

May 27, 2005

**BY ECFS**

Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, S.W.  
Washington, DC 20554

**Re: Ex Parte, WC Docket No. 05-25, RM-10593**

Dear Ms. Dortch:

ATX Communications, Inc., CTC Communications Corp., Pac-West Telecomm, Inc., US LEC Corp., and US Telepacific Corp. d/b/a US Telepacific request, as envisioned in the *NPRM* initiating the above-captioned proceeding, that the Commission establish interim requirements pending completion of this proceeding that will begin to move price cap ILEC special access prices towards a reasonable level.<sup>1</sup> As requested by the eCommerce & Telecommunications User Group (“eTUG”),<sup>2</sup> the Commission should promptly establish for special access an interim X-Factor of 5.3 percent. Absent application of an X-Factor, special access prices are unreasonable *per se* because they do not reflect productivity gains that characterize the telecommunications industry, effectively allocating all the benefits of productivity gains to price cap ILECs and none to their customers.

In addition, the Commission should establish interim requirements directed at moving special access prices towards more reasonable levels in areas where price cap ILECs have qualified for Phase II pricing flexibility. When the Commission established pricing flexibility, it anticipated that the level of competition in the marketplace that would be captured by the adopted pricing flexibility triggers would put *downward* pressure on special access rates and

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<sup>1</sup> *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 Docket No. 05-25, RM-10593, Order and Notice of Proposed Rulemaking, ¶ 131 (rel. Jan. 31, 2005) (“*NPRM*”).

<sup>2</sup> Letter from Brian R. Moir, Counsel for eTUG and C. Douglas Jarett, Counsel for API, to Marlene H. Dortch, Secretary FCC (May 10, 2005) (“eTUG/API Letter”).

cause them to be *reduced* to cost-based and forward-looking levels.<sup>3</sup> The Commission believed that BOCs that obtained Phase II pricing flexibility would begin lowering special access rates in specific markets (*i.e.*, MSAs) in response to competitive pressures.<sup>4</sup> Indeed, when the *Pricing Flexibility Order* was adopted, two Commissioners specifically acknowledged this and one stated that “[b]y first providing incumbents with some downward pricing flexibility for high-capacity services, we allow them to respond to the new competitive marketplace for these services. Consumers should also benefit from lower prices.”<sup>5</sup>

Contrary to the Commission’s expectations, competition has not constrained special access pricing.<sup>6</sup> Substantial evidence in the record demonstrates that, as noted in the *NPRM* and other filings in this proceeding, price cap ILECs have not used this flexibility to lower special access prices in any MSA for which they have received Phase II pricing flexibility. Rather, they have either maintained or raised rates in each of these MSAs.<sup>7</sup> Pricing flexibility rules, therefore,

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<sup>3</sup> The Commission’s longstanding goal is that interstate access charges reflect the forward-looking costs of providing those services. *See NPRM*, ¶ 65 & n.174 (citing *Access Charge Reform Order*, 12 FCC Rcd at 16001-03, 16092-100, ¶¶ 42-49, 258-74).

<sup>4</sup> *See NPRM*, ¶ 70, n.182 (citing *Pricing Flexibility Order*, 14 FCC Rcd at 14257-58, 14260, 14301, ¶¶ 67-69, 72-74, , 153-54); *see also Pricing Flexibility Order*, ¶¶ 122, 136. Although the Commission recognized that Phase II pricing flexibility may enable BOCs to increase prices to the extent their services are below cost, *Pricing Flexibility Order*, 14 FCC Rcd at 14301, ¶ 155, that is not the case given the excessive special access returns that BOCs are experiencing.

<sup>5</sup> *See Pricing Flexibility Order*, 14 FCC Rcd at 14390 (Separate Statement of Commissioner Ness); *see also* 14 FCC Rcd at 14391 (Separate Statement of Commissioner Furchtgott-Roth stating “It is very difficult to rationalize any occasion where the government stands between consumers and lower prices....Today’s Order establishes triggering mechanisms that will open the door to a degree of regulatory relief that will, in turn, provide lower prices to consumers.”).

<sup>6</sup> Although under price caps the Commission permitted BOCs to reduce prices in an unconstrained fashion, this has not occurred. *Access Charge NPRM, Order, and NOI*, 11 FCC Rcd at 21487-88, ¶ 305 (the Commission eliminated the lower service band indices and concluded that this would lead to lower prices and encourage LECs to charge rates that reflect the underlying costs of providing exchange access services. It also found that the PCI and upper pricing bands adequately control predatory pricing and that greater downward pricing flexibility would benefit consumers both directly through lower prices and indirectly by encouraging only efficient entry.).

<sup>7</sup> *NPRM*, ¶ 70 & n.183 (citing AT&T Petition for Rulemaking at 11-12; Worldcom Comments at 7-8); *see* RM 10593, Letter from David L Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, attachments: “Declaration of Lee Selwyn (October 4, 2004)” at 68-69 (explaining that “there is abundant evidence demonstrating that the RBOCs have the power to increase their special access rates in the wake of the pricing flexibility order”), “Reply Comments of AT&T” at 83 (explaining that “the Bells’ have stiffly increased prices in pricing flexibility areas.”), “Reply Declaration of Lee Selwyn (October 19, 2004)” at 58 (finding “that higher pricing flexibility rates were substituted for lower price cap rates”), “Letter from C. Frederick Beckner III to Marlene H. Dortch, dated November 8, 2004 (with ex parte Declaration of Lee Selwyn)” (demonstrating that Verizon’s own analysis proves that “Verizon has raised prices in pricing flexibility areas”), “Letter from C. Frederick Beckner III to Marlene H. Dortch, dated December 7, 2004” at 2 (proving “that Bellsouth’s special access rates in areas where it has obtained pricing flexibility are well above what it charges in whereas where it remains subject to price caps”); *see* RM 10593, Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users, to Marlene

fail to identify where competition is sufficient to prompt rate reductions to forward-looking cost-based levels or constrain BOCs from raising rates. Significantly, although the Commission had hoped that competition would have caused special access rates to decrease to forward-looking cost-based levels by now, it also said that it would act proactively, if necessary, to accomplish this; however, BOCs have been permitted to escape this obligation.<sup>8</sup>

