

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

In the Matters of)	
)	
Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans)	WC Docket No. 15-247
)	
Special Access for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	

**MOTION OF AT&T INC., VERIZON, CENTURYLINK,
AND FRONTIER TO MODIFY PROTECTIVE ORDERS**

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Pursuant to 47 C.F.R. § 1.41, AT&T Inc. (“AT&T”), Verizon, CenturyLink, and Frontier submit this motion to modify the protective orders in the pending special access rulemaking proceeding¹ to permit the parties to use the confidential data collected in that proceeding in the above-captioned tariff investigation.

In the special access rulemaking docket, the Commission collected extensive data regarding competition in the special access marketplace. The Wireline Competition Bureau (Bureau) not only references that data in the tariff investigation *Designation Order*, but also uses it to draw preliminary conclusions related to this investigation. But the terms of the Modified Protective Order limit use of the data to the special access proceeding, so that none of the parties subject to the *Designation Order* may use them in connection with the tariff investigation, which

¹ Order and Data Collection Protective Order, *Special Access for Price Cal Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 14-1424 (rel. Oct. 1, 2014) (“*Data Collection Protective Order*”); Second Protective Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2419 (rel. Dec. 27, 2010) (“*Second Protective Order*”); Modified Protective Order, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, RM-10593, DA 10-2075 (rel. Oct. 28, 2010) (“*Modified Protective Order*”).

is a separate docket.² Although these data may not be sufficient to resolve the issues raised in the tariff investigation, as the Commission posits, they are clearly *relevant* to the substantive issues raised in the investigation. The data are likely to include relevant information about the state of competition in the marketplace, the impact of specific contract terms on such competition, the extent to which competitive providers use contract terms similar to ILECs, as well as potentially other matters. These data are therefore necessary to the ILECs' defense in the tariff investigation, and the Commission should accordingly modify the protective orders in the rulemaking proceeding to permit parties in the tariff investigation to use that data in defending their tariffs.

In the pending special access rulemaking proceeding, the Commission has “require[d] providers and purchasers of special access service and certain other services to submit data, information and documents to allow the Commission to conduct a comprehensive evaluation of competition in the special access market.”³ In that data collection effort, the Commission mandated that ILECs, CLECs, cable companies, wireless providers, and others submit detailed, nationwide data covering the location of special access facilities deployments, the types of special access services that are offered, and the various marketplace participants' purchases and sales of each such service. The Commission further sought such data for both the DS1 and DS3

² Order Initiating Investigation and Designating Issues for Investigation, *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, WC Docket No. 15-247 (rel. Oct. 16, 2015) (“*Designation Order*”).

³ Report and Order and Further Notice of Proposed Rulemaking, *Special Access for Price Cap Local Exchange Carriers, et al.*, 27 FCC Rcd. 16318, ¶ 13 (2012) (“*Data Collection Order*”); see also Report and Order, *Special Access for Price Cap Local Exchange Carriers, et al.*, 28 FCC Rcd. 13189 (2013) (Wireline Competition Bureau 2013) (“*Implementation Order*”); Order on Reconsideration, *Special Access for Price Cap Local Exchange Carriers, et al.*, 29 FCC Rcd. 10899 (2014) (Wireline Competition Bureau 2014) (“*Reconsideration Order*”); Order, *Special Access for Price Cap Local Exchange Carriers, et al.*, 29 FCC Rcd. 14346 (2014) (Wireline Competition Bureau 2014) (“*Extension Order*”).

special access services at issue here and the broadband Ethernet services to which the industry is rapidly transitioning. And, the Commission specifically requested comment on the terms and conditions of ILEC tariffs in the rulemaking proceeding, including the types of term discounts and portability plans at issue in this tariff investigation,⁴ and the data collection includes information and data on those arrangements as well.⁵ The Commission requested similar information about the terms and conditions under which competitive providers offer special access service.⁶ The Commission recently made this large dataset (consisting of competitive data from 2013) available for review in the rulemaking proceeding.⁷

The *Designation Order* is closely related to, and indeed is a direct outgrowth of, the special access rulemaking proceeding. As the Commission notes, “[t]his investigation is rooted in a significant body of comment and data on issues related to incumbent LEC special access tariff pricing plan terms and conditions” filed in the special access rulemaking docket.⁸ The Commission has designated seven issues for investigation, and six of them focus on whether certain types of tariffed contract terms constitute either a just and reasonable practice under Section 201(b), unreasonable discrimination under Section 202(a), or both.⁹ Each of these issues for investigation is derived from CLEC allegations that the contract terms at issue “lock up

⁴ *Data Collection Order* ¶¶ 91-93.

