

August 28, 2015

VIA ECFS

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW, Room TW-A325
Washington, DC 20554

Re: *Special Access for Price Cap Local Exchange Carriers, WC Dkt. 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*

Dear Ms. Dortch:

Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC (collectively, the “Joint CLECs”), through their undersigned counsel, hereby submit this letter in the above-referenced proceedings. As the Commission proceeds with analysis of data submitted in response to the mandatory information collection in this rulemaking, this letter explains that the agency has broad discretion in adopting regulations governing rates for incumbent LEC special access services.

I. Courts Grant Substantial Deference to Commission Ratemaking Decisions.

In this proceeding, the Commission seeks to establish rules to ensure that rates for incumbent LEC special access services are just and reasonable and not unjustly or unreasonably discriminatory,¹ as required by Sections 201(b) and 202(a) of the Act.² The statutory terms

¹ See, e.g., *Technology Transitions; Policies and Rules Governing Retirement of Copper Loops by Incumbent Local Exchange Carriers; 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, Order on Reconsideration, and Further Notice of Proposed Rulemaking, FCC 15-97, ¶¶ 6, 132 (Aug. 7, 2015) (“*Technology Transitions Order and FNPRM*”).

² 47 U.S.C. §§ 201(b), 202(a).

“just,” “reasonable,” “unjust,” and “unreasonable” are ambiguous.³ Under *Chevron*, such “ambiguities in statutes within an agency’s discretion to administer are delegations of authority to the agency to fill the statutory gap in reasonable fashion.”⁴ “Filling these gaps,” the Supreme Court has explained, “involves difficult policy choices that agencies are better equipped to make than courts.”⁵ Therefore, in the event of a challenge to the Commission’s interpretation of the ambiguous “just and reasonable” standard, *Chevron* requires a court to accept the Commission’s reasonable construction of the statute “even if the agency’s reading differs from what the court believes is the best statutory interpretation.”⁶

In addition to challenges based on the terms of the Act, parties often challenge Commission decisions under Section 706(2)(A) of the Administrative Procedure Act (“APA”).⁷ When considering such challenges, courts ask whether the agency’s action was “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”⁸ This is a “narrow standard of review, and . . . require[s] only that the Commission examine the relevant data and articulate a satisfactory explanation for its action.”⁹ Courts are “particularly deferential” when reviewing Commission ratemaking decisions “[b]ecause agency ratemaking is far from an exact science and involves ‘policy determinations in which the agency is acknowledged to have expertise.’”¹⁰ When reviewing such determinations, a court will “not substitute its judgment for that of the agency”¹¹ and will instead merely “patrol[] the perimeters of an agency’s

³ See, e.g., *Capital Network Sys., Inc. v. FCC*, 28 F.3d 201, 204 (D.C. Cir. 1994); *Orloff v. FCC*, 352 F.3d 415, 420 (D.C. Cir. 2003) (“[T]he ‘generality of these terms’ – unjust, unreasonable – ‘opens a rather large area for the free play of agency discretion, limited of course by the familiar ‘arbitrary’ and ‘capricious’ standard.”) (quoting *Bell Atl. Tel. Cos. v. FCC*, 79 F.3d 1195, 1202 (D.C. Cir. 1996)).

⁴ *Nat’l Cable & Telecomms. Ass’n v. Brand X Internet Servs.*, 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

⁵ *Id.*

⁶ *Id.*; see also *Capital Network Sys., Inc.*, 28 F.3d at 204 (“Because ‘just,’ ‘unjust,’ ‘reasonable,’ and ‘unreasonable’ are ambiguous statutory terms, this court owes substantial deference to the interpretation the Commission accords them.”).

⁷ 5 U.S.C. § 706(2)(A).

⁸ *Id.*

⁹ *Qwest Corp. v. FCC*, 689 F.3d 1214, 1224 (10th Cir. 2012) (internal quotation marks and citations omitted).

¹⁰ *Time Warner Entm’t Co., L.P. v. FCC*, 56 F.3d 151, 164 (D.C. Cir. 1995) (quoting *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983)).

