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***Via Electronic Submission***

Ms. Marlene Dortch, Secretary  
Federal Communications Commission  
445 12<sup>th</sup> Street, SW  
Washington, DC 20554

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

Dear Ms. Dortch:

As the Commission has held in numerous contexts, prescriptive economic regulation – particularly rate regulation – is warranted only in clear cases of market failure and, even then, only when it can be shown that the benefits of government intervention would outweigh its very substantial costs.<sup>1</sup> The record in the Commission’s special access refresh proceeding overwhelmingly establishes both the complete lack of any market failure in special access services and the enormous costs that would be entailed in resurrecting regulatory policies that were abandoned many years ago as unnecessary, inefficient, and inhospitable to investment and competition. Based on this record and the Commission’s longstanding preference for market-based rates over government mandates, the Commission should reject calls for re-regulation of special access services and should, instead, continue and extend the market-based policies it implemented long ago when it became clear that high capacity transmission services could and would be competitively supplied.

AT&T and other ILECs have submitted detailed record evidence demonstrating that since the advent of pricing flexibility, prices have been *decreasing* year-over-year. These data, taken from actual billing records, show substantial and sustained decreases for special access services as a whole, for DS1 and DS3 services individually, for both price cap and pricing flexibility areas,

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<sup>1</sup> See, e.g., *Orloff v. Vodafone AirTouch Licenses*, 17 FCC Rcd 8987 (2002), ¶ 22, n.69 (2002) (“the Commission generally has relied on market forces, rather than regulation, except when there is market failure”); *700 Megahertz Auction Proceeding*, FCC 07-132, Separate Statement of Commissioner McDowell, at 2 (“In the absence of market failure, I favor a market-based pro-competitive solution to the challenges raised in this proceeding over a prescriptive regulatory approach”); *Access Charge Reform*, 14 FCC Rcd. 14221, ¶ 144 (1999) (“Almost 20 years ago, the Commission determined that regulation imposes costs on common carriers and the public, and that a regulation should be eliminated when its costs outweigh its benefits”).

for all customers collectively and, individually, for the most vocal proponents of re-regulation.<sup>2</sup> Those that complain about special access prices have neither attempted to rebut these showings nor bothered to put in any of their own evidence of the trends in the prices they pay.

Under these circumstances, the Commission cannot conclude that its policies have failed and that intrusive price re-regulation is warranted. As the Commission has long recognized, the hallmarks of market power are rising prices and falling output.<sup>3</sup> Here just the opposite is occurring: prices are falling while output is rising. The only conclusion the Commission could logically draw from these patterns is that, contrary to the rhetoric of those who seek to use the regulatory process to increase their profit margins, market forces are driving special access pricing and delivering concrete benefits to the businesses that use special access.

In addition to demonstrating that prices are declining everywhere for all services, we have shown, based on the incomplete information available to us, that competitors have blanketed urban areas, which account for the majority of special access demand, with their own facilities. And we have shown that facilities-based competition is now spreading rapidly to more far-flung areas as technology advances and the exponential growth of wireless bandwidth requirements have spurred broad deployment of special access services by wireless and cable providers to cell tower, small business and other locations outside the commercial areas where special access demand has been most heavily concentrated.

Specifically, we have submitted highly granular information that establishes that competitive fiber blankets the downtown and other commercial centers where special access demand is heavily concentrated and, indeed, is already connected to or within striking distance of the buildings that account for the bulk of special access demand. We have identified the small subset of wire centers that account for the majority of our special access demand and have submitted detailed maps that plot the known fiber of dozens of CLECs capable of serving that demand.<sup>4</sup> We have catalogued our competitive losses – showing that in some areas competitors

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<sup>2</sup> See, e.g., SBC Reply at 27-31 & Casto Reply Decl. ¶¶ 27-29 (documenting double digit percentage declines for both DS1 and DS3 services from 1999 through 2004); AT&T Supp. Comments at 22-23 & Casto Supp. Decl. ¶ 57 (documenting double digit percentage declines for both DS1 and DS3 circuits from 2004 through the beginning of 2007); Verizon at 10-13 & Taylor Supp. Decl. ¶¶ 6-24 (“Between 2002 and 2006, prices paid for DS1 services fell an average of 5.28 percent per year, while prices paid for DS3 services during that time fell an average of 4.97 percent per year”); Qwest at 45-47 & Cogan Decl. ¶¶ 16-17 (documenting significant declines in revenue per DS0 equivalent, as well as sharp declines in average revenues for DS1 and DS3 channel terminations). See also GAO Report at 13 (“the decrease [in DSn-level pricing] appears to be consistent with the prospect of competition that the FCC predicted”).

