

November 9, 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 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; Technology Transitions, GN Docket No. 13-5*

Dear Ms. Dortch:

Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC (collectively, the “Joint CLECs”), through their undersigned counsel, respond to recent ex parte filings¹ submitted by incumbent LECs in response to the Joint CLECs’ ex parte letter dated August 28, 2015.² The incumbent LECs’ filings consist largely of their usual empty rhetoric, to which no response is necessary, but it is important to set the record straight on the subset of issues addressed below.

I. The Incumbent LECs Do Not Have “Serious Reliance Interests” Engendered by the Commission’s Current Special Access Regulations.

USTelecom argues that the Commission must meet a high burden to justify altering the current regulatory scheme for special access because the incumbent LECs have “serious reliance

¹ Letter from Keith M. Krom, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Sept. 28, 2015) (“AT&T September 28th Letter”); Letter from Diane Griffin Holland, Counsel for USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and GN Docket No. 13-5 (filed Sept. 24, 2015) (“USTelecom September 24th Letter”).

² Letter from Thomas Jones, Counsel for Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 (filed Aug. 28, 2015) (“Joint CLECs August 28th Letter”).

interests” engendered by the Commission’s rules and policies governing special access, and those interests somehow preclude the Commission from reversing forbearance and re-imposing price caps.³ That is incorrect for two reasons. *First*, the incumbent LECs have long been aware of impending changes to the Commission’s special access regulations, including the possibility that the Commission will reverse forbearance from dominant carrier regulation of packet-based special access services and re-impose price caps on those services.⁴ Such prior notice significantly diminishes the extent to which the Commission must account for the incumbent LECs’ purported reliance on current special access regulations when the Commission designs its new regulatory regime.⁵ *Second*, even if the incumbent LECs could legitimately claim that they have serious reliance interests in the current regulations, that fact does not dictate a particular outcome. It simply means that the Commission must account for those interests.⁶ The Commission is free to “disregard[] facts and circumstances that underlay or were engendered by

³ USTelecom September 24th Letter at 2 & n.10.

⁴ 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 and Further Notice of Rulemaking, 27 FCC Rcd. 16318, ¶ 67 (2012) (“*Data Request Order*”) (noting that the analysis described in the *Data Request Order* will help the Commission determine whether any market participants have market power and how to construct targeted regulatory remedies to address such market power); see also Joint CLECs August 28th Letter at 6 (reiterating that the Commission has given the incumbent LECs more than sufficient notice that it could reverse forbearance and adopt rate regulation of their packet-based special access services); Reply Comments of BT Americas, Cbeyond, EarthLink, Integra, Level 3, and tw telecom, WC Docket No. 05-25 and RM-10593, at 18-26 (filed May 31, 2013) (“CLECs Reply Comments”) (explaining that the incumbent LECs have been on notice that the Commission could reverse forbearance and is considering adopting new pricing regulations for packet-based special access services).

⁵ See *Qwest Corp. v. FCC*, 689 F.3d 1214, 1229-30 (10th Cir. 2012) (holding that the Commission did not act arbitrarily or capriciously when it denied Qwest’s forbearance petition on the basis of a newly-adopted market power analysis because it provided Qwest with notice that a policy change might be in the offing, thus significantly diminishing Qwest’s reasonable reliance on the previous policy).

⁶ See *In re FCC 11-161*, 753 F.3d 1015, 1143 (10th Cir. 2014) (“When the FCC drew on [its] empirical judgment [that rural CLECs had not built out their networks subject to carrier-of-last-resort obligations and thus were not entitled to Universal Service support], it did not ignore the CLECs’ reliance interests; instead, the FCC concluded that these interests did not trump other competing considerations.”); see also *Chem. Waste Mgmt. v. EPA*, 869 F.2d 1526, 1536 (D.C. Cir. 1989) (“It is often the case that a business will undertake a certain course of conduct based on the current law, and will then find its expectations frustrated when the law changes. . . . [M]ost economic regulation would be unworkable if all laws disrupting prior expectations were deemed suspect.”).

