

**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

REPLY COMMENTS OF COMPETITIVE CARRIERS ASSOCIATION

Competitive Carriers Association (“CCA”) hereby replies to the initial comments on the Federal Communications Commission’s (“FCC” or “Commission”) Report and Order and Further Notice of Proposed Rulemaking (“FNPRM”) issued on December 18, 2012, in the above-captioned proceedings.¹ The FNPRM seeks comment on possible changes to the special access regulatory regime following review of the special access industry data collected by the Commission. The record in this proceeding clearly dictates that the Commission repair the broken special access market.

I. INTRODUCTION AND SUMMARY

CCA is the nation’s leading association for competitive wireless providers and stakeholders across the United States. CCA’s membership includes nearly 100 competitive wireless providers ranging from small, rural carriers serving fewer than 5,000 customers to

¹ *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. 16, 318, 319 ¶ 1 (2012).

regional and national providers serving millions of customers. CCA also represents approximately 200 associate members consisting of businesses, vendors, and suppliers of all sizes that serve carriers of all sizes.

The special access market is a \$40 billion industry of staggering importance.² Indeed, special access connections—along with access to spectrum, data roaming, devices and support in high-cost areas—help to complete the multi-faceted puzzle of wireless broadband competition. Competitive carriers rely on special access services provided by incumbent local exchange carriers (“incumbent LECs”) to connect cell towers to the Internet backbone—known to the Commission and wireless industry as “wireless backhaul”—and for linking networks between two providers. Without backhaul from towers, competitive carriers cannot effectively deploy the next generation wireless broadband services that underpin modern society.

AT&T and Verizon Wireless are in the fortunate position of purchasing backhaul from their incumbent LEC affiliates while these same affiliates foist unreasonable rates, terms, and conditions onto competitive carriers.³ Either through contract or tariff, the incumbents leverage their dominance in the special access marketplace to impede competitive carriers’ ability to offer wireless services, ultimately harming consumers, competition and innovation. The impact of this marketplace inequity will only grow as competitive carriers invest to expand their backhaul capacity in order to meet the ever-increasing wireless needs of consumers—especially as consumers embrace bandwidth-intensive 5G technologies. As FCC General Counsel Sallet

² *Investigation of Certain Price Cap Local Exchange Carrier Business Data Services Tariff Pricing Plans*, Order Initiating Investigation and Designating Issues for Investigation, WC Docket No. 15-247, DA 15-1194, ¶ 2 (2015) (“Designation Order”).

³ *See, e.g.*, Reply Comments of T-Mobile USA, Inc. at 2-3, WC Docket No. 05-25, RM-10593 (filed Feb. 24, 2010) (“T-Mobile Comments”); Comments of Sprint Corporation at 21-79, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (“Sprint Comments”).

recently recognized, “the structure and efficient performance of the market for dedicated business data services may be fundamental to the deployment of 5G mobile broadband, which will require many more cell sites and thus much greater demand for the business data services generally referred to as backhaul.”⁴

CCA urges the Commission to act quickly to remedy the harm caused by the incumbent LECs’ dominance in the special access marketplace. As an initial matter, the Commission should employ a traditional market analysis to assess fully whether the special access marketplace is competitive. It then must take swift action to rein in incumbent LEC abuses, including by ensuring that incumbent special access rates are brought to levels of a properly functioning market. Correcting the problems of the broken special access marketplace will help to ensure that competitive carriers are positioned to deploy wireless broadband technologies like 5G to American consumers.

II. THE BROKEN SPECIAL ACCESS MARKETPLACE IMPEDES WIRELESS COMPETITION

Special access services are a critical input into the ability of competitive carriers—both competitive wireless carriers and local exchange carriers (“competitive LECs”)—to provide broadband services to businesses, schools, libraries, and local, state, and federal government agencies, and, in the case of competitive wireless carriers, to wireless customers.⁵ As T-Mobile has explained, wireless providers “need special access services and facilities to provide backhaul in order to connect their base stations to mobile switching centers, as well as to link their

⁴ Jon Sallet, General Counsel, Federal Communications Commission, Remarks as prepared for delivery at Incompas 2016 Policy Summit: “20th Anniversary of the Telecom Act” at 8 (Feb. 10, 2016), http://transition.fcc.gov/Daily_Releases/Daily_Business/2016/db0210/DOC-337681A1.pdf (“Sallet Remarks”).