¹¹ *Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1228 (D.C. Cir. 1980).

discretion.”¹² Furthermore, in general, “no heightened level of scrutiny attends a policy change” by the Commission.¹³ The agency need only (1) display awareness that it is changing its position; (2) ensure that its new policy is permissible under the statute; and (3) show that there are good reasons for the new policy.¹⁴

II. The Commission Has Broad Discretion to Adopt Appropriate Regulation of Incumbent LEC Special Access Rates.

Under the standards discussed above, the Commission has broad discretion to adopt appropriate regulation of incumbent LEC special access rates. The agency should begin by using a market power analysis to identify the relevant special access markets in which incumbent LECs have the ability to set and maintain supracompetitive prices.¹⁵ Indeed, the Commission has repeatedly relied on such a market power analysis “to identify where competition is sufficient to constrain carriers from charging unjust and unreasonable prices”¹⁶ and has already explained that it intends to conduct a similar analysis here.¹⁷

Once the Commission has identified the relevant product and geographic markets in which incumbent LECs have market power in the provision of DSn and packet-based special access services, the agency has wide latitude in deciding how to ensure that special access rates in those markets are just and reasonable and not unjustly or unreasonably discriminatory. Indeed, “the Commission has broad discretion in selecting methods for the exercise of its

¹² *Nat’l Ass’n of Regulatory Util. Comm’rs v. FCC*, 737 F.2d 1095, 1140 (D.C. Cir. 1984).

¹³ *Qwest Corp.*, 689 F.3d at 1224; *see also FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009) (an agency generally “need not demonstrate . . . that the reasons for a new policy are *better* than the reasons for the old one”) (emphasis in original).

¹⁴ *Fox Television Stations, Inc.*, 556 U.S. at 515. If, however, the new policy “rests upon factual findings that contradict those which underlay its prior policy” or the prior policy “has engendered serious reliance interests that must be taken into account,” then the Commission must “provide a more detailed justification than what would suffice for a new policy created on a blank slate.” *Id.*

¹⁵ *See, e.g.*, Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3 and tw telecom, WC Dkt. No. 05-25, at 47-81 (filed Feb. 11, 2013); Comments of Sprint Nextel Corporation, WC Dkt. No. 05-25, at 5-10 (filed Feb. 11, 2013); Comments of XO Communications, LLC, WC Dkt. No. 05-25, at 2-8 (filed Feb. 11, 2013).

¹⁶ *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 and Further Notice of Proposed Rulemaking, FCC 12-153, ¶ 71 (2012) (“*Data Request Order and FNPRM*”).

¹⁷ *See id.* ¶¶ 69-71.

powers to make and oversee rates.”¹⁸ These methods include price cap regulation. “Like agency ratemaking, price cap regulation of local carriers ‘involves policy determinations in which the agency is acknowledged to have expertise.’”¹⁹ Therefore, courts will not “second guess the FCC’s policy judgment, so long as it comports with established standards of administrative practice.”²⁰

Here, the Commission can adopt a number of changes to its existing regime for special access services. These include but are not limited to the following: (1) bringing incumbent LECs’ Phase II price flex DS_n special access services and packet-based special access services under price caps based on evidence that incumbent LECs have market power in the provision of those services; (2) reducing the price cap index (“PCI”) for the special access basket based on evidence that incumbent LEC productivity gains have outpaced those of the larger economy in previous years (*e.g.*, since the beginning or expiration of the CALLS plan); and (3) adopting a prospective “X-factor” that lowers the PCI for the special access basket each year by a specified percentage based on evidence of likely future incumbent LEC productivity gains. These potential reforms are discussed in turn below.

First, the Commission has both the authority and the discretion to bring special access services that are not currently subject to price caps (*e.g.*, Phase II price flex DS_n and packet-based special access services) within the price cap regime. Contrary to AT&T’s claims,²¹ the Commission is not required to undertake a Section 205 rate prescription proceeding in order to impose price caps on these services. As AT&T is well aware,²² this is because the application of price caps does not constitute an actual or *de facto* rate prescription.²³ That is, unlike a rate

¹⁸ *MCI Telecomms. Corp. v. FCC*, 675 F.2d 408, 413 (D.C. Cir. 1982) (citation omitted).

