Before the
Federal Communications Commission
Washington, DC 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 PUBLIC KNOWLEDGE, COMMON CAUSE, OPEN TECHNOLOGY INSTITUTE AT NEW AMERICA, & ENGINE

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Public Knowledge files these Reply Comments in response to the Federal Communications Commission's ("Commission" or "FCC") Special Access Notice of Proposed Rulemaking.[1] The record supports Commission action to stop the persistence of unreasonable rates, terms, and conditions in the special access market. By preventing incumbent local exchange carriers ("ILECs") from exercising market power and imposing onerous terms and conditions on special access customers, the Commission will stimulate additional broadband deployment and economic growth and provide substantial benefits to consumers and American businesses.

I. ILECs Charge Wholesale Special Access Rates in Excess of Retail Rates, Illustrating that ILECs Have Market Power and Exercise it to Exclude Competition.

The record clearly demonstrates that ILECs exercise market power to keep special access prices at inexplicably high levels. As TDS Metrocom, Windstream, and XO Communications explain, rates that ILECs charge competitive carriers for wholesale last-mile access often exceed the retail rates the ILECs charge to business telecommunications customers.[2]

The fact that ILECs charge wholesale special access customers higher rates than retail customers is counterintuitive. As TDS explains, when ILECs sell special access to competitive carriers at wholesale, they incur lower costs than when selling service to retail customers, including retail and billing collection, customer service, marketing, and sales.[3] Further, Windstream points out that "when subject to meaningful competition, a

[1] *See* Special Access Rates for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services; WC
[2] *See* Comments of TDS Metrocom, LLC; WC Docket No. 05-25, RM-10593; at 25-27 (filed Jan. 27, 2016) ("TDS Comments"); Comments of Windstream Services, LLC; WC Docket No. 05-25, RM-10593, GN Docket No. 13-5; at 3-4, 60 (filed Jan. 27, 2016) ("Windstream Comments"); Comments of XO Communications, LLC; WC Docket No. 05-25, RM-10593; at 43 (filed Jan. 27, 2016) ("XO Comments").
[3] TDS Comments at 26.

typical supplier will charge its wholesale customers *less* per unit than its retail customers for identical or similar services," explaining that in addition to lower costs, wholesale special access customers ensure ILECs of "reduced churn and greater revenue certainty by wholesale customers' committing to larger volumes and longer terms."[4]

The fact that the special access market is not competitive and that ILECs possess market power explains why ILECs can charge wholesale customers prices in excess of retail rates. In a competitive market, suppliers charging wholesale customers rates that exceed retail prices would cede the wholesale market to competitors charging lower rates.[5] As TDS, Windstream, and XO Communications conclude, the only rationale for ILECs charging excessive and unjustifiable wholesale special access rates is to exclude competitive carriers from offering competitively priced service to retail customers.[6] Specifically, XO explains that where it purchases Ethernet on a wholesale basis, ILECs set the price so that XO's resulting retail service must be priced as much as 30% higher than the ILEC's retail service, making competition nearly impossible except in markets where XO has its own facilities or competing wholesale service providers discipline ILEC wholesale prices.[7]

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[4] Windstream Comments at 3.
[5] *See* TDS Comments at 26-27.
[6] *See id*.; Windstream Comments at 3, 60; XO Comments at 43.
[7] XO Comments at 43.

II. Unjust and Unreasonable Special Access Terms and Conditions are Anticompetitive and Stifle New Competition.

The record also overwhelmingly shows that ILECs routinely impose anticompetitive terms and conditions in special access contracts with customers. These practices are used to stifle any new competition in the market for special access services.[8]

For example, Sprint explains that terms and conditions in ILEC special access plans are effectively loyalty mandates that lock-in customers and kill the prospect of any new competition. ILECs force customers into loyalty plans by setting exorbitant rates and condition relief from the high rates on the customer agreeing to a loyalty commitment, and by excessively penalizing customers who respond to retail churn by switching circuits from one location to another, even if the customer is also purchasing from the ILEC at the new location. ILECs will agree to waive the massive penalties, but only if the customer commits its future business to the ILEC, undermining future competition.[9] The Computer & Communications Industry Association ("CCIA") also describes that for competitive carriers purchasing wholesale service from ILECs, anticompetitive terms and conditions may include early termination penalties, loyalty commitments, term commitments, shortfall penalties, overage penalties, and circuit migration charges.[10]

