



April 5, 2016

**Ex Parte**

Ms. Marlene Dortch  
Secretary  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Re: Special Access for Price Cap Local Exchange Carriers (WC Docket No. 05-25);  
AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local  
Exchange Carrier Rates for Interstate Special Access Service (RM-10593)

Dear Ms. Dortch:

On Wednesday, March 30, Jonathan Banks and I met with Stephanie Weiner, Senior Legal Advisor to Chairman Wheeler; Deena Shetler, Wireline Competition Bureau; and William Dever and Joel Rabinovitz, Office of General Counsel regarding the above-referenced proceeding. We discussed the guidance regarding the confidentiality of analyses performed on confidential special access data as described in a Public Notice released one day before comments were scheduled to be filed in this proceeding,<sup>1</sup> which led to significant and unnecessary redaction of crucial information germane to the examination of competition in the special access marketplace and necessary for parties and the general public to participate effectively in this and related proceedings.

On March 4, USTelecom and INCOMPAS submitted a list of categories of aggregated data that parties should be permitted to include in their public comments and other filings in this proceeding because they do not reveal company-specific confidential information, and asked that the Commission confirm that aggregated data meeting those criteria need not be redacted from public filings.<sup>2</sup> That list was not intended to be exhaustive. Moreover, because these categories by design provide sufficient protection against disclosure of company-specific confidential information, we encouraged the Commission to treat them as a “safe harbor” for parties to follow in filing their public comments. We also asked that the Commission promptly address two other outstanding requests submitted by parties with their comments more than two months ago by confirming that there is no per se restriction on disclosing aggregated data

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<sup>1</sup> Public Notice, *Parties are Reminded That Results of Analyses of the Highly Confidential Data Filed in Response to the Business Data Services (Special Access) Data Collection are Highly Confidential*, WC Docket No. 05-25, RM-10593, DA 16-81 (Jan. 21, 2016).

<sup>2</sup> See Ex Parte Letter of USTelecom and INCOMPAS, WC Docket No. 05-25, RM-10593, (filed Mar. 4, 2016) (attaching a nonexclusive list of categories of non-confidential aggregated data).

in public filings, including specifically the data contained in a White Paper attached to those filings.

During the meeting, we also discussed the importance of permitting transparency while not disclosing the specific data submitted by any particular provider, emphasizing that aggregated data that do not reveal company-specific, commercially sensitive, or proprietary information are not themselves confidential or highly confidential. The Commission has confirmed as much.<sup>3</sup> The Commission therefore may only restrict parties from disclosing aggregated data if that disclosure would violate a submitting party's right to and request for confidentiality by, for example, revealing, or enabling the discovery of market-sensitive data belonging to a particular company.<sup>4</sup> Moreover, the Commission itself routinely publishes aggregated data of the same nature that would be publically available to the general public in this proceeding absent the January 21 *Public Notice*.<sup>5</sup> Thus, parties should not be subject to more stringent confidentiality standards, and the Commission may not overly restrict the free flow of non-confidential information without good reason, in accordance with APA notice and comment requirements and the general obligation for agencies to conduct their actions in an open and transparent manner.

Consistent with this approach, all of the information derived from the data collection contained in the submissions by Drs. Israel, Rubinfeld, and Woroch could be publicly disclosed, because they contain only data aggregated at the national and MSA level (and in some cases the State level) that cannot be used to identify specific information submitted by any provider. For example, this approach would permit the disclosure of the tables in the White Paper that identify, for each MSA, the percent of census blocks where a competitor has deployed facilities

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<sup>3</sup> *Examination of Current Policy Concerning the Treatment of Confidential Information Submitted to the Commission, Report and Order*, 13 FCC Rcd 24816, 24853, ¶ 64 (1998) (“Aggregation of data ensures that confidential materials are released in a form that removes confidentiality issues.”). The Commission also stated that “releasing an order that cites to but does not reveal confidential information remedies confidentiality concerns.” *Id.*

<sup>4</sup> This includes where company-specific information can be reverse-engineered or otherwise reasonably ascertained because the aggregated data contains confidential or proprietary information of only one or two providers. See, e.g., Comments of the United States Telecom Association, WC Docket No. 07-38, GN Docket Nos. 09-47, 90-51 (filed Jul. 30, 2009) (explaining that the Commission “should avoid disclosure of aggregate data when such data could be disaggregated by a competitor operating in the region, making release of the aggregate data tantamount to release of raw data”).

<sup>5</sup> For example, the Commission routinely publishes reports that aggregate confidential and competitively sensitive data submitted on Form 477, including broadband data deployment reports. Broadband Data Deployment, available at <https://www.fcc.gov/general/broadband-deployment-data-fcc-form-477> (compiling and analyzing data filed by all facilities-based broadband providers on where they offer Internet access service at speeds exceeding 200 kbps in at least one direction). See also Internet Access Services, available at <https://www.fcc.gov/document/fcc-releases-new-data-internet-access-services-2> (compiling and analyzing data on US Internet access connections) (Internet access services reports); National Broadband Map, available at <http://www.broadbandmap.gov/data-download> (detailing US broadband availability).

and the number of business establishments covered by those census blocks. These data do not identify the names of the competitor(s), the names or location of the census blocks or business establishments covered by competitor(s), nor any other information that could be used to identify specific data submitted by any provider.

Further, we see no need to layer additional restrictions on the disclosure of certain aggregated data except where the Commission demonstrates that such restrictions are necessary to protect confidentiality. Specifically, we discussed with Commission staff the need to protect from public disclosure information that includes data from fewer than three providers where one provider has an overwhelming market share, to prevent reverse engineering that could reveal company-specific confidential information. We agreed generally that such a restriction would serve a valid purpose in some circumstances, but only where company-specific confidential information would be revealed without it. For example, market share data within an identified MSA with only two providers could be used by either of those providers to determine the market share of the other. However, if the market share data was limited to unidentified census blocks within an MSA, whether or not identified, the same ability to derive company-specific information does not exist. We therefore encourage the Commission not to layer this additional restriction onto the categories of non-confidential aggregated data submitted by USTelecom and INCOMPAS, or otherwise to establish a blanket requirement that parties ensure that aggregated information contain data from three or more providers as a prerequisite to filing such aggregated information publically.<sup>6</sup>

Finally, we expressed concern that the Commission's White Paper examining the state of competition and practices in the special access services marketplace has not been made available to the public, and stated the importance of providing adequate time for public review before the Commission makes a decision in the special access proceeding.

Please do not hesitate to contact the undersigned if you have questions or concerns.

Respectfully submitted,



Diane Griffin Holland  
Vice President, Law & Policy

cc: Stephanie Weiner, Senior Legal Advisor to Chairman Wheeler  
Deena Shetler, Wireline Competition Bureau  
William Dever, Office of General Counsel  
Joel Rabinovitz, Office of General Counsel

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<sup>6</sup> Such a requirement would be overly burdensome without providing additional benefit in many instances, especially where company names, market shares, locations, etc. are not revealed nor derivable from the filings.