¹⁹ *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001) (quoting *Time Warner Entm’t Co., L.P.*, 56 F.3d at 163).

²⁰ *WorldCom, Inc.*, 238 F.3d at 458.

²¹ See Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 5 (filed July 14, 2015) (asserting that the Commission cannot regulate incumbent LEC Ethernet special access rates without adhering to the requirements of Section 205); Comments of AT&T Inc., WC Dkt. No. 05-25, at 15-16 (filed Apr. 16, 2013).

²² When AT&T sought to compel the Commission to re-impose price caps on incumbent LEC DS_n special access services in price flex areas, AT&T explained to the D.C. Circuit that Section 205 was no obstacle because “[i]t is well-settled that the imposition of price caps is not a rate prescription, but only a ‘safe harbor’ of rates that are presumptively lawful.” Brief of Petitioners, *In Re AT&T Corp.*, No. 03-1397, at 42 (D.C. Cir. Aug. 20, 2004).

²³ See *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, ¶¶ 894-895 (1989) (“*AT&T Price Cap Order*”).

prescription, imposing price caps does not involve setting individual rates.²⁴ Instead, price caps merely reflect the Commission's "'tentative opinion' about the dividing line between reasonable and unreasonable rates for the limited purpose of exercising [its] suspension power"²⁵ under Section 204 of the Act.²⁶

Also contrary to AT&T's assertions,²⁷ the Commission has the authority to reverse the grants of forbearance from dominant carrier regulation of incumbent LECs' packet-based special access services and impose rate regulation, including tariffing and price cap regulation, on those services. Both the Commission and the D.C. Circuit have expressly confirmed the agency's authority to reverse these grants of forbearance.²⁸ Indeed, the agency has an *obligation* to

²⁴ See *American Telephone and Telegraph Company Charges for Private Line Services Revisions of Tariff F.C.C. Nos. 260, 264, and 266 Filed in Transmittal Nos. 12546, 12716, and 12927 (Series 2000/3000) Charges for Private Line Services Revisions of Tariff F.C.C. No. 260, Filed in Transmittal No. 12547 (Series 5000)*, Memorandum Opinion and Order, 85 FCC 2d 549, ¶ 20 (1981) ("The essential element of prescription is *compulsion*: compelling a carrier to adhere to a fixed rate which can be revised only with the prior consent of the Commission.") (emphasis in original).

²⁵ *AT&T Price Cap Order* ¶ 895 (quoting *In re Trans Alaska Pipeline Rate Cases*, 436 U.S. 631, 653 (1978)).

²⁶ 47 U.S.C. § 204.

²⁷ See Letter from James P. Young, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, at 4 (filed July 29, 2015) ("[N]o statute or Commission rule authorizes the Commission to rescind or reverse an earlier forbearance ruling."). AT&T's claim that the Commission lacks authority to reverse forbearance is inconsistent with its statements elsewhere. See, e.g., Comments of AT&T Services, Inc., GN Dkt. Nos. 10-127 & 14-28, at 67-68 (filed July 15, 2014) ("There also would be no assurance that later Commissions would adhere to the forbearance decisions made by this Commission. The Commission has emphasized that forbearance decisions are not irreversible."); Remarks of Jim Cicconi, Senior Executive Vice President, AT&T, at the Aspen Institute, "Getting Serious on the Net Neutrality Debate" (June 11, 2014) ("The FCC can change its mind on forbearance at any time.").