Because the market for special access service is not competitive, competitive carriers are dependent on ILECs for wholesale special access in order to serve business customers. As a result, competitive carriers have no choice but to agree to the ILEC terms

[8] *See* Comments of Birch, BT Americas, Earthlink, and Level 3; WC Docket No. 05-25, RM-10593; at 63 (filed Jan. 27, 2016); Comments of the Computer & Communications Industry Association; WC Docket No. 05-25, RM-10593; at 10 (filed Jan. 27, 2016) ("CCIA Comments"); Comments of INCOMPAS; WC Docket No. 05-25, RM-10593; at 10-11 (filed Jan. 27, 2016) ("INCOMPAS Comments"); Comments of Sprint Corporation; WC Docket No. 05-25, RM-10593; at 45-70 (filed Jan. 27, 2016) ("Sprint Comments"); XO Comments at 40-42.
[9] Sprint Comments at 46-47.
[10] *See* CCIA Comments at 10.

and conditions, locking up wholesale customers and reducing the potential customer base for existing competitors, as well as new market entrants, and stifling any possibility for robust competition in the special access market.[11] Further, by locking competitive carriers into purchasing special access from ILECs, these lock-up plans are prohibitive for competitive carriers that want to build new facilities or reduce costs by switching to another special access provider. As a result, these anticompetitive terms and conditions deter new facilities-based competition.[12]

III. Unjust and Unreasonable Special Access Rates, Terms, and Conditions Harm Consumers, Businesses, and Economic Growth.

The record demonstrates that ILECs routinely exercise and maintain their market power in the market for special access services by unjustifiably setting wholesale rates in excess of retail rates, as well as requiring customers to agree to anticompetitive terms and conditions for service. As a result, American businesses and consumers annually pay billions of dollars in unreasonable special access costs.[13] The result is that billions of dollars that could otherwise be earmarked for investments in American workers, business formation, research and innovation, and savings for consumers are pocketed by a handful of companies extracting monopoly-level profits in the special access market.

A. Unjust and Unreasonable Special Access Rates, Terms, and Conditions Stifle Economic Growth.

In addition to harming competitive telecommunications carriers and deterring investments in new telecommunications networks, unjust and unreasonable special access rates, terms, and conditions also create an unmitigated drag on the American economy.[14]

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[11] *See* INCOMPAS Comments at 10-11.
[12] *See* XO Comments at 42.
[13] *See* Competify, http://trycompetify.com/about/ (last visited Feb. 18, 2016).
[14] *See* INCOMPAS Comments at 2-4.

As Sprint notes, current ILEC practices in the special access market "extract[] an enormous toll on the nation, undermining the Commission's pro-innovation, pro-competition policies, and forcing consumers to bear unjustified costs."[15] By reforming the special access market, business customers that pay excessive rates for telecommunications services could reinvest those savings into hiring additional employees, expanding production, and increasing sales.

CCIA agrees, pointing out that anticompetitive special access rates impede economic growth. A functioning special access market with rational rates would allow Internet companies to use savings to invest in developing new applications and services, spurring the "virtuous cycle" that drives greater consumer participation in the broadband economy and creating greater demand for faster and better broadband networks.[16] Instead, the current special access regime is a critical source of economic loss, which will only grow as the burgeoning Internet of things increases the importance of connectivity for even wider segments of U.S. economic activity.[17]

New and small businesses also face serious headwinds from the dysfunctional special access market and would reap substantial benefits from reform. As Engine explains, special access reform would "lower the costs of launching businesses, which will lead to a cycle of more startups, more jobs, and more innovation."[18] While the U.S. Small Business Administration's Office of Advocacy notes that special access reform

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[15] Sprint Comments at 71.
[16] CCIA Comments at 8-9.
[17] *Id.* at 6.
[18] Evan Engstrom, Policy Director, Engine, *Starting Up the Broadband Economy*, RECODE, Dec. 3, 2015, http://recode.net/2015/12/03/starting-up-the-broadband-economy (last visited Feb. 18, 2016).

would "provide small businesses with affordable access and choice regarding the services they need to grow and create new jobs."[19]

Unjustifiably high rates also have a deleterious effect on public institutions that rely on special access services, including government agencies, schools, libraries, universities, and public safety organizations.[20] While the direct monetary costs are significant, the opportunity costs from excessive telecommunications charges are a waste of taxpayer resources that could otherwise be used to hire and train more teachers; invest in life-saving medical research; and rebuild America's aging roads, bridges, and infrastructure.