⁵ Comments of INCOMPAS at 2, WC Docket No. 05-25, RM-10593 (filed January 27, 2016) (“INCOMPAS Comments”).

networks to the networks of other providers.”⁶

The Commission’s recently released Eighteenth Wireless Competition Report recognized the importance of backhaul for wireless providers: “[b]ackhaul connections are an integral component of a wireless service provider’s network” and estimated that “the cost of backhaul is approximately 30 percent of the operating cost of providing wireless service.”⁷ Competitive wireless carriers typically must purchase these connections from third parties. More often than not, competitors are forced to purchase from incumbent LECs as a result of their overwhelming dominance in the marketplace.

Traditionally, carriers signed up for special access services provisioned using traditional time-division-multiplexed (“TDM”) technology—chiefly DS1s and DS3s.⁸ These TDM-based services remain a critical input for competitive carriers, even as their purchases shift to services delivered using high-bandwidth Ethernet technologies when and where they are available.⁹ Ethernet-based backhaul technology will become more important as the needs of wireless broadband networks increase. And as the Commission explained, “[t]he capacity of a service provider’s wireless network is dependent on the deployed mobile wireless technology, sites and equipment, available bandwidth, and enhanced backhaul connections.”¹⁰ The rising popularity

⁶ T-Mobile Comments at 2.

⁷ *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993 - Annual Report and Analysis of Competitive Market Conditions With Respect to Mobile Wireless, Including Commercial Mobile Services*, Eighteenth Report, WT Docket No. 15-125, DA 15-1487, 50 ¶ 69 (2015) (“Eighteenth Report”).

⁸ T-Mobile Comments at 2, 5.

⁹ T-Mobile Comments at 2; *see also* Comments of Birch, BT Americas, Earthlink, and Level 3 at 2, WC Docket No. 05-25, RM-10593 (filed January 22, 2016) (“Level 3 Comments”); Sprint Comments at 55, 70 n.205.

¹⁰ Eighteenth Report at 80 n.362.

of video streaming services, as well as the dawn of 5G and the “Internet of Things,” means that mobile networks “will need to dramatically increase their current capacity to accommodate this demand.”¹¹

Importantly, the Commission’s actions in this proceeding will “directly impact the speed and capacity of the next generation of mobile broadband services.”¹² The speed and capacity of a wireless network will ultimately depend on the quality, pricing and terms for available backhaul technology, and the cost to deploy these modern networks largely depends on the incumbent LECs who control backhaul.

The Commission correctly recognized that its treatment of special access services impacts competition and investment in downstream markets for “retail broadband services provided to small businesses, mobile customers and enterprise customers.”¹³ However, the current regulatory regime of price caps and pricing flexibility has failed to prevent incumbent LECs from using their dominance in the marketplace to raise rates, impose unreasonable terms and conditions, and impede competitive entry.

III. THE INCUMBENT LECS LEVERAGE THEIR MARKET DOMINANCE TO IMPOSE ANTICOMPETITIVE RATES, TERMS AND CONDITIONS

The record shows that the incumbent LECs leverage their dominance in the special access marketplace to levy anticompetitive rates, terms, and conditions on competitive carriers.¹⁴ They do this by employing many unjust and unreasonable rates, terms and conditions, for

¹¹ INCOMPAS Comments at 6.

¹² *Id.* at 7.

¹³ FEDERAL COMMUNICATIONS COMMISSION, CONNECTION AMERICA: THE NATIONAL BROADBAND PLAN at 47, *available at* <http://www.broadband.gov/download-plan/> (“National Broadband Plan”).

¹⁴ *See* Sprint Comments at 45-70.

example mercenary loyalty mandates, “lock-in” provisions, and portability limitations, to name a few. The incumbents also set supracompetitive rates that successfully deter competitive entry and ultimately harm consumers.¹⁵ CCA members across the United States attest they have not observed competitive alternatives to ILEC-provided special access services.

