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August 31, 2001

Magalie Roman Salas
Secretary
Federal Communications Commission
Room TW-A325
445 Twelfth Street, S.W.
Washington, D.C. 20554

Re: CC Dkt. Nos. 96-98, 96-262

Dear Ms. Salas:

This letter is written on behalf of Time Warner Telecom Inc. ("TWTC") in response to assertions made by SBC Communications Inc. ("SBC") that the Commission should not adopt a Notice of Proposed Rulemaking ("NPRM") concerning special access performance measures because to do so would be inconsistent with the Commission's decision to grant price cap ILECs pricing flexibility for special access. In particular, SBC has argued that the Commission has concluded that the competitive pressures on an ILEC that has received Phase II pricing flexibility for special access under the competitive triggers established in the *Pricing Flexibility Order*[1] are sufficient to restrain an ILEC from charging unreasonable rates. SBC further asserts that ILECs have received Phase II pricing flexibility in MSAs accounting for 2/3 of special access revenues, and that therefore ILECs are broadly subject to competitive pressures that discipline price and, by the same logic, prevent ILECs from providing unreasonably low service quality.[2]

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[1] *See Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, 14 FCC Rcd 14221 (1999) aff'd *WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001) ("*Pricing Flexibility Order*").

[2] *See* Letter from Brian Benison, Associate Director Federal Regulatory, SBC Telecommunications, Inc. to Ms. Magalie Roman Salas, CC Docket No. 96-98, at 3 (Aug. 17, 2001) ("Given that the FCC has found that pricing flexibility triggers constrain an ILEC's ability to set unreasonable prices, how could the FCC conclude that the ILECs simultaneously maintain the ability to sustain unreasonable service quality?" (italics and underlining omitted)).

This argument is fundamentally flawed on a number of levels. To begin with, as recently as November of last year, the Commission rejected ILEC petitions for forbearance from dominant carrier regulation in the provision of special access and high capacity dedicated transport services in the urban markets with the largest amount of competitive entry.[3] The Commission found that there was simply no basis for concluding that ILECs "are no longer dominant in the provision of special access and high capacity dedicated transport services or that sufficient competition exists to preclude anti-competitive conduct in those markets." *Dominance Order* ¶ 33.

Moreover, as the Commission observed, "[a]bsent sufficient competition in, or dominant carrier regulation of [the market for special access and dedicated transport] . . . BOC petitioners would be able to charge unjust and unreasonably discriminatory rates for special access and high capacity dedicated transport services." *Id.* ¶ 32. An ILEC could exploit its market power by charging unreasonably high rates or by degrading service quality. While existing price regulation addresses the former, only performance measures and penalties (absent competition) can address the latter. There is thus every reason to proceed with the NPRM on performance measures and penalties.

Nor is it any answer to suggest, as SBC does, that there is no need for performance requirements where an ILEC has received Phase II pricing flexibility. In Phase II, ILECs gain freedom from price cap and rate structure regulation. In order to obtain such relief for dedicated transport as well as special access services other than channel terminations between ILEC end offices and customer premises, an ILEC must show that competitors have collocated in 50 percent of the wire centers in an MSA or in wire centers representing 65 percent of the ILEC's revenues from the services in question. 47 C.F.R. § 69.709(c).[4] For Phase II relief for special access channel terminations between ILEC end offices and customer premises, an ILEC must demonstrate the existence of collocation in 65 percent of wire centers or collocation representing 85 percent of the ILEC's revenues from channel terminations. 47 C.F.R. § 69.711(c). Thus, Phase II relief is available for an ILEC throughout an MSA even where the ILEC faces no competitive entry in a significant portion (50 percent of the wire centers or 35 percent of the wire centers, depending on the service) of the MSA. The Commission therefore concluded that an ILEC that receives Phase II relief may charge "an unreasonably high rate for access to an area that lacks a competitive alternative." *Pricing Flexibility Order* ¶ 144. Accordingly, the Commission refused to deem ILECs non-dominant in the provision of special access service, even after Phase II relief has been granted. *Id.* ¶ 151. Most importantly, this means that ILECs are still

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[3] *See Petition of U S West Communications, Inc. et al*, Memorandum Opinion and Order, 14 FCC Rcd 19947 (1999) ("*Dominance Order*").

[4] In addition, the triggers for both Phase I and Phase II pricing flexibility for dedicated transport/special access services other than channel terminations between ILEC end offices and customer premises as well as channel terminations between ILEC end offices and customer premises require that the ILEC demonstrate that at least one of the collocators in each wire center is using transport facilities owned by a transport provider other than the price cap ILEC to transport traffic from that wire center. *See* 47 C.F.R. §§ 69.709, 69.711.

required in Phase II to file generally available tariffs that customers can challenge and that the Commission can itself investigate. *Id.*[5]

Indeed, tariff filings in Phase II perform a function that closely resembles the role that performance requirements would play. As explained, where an ILEC has received Phase II relief, it still has the incentive to charge unreasonably high rates to customers without competitive alternatives. Tariff filing requirements protect those customers against unreasonable prices. Similarly, an ILEC that has received Phase II relief has the incentive to degrade service quality for customers without competitive alternatives. This is especially true for ILEC special access customers like TWTC that are also the ILEC's competitors.[6] Performance requirements protect those customers against unreasonable service quality. In all cases, of course, an ILEC with pricing flexibility has the right to enter into agreements that include prices and service quality levels that differ from those that are available under the tariff and performance requirements. Some agreements may include lower prices and/or higher service quality commitments. It is even conceivable that some customers with competitive alternatives would prefer lower prices for lower service quality (such as longer provisioning times). But it is critical that tariffs and performance requirements establish a baseline level of price and performance that is available to customers without competitive alternatives.