[a] prior policy,” as long as it provides a reasoned explanation for doing so.⁷ It would be no great challenge to do so here, since the ample evidence of incumbent LEC market power in the record of these proceedings will allow the Commission to “provide a more detailed justification”⁸ (if one is even necessary) for taking action to constrain that power.

II. Contrary to AT&T’s Claims, the Commission Need Not Overcome Unusual Administrative or Legal Obstacles Before Updating Price Cap Regulations for Special Access Services.

AT&T makes several assertions in an attempt to scare the Commission into thinking that adopting updated rules designed to constrain incumbent LEC market power in the provision of special access services would be too difficult and would lead to reversal on appeal. None of these arguments has merit.

First, there is no basis for the incumbent LECs’ view that applying an updated price cap regime to DSn and Ethernet special access services not currently subject to price caps is an unusually difficult task. The Commission has extensive experience in establishing and refining price cap regimes. In fact, it has successfully developed price cap regulations for long distance services, switched access services, and basic tier cable rates. There is every reason to believe that the Commission can utilize similar methodologies and rules to reform special access prices in this proceeding.

Second, AT&T incorrectly asserts (once again) that, in order to re-impose price caps, the Commission must “make an affirmative showing that the [incumbent LECs’] current rates are unjust and unreasonable.”⁹ As some of the Joint CLECs and others have repeatedly explained, that is both wrong as a matter of law and inconsistent with AT&T’s prior advocacy.¹⁰ In fact, the

⁷ *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 516 (2009).

⁸ *Id.* at 515.

⁹ AT&T September 28th Letter at 6.

¹⁰ CLECs Reply Comments at 27-29. AT&T cites the Commission’s 2004 brief in the special access mandamus case before the D.C. Circuit to support its assertion that, for the Commission “to impose interim special access rate prescriptions, . . . the ‘record would have to support the conclusion that *every* . . . rate [and practice for] *every* service for which pricing flexibility [or forbearance] has been granted violates Section 201.’” AT&T September 28th Letter at 6-7 (quoting Brief for FCC, *In re AT&T Corp.*, No. 03-1397, at 23-24 (D.C. Cir. Aug. 23, 2004) (“FCC Brief”) (emphasis in original)). The Commission’s brief makes clear, however, that such a showing is only required in a Section 205 rate prescription. FCC Brief at 24 (citing 47 U.S.C. § 205(a)) (“The FCC may *prescribe* rates only after it has found the existing rate to be unlawful[.]”) (emphasis added). Moreover, AT&T explained in *its own brief* in the mandamus case that Section 205 is not relevant to the application of price caps 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

Commission would only need to make such an affirmative showing if it were prescribing rates pursuant to Section 205, but the adoption of price caps does not constitute a rate prescription under Section 205.¹¹ That is why the Commission adopted and modified price caps many times in the past without finding that each and every affected rate and practice was unjust and/or unreasonable.¹² Nor would such a requirement make sense, because imposing price caps does not involve setting individual rates.¹³ Rather, the Commission's price cap regulations simply establish a weighted average of prices for services in a given basket. The incumbent LECs are free to select the individual rates for services within the special access basket as long as the weighted average of those prices does not exceed the cap.

are presumptively lawful.” Brief of Petitioners, *In Re AT&T Corp.*, No. 03-1397, at 42 (D.C. Cir. Aug. 20, 2004).

¹¹ See *Policy and Rules Concerning Rates for Dominant Carriers*, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd. 2873, ¶ 895 (1989) (“*AT&T Price Cap Order*”) (“Because we are not prescribing rates, either explicitly or implicitly, we need not follow the procedural requirements of Section 205(a) of the Communications Act[.]”) (citing *AT&T Co. v. FCC*, 487 F.2d 865, 874 (2d Cir. 1973)) (internal citation omitted).

¹² See *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786, ¶¶ 230-256 (1990) (“*LEC Price Cap Order*”) (formulating new price cap methodology without determining individual current rates are unreasonable); *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, ¶¶ 177-181 (1997) (changing X-Factor methodology without evaluating reasonableness of incumbent LECs' current rates); *Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers, Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers, Petition of US West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 19-30 (1999) (amending price cap rules to allow incumbent LECs greater pricing flexibility); *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, ¶¶ 129-184 (2000) (adopting a separate X-Factor not based on productivity measures); *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, 27 FCC Rcd. 10557, ¶¶ 76-84 (2012) (suspending pricing flexibility rules).