²⁸ See, e.g., *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*, Memorandum Opinion and Order, 22 FCC Rcd. 18705, n.120 (2007) ("*AT&T Forbearance Order*") (noting that the Commission retains "the option of revisiting th[ese] forbearance ruling[s]"); *Petition of the Embarq Local Operating Companies for Forbearance Under 47 U.S.C. § 160(c) from Application of Computer Inquiry and Certain Title II Common-Carriage Requirements*; *Petition of the Frontier and Citizens ILECs for Forbearance Under Section 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Their Broadband Services*, Memorandum Opinion and Order, 22 FCC Rcd. 19478, n.113 (2007) (same); *Qwest Petition for Forbearance Under 47 U.S.C. § 160(c) from Title II and Computer Inquiry Rules with Respect to Broadband Services*, Memorandum Opinion and Order, 23 FCC Rcd. 12260, n.127 (2008) (same); see also

reverse forbearance where its predictive judgments underlying those decisions have proven erroneous.²⁹ Here, even if the Commission were required to “provide a more detailed justification” for reversing forbearance,³⁰ the record in this proceeding and the information submitted in response to the special access data collection³¹ will allow the agency to do just that.

Nor is there any question that incumbent LECs have been on notice that the Commission could (1) reverse forbearance and (2) adopt rate regulation of their packet-based special access services. As some of the Joint CLECs and others have explained, the agency has provided more than sufficient notice under the APA to take both of these actions.³²

To bring incumbent LECs’ Phase II price flex DSn and packet-based special access services within price caps, the Commission will need to attribute prices to those services for purposes of establishing the appropriate PCI for the special access basket.³³ The Commission has wide discretion to choose the rates for these services for purposes of setting the applicable PCI. The Commission’s price caps are designed to produce a “zone of reasonableness” in which aggregate rates at or below the PCI are presumptively lawful,³⁴ and courts have upheld the

AT&T Forbearance Order ¶ 50 (promising to revisit within 30 days the deemed grant of forbearance to Verizon); *Ad Hoc Telecomms. Users Comm. v. FCC*, 572 F.3d 903, 911 (D.C. Cir. 2009) (stating that the Commission’s grants of forbearance as well as the deemed grant to Verizon were not “chiseled in marble” and could be reversed in the “ongoing Special Access Rulemaking proceeding”).

²⁹ See, e.g., *Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428, 445 (D.C. Cir. 1991) (“[S]hould the Commission’s predictions . . . prove erroneous, the Commission will need to reconsider its [decision] in accordance with its continuing obligation to practice reasoned decisionmaking.”); *Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) (holding that the Commission’s “latitude to make policy based upon predictive judgments deriving from its general expertise . . . implies a correlative duty to evaluate its policies over time to ascertain whether . . . they actually produce the benefits the Commission originally predicted they would”).

³⁰ *Fox Television Stations, Inc.*, 556 U.S. at 515.

³¹ See, e.g., *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, 28 FCC Rcd. 13189, App. A, Questions II.A.12-14, II.B.4-6, II.F.6-7 (2013) (collecting pricing information from both providers and purchasers of packet-based special access services).

³² See Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Dkt. No. 05-25, at 15-26 (filed May 31, 2013).

³³ See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, ¶ 230 (1990) (using existing LEC interstate access rates to initiate price caps).

³⁴ See *id.* ¶ 49.

Commission's use of benchmark comparisons to help determine whether particular rates are lawful.³⁵ Thus, it would be reasonable for the Commission to look to other available prices to determine the rates that should be used to set the PCI.³⁶ For example, for purposes of setting the PCI, the Commission could attribute to Phase II price flex DSn special access services the same prices attributed to DSn services already governed by price caps or prices for comparable UNEs. And for the packet-based special access prices needed to establish the PCI, the Commission could use existing packet-based special access prices charged by competitive LECs or existing packet-based special access prices charged by incumbent LECs in relevant markets (if any) in which they face effective competition.

