

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

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| 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 |
| |) | |

COMMENTS OF HAWAIIAN TELCOM, INC.

The Commission in the above-captioned proceeding has collected data surrounding the provision of special access and other business services to evaluate the competitiveness of the market in which special access services are provided.¹ The Commission has requested comment on whether existing pricing flexibility regulations should be modified for special access services provided by incumbent local exchange carriers (“ILECs”) operating pursuant to price cap regulation. According to Compass Lexicon’s analysis of data the Commission has collected in this proceeding,² it is apparent that the markets in which price cap ILECS, including Hawaiian

¹ Specifically, these comments are addressed to Section IV.B. of the Commission’s *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *et al.*, Report & Order & Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (“*Special Access FNPRM*”). The Commission most recently extended the time for filing comments with respect to this Section until January 22, 2016, *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *et al.*, Order, DA 15-1473 (Wir. Comp. Bur., rel. Dec. 21, 2015), and further extended due to the weather-related closing of the government. Public Notice, *Waiver of Filing Deadlines Due to Adverse Weather Conditions*, DA 16-92 (rel. Jan. 27, 2016).

² Compass Lexecon, *Competitive Analysis of FCC’s Special Access Data Collection*, WCB Docket No. 05-25, *et al.* (dated Jan. 26, 2016) (filed on behalf of Alaska Communications, AT&T Inc., CenturyLink, FairPoint Communications, Frontier Communications, Hawaiian Telcom, and Verizon) (“Compass Lexecon White Paper”).

Telcom, Inc. (“Hawaiian Telcom”), provide special access services is highly and pervasively competitive. Therefore, the Commission should immediately lift the suspension on pricing flexibility petitions and maintain existing flexibility rules until more effective triggers can be adopted that permit ILECs to demonstrate entitlement to pricing flexibility where existing triggers erroneously fail to identify the presence of sunk investment by competitors. The Commission should permit the competitive market to operate unimpeded by regulatory uncertainty.

I. PRICE CAP CARRIER SPECIAL ACCESS SERVICES ARE SUBJECT TO PERVASIVE COMPETITION FROM MULTIPLE FACILITIES-BASED PROVIDERS.

Multiple and well-heeled wireline communications companies continue to enter the marketplace for business broadband services, including special access services, and invest billions of dollars to provide services in competition with price cap ILECs.³ These companies provide service utilizing fiber and other facilities-based high-bandwidth facilities.⁴ The availability of such services and new technologies, such as Internet protocol (“IP”) and DOCSIS 3.0, have grown over time. This trend is particularly evident in the State of Hawaii, where Oceanic Time Warner Cable and Level 3, a facilities-based CLEC, as well as a number of other national and local companies, actively build facilities and provide services to business customers in competition with Hawaiian Telcom’s special access services. These competitors are not

³ See, e.g., Comments of United States Telecom, WCB Docket No. 05-25, *et al.*, (filed Jan. 28, 2016).

⁴ Compass Lexecon indicates that cable company DOCSIS 3.0 and optical fiber facilities should be treated as competition to special access services. Compass Lexecon White Paper at § III.

hindered by the manner in which Hawaiian Telcom provides special access services under current pricing flexibility regulations.⁵

According to Compass Lexecon, based on data the Commission has collected in this proceeding, competition for special access services is “near ubiquitous” and “pervasive.”⁶ CLECs and cable companies have deployed facilities to the overwhelming majority of census blocks and business establishments in Metropolitan Statistical Areas (“MSAs”) where Phase I and II pricing flexibility has been granted and where businesses operate.⁷ This is equally true in Honolulu, Hawaii, the main center of business activity where Hawaiian Telcom provides special access services.⁸

This competitive marketplace effectively protects business and carrier customers and ensures that prices remain just and reasonable. This evidence shows that the Commission’s pricing flexibility triggers,⁹ though flawed, have nonetheless successfully identified the presence of ever increasing competition. Therefore, there is no reason to rescind the flexibility authorizations previously granted, including in Hawaii. In addition, there is no justification for

⁵ Hawaiian Telcom provides special access services pursuant to FCC-authorized pricing flexibility in some parts of Hawaii. *Petition of Hawaiian Telcom, Inc. for Phase I Pricing Flexibility Pursuant to Section 69.709 of the Commission’s Rules*, WCB/Pricing File No. 08-01, 23 FCC Rcd 7856 (Wir. Comp. Bur., 2008); *Petition of Verizon for Pricing Flexibility for Special Access and Dedicated Transport Services*, WCB/Pricing File No. 01-27, 17 FCC Rcd 5359 (Wir. Comp. Bur., 2002), and WCB/Pricing File No. 03-10, 18 FCC Rcd 11356 (Wir. Comp. Bur., 2003).

