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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Before the

Federal Communications Commission

Washington, D.C. 20554

In the Matter of	)	
	)	
Access Charge Reform	)	CC Docket No. 96-262
	)	
Price Cap Performance Review for Local Exchange Carriers	)	CC Docket No. 94-1
	)	
Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers	)	CC B/CPD File No. 98-63
	)	
Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA	)	CC Docket No. 98-157

PETITION FOR PARTIAL RECONSIDERATION

Network Access Solutions Corporation ("NAS"), by its attorneys and pursuant to Section 1.429 of the Commission's Rules, hereby petitions for partial reconsideration of the FCC's Fifth Report and Order in this proceeding.[1] In that order, the FCC adopted several measures that give price cap-regulated ILECs increased flexibility to set prices for their dedicated transmission service offerings as competition develops. Below, NAS urges the Commission to reconsider two decisions it made in its order. First, the agency should grant an ILEC Phase I relief for those dedicated transmission service offerings in a given MSA that are below DS3 capacity only if the ILEC demonstrates that competitors provide an alternative source of transmission facilities *via*

1. Access Charge Reform, *Fifth Report and Order and Further Notice of Prop. Rule Making*, FCC 99-206 (rel. Aug. 27, 1999) ("Fifth R&O"). Notice of the Fifth R&O was published in the Federal Register on September 22, 1999 (64 Fed. Reg. 51258).

collocation in at least 50 percent (rather than 15 percent as the order provided) of the ILEC's central offices ("COs") in that MSA. Second, the Commission should grant an ILEC Phase I relief for those dedicated transmission offerings in a given MSA that are DS3 capacity or above only if the ILEC demonstrates that competitors provide an alternative source of transmission facilities *via* collocation in at least 30 percent (rather than 15 percent as the order provided) of the ILEC's COs in that MSA.

DISCUSSION

In its order, the FCC established a mechanism by which price cap-regulated ILECs can obtain increased flexibility to set the price at which they sell dedicated transmission services. That mechanism awards increased pricing flexibility in two phases. Each phase requires a successively more stringent showing to demonstrate that the dedicated transmission services market is sufficiently competitive to justify the specific price setting freedom covered by that phase. NAS is concerned in this petition only with Phase I relief. Phase I relief permits an ILEC to enter into individually negotiated contracts with customers for discounted dedicated transmission services.[2]

The Commission divided the dedicated transmission services market into two segments in its order, and for each segment it adopted a different trigger for determining an ILEC's entitlement to Phase I pricing flexibility. The agency defined the first market segment as dedicated transport and all aspects of special access other than the channel termination that runs from an end user premises to that user's serving wire center ("end user channel termination"). It defined the second market segment as end user channel terminations. To qualify for Phase I relief in a given MSA for the first market segment, the Commission held that the ILEC must show that unaffiliated

2. Fifth R&O at ¶ 69.

carriers provide an alternative source of transmission facilities *via* collocation in 15 percent of the COs in that MSA.[3] To receive Phase I relief for end user channel terminations in that MSA, the agency required the ILEC to show that competitors provide an alternative source of transmission facilities *via* collocation in 50 percent of the COs in that MSA.[4]

The trigger mechanism for Phase I price-setting flexibility obviously has important ramifications. If the trigger is set too low, competitors will abandon their sunk investment in the face of a predatory pricing onslaught, and competition in the supply of transmission facilities will be lost. If the trigger is set too high, ILECs will be shackled with unnecessary price regulation to the detriment of consumers.

A. The 15 Percent Phase 1 Price-Setting Flexibility Trigger Is Unlawful Because the Commission Failed to Show that This Trigger Will Achieve the Objective that It Is Supposed to Achieve

The Commission's decision to let ILECs set by contract the price of all dedicated transmission services other than end user channel terminations in a given MSA when an alternative source of transmission facilities is available through collocation in 15 percent of the MSA's COs (as opposed to some different percentage of COs) is unlawful because the agency offered no rational explanation for its selection of a 15 percent trigger. In order to sustain an order against the claim that it is arbitrary and capricious, the agency must articulate the order's rationale and explain why that order will achieve its intended objective.[5] In this case, the Commission offered two explanations

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3. *Id.* at ¶ 93.

4. *Id.* at ¶ 100.

5. *See United States v. FCC*, 707 F.2d 610, 618 (D.C. Cir. 1983).

for why it selected a 15 percent trigger, but neither is rational. First, although competitors may have collocated in 17.9 percent of the Norfolk LATA wire centers and may have installed 2,200 miles of fiber in that LATA, this fact does not help justify the agency's use of a 15 percent trigger since it has no bearing on whether a 15 percent trigger is rational.[6] Second, the fact that evidence of collocation may "underestimate the extent of competitive transmission facilities" because non-collocated carriers may provide an alternative source of transmission capacity in some situations likewise does not help justify use of a 15 percent trigger since it too has no bearing on whether a 15 percent trigger is rational.[7]

Not only was the FCC's decision to impose a 15 percent trigger arbitrary, it also is so low that it almost certainly would give ILECs an unfair ability to suppress competition in the dedicated transmission services market. For example, while competitors had collocated in far more than 15 percent of the COs in *more than half* of the Bell Atlantic's LATAs as of January 1 of this year, including all of the northeast corridor from Washington, D.C. to Boston,[8] those best positioned to take advantage of competitive dedicated transmission offerings, large IXCs, have argued strenuously that Bell Atlantic is the *only* supplier of dedicated transmission facilities in substantially all of these areas.[9] The fact that the 15 percent trigger would likely give an ILEC pricing flexibility

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6. *See* Fifth R&O at ¶ 95.

