated authority is in conflict with statute, regulation, case precedent, or established Commission policy.").

50 USTelecom Application at 2-3.

51 *Cf. Skybridge Spectrum Foundation*, 26 FCC Rcd 13800, ¶ 11 (2011) (dismissing application for review that "provides no data or arguments to explain why OGC's conclusion was in error"); *Deferral of Licensing of MTA Commercial Broadband PCS*, 11 FCC Rcd 17052, ¶ 9 (1996) (denying application for review that contained merely a "statement of general disagreement with the Bureau's" order); *Applications for A & B Block Broadband PCS Licenses*, 11 FCC Rcd 17062, ¶ 6 (1996) (same); *Applications of Chapman S. Root Revocable Trust Licensee of Stations WNDB(AM), Daytona Beach, Florida, WWLV(FM), Daytona Beach, Florida WLKF(AM), Lakeland, Florida WEZY(FM), Lakeland, Florida*, 8 FCC Rcd 4223, ¶ 5 (1993) (dismissing application for review that "consists, in its entirety, of four paragraphs").

Respectfully submitted,

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Dated: November 20, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of November, 2014, I caused a true and correct copy of the foregoing document to be served via electronic mail and U.S. mail to:

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