First, incumbent LECs impose terms and conditions that violate Sections 201 and 202 of the Communications Act.¹⁶ As Sprint explains, the incumbents routinely use anticompetitive terms and conditions which “require customers to maintain their prior purchase levels and commit new demand to the incumbent LEC, drastically reducing the possibility of competitive entry for everyday special access business.”¹⁷ Such provisions have harmed “broadband competition supported by TDM special access services” and will “interfere with the country’s evolution to IP-based networks.”¹⁸ For instance, incumbent LECs frequently employ “loyalty mandates” to restrict competition. Incumbents require customers to “accept, and remain subject to, loyalty commitments,” which acts to further “undermine the ability of new entrants to compete” and leverage their “historic dominance.”¹⁹

Incumbent LECs then impose additional terms linked to their loyalty commitments that are designed to lock-in competitive carriers. For example, incumbent LECs will charge a “shortfall” penalty to a competitive carrier who misses its commitment. Ironically, this penalty

¹⁵ See, e.g., Sprint Comments at 48; Comments of XO Communications, LLC at 33-36, WC Docket No. 05-25, RM-10593 (filed January 27, 2016) (“XO Comments”); Comments of TDS Metrocom, LLC at 27, WC Docket No. 05-25, RM-10593 (filed January 27, 2016) (“TDS Comments”).

¹⁶ See *Id.* at 45-46; Level 3 Comments at 64; Windstream Comments at 75.

¹⁷ Sprint Comments at 45.

¹⁸ *Id.*

¹⁹ *Id.* at 46.

“can far exceed the amount by which the customer missed its loyalty commitment.”²⁰ Even a competitive carrier who actually wishes to reduce its commitment may face an “enormous ‘buydown’ penalty, which can similarly cost the customer more than it would pay by maintaining the loyalty commitment.”²¹ The incumbent LECs’ unreasonable terms and conditions also include “unworkable circuit portability restrictions” to push competitive carriers into signing loyalty provisions, which further lock up demand that could be absorbed by a competitive LEC offering better prices.²² Competitive carriers who purchase circuits under a single incumbent’s special access plan will inevitably need to activate circuits at some locations and deactivate circuits at others to respond to a fluctuating end user base.

Second, incumbent LECs charge exorbitant rates for these services.²³ Sprint cites examples of ILECs charging “rack rates” for month-to-month service if consumers do not agree to a loyalty contract. These rates “wildly exceed the price that a competitive market would produce” so as to be manifestly unreasonable.²⁴ To avoid these rack rates, many special access customers choose to subject themselves to loyalty provisions in order to secure a lower, but still supracompetitive, rate.²⁵

The record shows that incumbent LECs also engage in “price squeezing” by charging higher rates to their wholesale customers than retail customers. For example, Windstream

²⁰ *Id.* at 47.

²¹ *Id.*

²² *Id.* at 49-50.

²³ XO Comments at 33-36 (analysis of ILEC prices for Dedicated Services to benchmark rates for reasonably similar services, and wholesale prices charged by ILECs on a month-to-month basis, indicates ILEC rates are supracompetitive).

²⁴ *Id.* at 48.

²⁵ *Id.* at 49.

explains that incumbent LECs charge carrier customers more than a comparable retail customer, even when the carrier customer makes “significant volume commitments that the retail customer does not.”²⁶ These disadvantages to wholesale customers negatively impact competition in the retail marketplace, because competitive carriers may be forced to raise retail rates or may be squeezed out of the market entirely.²⁷ As INCOMPAS explains, “[f]or competitors to establish the customer base needed to innovate and invest . . . they need an economically viable means of obtaining wholesale inputs (*i.e.*, reasonably priced special access services).”²⁸

IV. THE COMMISSION MUST ACT QUICKLY TO INJECT COMPETITION INTO SPECIAL ACCESS MARKET

The Commission has a duty to ensure rates for dedicated access services provided by LECs are just, reasonable, and nondiscriminatory.²⁹ The record in this proceeding demonstrates that the current regulatory regime governing special access services has failed competitive carriers. For example, the Massachusetts Department of Telecommunications and Cable has said that the “current regulations for interstate special access circuits have created conditions in which dominant providers are using their market power to charge high prices and impose unreasonable non-price terms and conditions.”³⁰ Accordingly, the Commission must take action immediately to meet its statutory obligations and to guard against abuses of market power by incumbent

²⁶ Comments of Windstream Services, LLC at 51, WC Docket No. 05-25, RM-10593, GN Docket No. 13-5 (filed Jan. 27, 2016) (“Windstream Comments”).