⁶ *Id.* at §§ I.B, II.C.

⁷ *Id.* at § III.

⁸ *Id.*, Special Access Competition Data Analysis, Competition Tables & Table All-MSA-PEN-C (citing CLEC penetration in Honolulu, Hawaii, which is consistent with nationwide data).

⁹ 47 C.F.R. §§ 1.774 & 69.701, *et seq.*

additional rate regulation of special access services,¹⁰ particularly because pricing regulations can harm competition, as the Commission has previously found.¹¹ Such regulations would undoubtedly be harmful to consumers in the current marketplace in which price cap ILECs operate. Rather, the current regulatory environment, where volume and term discounts, contract tariffs, elimination of price cap rate structures, and short-notice tariff filings are available, has been enormously favorable to customers.¹²

II. THE EXISTING TRIGGERS SHOULD BE RETAINED AND EXPANDED TO ALLOW MORE FLEXIBLE PRICING FLEXIBILITY SHOWINGS.

Given that the data provided to the Commission in this proceeding proves the existence of “pervasive” competition, the current suspension on pricing flexibility petitions, adopted over three years ago,¹³ should be withdrawn and the current triggers retained until more effective triggers are adopted.¹⁴ Continuing to prevent additional pricing flexibility is harmful to competition and disserves business customers that benefit from flexible ILEC pricing. Notwithstanding, there are valid reasons for expanding the current triggers in order to more effectively identify markets where pricing flexibility is warranted, while continuing to ensure

¹⁰ Indeed, nothing in this record demonstrates that special access pricing is unreasonable under 47 U.S.C. § 201(b).

¹¹ See note 29, *supra*.

¹² L. Downes, Senior Industry and Innovation Fellow, Georgetown Center for Business and Public Policy, *The Losing Case for Special Access Regulation* (Nov. 2015), available at http://cbpp.georgetown.edu/sites/cbpp.georgetown.edu/files/Larry_Downes_PolicyPaper_Special_Access%2012.14.15.pdf (last viewed on Jan. 19, 2016).

¹³ The Commission suspended new pricing flexibility petitions. *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *et al.*, Report and Order, 27 FCC Rcd 10557 (2012).

¹⁴ The current triggers “understate the extent of competitive deployment” because the 2013 data do not show competitive expansion since that date. Compass Lexecon White Paper at § I.B.

that the facts necessary to make such showings are readily ascertainable and relatively inexpensive to administer.

A. Pricing Flexibility Should Continue to Be Determined on an MSA Basis.

There were compelling reasons why the Commission originally selected MSAs as an appropriate geographic area in which to seek pricing flexibility.¹⁵ When adopting pricing flexibility, the Commission specifically rejected arguments for both smaller and larger designations. The Commission concluded that MSAs reflect “the scope of competitive entry” and are “administratively workable.”¹⁶

Some parties have raised concerns that, although pricing flexibility may be justified in an MSA for central business districts and other high-traffic areas of the MSA, certain portions of MSAs are more lightly served, and thus do not justify pricing flexibility.¹⁷ *In the Special Access FNPRM*, the Commission questions whether more discrete geographic areas, such as census blocks, should be utilized in order to provide a more granular level of market analysis. Vastly increasing the number of geographic areas in which a competitive showing needs to be made, such as through the use of census blocks, should be rejected for four reasons. First, the data filed in this proceeding demonstrate pervasive competition in MSA areas,¹⁸ proving that this geographic selection was the correct one. Second, actual provision of services to discrete locations are not necessary to demonstrate the level of competition in an MSA because nearby

¹⁵ *Access Charge Reform*, Fifth Report & Order & Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“*Pricing Flexibility Order*”)

¹⁶ *Pricing Flexibility Order*, ¶¶ 71-72.