While this is necessary under Phase II, it is even more critical for those ILECs that are eligible for Phase I flexibility only or for no flexibility at all. In Phase I, ILECs gain the right to file, on one day's notice, tariffs offering volume and term discounts and contract tariffs for the services for which flexibility has been granted. To gain this flexibility for dedicated transport as well as special access services other than channel terminations between ILEC end offices and customer premises, ILECs must demonstrate that competitors have collocated in only 15 percent of the wire centers in an MSA or in wire centers representing only 30 percent of the ILEC's revenues for the relevant services. 47 C.F.R. § 69.709(b). For channel terminations between ILEC end offices and customer premises, the

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5 In fact, one of the central reasons that the competitive triggers in the *Pricing Flexibility Order* were upheld by the D.C. Circuit is that the Commission retained dominant carrier regulation of ILECs after Phase II relief is granted,

> the Pricing Flexibility Order expressly does "not grant incumbent LECs all the regulatory relief . . . afford[ed] to non-dominant carriers." Order ¶ 151. Even those LECs which [sic] receive Phase II relief must still file tariffs. This is not insignificant; tariff filing is the "centerpiece of . . . common carrier regulation." Southwestern Bell Tel. Co. v. FCC, 19 F.3d 1475, 1479 (D.C. Cir. 1994). Therefore, the fact that the FCC did not engage in thorough competition analysis common in non-dominance proceedings does not render the FCC's action arbitrary and capricious.

WorldCom, Inc. v. FCC, 238 F.3d 449, 460 (D.C. Cir. 2001)

6 As TWTC has explained elsewhere, there are many situations in which TWTC cannot efficiently build connections to end user customers and where non-ILEC channel termination facilities are unavailable. *See* Reply Comments of TWTC, CC Docket No. 96-98 at 2 (June 25, 2001) (explaining that "there are many circumstances in which TWTC cannot use its own facilities to link its fiber transport network to the end user" and that, "it has been TWTC's experience that other competitive carriers generally do not have high-capacity loop facilities in place and are unwilling to build such facilities to connect buildings for which TWTC cannot deploy its own loop facilities"). In these cases, TWTC relies on ILEC special access as an input in its competitive offerings.

ILECs must demonstrate the existence of collocations in only 50 percent of wire centers or collocations representing only 65 percent of the ILEC's channel termination revenues. 47 C.F.R. § 69.711(b). Not surprisingly, the Commission held that this level of competitive entry is simply inadequate to prevent ILECs from charging unreasonably high rates to some customers. Accordingly, the Commission required, among other things, that ILECs that receive Phase I relief (1) continue to maintain generally available tariffs subject to price cap regulation to "ensure[] that no access customer will be required to pay dramatically higher access rates as a result of Phase I pricing flexibility, " *Pricing Flexibility Order* ¶ 122, and (2) make volume and term discounts as well as contract tariff arrangements available on a nondiscriminatory basis, *Id.* ¶¶ 124, 129. Of course, ILECs that are ineligible for even Phase I flexibility are subject to even more stringent safeguards. In either case, it is reasonable to impose service quality requirements in addition to the existing price regulations.

Finally, notwithstanding SBC's assertions to the contrary, the Commission's brief in the appeal of the *Pricing Flexibility Order* fully supports the need to impose service quality requirements on ILECs that receive pricing flexibility.[7] In its appellate advocacy, the Commission was careful to explain that the investment in collocation required by both Phase I and Phase II are insufficient by themselves to justify eliminating safeguards designed to prevent unreasonably high rates (and therefore unreasonably poor service quality). Thus, the Commission explained that it "took steps to protect consumers under the relaxed Phase II regime." FCC July 20, 2000 Brief at 27. Most importantly, the Commission emphasized that "ILECs must continue to file generally available tariffs" under Phase II. *Id*. This requirement, along with requirements that rates be just, reasonable and nondiscriminatory, are intended to "constrain the ILEC's incentive [in Phase II] to charge unreasonable rates at the outset, and help ensure that any unreasonable charges that become effective do not continue." *Id.* at 28. Indeed, a central theme of the Commission's defense of the *Pricing Flexibility Order* on appeal was that, even in Phase II, "the Commission did not deregulate the ILECs but in fact retained tariffing and other requirements to restrain abuse of market power." *Id.* at 29. Furthermore, as to Phase I, the Commission explained that it "established significant protections to ensure that Phase I pricing flexibility will not harm consumers." *Id.* at 24. For example, the FCC stressed the importance of the requirement that price cap rules continue to apply to ILECs in Phase I. As the Commission explained, this means that "customers may be able to obtain *lower* rates, pursuant to volume and term discounts or contract tariffs, but the ILECs' ability to *increase* rates for those services is still constrained by price caps." *Id.*

In sum, the Commission has concluded that an ILEC continues to have the incentive to charge unreasonably high special access rates to certain customers, even where the ILEC has received pricing flexibility. Where an ILEC has the incentive to increase prices, it also has the incentive to lower quality. It follows that the Commission's pricing flexibility decisions are completely consistent with the need for service quality rules for special access.

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[7] SBC quotes passages from the brief in which the Commission stated that the collocation triggers offer a "guidepost for determining whether there is a competitive presence sufficient to restrain a price cap LEC's incentives to charge unreasonable rates" and that the pricing flexibility triggers require enough capital investment by competitors to "alleviate concerns about anticompetitive pricing." FCC July 20, 2000 Brief at 14, 28.

Pursuant to Section 1.1206(b)(1) of the Commission's rules, 47 C.F.R. § 1.1206(b)(1), an original and one copy of this letter are being provided for inclusion in the above-referenced docket.

Sincerely,

_______/s/_______
Thomas Jones
Counsel for Time Warner Telecom

cc: Michelle Carey