Second, the Commission can help ensure that rates for services under price caps are just and reasonable by reducing the PCI for the special access basket. The Commission can make such a reduction based on evidence that incumbent LECs have experienced, and continue to experience, a windfall (*i.e.*, because incumbent LECs' productivity gains have surpassed those of the economy as a whole and the Commission's X-factor has failed to capture those productivity gains).³⁷ Such a decision requires Commission expertise, and courts will not substitute their

³⁵ See, e.g., *WorldCom, Inc. v. FCC*, 308 F.3d 1, 6-10 (D.C. Cir. 2002) (holding that the Commission's decision to assess whether a Section 271 applicant's rates were TELRIC-compliant by comparing the applicant's rates to those already approved by the FCC in a neighboring state was reasonable); *In re FCC 11-161*, 753 F.3d 1015, 1145-46 (10th Cir. 2014) (upholding the FCC's use of benchmarking to simplify the determination of whether access-stimulating CLECs' rates are just and reasonable); *id.* at 1147 (holding that the FCC's chosen benchmark "may be debatable, but it [wa]s neither arbitrary nor capricious").

³⁶ See also *Technology Transitions Order and FNPRM* ¶¶ 165-166 (adopting a benchmarking approach to determining whether the rates for IP-based replacement services are reasonably comparable to those of discontinued DSn special access services and discontinued commercial wholesale platform services); *Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Second Order on Reconsideration, Fourth Report and Order, and Fifth Notice of Proposed Rulemaking, 9 FCC Rcd. 4119, ¶¶ 2-5 (1994) (adopting a "competitive differential" approach under which the Commission examined the rates of cable systems subject to effective competition to determine the rates that cable systems not subject to effective competition should be able to charge).

³⁷ See, e.g., *Price Cap Performance Review for Local Exchange Carriers; Access Charge Reform*, Fourth Report and Order in CC Docket No. 94-1 and Second Report and Order in CC Docket No. 96-262, 12 FCC Rcd. 16642, ¶ 179 (1997) (reducing the PCI to account for understated productivity); *Price Cap Performance Review for Local Exchange Carriers*, First Report and Order, 10 FCC Rcd. 8961, ¶ 246 (1995) ("A one-time reduction in LEC PCIs is required to correct, on a prospective basis, the effects of our underestimation of LEC productivity. . . . If, as we now conclude, the productivity factor we selected was lower than the actual difference between LEC productivity and that of the economy as a whole, then the price cap formula was less favorable to ratepayers . . . than we intended.").

judgment for that of the agency.³⁸ As courts have explained, they are not a “panel of referees on a professional economics journal, but a ‘panel of generalist judges obliged to defer to a reasonable judgment by an agency acting pursuant to congressional delegated authority.’”³⁹

Third, the Commission can choose to adopt a prospective X-factor to pass incumbent LECs’ savings from decreased costs and/or increased productivity on to consumers. Indeed, while courts have remanded for further explanation the Commission’s decision to set the X-factor at a certain percentage,⁴⁰ courts have not found unreasonable the agency’s decision to adopt an X-factor in the first instance (either as a productivity offset or as a transitional mechanism for reducing rates over a period of time).⁴¹

It is worth pointing out that the Commission has the discretion to adopt the reforms discussed herein even in the absence of a comprehensive data set. Courts have repeatedly upheld FCC ratemaking decisions even where the agency did not possess ideal data.⁴² The agency is not

³⁸ See, e.g., *Sw. Bell Tel. Co. v. FCC*, 153 F.3d 523, 554 (8th Cir. 1998) (holding that the FCC’s decision to increase price cap indices for baskets containing services that generate end-user interstate revenues, and that thereby allow LECs to recover their contributions to the new universal service fund from their interstate customers, was a determination made “based on extremely technical factors . . . by the expert agency in charge of monitoring the telecommunications market and is entitled to deference—particularly because it involves an area requiring expertise”); see also *Nat’l Ass’n of Regulatory Util. Comm’rs*, 737 F.2d at 1140 (“We are not a policy-making body. This court instead patrols the perimeters of an agency’s discretion.”).

³⁹ *Qwest Corp.*, 689 F.3d at 1234 (internal citation omitted).

⁴⁰ See *U.S. Tel. Ass’n v. FCC*, 188 F.3d 521, 524-27 (D.C. Cir. 1999) (remanding the Commission’s decision to adopt 6.0% as the historical component of the X-factor for failure to “give a rational explanation of that choice”); *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 329 (5th Cir. 2001) (remanding Commission’s decision to adopt 6.5% as the X-factor for failure to “provide a rational explanation of how it derived th[at] precise percentage”).