¹³ To the extent that AT&T implies otherwise, the application of price caps does not constitute *de facto* rate prescription. See *AT&T Price Cap Order* ¶¶ 894-895; see also CLECs Reply Comments at 28.

Third, AT&T questions how the Commission could use benchmarks (such as competitors' rates) to establish the PCI for the special access basket.¹⁴ As the Joint CLECs have explained, the Commission has frequently used benchmark comparisons in the ratemaking context – a practice that courts have upheld.¹⁵

Fourth, AT&T misleadingly asserts that the Commission cannot “presume that the price cap rates are the ‘correct’ rates” for particular services that have not been subject to price cap regulation.¹⁶ But again, the Commission does not select individual rates under a price cap regulatory regime. It establishes a range of rates that are presumptively reasonable, so it need not consider which rates are “correct.” It need only adopt a reasonable methodology for setting the weighted average that constitutes the cap.

Fifth, AT&T's criticisms notwithstanding,¹⁷ there should be no dispute that application of price caps is the appropriate way to limit incumbent LECs' exercise of market power in the provision of DSn and Ethernet special access services. Price cap regulation promotes consumer welfare by rewarding efficiency and avoiding the perverse incentives of rate-of-return regulation, while at the same time establishing an effective check on the abuse of market power.¹⁸

Finally, AT&T incorrectly asserts that there is a “high likelihood” that adoption of a prospective X-Factor designed to capture incumbent LECs' savings from increased productivity and/or decreased input costs would result in reversal on appeal.¹⁹ AT&T cites two cases to support its argument. One of the cases is not even arguably relevant to the Joint CLECs' proposal because it did not concern an X-Factor designed to pass through either gains in

¹⁴ AT&T September 28th Letter at 8.

¹⁵ See, e.g., *Access Charge Reform, Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Rulemaking, 16 FCC Rcd. 9923, ¶ 4 (2001) (adopting a benchmark of ILEC prices to set CLEC access charges); *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Physical Collocation for Special Access and Switched Transport*, Second Report and Order, 12 FCC Rcd. 18730, ¶ 300 (1997) (determining that TRP data should serve as a benchmark for examining the reasonableness of LEC direct cost adjustments); see also Joint CLECs August 28th Letter at 6-7.

¹⁶ AT&T September 28th Letter at 8.

¹⁷ See *id.* at 8-9.

¹⁸ See *LEC Price Cap Order* ¶ 2 (“In designing an incentive-based system of regulation . . . our objective . . . is to harness the profit-making incentives common to all businesses to produce a set of outcomes that advance the public interest goals of just, reasonable, and nondiscriminatory rates, as well as a communications system that offers innovative, high quality services.”).

¹⁹ AT&T September 28th Letter at 9.

productivity or changes in input costs.²⁰ In the other case, the court did review an order adopting an X-Factor that was set based on both of these factors,²¹ but no party challenged the soundness of either approach. Instead, parties appealed several aspects of the manner in which the Commission implemented these approaches as well as other aspects of the X-Factor. The court applied the usual deference granted to agency decisions affecting rates and, in so doing, upheld²² some aspects of the order and remanded²³ others. Nothing in the decision remotely supports the view that future X-Factors that are based on increased productivity and/or decreases in input costs would likely be overturned in the future. On the contrary, it is clear that the Commission's experience in utilizing these methodologies in the past enhances its ability to do so again.

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

Respectfully submitted,

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²⁰ See *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313, 328-29 (5th Cir. 2001) (reviewing X-Factor adopted in CALLS Order that was designed to reduce rates by a predetermined amount net of inflation and changes made to account for exogenous costs).

²¹ See *United States Tel. Ass'n v. FCC*, 188 F.3d 521 (D.C. Cir. 1999).

²² See *id.* at 527-30 (upholding the elimination of sharing, reliance on total-company (rather than interstate) productivity, and reinitialization of rates for one year).

²³ See *id.* at 524-26 (remanding the choice of percentages set based on historic productivity and consumer productivity dividend).