²⁷ *Id.* at 55.

²⁸ INCOMPAS Comments at 9.

²⁹ 47 U.S.C. §§ 201, 202.

³⁰ Comments of the Massachusetts Department of Telecommunications and Cable at 5, WC Docket No. 05-25 (filed Jan. 19, 2010) (“MDTC Comments”).

LECs.³¹

The data collection the Commission initiated in this proceeding and the Wireline Competition Bureau's comprehensive investigation of the incumbent LECs' special access tariffs are good initial steps.³² Indeed, the Commission's tariff investigation is an important part of the Commission's comprehensive plan to fix the broken special access marketplace. However, to rectify the harm competitive carriers currently face and to ensure that the broken special access marketplace does not further impede the ability of carriers to deploy networks capable of delivering next generation mobile technologies, the Commission must adopt remedies to reduce the supracompetitive rates that incumbent LECs charge for special access services.

The Commission must put to bed once and for all the incumbents' argument that the market is competitive. The records in the two related special access proceedings make clear the market is rigged against competition. To this end, the Commission should use the data it has collected to perform a traditional market power analysis. The overwhelming majority of commenters agree that the Commission should use this proven market framework upheld by the courts to assess the competitive state of the market.³³ This analysis requires the Commission

³¹ See Level 3 Comments at 64-67; Windstream Comments at 60; Sprint Comments at 79; MDTC Comments at 13.

³² See Designation Order.

³³ See Sprint Comments at 5-9; Level 3 Comments at 3; Declaration of Jonathan Baker on behalf of Level 3 Communications, LLC, Windstream Services, LLC and XO Communications, LLC at 30 ¶ 52, WC Docket No. 05-25, RM-10593 (filed Jan. 27, 2016) (applying methodology comparable to market power analysis Commission has previously used); Comments of BT Americas Inc., Cbeyond Communications, LLC, EarthLink, Inc., Integra Telecom, Inc., Level 3 Communications, LLC, and tw telecom Inc. at 64, WC Docket No. 05-25 (filed Feb. 11, 2013) ("The established market power framework is a reliable and efficient means of identifying the relevant special access markets in which incumbent LECs currently have the ability to set and maintain supra-competitive prices."); Comments of the Ad Hoc Telecommunications Users Committee at 8-9, WC Docket No. 05-25 (filed Feb. 11, 2013); Comments of XO Communications, LLC at 3-5, WC Docket No. 05-25 (filed Feb. 11, 2013) (The Commission's market power analysis "is widely accepted as the analytical

first to define the relevant product and geographic markets. The Commission must then consider specific market characteristics, which “will allow the Commission to identify areas in which competition is sufficient to constrain carriers” from acting in an anticompetitive manner.³⁴ As the record makes clear, the Commission has successfully used the market power analysis in other proceedings,³⁵ and such an analysis is “well-suited for use in this proceeding.”³⁶

V. CONCLUSION

As the market currently stands, competitive carriers and ultimately consumers have little choice but to bow to the demands of incumbent LECs who use their dominance to prevent meaningful competition. This harmful dynamic will undercut the Commission’s goals on a wider scale; without effective policy disciplining the special access marketplace, competitive carriers will struggle to deliver to consumer-demanded next generation mobile technologies. To promote wireless broadband growth and competition, CCA urges the Commission to take swift action to rein in the incumbent LECs’ anticompetitive special access practices.

Respectfully submitted,

/s/ Rebecca Murphy Thompson

Rebecca Murphy Thompson
EVP & General Counsel
Competitive Carriers Association
805 15th Street, NW, Suite 401
Washington, DC 20005

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framework that will most accurately determine whether and the extent to which competition exists.”).

³⁴ See Sprint Comments at 5-6.

³⁵ See *Id.* at 6-7.

³⁶ Level 3 Comments at 11.