⁵ *Designation Order* ¶ 26 (citing *Reconsideration Order*, 29 FCC Rcd. at 10916-21 (Appx. A (Data Collection) at 9-14).

⁶ *Implementation Order* at 35-36; *Reconsideration Order* at 9 (II.A.17-II.A.19).

⁷ Public Notice, *Wireline Competition Bureau Further Extends Comment Deadlines in Special Access Proceeding*, WC Docket No. 05-25, RM-10593, DA 15-1037 (rel. Sept. 17, 2015) (“The Bureau is initiating the process of allowing access to the data collected to authorized parties pursuant to the protective order in this proceeding via the NORC Data Enclave®”).

⁸ *Designation Order* ¶ 23; see also *id.* ¶ 1 n.2 (“[t]his investigation is based on the record generated in the Commission’s special access proceeding”).

⁹ *Id.* ¶ 24.

substantial proportions of carrier and end-user demand, [and thus] locks out competition for such demand and consequently harms both competition and innovation.”¹⁰

The Commission acknowledges that the data it has received in the rulemaking “do not address in sufficient detail the tariff pricing plan terms and conditions being investigated herein and are insufficient for the conduct of this investigation” for purposes of Section 205, and thus it seeks “additional, more targeted data” from the ILECs.¹¹ But even if the data collection does not contain *sufficient* information to conduct a Section 205 investigation, that data is clearly *necessary* to any fair consideration of the issues raised in the tariff investigation.¹² This is so for several reasons.

First, the data addressing the broader competitive context in which the ILECs have developed their discount plans is centrally relevant to the substantive issues raised in the *Designation Order*, and will be important to the ILECs’ defense of their tariffs. The Commission itself has previously stated that it cannot assess the reasonableness of the ILECs’ special access practices, including the terms and conditions of their contract tariffs, without analyzing the broad, industry-wide set of data it has collected for that purpose in the rulemaking.¹³ The *Designation Order* reiterates that the Bureau will investigate “the effects of

¹⁰ *Id.* ¶ 6.

¹¹ *Id.* ¶ 26.

¹² Although the Commission’s dataset would have unique probative value in the tariff investigation that cannot be duplicated from the more targeted requests in the *Designation Order*, the special access marketplace is evolving quickly and the dataset from the rulemaking, which is limited to information from 2013, is already dated. The ILECs thus reserve the right to seek further supplementation of that data from more current sources.

¹³ Report and Order, *Special Access for Price Cap Local Exchange Carrier*, 27 FCC Rcd. 10557, ¶ 3 (2012) (“*Pricing Flexibility Suspension Order*”) (“[c]ompetitive carriers argue that the terms and conditions of special access contract tariffs ‘lock up’ demand, preventing competitors from entering markets and investing in new facilities,” but the Commission “cannot yet evaluate these

the terms and conditions at issue on competition, innovation, and end-user consumers,” including the “the totality of their impact on the business data services market.”¹⁴ In addition, the *Designation Order* cites economic testimony and literature establishing that whether the CLECs’ “lock-in,” “loyalty,” and other theories are sound depend critically on the threshold question of the extent of competition in the marketplace.¹⁵

The Commission cannot assess those broader market-wide impacts, however, based solely on the additional data it is seeking from the ILECs. The reasonableness of the tariffed terms under investigation depends in part on the competitive alternatives available in the overall marketplace and the extent to which those purchasers could choose to take advantage of those alternatives. Much of that data is not within the ILECs’ possession; rather, the Commission sought to build a more comprehensive view of the marketplace in the rulemaking’s data collection by gathering relevant information from *all* competitors, including the CLECs. The ILECs should be permitted to draw on that broader data collection in demonstrating that their tariff provisions are not anti-competitive.

Second, the Commission itself has put the data collected in the rulemaking at issue here by relying on “preliminary analysis” of that data as a basis for the allegations in the *Designation Order*. The Commission relies on such preliminary analyses as grounds for assertions concerning (1) the portion of the special access marketplace represented by TDM services, (2)

claims of competitive harm based on the evidence to date in the record,” which is why the Commission has undertaken the data collection); *see also id.* ¶¶ 6-7, 50, 52.

¹⁴ *Designation Order* ¶¶ 20, 25.