<sup>3</sup> See, e.g., Fourth Report and Order, *Competitive Carrier*, 95 F.C.C 2d. 554, 558 (1983) (“The basic concept of market power is the ability to raise prices by restricting output”).

<sup>4</sup> See, e.g., SBC Comments at 13 & Casto Decl. ¶¶ 12, 16-20 & Attachment 1; AT&T Supp. Comments at 10-11 & Casto Supp. Decl. ¶ 6 & Attachment; Verizon at 15-17 & Attachment H and & Garzillo Decl. ¶ 3; Qwest Comments at 22; *Verizon Ex Parte Letter*, WC Docket No. 05-25 (filed Aug. 31, 2007) (attaching article quoting a Time Warner Telecom senior executive’s statement that “We have 900,000 buildings within just a mile of our fiber footprint”).

already serve nearly half of the DS1 and DS3 circuit demand.<sup>5</sup> We have documented that below-cost UNE alternatives to special access remain broadly available.<sup>6</sup> And we have shown that because our special access rates are set over broad geographic areas, the intense and growing facilities-based competition in the areas where demand is concentrated disciplines prices throughout the MSAs where pricing flexibility has been granted, and not merely with respect to the individual buildings or locations to which competitors have already deployed competing facilities.<sup>7</sup>

Proponents of special access re-regulation do not refute these showings with facts of their own. To the contrary, they have gone out of their way to conceal the relevant facts within their control. Although they own competing networks, they have provided no maps of their facilities, no lists of buildings they serve, no analyses of the special access demand within easy reach of their fiber, and no evidence of their competitive successes or plans for expansion. Nor have they provided any hard data detailing the locations where alternative providers have offered to or could supply them services, and no information about their own plans to purchase (or self-supply) competitive services. And they refuse even to confront the evidence that *has* been submitted in the record and that facilities-based competition is intense and widespread and becoming more so each day.

The same pattern exists with respect to intermodal competition. We have submitted unassailable evidence that cable and wireless special access alternatives have been widely and successfully deployed, that these intermodal providers are specifically targeting the lower demand and more remote customer locations that re-regulation proponents previously contended were entirely dependent upon ILEC services, and that wireless and other customers are already using these intermodal DS<sub>n</sub> alternatives at many remote locations.<sup>8</sup> We have identified the microwave and other wireless providers that are offering special access services, demonstrated that these commercially proven technologies are widely available on attractive terms and are experiencing extremely rapid growth, and documented that Sprint, T-Mobile and other special access customers, including AT&T Mobility and Verizon Wireless, are already purchasing thousands of

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<sup>5</sup> See, e.g., Qwest at 22; AT&T Comments at 16-21 & Casto ¶¶ 30, 45-54 (documenting competitive losses to CLECs, cable and wireless competitors); Verizon Comments at 7-10, 30-37 & Lew Decl. ¶¶ 22-39.

<sup>6</sup> See, e.g., AT&T Comments at 13 & Casto Supp. Decl. ¶ 13 (UNEs available in more than 90% of wire centers); Qwest Comments at 24 (UNEs available in “almost every” wire center); Verizon Comments at 15.

<sup>7</sup> See, e.g., AT&T Comments, Casto Supp. Decl. ¶ 21; Verizon Comments at 2-3, 31; Qwest Comments at 55-56.