7. *See id.* In any event, the Commission cited no evidence regarding the extent to which carriers provide transmission facilities in competition with ILECs in MSAs without collocating in COs serving those MSAs, which would be required in order to evaluate the rationality of a 15 percent trigger.

8. Petition of Bell Atlantic for Forbearance, Attachment C, Table 4.

9. *See* Comments of AT&T in CC Docket Nos. 96-262 and 94-1 at 10 (Oct. 26, 1998) ("there (continued...)

sooner than even ILECs themselves had requested also is evidence that the 15 percent trigger is too low. For example, Bell Atlantic has indicated its belief that until non-Bell Atlantic suppliers provide dedicated transmission facilities sufficient to cover 75 percent of total demand, pricing flexibility is not justified.[10] Yet to judge by Bell Atlantic's own data, a typical urbanized area may not reach this level of competition in the supply of transmission facilities until collocators are present in *at least 30 percent* of the COs in that area. In Eastern Massachusetts, for example, Bell Atlantic's own data shows that an alternative supplier of transmission facilities is present in 16.9 percent of the COs -- above the Commission's 15 percent trigger -- yet these COs account for only 70.1 percent of the demand -- well below Bell Atlantic's 75 percent threshold. Similarly, while dedicated transmission facility competitors are present in 17.9 percent of the Norfolk COs, these competitors account for only 68.8 percent of the demand for such facilities. In Baltimore, by contrast, competitors are present in 32.3 percent of the COs, and these COs account for 78.6 percent of the demand -- just rising above Bell Atlantic's 75 percent threshold.[11] Since urbanized Baltimore is likely to be representative of the conditions in a typical MSA, it is reasonable to assume that collocation in 30

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9. (...continued)
is presently no significant competition in any of the ILECs' exchange access markets"); Comments of MCI in CC Docket Nos. 96-262, 94-1 at 5 (Oct. 26, 1998) ("our ability to move access minutes off of ILEC networks and on to our own or other new entrants' networks is sharply constrained").

10. Petition of Bell Atlantic for Forbearance, Attachment C, ¶ 40 ("Bell Atlantic only seeks forbearance where at least 75 percent of the demand in a state is subject to a competitive alternative").

11. *Id.* Attachment C, Table 4.

percent of COs means that competitors can address approximately 75 percent of the demand for high-capacity dedicated transmission services.

B. The Commission Should Use, for All Low-Capacity Dedicated Transmission Services, the Same 50 Percent Phase I Trigger that It Adopted for Channel Terminations, and it Should Increase the Phase I Trigger for High-Capacity Dedicated Transmission Services from 15 Percent to 30 Percent

The Commission should modify two decisions it made in its order. First, it should distinguish low-capacity dedicated transmission service from high-capacity dedicated transmission service and then apply the 50 percent Phase I trigger to all *low-capacity* services rather than applying that trigger only to one type of low-capacity service, end user channel terminations. For this purpose, a high capacity service should be defined as a service providing DS3 bandwidth or greater, and a low capacity service should be defined as one providing less than DS3 bandwidth. Second, the Commission should raise the Phase I trigger for *high-capacity* services to 30 percent from the 15 percent trigger established in the order.

Considerations that led the Commission to set the Phase I trigger at 50 percent for end user channel terminations support application of the same trigger to *all* low-capacity dedicated transmission services. In its order, the Commission held that Phase I pricing flexibility is justified for end user channel terminations only if competition in the supply of dedicated transmission facilities is available in at least 50 percent of all COs in a given MSA (rather than a smaller percentage of COs) because of two important differences between the end user channel termination market and other dedicated transmission service markets. First, users of end user channel

terminations are far more broadly dispersed than users of other dedicated transmission services.[12] Second, the typical end user channel termination provides significantly lower bandwidth (usually below DS3) than do many other types of dedicated transmission service.[13] For high bandwidth services, the existence of a competitive supplier in substantially less than 50 percent of a given MSA's COs may demonstrate a level of sunk investment in transmission facilities that is sufficient to prevent the ILEC from pricing these high bandwidth services predatorily in the short term since the universe of COs through which such services are provided is substantially smaller than the total number of COs in the MSA. On the other hand, dedicated transmission services with less than DS3 bandwidth share more characteristics of end-user channel terminations than of high-capacity transmission services since a supplier of these low bandwidth services must be more widely collocated given that low bandwidth services are used by small businesses, small CLECs and Internet service providers (ISPs) and other low-volume users who are not highly concentrated in particular geographic locations.[14] The FCC itself acknowledges that competition in the geographically dispersed, low bandwidth transmission market is more susceptible to exclusionary pricing than is competition in the market for geographically concentrated, high-capacity service.[15]

In addition to defining high-capacity dedicated transmission service as a service providing DS3 capacity or above, the Commission also should raise the threshold for Phase I relief for all high-capacity services from 15 percent. As discussed above, use of a 15 percent trigger is

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12. Fifth R&O at ¶ 102.

13. *Id.*

14. *Id.*

15. *Id.* at ¶ 88.

arbitrary and capricious since its use is totally without record support. By contrast, there is record support for a 30 percent trigger as discussed above.

CONCLUSION

The Commission should reconsider its order as described above.

Respectfully submitted,

NETWORK ACCESS SOLUTIONS CORPORATION

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