⁴¹ See *U.S. Tel. Ass’n*, 188 F.3d at 524-29; *Tex. Office of Pub. Util. Counsel*, 265 F.3d at 328-29.

⁴² See, e.g., *U.S. Tel. Ass’n*, 188 F.3d at 528 (holding that the Commission’s decision to use total company productivity rather than productivity based on interstate operations in calculating the X-factor was reasonable in light of the lack of record evidence allowing the agency to quantify the extent to which interstate productivity growth may differ from total company productivity growth); *Nat’l Ass’n of Regulatory Util. Comm’rs*, 737 F.2d at 1116-17 (holding that while the FCC “had nothing in hand approaching a ‘definitive analysis,’” on the issue of “uneconomic bypass,” the FCC’s determination that bypass threatened to increase costs for remaining local telephone subscribers and thereby jeopardized universal service was reasonable “[i]n light of the material available to the Commission and the leeway the FCC has to make ‘deductions based on [its] expert knowledge’”); *id.* at 1138-40 (holding that although the FCC lacked data on the extent of “leakage” from private lines that was interstate, the FCC’s decision to impose an

required “to enter precise predictive judgments on all questions as to which neither its staff nor interested commenters have been able to supply certainty.”⁴³ And where the concrete data needed to resolve a regulatory problem is unavailable, the Commission has the leeway to make deductions and engage in “reasoned guesswork” based on its experience and expertise.⁴⁴

III. The Commission Can Easily Avoid Making Errors That Have in Some Cases Caused Courts to Remand Its Ratemaking Decisions.

Finally, the fact that courts have, in some cases, remanded Commission ratemaking decisions for failure to engage in reasoned decisionmaking or failure to provide a reasonable explanation for the decision in no way precludes this Commission from adopting special access rate reform. In some of those instances, the agency failed to explain how it arrived at a particular figure,⁴⁵ a mistake that should be easy to avoid. In others, the Commission’s reasoning was clearly irrational,⁴⁶ but there is no reason to think that would be the case here. Finally, in other

interim surcharge on private line users was reasonable because the agency “chose to rely upon its historical experience and expertise to employ a system of conservative estimates”).

⁴³ *Am. Pub. Comm’cns Council v. FCC*, 215 F.3d 51, 55-56 (D.C. Cir. 2000).

⁴⁴ *Nat’l Ass’n of Regulatory Util. Comm’rs*, 737 F.2d at 1116-17, 1140-42 (emphasis omitted); *see also id.* at 1141 (“Each step in the FCC’s calculation [wa]s to some extent guesswork, but it [wa]s *reasoned guesswork.*”) (emphasis in original); *United States v. FCC*, 707 F.2d 610, 617 (D.C. Cir. 1983) (holding that in setting AT&T’s authorized rate of return, the FCC adequately explained its choice of 17.4% as the company’s cost of equity because the agency “essentially engaged in a triangulation exercise” to arrive at a “reasonable computation of [an] unknown variable”).

⁴⁵ *See, e.g., U.S. Tel. Ass’n*, 188 F.3d at 527 (holding that the Commission failed to explain why it chose a consumer productivity dividend of 0.5%); *Tex. Office of Pub. Util. Counsel*, 265 F.3d at 329 (holding that the Commission failed to explain how it derived an X-factor of 6.5%); *see also id.* at 328 (holding that the agency “seem[ed] to invoke the Goldilocks approach to rulemaking” in establishing \$650 million as the amount of the Universal Service Fund because while that figure fell within the range of estimates provided by commenters, the FCC failed to “provide some explanation as to why it found one study more persuasive than the other”).

