

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

June 3, 2009

Re: *WC Docket 05-25 – Special Access Rates for Price Cap Local Exchange Carriers*

Dear Ms. Dortch:

Access to reasonably priced high-capacity broadband services by large and small businesses, educators, and health care professionals is critical to the Nation's economy. Unfortunately, the market for these so-called "special access" services is broken. Every day that the special access broadband market remains broken, a wide range of companies, government entities, and non-profits are drained of financial resources they need to protect jobs, innovate, and serve consumers.

AT&T, Verizon, and a handful of other incumbent price-cap carriers have dominant positions in the provision of special access in their home markets. For example, Sprint Nextel and T-Mobile, two large purchasers of special access circuits, have both indicated that they have in most cases, for years, purchased the vast majority of their high-capacity circuits from incumbent LECs—their competitors in the wireless market. Careful scrutiny clearly reveals that the market for special access service is not competitive.

The result of this lack of competition is predictable. Rates for special access service are extremely high. Even the most favorable prices available under long-term contracts are much higher than the regulated, cost-based prices for equivalent unbundled network elements. Special access prices are also many times higher than incumbent prices for services of comparable speeds in residential broadband markets.¹ Additionally, the Commission's own ARMIS data shows that incumbent price-cap carriers earn astonishing rates of return on their special access services.

Incumbent LECs have objected to comparing special access pricing to the prices of unbundled network elements and the use of ARMIS data to calculate rates of return. But they have failed to offer any better way to evaluate their prices, refusing to supply the relevant cost study information and relying instead on well-worn invocations of the potential

¹ See *ex parte* proposal attached to letter from Christopher J. Wright and A. Richard Metzger, Jr., on behalf of Sprint Nextel Corporation, to Marlene Dortch, FCC Secretary, at 26 (Oct. 5, 2007).

effects of competition and emphatic—though erroneous—assertions that sufficient competition is here to discipline prices, or will be soon. The truth is that incumbent price-cap carriers insist on onerous and anticompetitive terms and conditions on their special access offerings to strangle the very competition that they claim exists.

We are pleased that correcting the deficiencies of the high-capacity broadband market appears to be at the top of the Commission's agenda for 2009. This effort is fully consistent with the Commission's commitment to and the Administration's focus on improving broadband access across the country. The Commission understands that it must address not only residential broadband but also special access services because the economic engine of the country depends more and more on high-capacity broadband facilities, such as DS1s, DS3s, and Ethernet.

Year after year, every independent study has shown that there is virtually no competition for special access services. The currently available data allows the Commission to act immediately to address this problem. But we understand the Commission's desire for additional data so that it can present even stronger empirical support for correcting the market failure that has led to excessive special access prices and onerous contractual terms. Thus, we urge the Commission to make any data request focused on the Commission's specific needs and to keep the time frame as short as possible.

The United States Telecom Association's ("USTA") recent ex parte demonstrates that the RBOCs' intention is to use a data request as political gambit rather than to engage in a productive exchange of information. Amazingly, USTA asks the Commission to require every large and small business, school, and hospital to provide the geocoded location of every special access facility across the country. And, USTA goes so far as to ask for every competing offer each business, school, and hospital has ever received for special access as some sort of price of admission to comment in this rulemaking proceeding. USTA goes on to argue that the Commission should require the RBOCs' competitors to provide highly sensitive data down to the building level everywhere in the country, but does not offer to provide any of the important RBOC-derived data that the RBOCs have consistently refused to provide in other data requests.

USTA's request is a blatant attempt to tie the Commission's hands by forcing a multi-year data-fishing exercise. They ask the Commission to gather information that is largely irrelevant to the FCC's proceeding but that provides insight about their competitors' operations so that RBOCs can cherry-pick clients, or so they can make it difficult or risky for their customers to participate in the special access proceeding. The Commission should see this tactic for what it is: a political maneuver rather than a real attempt to help fashion a useful data request.

The undersigned, companies that are sellers and purchasers of special access services, take the Commission's interest in analyzing additional data more seriously. We commit to working with the Commission to find a solution to this important problem. The first step in this process is to identify the goals of a data request. This will enable the Commission to

request data that are relevant to these goals. Toward this end, we propose that the Commission adopt the following goals for any data request:

1. Establish financial performance and productivity for incumbent price-cap carrier special access by gathering historical data on revenues, costs, and inputs;
2. Identify whether there are any areas of the country where there is enough competition in the special access market to protect consumers;
3. Determine how the current “Phase II” trigger, based on collocation, can be modified to reflect actual competition;
4. Evaluate what demand and pricing data derived from the largest buyers and sellers of special access services indicates about competition; and
5. Identify terms and conditions imposed on purchasers of incumbent price-cap carrier special access that thwart competition.