¹⁷ *See Special Access FNPRM*, ¶¶ 87-90.

¹⁸ Compass Lexecon White Paper at § III.B.

providers can efficiently deploy facilities to lightly served areas.¹⁹ Third, the presence of actual competition at discrete business locations may not show a lack of competition, but only a lack of demand for service. Low demand does not justify greater regulation because it is not evidence by itself that alternative providers could not easily compete to provide special access service in these locations. Fourth, MSA-level showings are administratively more efficiently processed, and less costly for ILECs, CLECs, and the Commission to administer.

In any event, an injured party may file a complaint with the Commission if it believes that ILEC special access pricing is unjust and unreasonable, or otherwise acting contrary to the Communications Act or Commission rules.²⁰ Such mechanism is sufficient protection in the unlikely event that an ILEC is engaged in any unreasonable pricing or anticompetitive behavior.

B. The Commission Should Modify the Flexibility Rules to Permit Competitive Showings by ILECs Where Triggers are Not Met.

One of the most serious shortcomings of the existing pricing flexibility triggers is that they take into account only one type of competitor: one that deploys facilities through fiber collocation arrangements. Since the pricing flexibility rules were adopted over fifteen years ago, competition for business high-bandwidth services has exploded, largely through use of IP-based and DOCSIS 3.0 cable facilities, neither of which depend on collocation arrangements. These other types of technologies have increasingly become the technologies that customers want, and therefore should be the basis of new triggers or other showings justifying pricing flexibility. The existence of these alternative facilities-based competitors provide clear evidence of “sunk

¹⁹ *Id.* at §§ I.B., II.B.

²⁰ *See, e.g.*, 47 U.S.C. § 208.

investment” that demonstrates the existence of irreversible competitive commitments to serve a market, the same rationale upon which the collocation triggers were based initially.²¹

C. The Commission Should Consider Further Pricing Flexibility in Response to Current Market Developments.

Although the Commission’s original Phase I and II deregulatory mechanisms were a good first step, the competitiveness of the marketplace in which price cap ILECs provide special access services has far surpassed what existed over fifteen years ago when these mechanisms were adopted. Currently, facilities-based carriers offer competing IP-based and DOCSIS 3.0 cable services that further discipline price cap ILEC special access service offerings. The Commission’s 2013 data demonstrates that, with or without DOCSIS 3.0 or optical fiber facilities, the current market is competitive.²² Given that these competing services are offered with virtually no pricing regulation, and are otherwise largely deregulated, the facts fully justify the Commission to treat, at a minimum, all special access services subject to pricing flexibility on a non-dominant basis. Such treatment is consistent with Commission precedent that treats previously regulated telecommunications services with minimal non-dominant regulations.²³ The data filed in this record support further deregulation for special access services.²⁴

²¹ *Pricing Flexibility Order*, ¶ 79.

²² Compass Lexecon White Paper at §§ II., III.

²³ See, e.g., *Motion of AT&T Corp. to be Declared Non-Dominant for International Services*, Order, 11 FCC Rcd 17963 (1996); *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as Amended (47 U.S.C. § 160(c)), for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, WC Docket No. 06-109, Mem. Opinion & Order, 22 FCC Rcd 16304, ¶¶ 56, *et seq.* (2007)

²⁴ Compass Lexecon White Paper at §§ I.B., II., III.

III. THERE IS NO JUSTIFICATION FOR ADOPTING RULES REGULATING TERMS AND CONDITIONS OF SPECIAL ACCESS OFFERINGS SUBJECT TO PRICING FLEXIBILITY.

More recently, CLECs have been focusing almost entirely on whether certain terms and conditions of special access offerings are anticompetitive. In particular, they seek to invalidate so-called “lock-in” provisions in which customers have agreed to specific minimum terms or made other usage commitments in exchange for more favorable pricing. The Commission should continue to reject claims that these provisions be eliminated on a wholesale basis because these arrangements are favorable to customers both in terms of pricing and reliability, a standard competitors must meet in a competitive environment.