<sup>8</sup> See, e.g., AT&T Comments at 14-24 and Casto Decl. ¶¶ 22-54; Qwest Comments at 29-39; Verizon Comments at 21-25 & Wells Decl. ¶¶ 6-7; Verizon Ex Parte Letter, WC Docket No. 05-25, (filed Sep. 5, 2007) (attaching press releases and web site materials from intermodal carriers confirming that they can and do provide widespread special access alternatives).

wireless DSN-level special access circuits.<sup>9</sup> The record likewise contains documented evidence that cable operators are offering a wide range of T-1 and other special access substitutes to small and medium businesses nationwide, that they are rapidly expanding their offerings, and that they are already winning substantial special access business.<sup>10</sup>

Here, again, our opponents respond with a struthious approach that is flatly inconsistent even with their own publicly announced actions. They do not deny that they have intermodal alternatives today, that they are already taking advantage of those alternatives and leveraging them to demand lower prices from their incumbent suppliers, and that they plan increasingly to do so in the future.<sup>11</sup> Instead, they merely note only that wireless and cable alternatives are not today available to every customer everywhere. But in a proceeding in which the Commission is assessing requests that it jettison its pricing flexibility rules and adopt new regulations that will apply *prospectively*, the Commission's decision must obviously be based, not only on conditions that currently exist, but also on how the competitive landscape is currently changing and what it will look like in the near future.<sup>12</sup> Wireless and other intermodal alternatives are plainly here to stay – the *majority* of wireless backhaul circuits worldwide are provided over wireless technologies – and will soon be available wherever customers demand them. And that applies with particular force to the complaints of large wireless special access customers whose rapidly increasing bandwidth requirements are causing intermodal and intramodal providers alike to line up to capture those substantial revenue opportunities.<sup>13</sup>

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<sup>9</sup> See, e.g., AT&T Comments at 15-18, 21-24 & Casto Supp. Decl. ¶¶ 22-29, 40-54; Verizon at 23-25, 28 & Wells Decl. ¶¶ 6-7; Qwest Comments at 29-35.

<sup>10</sup> See, e.g., AT&T Comments at 18-21, 21-24 & Casto Supp. Decl. ¶¶ 30-39, 40-54; Verizon Comments at 21-23; Qwest Comments at 35-39.

<sup>11</sup> See, e.g., AT&T Reply Comments at 11-13, 16-22; Verizon Comments at 21-23, 28, 35-39 & Well Decl. ¶¶ 6-7; Qwest Comments at 29-39; Clearwire Comments at 3 (“Clearwire has not had to rely on incumbent LEC provided special access,” and carries “the majority of [its] current backhaul traffic over licensed and unlicensed microwave frequencies”); *FiberTower Announces Backhaul Agreement With Sprint Nextel for WiMax Buildout*, CNNMoney.com (Aug. 1, 2007) (emphasis added), available at <http://money.cnn.com/news/newsfeeds/articles/prnewswire/LAW03301082007-1> (Sprint announcement that “FiberTower’s superior service quality, flexibility and scalability are a perfect fit for our next-generation network plans and we look forward to *dramatically expanding* this relationship going forward”).

<sup>12</sup> See, e.g., *Wireline Broadband Order*, 20 FCC Rcd. 14853, ¶ 50 (2005) (where new technologies and new providers are emerging, competition “is more appropriately analyzed in view of larger trends in the marketplace, rather than exclusively through the snapshot of data that may quickly and predictably be rendered obsolete as th[e] market continues to evolve”); *Cingular/AT&T Wireless Merger Order*, 19 FCC Rcd. 21522, ¶ 41 (2004) (the Commission will “consider technological and market changes, and the nature, complexity, and speed of change of, as well as trends within the communications industry”); *Qwest Omaha Forbearance Order*, 20 FCC Rcd 19415, ¶ 62 (2005) (Commission examines both “actual and potential competition” that “either is present or readily could be present”).

<sup>13</sup> See, e.g., AT&T Comments at 21 & Casto Supp. Decl. ¶¶ 40-54; Verizon Comments at 25-29; Qwest Comments at 39-41; T-Mobile Sep. 4, 2007 Ex Parte Letter at 1-2 (“To support T-Mobile’s wireless