The undersigned have attached a proposed data request that would enable the Commission to accomplish these goals. We do not submit this proposal lightly – it includes a commitment to provide significant, difficult to produce, and highly sensitive information drawn from our companies.

Accordingly, we support the attached data request only if the Commission adopts a careful plan for ensuring that the agency obtains the data it needs, that commenters have the ability to review and comment on material on which the FCC bases any decision, and that data suppliers’ proprietary information remains confidential. Many companies consider the data requested in the attached proposal to be their “crown jewels.”

The FCC will likely need only rely on aggregated data to reach its decision in this proceeding. It need not rely on company-specific data. Given this fact, and in light of the need to establish the most robust protections possible against disclosure of company-specific data, the Commission should explicitly state in its data request that it will ensure confidentiality by: (1) collecting confidential, company-specific data from each party; (2) making this company-specific data available only to Commission staff and Commission-contracted consultants who then aggregate the data into a report that identifies both the presence of indicators of actual competition and the “build/buy” decision by geographic area but does not include, or enable the reader to infer, company-specific data; (3) making this report available for public review and comment; and (4) relying only on this report in making a decision. This system is superior to a system based solely on non-disclosure agreements in two ways. First, it is more protective of highly sensitive information. Second, and at least as important, it allows commenters to understand and comment on the market information that will form the basis of the FCC’s decision far better than would a system where only a select group of attorneys have access to otherwise-secret information.

We look forward to working with the Commission in the coming weeks on a meaningful plan for reform.

Sincerely,

/s/

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Proposed Data Request

- I. Definitions.
 - A. Transmission Facilities: Any channel facility that is currently capable of providing to customers the high-capacity transmission services offered as special access under the FCC's rules, including standard compliant DS1, DS3, OCn, switched Ethernet or dedicated Ethernet service, SONET, etc.
 - B. Own or control: Transmission Facilities that an entity either owns or controls pursuant to a long-term IRU agreement (i.e., 25 years or longer).
 - C. Volume Commitment Agreement: Any contract for the sale of special access in which a discount on special access prices is conditioned on the customer (1) maintaining a particular number of circuits in service with the service provider (e.g., where the customer must maintain 1,000 DS1 circuits in service over a 5-year term); (2) maintaining a particular percentage of special access demand with the service provider (e.g., where the customer must maintain 90 percent of its DS1 circuit purchases with the service provider over a 5-year term based on a given number of circuits purchased at the inception of the agreement); and/or (3) maintaining a particular spending level (in dollars) with the service provider (e.g., customer must maintain \$25 million dollars in overall spending for eligible special access services over a 5-year term).
- II. Data to establish financial performance and productivity for incumbent price-cap carrier special access.
 - A. RBOCs should provide ARMIS 43-01 Table I and II data for 2008.
 - B. RBOCs should provide ARMIS 43-02 Table I1 data on employee counts and compensation, and Table B1B data on capital additions, end of year, and beginning of year plant amounts for 2008.
 - C. RBOCs should provide ARMIS 43-08 Table III data on switched and special access lines for 2008. In order to allow assessment of the effect of changes in the types of special access circuits purchased, RBOCs should also provide DS1, DS3, Ethernet and OCn channel terminations from 1985 to 2008.
 - D. RBOCs should provide any revisions to their previously filed ARMIS 43-01 and/or ARMIS 43-02 Table B1B revenue, expense and investment data to correct for any alleged special access misallocations for all years that

need correction. Any correction prior to 2001, the year the separations freeze was adopted, should be explained.

- III. Data to identify whether there are areas of the country where there is enough competition to protect consumers.
 - A. Data on actual competition.
 1. From all CMRS carriers.
 - a. Provide the address of each cell site served by Transmission Facilities. For each cell site listed, provide street address and, if available, information sufficient to geocode (e.g. V&H coordinates, CLLI code) the location.²
 - b. Provide information that identifies whether the owner of the Transmission Facilities that serve each cell site is an ILEC or alternative vendor, and the type of Transmission Facilities provided (i.e., DS1, DS3, or above DS3).
 2. From sellers of special access services.
 - a. Provide the address of each building or cell site that the seller of special access services serves via a Transmission Facility that it owns or controls. For each building listed, provide street address, and if available, information sufficient to geocode (e.g., V&H coordinates, CLLI code) the location.
 - b. Identify the type of service(s) (e.g., DS1, DS3, Ethernet) that the special access services provider provides via Transmission Facilities it owns or controls that connect to end-user locations and for each service provide the number of units provided in such manner (e.g., channel terminations, circuits or Ethernet ports). If it does not own or control its own Transmission Facilities, provide a response that makes clear that it neither owns nor controls facilities.