⁴⁶ *See, e.g., U.S. Tel. Ass’n*, 188 F.3d at 526 (finding that the FCC failed to explain why it was relying on an upward trend in recent years to justify its choice of 6% as the historical component of the X-factor where the trend appeared to be part of a cyclical pattern and where the X-factor was the sum of two components, neither of which followed a trend during the relevant period); *id.* (finding the FCC’s decision to give independent weight to AT&T’s X-factor estimates when it extended the range of reasonableness upward to be irrational given that the agency had rejected certain aspects of AT&T’s methodology); *Nat’l Ass’n of Regulatory Util. Comm’rs*, 737 F.2d at 1128 (remanding the FCC’s changes to its average company status rules because, among other reasons, “the Commission agreed with the fundamental objectives advanced by a commenting

cases, the Commission clearly ignored the record evidence or the lack thereof,⁴⁷ ignored interested parties' arguments,⁴⁸ or failed to consider viable alternatives.⁴⁹ Again, there is every reason to conclude that the Commission can easily avoid these problems with adequate consideration of all relevant factors and arguments. This is especially so given that courts recognize that agencies are constrained by the "need to respond to complex, growing regulatory problems within a reasonable period of time," and judicial review "does not and cannot require

party, but promulgated a rule which could cause drastically different consequences, without record support for the discrepancy between means and end").

⁴⁷ See, e.g., *Aeronautical Radio, Inc.*, 642 F.2d at 1231 ("The Order contains no examination of the voluminous evidence of record, no analysis of the substance of the underlying cost studies, and no discussion of the rate element increases on their merits. This treatment cannot qualify as reasoned decisionmaking. AT&T has pointed to certain record evidence, none of which is mentioned or discussed by the Commission, which substantiates its position."); *BellSouth Telecomms., Inc. v. FCC*, 469 F.3d 1052, 1057-60 (D.C. Cir. 2006) (holding that the FCC failed to provide a reasoned explanation for its decision that the 90% requirement in BellSouth's volume discount plans violated Section 272 by favoring smaller, faster growing customers over larger, established customers where (1) there was an "absence of record evidence showing that the 90% commitment requirement harmed" large, established companies, and (2) "the Commission had nearly five years of data against which to test the proposition that the 90% requirement burdened large and established companies").

⁴⁸ See, e.g., *Nat'l Ass'n of Regulatory Util. Comm'rs*, 737 F.2d at 1127 ("Certainly the Commission would not be required to maintain full cost-based access pricing for end-user party-line charges, but we should expect to find either a clear explanation for its departure from the general principle followed elsewhere in the rulemaking, or a responsive rebuttal of charges that its party-line access charges do not accurately reflect costs. The Commission offered neither. It concluded its discussion in apparent agreement with RTC that party-line charges should permit rational economic choices, again ignoring the RTC's claim that the Commission's plan would reach the opposite result. This unexplained and unsupported conclusion is the antithesis of rational rulemaking."); *City of Brookings Mun. Tel. Co. v. FCC*, 822 F.2d 1153, 1170-71 (D.C. Cir. 1987) (finding that the FCC failed to demonstrate a rational basis for approving NECA's revisions to average schedules because, among other things, the agency "improperly ignored petitioners' argument that the 'flash cut' proposed by NECA was grounded on an inaccurate figure"); see also *WorldCom, Inc.*, 308 F.3d at 9-10 (finding that the FCC failed to adequately justify its decision not to consider competitive LECs' price squeeze argument where the agency's reasons for deeming the argument irrelevant were identical to ones already deemed inadequate by the court in another case).

⁴⁹ See, e.g., *City of Brookings Mun. Tel. Co.*, 822 F.2d at 1169-71 (finding that the FCC violated the requirements of reasoned decisionmaking by, among other things, "not considering one of the alternatives to NECA's methodology brought to its attention by petitioners").

Ms. Marlene H. Dortch

August 28, 2015

Page 11

perfection.”⁵⁰ Indeed, courts will uphold ““a decision of less than ideal clarity if the agency’s path may be reasonably discerned.””⁵¹

Please do not hesitate to contact the undersigned if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones

*Counsel for Birch Communications, Inc.,
BT Americas Inc. & Level 3 Communications, LLC*

⁵⁰ *Nat’l Ass’n of Regulatory Util. Comm’rs*, 737 F.2d at 1124, 1147.

⁵¹ *United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983) (internal citation omitted).