Accordingly, as further interim relief, the Commission should first, prohibit any further price increases where BOCs have already obtained Phase II pricing flexibility. This is essential to prevent further harm caused by the inability of current pricing rules to accurately identify where competition is sufficient to constrain prices. The Commission should also require price cap ILECs to roll back to price cap levels any prices that have been increased since Phase II pricing flexibility was granted. This will at least preclude further harm caused by these price increases, although not undo the exorbitant, non-cost based prices that special access customers have paid. Unlike the relief AT&T sought in its petition, this relief “only restor[es] the rate levels that would have been in place had the Commission never adopted the pricing flexibility rules.”<sup>9</sup> In addition, the relief is justified to avoid further market disruptions that would be caused if BOCs with special access pricing flexibility continued to increase special access rates

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Dortch, Secretary, FCC (Sep. 13, 2004); RM 10593, Letter from Colleen Boothby, Counsel for Ad Hoc Telecommunications Users, to Marlene Dortch, Secretary, FCC, attaching Competition in Access Markets: Reality or Illusion A proposal for Regulating Uncertain Markets, at 35-37 (Aug 26, 2004) (explaining that persistent excessive RBOC pricing of special access services in areas where Phase II Pricing Flexibility has been granted demonstrates that the level of competition in those areas is not sufficient to constrain monopoly pricing practices); *see also* WC Docket No. 05-65, Reply Comments of Ad Hoc Telecommunications Users Committee, Reply Declaration of Susan M. Gately, at 13-14 (May 10, 2005) (for a 10-mile DS1 special access circuit, SBC charges 25% more where it has pricing flexibility); CC Docket 05-65, Comptel/ALTS Reply Comments, Lee Selwyn Reply Declaration at 49-57 (May 10, 2005).

<sup>8</sup> In 1997, the Commission stated that “[w]here competition has not emerged, we reserve the right to adjust the rates in the future to bring them in line with forward-looking costs. To assist us in that effort, we will require price cap LECs to submit forward-looking cost studies of their services no later than February 8, 2001 and sooner if we determine that competition is not developing sufficiently for the market-based approach to work.” *Access Charge Reform Order*, 12 FCC Rcd at 16003, ¶ 48. However, in the *CALLS Order*, the Commission adopted a five-year interim regime that was designed to phase out implicit subsidies and (as it pertains to access charges) to move towards a more market-based approach to ratesetting. *See CALLS Order*, 15 FCC Rcd at 12965, 12977-79, ¶¶ 4, 36-42. In adopting this plan, the Commission offered price cap carriers the choice of completing the forward-looking cost studies required by the *Access Charge Reform Order* or voluntarily making the rate reductions required under the five-year *CALLS* plan. *See id.*, 15 FCC Rcd at 12974, 12983-86, ¶¶ 29, 56-62. The Commission permitted carriers to defer the planned forward-looking cost studies in favor of the *CALLS* plan because it found the plan to be “a transitional plan that move[d] the marketplace closer to economically rational competition, and it [would] enable [the Commission], once such competition develops, to adjust our rules in light of relevant marketplace developments.” *See id.*, 15 FCC Rcd at 12977, ¶ 36. Unsurprisingly, all price cap carriers avoided submitting forward-looking cost studies and opted for the *CALLS* plan. *See NPRM*, ¶ 14 (citing *Petition for Forbearance of Iowa Telecommunications Services, Inc. d/b/a Iowa Telecom Pursuant to 47 U.S.C. § 160(c) from the Deadline for Price Cap Carriers to Elect Access Rates Based on the CALLS Order or a Forward Looking Cost Study*, CC Docket No. 01-131, Order, 17 FCC Rcd 24319, 24320, ¶ 3 (2002)).

<sup>9</sup> *NPRM*, ¶ 130.

Marlene H. Dortch, Secretary

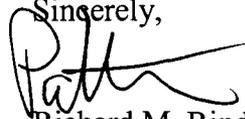
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while the Commission “moves towards broad reforms” in this proceeding.<sup>10</sup> Both of these aspects of interim relief would be administratively simple for price cap ILECs to implement and would not burden the Commission.

As the Commission has noted, market power can be exercised through high prices and also through tariff terms and conditions designed to exclude competitors from the market.<sup>11</sup> Growth commitments, prohibitions on using UNEs, and limits on the ability of the customer to purchase service from other providers are examples of terms and conditions that can be unreasonable. As interim relief, the Commission should establish a “fresh look” opportunity that would permit special access customers to escape contract provisions and seek service from competitive alternatives, if available.<sup>12</sup> This will also help to move special access pricing toward more reasonable levels on an interim basis.

Sincerely,



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Patrick J. Donovan  
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ATX Communications, Inc.  
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US LEC Corp.  
US Telepacific Corp. d/b/a US Telepacific

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<sup>10</sup> *NPRM*, ¶ 130 (citing *Competitive Telecommunications Ass’n v. FCC*, 309 F.3d 8, 14 (D.C. Cir. 2002)).

<sup>11</sup> *NPRM*, ¶ 114.

<sup>12</sup> Courts have held that “the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful...and to modify other provisions of private contracts when necessary to serve the public interest.” *Western Union Tel Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987). The FCC has exercised this authority and has granted “fresh look” relief in the past.