Instead of directly confronting these marketplace facts, those who seek a return to the intensely regulatory past offer nothing but smoke and mirrors. They continue shamelessly to peddle meaningless ARMIS-based special access “rates of return” that have repeatedly been shown to reflect arbitrary and long-frozen allocations that result in a steadily growing mismatch between costs and revenues. They proffer backward-looking anecdotal snapshots of their past purchase decisions that ignore that the relevant metric is not the choices customers *have made* in the past, but the choices they *can make* today and will be able to make in the near future given the many alternatives available in the marketplace. They make nonsensical arguments that declining special access rates are nonetheless “too high” in some metaphysical sense as compared to rates for other things, including long distance services, services provided in foreign countries, and even services price cap LECs are forced to provide at below-cost TELRIC rates. They make apples-to-oranges comparisons of rates that our companies offer at all locations throughout broad geographic areas to rates that certain unnamed competitors ostensibly have offered at some undisclosed point in time and at some undisclosed location presumably to cherry-pick customers that cost the least to serve and, further, they base such meaningless comparisons on misrepresentations of our rates. And they persist in complaining that particular features of some of our tariffed offerings “lock up” customers, notwithstanding that those plans are *optional*, that customers are free to accept or reject them in return for a particular type or level of discount, and that we offer a wide range of alternative volume and term discount arrangements that do not include those features.<sup>14</sup>

Finally, even aside from their failure to prove the market failure that is a precondition to *any* additional regulation, the re-regulation proponents refuse to confront the practical implications of the exceedingly intrusive regulations they seek. The Commission adopted pricing flexibility in 1999 based upon its determination that the costs of regulating special access prices are immense and would exceed any benefits “even if competition had not fully developed” and did not thereafter develop “as fast as the Commission had projected.”<sup>15</sup> Even attempting the cost or return-based rate “reinitialization” that our opponents urge here would be a far more costly and investment-dampening undertaking than continuing the regulatory regime the Commission found too costly eight years ago when it introduced pricing flexibility. Indeed, the Commission could

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broadband offerings, T-Mobile anticipates that its demand for higher capacity special access services will significantly increase”; “For its ‘last mile’ connections . . . T-Mobile typically purchases DS1 channel terminations, but is increasingly beginning to purchase DS3 channel terminations for these links”).

<sup>14</sup> See, e.g., AT&T Reply at 61-64 (explaining that AT&T offers “a variety of discount plans with a variety of features, including term plans with no volume commitments and volume plans with no term commitments”); Verizon Reply at 13-19 (“Verizon’s discount plans with minimum service commitments to not ‘lock up’ their special access business” and, in any event, there are Verizon special access plans that “provide the same level of discounts on Verizon’s Commitment Discount Plan, but require no commitment at all”); Qwest Reply at 16 (demonstrating that “Qwest does *not* offer any pricing plan in either Phase I or Phase II areas that require customers to make a certain percentage of their total telecommunications purchases from Qwest”).

<sup>15</sup> See Letter from FCC (Anthony Dale, Managing Director) to GAO (Mark Goldstein, Director, Physical Infrastructure Issues), at 2 (Nov. 13, 2006) (“FCC GAO Response Letter”) *reprinted in* Gov’t Accountability Office, FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services, App. III (Nov. 2006) (“GAO Report”).

not even begin such an undertaking without, among many other things, completely overhauling its accounting rules so that they reflect today's network and marketplace realities and revisiting its regulation of switched access services (which, according to ARMIS data earn virtually *no* return) to ensure that any regulation of special access services did not result in an inappropriately low enterprise-wide return on investment. It is self-evident that any attempt to go down this path would spawn a nightmare of protracted litigation, inherently arbitrary judgments, judicial reversals, business uncertainty, disincentives for facilities investment and harm to consumers.

None of this could be avoided through the re-regulation proponents' blatantly arbitrary "short-cut" proposals, such as reviving "X-factors" adopted more than ten years ago (based upon even older data), simplistic reliance on flawed ARMIS or TELRIC data that has been shown to be of no use in this context, and patently unlawful delegation of Commission authority to state commissions and private arbitrators who would establish rates out of a "black box." The Commission would have no hope of defending potentially confiscatory rate decreases on the basis of such facially deficient short-cuts, and no commenter has come close to making the case for the extremely burdensome proceedings that would actually be required if there were any reason to head down any re-regulatory path.

In short, the re-regulation proponents ask the Commission to abandon principle, disregard precedent, ignore the record evidence and set special access policy without regard to the relevant competitive conditions in order to satisfy their preference for still lower prices. But a desire for lower prices, no matter how strong, does not translate into a public-policy rationale for regulation. The proper course is faithful adherence to the law, sound economic policy and the record evidence through an order that recognizes that the market is functioning far more effectively with pricing flexibility and provides price cap LECs with further flexibility to respond to their customers' needs.

Sincerely,

/s/ Gary L. Phillips

CC: Ian Dillner  
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