¹⁵ *Id.* ¶ 19 & n.54 (“That being said, exclusive contacts can serve pro-competitive purposes, thus any contract found to be expressly or in effect to be (possibly partially) exclusive, must be examined carefully in the context of the market in question. For example, there is a consensus that exclusive contracts ‘are most likely to harm competition or consumers when they involve dominant firms possessing market power and a high market share,’” citing Morton, Fiona Scott, “Contracts that Reference Rivals,” *Antitrust*, Vol. 27, No. 3, Summer 2013, at 73).

the market share of the ILECs for DS1 and DS3 channel terminations and TDM services as a whole, and (3) the extent to which incumbent LECs are the sole facilities-based provider of TDM-based special access services to business locations.¹⁶ As a matter of fundamental fairness, the ILECs should be permitted access to that same dataset to address those claims.¹⁷

Third, the data collection in the rulemaking also contains other, indisputably relevant information that would not be replicated by the *Designation Order*'s supplemental requests directed to the ILECs. For example, the Commission sought data from the CLECs concerning their own contractual terms and conditions, such as the extent to which these CLECs have the same types of purchase commitments or term and volume discounts as the ILECs and how the CLECs justified such terms.¹⁸ The ILECs should be permitted to draw on the CLECs' responses to such requests in defending their tariffs.

Fourth, the data collection in the rulemaking is clearly relevant to assessing numerous CLEC allegations on which the *Designation Order* relies. The *Designation Order* relies upon CLEC allegations that they were forced to accept term and portability plans, that those plans have precluded CLECs from taking advantage of competitive alternatives, that in many areas

¹⁶ *Id.* ¶¶ 2-4.

¹⁷ *Am. Radio Relay League, Inc. v. FCC*, 524 F.3d 227, 243 (D.C. Cir. 2008) (Tatel, J., concurring) (stating the Commission must disclose redacted portions of the record to petitioners so they could "mount a substantial evidence challenge"); *Air Trans. Ass'n of Am. v. FAA*, 169 F.3d 1, 7 (D.C. Cir. 1999) ("But even in the informal rulemaking context, we have cautioned that the most critical factual material that is used to support the agency's position on review must have been made public in the proceeding and exposed to refutation.").

¹⁸ See *Data Collection Order* (Data Requests) ("II.A.17. What percentage of your *Revenues* from the sale of *DS1*, *DS3*, and *PBDS* services in 2012 were generated from an agreement or *Tariff* that contains a *Prior Purchase-Based Commitment*? . . . II.A.18. If you offer *Dedicated Services* pursuant to an agreement or *Tariff* that contains either a *Prior Purchase-Based Commitment* or a *Non-Rate Benefit*, then explain how, if at all, those sales are distinguishable from similarly structured *ILEC* sales of *DS1s*, *DS3s*, and/or *PBDS*. . . . II.A.19. Provide the business justification for the *Term* or *Volume Commitments* associated with any *Tariff* or agreement you offer for the sale of *Dedicated Services*.").

they lack competitive alternatives, and so on. The rulemaking data is directly relevant to testing those assertions, and not independently available. For example, the Commission requested extensive data on the extent to which CLECs rely on competitive facilities, which directly relates to the claims by some CLECs that they are forced to purchase most of their dedicated facilities from ILECs as a result of the terms and conditions under investigation.

In sum, the Commission should modify the protective orders in the special access docket to permit the parties in the tariff investigation to use the data gathered in the rulemaking in their defense. Most if not all of the persons that would have access to the data in the tariff investigation are already signatories to the special access protective orders. The special access protective orders already incorporate stringent controls to safeguard the confidentiality of the data, including limiting the most sensitive information to outside counsel and consultants, and those same stringent controls would apply to use of the data in the investigation. Moreover, the tariff investigation is a direct outgrowth of the rulemaking proceeding: the Commission has already sought comment and data on these issues in that proceeding and the *Designation Order* is based on allegations made in that proceeding. All parties to the rulemaking thus understood that the data they submitted in the rulemaking would be used in part to address the issues raised in the investigation. For all of these reasons, extending the scope of the protective orders to the tariff proceeding would be a seamless “housekeeping” step to account for the fact that the two inquiries are technically in separate dockets.¹⁹

¹⁹ In the alternative, the Commission could consider simply combining the two dockets, which would allow parties to the tariff investigation to draw on the entire record in the rulemaking proceeding, including the data collection.

CONCLUSION

The Commission should modify the protective orders in the special access rulemaking proceeding as described above.

Respectfully submitted,

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