

VIA ECFS

EX PARTE

May 1, 2009

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
Room TW-325
445 12th Street, S.W.
Washington D.C. 20554

RE: WC Docket No. 05-25

Dear Ms. Dortch:

On April 30, 2009, undersigned counsel and Don Shephard, Vice President, Federal Regulatory, tw telecom inc. ("TWTC"), met with Al Lewis, Deena Shetler, Pamela Arluk, Jay Atkinson, Randy Clarke, Marv Sacks, Dan Ball, and Margaret Dailey of the Wireline Competition Bureau. During the meeting, the TWTC representatives made the following points concerning the FCC's consideration of a data request in the above-referenced proceeding.

First, as a preliminary matter, a data request is unnecessary. There is abundant and sufficient information in the record to demonstrate the incumbent LECs' overwhelming market power in the special access market and the FCC's failure to sufficiently regulate that market power.

Second, if the FCC believes that additional data is necessary, it should request that incumbent LECs provide data regarding their special access costs and profit margins. There is no more direct way to assess the extent to which incumbent LECs are exercising market power in the provision of special access services.

Third, if the FCC requests information from non-incumbent LECs regarding the location of their on-net buildings, it should request such data on a building-by-building basis to eliminate the possibility of double counting (*e.g.*, when two competitors light the same building) that would occur if the FCC collected the data on a more aggregated geographic basis (*e.g.*, by census tract). However, given the highly confidential nature of this information, the FCC must be able to guarantee that the agency can sufficiently protect the information from inappropriate disclosure. In addition, the FCC

should take into account the different capabilities of the technology platform used and whether the platform is capable of providing a substitute for ILEC special access service. For example, substantial evidence placed on the record has shown that services provided over cable company hybrid fiber coaxial facilities are not capable of providing DS1 and DS3 service.¹ The FCC reached a similar conclusion just three years ago in the *Triennial Review Remand Order*.²

Fourth, TWTC explained that the presence of metropolitan fiber networks is not a reliable indication that competitors can deploy their own end-user connections. For example, TWTC described the difficulties (*e.g.*, insufficient revenue from end-user contracts and problems with access to public rights-of-way, pole attachments, building access, customer demands for timely service installation, and so on) that it faces in deploying facilities to end-user locations.

Fifth, TWTC explained that it is often unable to rely on other non-incumbent LECs' networks in the few locations in which they have been deployed. In particular, TWTC described the intractable problems associated with many non-incumbent LEC wholesale offers such as the lack of viable wholesale OSS and the inability of competitors to reach multiple floors in a single building.

Sixth, TWTC also addressed the substantial defects in USTA's data collection proposal.³ For example, if the FCC collects facilities deployment data from competitors, only competitors' own facilities and long term (*e.g.*, 25 year) IRUs should be considered. The FCC should not collect data regarding or consider locations served via leased other carriers' facilities (*e.g.*, dark fiber) as proposed by USTA. Additionally, the FCC should not seek information regarding the locations that competitors offer to serve in RFP responses. TWTC does not retain this data as a general matter and, even if it did, it could not readily distinguish the locations it proposed to serve on-net versus the locations it proposed to serve off-net. Finally, even those locations that TWTC might have committed to serve on-net in the context of a response to a particular RFP might well be unsuitable for self-deployed loop facilities in other contexts.

Pursuant to Section 1.1206(b) of the Commission's rules, 47 C.F.R. § 1.1206(b), a copy of this notice is being filed electronically in the above-referenced dockets.

¹ See, *e.g.*, Comments of Time Warner Telecom Inc., WC Dkt. No. 05-25, at 14-16 (filed Aug. 10, 2007).

² See *Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd 2533, ¶ 193 (2005) ("First, the record before us contains little evidence that cable companies are providing service at DS1 or higher capacities.").

³ See Letter from Glenn Reynolds - Vice President, Policy, USTelecom, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25, Attachment A: *Data Requests Directed to Competitive Providers* (Apr. 27, 2009).

Respectfully submitted,

_____/s/_____
Thomas Jones
Jonathan Lechter

WILLKIE FARR & GALLAGHER LLP
ATTORNEYS FOR TW TELECOM INC.

CC: Al Lewis
Deena Shetler
Pamela Arluk
Jay Atkinson
Randy Clarke
Marv Sacks
Dan Ball
Margaret Dailey