

May 10, 2005

Ex Parte

Ms. Marlene H. Dortch, Secretary
Federal Communications Commission
445 Twelfth Street, S.W., Room TW-B204
Washington, DC 20554

**Re: *Special Access Rates for Price Cap Local Exchange Carriers, WC
Docket No. 05-25***

July 1, 2005 Annual Access Charge Tariff Filings, WCB/Pricing 05-22

Dear Ms. Dortch:

Pursuant to Section 1.41 of the Commission's Rules, 47 C.F.R. Sec. 1.41, the eCommerce & Telecommunications User Group ("eTUG") and the Telecommunications Committee of the American Petroleum Institute ("API") hereby request the Commission to adopt an interim X-Factor of 5.3 percent for the rates for interstate special access services provided by incumbent local exchange carriers subject to Price Cap regulation ("Price Cap LECs"). eTUG and API request that this interim X-Factor become effective July 1, 2005, and that it apply until such time as the Commission adopts a final order in this rulemaking proceeding.

As the Commission emphasizes in the Notice of Proposed Rulemaking, FCC 05-18, released January 31, 2005, par. 131 ("NPRM"), "we anticipate adopting an order prior to July 1, 2005 that will establish an interim plan to ensure special access price cap rates remain just and reasonable while the Commission considers the record in this proceeding. One interim option would be to impose the last productivity factor, 5.3 percent, that was adopted by the Commission and judicially upheld." The Commission sought comment on imposing this productivity factor as well as other interim alternative as a basis for interstate rates until the conclusion of this proceeding

Unfortunately, this intended course of action is in jeopardy because publication of the NPRM in the Federal Register was delayed for the unanticipated and unusually extended period of 72 days from release of the NPRM. Presently, the comment cycle will not be completed prior to July 1, as the Commission assumed in the NPRM.

Therefore, eTUG and API request the Commission to adopt an interim X-Factor of 5.3 percent for the implementation in the annual access filing (currently set for July 1, 2005).

The need for an interim X-Factor is clear. The five-year CALLS Plan is due to expire on July 1, 2005. *See Access Charge Reform, et al.*, CC Docket Nos. 96-262 *et al.*, Sixth Report and Order, 15 FCC Rcd. 12962 (2000) (“*CALLS Order*”). For the final year of the CALLS Plan, the special access price caps were to be frozen; the Commission’s rules provide that “[s]tarting in the 2004 annual filing, X shall be equal to GDP-PI for the special access basket.” 47 C.F.R. Sec. 61.45 (b)(1)(iv). Accordingly, unless the Commission acts promptly and adopts interim rules, the X-Factor for special access services in the upcoming 2005 annual filing on July 1, 2005, will be equal to GDP-PI – *i.e.*, the Price Cap rules will not require the LECs to reduce their special access rates from current excessive levels. *See NPRM* par. 131.

The Commission should not permit these excessive rates to continue, even on an interim basis. Foremost, the Commission never intended the special access X-Factor to remain equal to GDP-PI after the CALLS Plan expired. Rather, the Commission explained that “[t]he compromise advocated by CALLS will provide a solution to the contentious X-Factor prescription proceeding *for the term of the CALLS Proposal*.” *CALLS Order* par. 160 (emphasis added).

Moreover, as the Commission notes in the NPRM, “this record contains substantial evidence suggesting that productivity has increased and continues to increase in the provision of special access services.” *NPRM* par.131. (citing *NPRM* paragraphs 26-29). These conclusions were unambiguously confirmed by the Price Cap LECs’ 2005 ARMIS filings (for 2004). These filings demonstrate that the accounting rates of returns for the interstate special access services of three of the four largest Price Cap LECs to be in excess of 76%, with one of these carriers securing returns on special access services in excess of 81%. Under these circumstances, the Commission should implement its critical conclusion in the NPRM and require the LECs to share at least some of this productivity with ratepayers on an interim basis.

As the it proposes in the NPRM (par. 131), the Commission should adopt an interim X-Factor of 5.3%. This interim productivity factor would apply to the 2005 annual access filings, continuing for the duration of this rulemaking proceeding. As the Commission notes (*NPRM* par. 131), 5.3 percent was the last X-Factor upheld by the courts. *Bell Atlantic Tel. Cos. v. FCC*, 79 F3d 1195, 1202-05 (D.C. Cir. 1996). Setting the X-Factor at 5.3 percent on an interim basis is fully justified, especially in view of the added deference the Commission receives when fashioning interim relief. *See, e.g., CompTel v. FCC*, 117 F.3d 1068, 1073-74 (8th Cir. 1997); *MCI Telecomms. Corp. v. FCC*, 750 F.2d 135, 140 (D.C. Cir. 1984).

It is also submitted that the notice requirements of the Administrative Procedure Act have been satisfied inasmuch as the *NPRM* (par. 131) expressly placed interested persons on notice that the Commission was considering an order adopting a 5.3 percent X-Factor prior to July 1. *See, e.g. Forester v. Consumer Product Safety Commission*, 559

F.2d 774, 779 (D.C. Cir. 1977) (APA requires only a “reasonable opportunity to participate in the rulemaking process”). The interim relief proposed herein by eTUG and API fully complies with the requirement that interested parties have a reasonable opportunity to comment on the proposed interim rule.

In the alternative, in the event the Commission believes that the interim rule cannot practically be implemented before July 1, it should postpone the date of the annual access filing (until an interim X-Factor is determined) to ensure that the interim rule can be promulgated and implemented as soon as possible.

One electronic copy of this Notice is being submitted to the Secretary in accordance with Section 1.1206 of the Commission’s rules.

Respectfully submitted,

eCommerce & Telecommunications User Group Telecommunications Committee of the
American Petroleum Institute

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