The Commission has very infrequently invalidated customer term or growth discounts as being anticompetitive.²⁵ These actions have been taken only when competition was in its nascency, and these restrictions have not been adopted for a number of years.²⁶ In more recent times, when competition is well under way, the Commission has frequently rejected efforts to

²⁵ See, e.g., *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, Report & Order, 6 FCC Rcd 5880, ¶ 151 (1991) (“800 Number Portability R&O”) (termination liability eliminated for small number of AT&T 800 service contracts to implement 800 number portability); *Expanded Interconnection with Local Telephone Company Facilities Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board*, CC Docket No. 91-141, Transport Phase I; CC Docket No. 80-286, Second Report & Order & Third Notice Of Proposed Rulemaking, 8 FCC Rcd 7374, ¶¶ 115, *et. seq.* (1993) (limited certain types of growth discounts for specific transport access services).

²⁶ The Commission’s cautious approach is particularly present in providing customers a “fresh look” to terminate existing ILEC contracts in limited circumstances. *800 Number Portability R&O*, ¶ 151; *Expanded Interconnection with Local Telephone Company Facilities*, CC Docket No. 91-141, Second Mem. Opinion & Order On Reconsideration, 8 FCC Rcd 7341, ¶¶ 12-13 (1993) (expanded interconnection term discounts to implement interstate access competition).

invalidate existing ILEC customer contracts in order to preserve customer expectations and benefits in a competitive market.²⁷

CLEC claims that ILEC special access terms and conditions should be invalidated are thinly veiled attempts to give CLECs an advantage in the competitive marketplace rather than offering better deals to customers. Customers negotiate contracts or opt into other arrangements because they include desired pricing and reliability benefits. When the terms of current contracts end, most typically in one to three years, the customer can be expected to engage in a new round of competitive bids. Businesses are extremely adept and accustomed to seeking the most cost-effective communications solution by soliciting competing offers. In competitive markets, businesses determine which offering is best for them, based on all components of the offering, including term, volume commitment, reliability, and price. Such markets cannot fairly be characterized as anticompetitive simply because there is a relatively brief period of time during the term of a contract when the customer is not actively seeking new special access service offerings.²⁸ The Commission should be cautious about interfering with competitive markets because such action risks sending the wrong signals to the market, and could hinder investment and skew competition in a way that is unfavorable to consumers.²⁹ In the past, the Commission

²⁷ See, e.g. *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, MB Docket No. 05-311, Second Report & Order, 22 FCC Rcd 19633, ¶ 25 (2007).

²⁸ Compass Lexecon White Paper at § II.B.

²⁹ See, e.g., *Policy and Rules Concerning the Interstate, Interexchange Marketplace, Implementation of Section 254(g) of the Communications Act of 1934, as amended*, CC Docket No. 96-61, Second Report & Order, 11 FCC Rcd 20730, ¶¶ 52, *et seq.* (1996) (tariff and rate regulation of competitive services eliminated to avoid impediments to competition).

has found terms and conditions that are the subject of CLEC complaints to be “permissible and pro-competitive.”³⁰

In no event should the Commission adopt blanket rules prohibiting certain terms and conditions, such as term commitments, termination penalties, or minimum volume requirements. Since such provisions produce customer benefits, a particular term or condition should only be invalidated pursuant to an adjudicative proceeding, such as a complaint case, based on a full record and evaluation of specific market facts and customer situation.

IV. CONCLUSION

The marketplace in which special access services are provided is pervasively competitive. Such competitive pressures effectively protect customers and carriers and ensure that prices remain just and reasonable. The Commission should immediately lift the suspension on pricing flexibility petitions and maintain existing flexibility rules until more effective triggers can be adopted that permit ILECs to demonstrate entitlement to pricing flexibility where existing triggers erroneously fail to identify the presence of sunk investment by competitors. The record does not support any blanket rules invalidating terms and conditions associated with special

³⁰ See, e.g., *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, CC Docket No. 99-295, Mem. Opinion & Order, 15 FCC Rcd 3953, ¶¶ 384-85 (1999) (termination liabilities for Centrex service found to be reasonable).

access offerings. Therefore, the Commission should permit the competitive market to operate unimpeded by regulatory uncertainty.

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