B. Unjust and Unreasonable Special Access Rates, Terms, and Conditions Hinder Deployment of Broadband Networks.

Because ILECs charge unjust and unreasonable rates for wholesale special access services and lock-up customers in long-term contracts with anticompetitive and onerous penalties and loyalty commitments, they effectively stifle investments in new facilities by competitors and potential new entrants.[21] Further, the monopoly special access prices that competitive wireless carriers have to pay to ILECS (who often offer competing, dominant wireless services) deter deployment of mobile broadband networks.[22]

INCOMPAS and CCIA correctly point out that wireless providers rely on backhaul from special access providers to connect wireless towers to the wireline network.[23] Backhaul costs are one of the largest operating expenses for wireless carriers –

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[19] Comments of U.S. Small Business Administration, Office of Advocacy; WC Docket No. 05-25; at 5 (filed May 24, 2012).
[20] *See* Sprint Comments at 76.
[21] *See* INCOMPAS Comments at 10-11, TDS Comments at 26-27, Windstream Comments at 3, XO Comments at 42.
[22] *See* CCIA Comments at 1, 5-7; INCOMPAS Comments at 6-7.
[23] *See* CCIA Comments at 7, INCOMPAS Comments at 6.

approximately one-third of the expense of operating a cell site.[24] Often, competitive wireless carriers must purchase backhaul from the parent companies of their most dominant rivals, AT&T and Verizon. Thus, ILECs with wireless affiliates have the opportunity to raise their wireless rivals' costs, giving them additional incentives to charge excessive rates.

Today, consumer demand for mobile broadband is intensifying and wireless operators are scrambling to add capacity to their networks by bringing new cell sites online. Because backhaul is such an important and expensive input to wireless cell sites, unjustifiable and unreasonable special access rates and anticompetitive terms and conditions in special access contracts cause wireless networks to delay investments in their networks.[25] Instead, if rates, terms, and conditions in the special access market were reasonable, competitive wireless companies would have additional resources to invest in their networks to increase coverage and capacity, acquire new spectrum, invest in new technologies, and offer better prices to consumers.

C. Unjust and Unreasonable Special Access Rates, Terms, and Conditions Harm Consumer Welfare.

Lastly, unjust and unreasonable special access rates and anticompetitive terms and conditions in special access contracts also harm consumers. As Sprint points out, the costs of special access services that businesses pay for telecommunications services, like those needed to process credit card transactions, affect the prices customers pay for goods and services.[26] And the National Association of State Utility Consumer Advocates explains, "[w]here ILECs set supra-competitive rates or impose unfair and unreasonable

[24] INCOMPAS Comments at 6.
[25] *See* CCIA Comments at 5-6.
[26] *See* Sprint Comments at 71, 76.

terms and conditions for special access circuits, those costs will be passed on to consumers in the prices they pay for, e.g., airfares, banking transactions, and many other common purchases."[27] Because of the current, dysfunctional special access regime, consumers pay an invisible telecommunications tax to the ILECs on every transaction. Thus, the Commission must take action to prevent unjust and unreasonable special access rates, terms, and conditions that silently siphon billions of dollars from the pockets of unsuspecting consumers.

IV. Conclusion

The record clearly demonstrates that unreasonable special access rates, terms, and conditions directly and indirectly cost American consumers and businesses billions of dollars per year. Further, these costs negatively effect American economic competitiveness, reduce investment in next-generation broadband networks, lessen incentives for new business formation, and waste precious taxpayer dollars. The record supports swift and decisive Commission action to reign in unjustifiable, unreasonable, and unlawful special access rates and practices.

Respectfully submitted,

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[27] Comments of the National Association of State Utility Consumer Advocates and the Maryland Office of People's Counsel; WC Docket No. 05-25, RM-10593; at 3-4 (filed Jan. 22, 2016).