² Since these data (as well as the data supplied in response to III.A.2.a.) will need to be processed once the Commission receives them, the Commission should specify the format in which these data are to be provided. In addition, if carriers are able to provide only addresses, the Commission will have to process the data to obtain geocoded data. This may require the use of outside contractors, as it did in the context of developing the High Cost Proxy Model for universal service.

- B. Data on the “build/buy” decision.
1. Non-ILEC facilities-based competitors should provide, if available, a description of the analysis they conduct to determine whether to deploy a new Transmission Facility to a building. If possible, such a description should include the following.
 - a. A description of the competitor’s “build/buy” analysis, including its average cost of deploying a Transmission Facility of a specified length (e.g., one mile or less) to a building and the revenues required to recover such costs from one or more end-user customers in a building.
 - b. For a representative subset of the areas in which the alternative provider offers service, provide the number of commercial buildings to which the competitor has not deployed Transmission Facilities but that meet the competitor’s criteria for deploying Transmission Facilities pursuant to its build/buy analysis.
 - c. A description of the factors that prevent the competitor from deploying Transmission Facilities to end-user locations that otherwise meet its build criteria (e.g., capital constraints, access to public rights of way, building access, customer demands for delivery of service in a short time frame, insufficient addressable market demand due to lock-in terms and conditions imposed by the incumbent provider, and similar barriers to Transmission-Facility deployment).
 2. To the extent each non-ILEC service provider can do so from records it keeps as a normal course of doing business, it should, for each geographic area³ in which it provides service.
 - a. Provide the total number of buildings served via Transmission Facilities that it does not own or control and that it purchased from ILECs.
 - b. Identify the type of special access service(s) (e.g., DS1, DS3, Ethernet) and UNEs (e.g., DS1, DS3) it purchases from ILECs and for each service provide the number of

³ The Commission may wish to specify which geographic areas it considers relevant for its analysis, e.g., state, Metropolitan Statistical Area (MSA), census tract, etc. Since the parties supporting this data request maintain differing levels of data for their general business purposes, we urge the Commission to consult further with the parties who would be subject to the data request to determine what levels of aggregation are feasible.

units it purchases (e.g., channel terminations, circuits, or Ethernet ports), breaking out special access and UNE units separately.

- c. Provide the total number of buildings it serves via Transmission Facilities that it does not own or control and that it purchases from non-ILECs.
- d. Identify the type of special access service(s) (e.g., DS1, DS3, Ethernet) it purchases from non-ILECs and for each service provide the number of units it purchases (e.g., channel terminations, circuits or Ethernet ports).

IV. Data to establish that the current “Phase II” trigger is inappropriate.

- A. Non-ILEC facilities-based competitors should provide the number of collocation arrangements they have established in ILEC central offices that are connected to Transmission Facilities that they own or control (i.e., fiber-based collocations used for purposes of the pricing flexibility rules).
- B. Non-ILEC facilities-based competitors should provide the number of Transmission Facilities connected to buildings listed in response to III. A. 2. a. that terminate in collocation arrangements listed in response to IV.A.

V. Data to evaluate what demand and pricing data derived from the largest buyers and sellers of special access services indicates about competition.

- A. The three largest national CMRS providers and the three largest IXC should provide the demand data requested in the NRRRI purchaser’s data request for the top 50 MSAs.
- B. For 2001 to 2009, the three largest ILECs should provide all changes to the channel termination, and fixed and per mile transport rates (separately for DS1/DS3/OCN/Ethernet services), that were not the result of either a price cap change or compliance with a merger condition. These changes should be shown separately for rack rates, each individual contract and each tier in generally available term and volume discount plans. Responses should indicate the year when a new pricing option with different terms and conditions became available and should provide the total volume (revenue) sold of each pricing element for each year.

- VI. Data to identify terms and conditions imposed on purchasers of incumbent price-cap carrier special access that forestall competition from having a chance to develop to evaluate the state of competition for special access services.
- A. Incumbent price-cap carriers should provide, by year for 2002 through 2008, (1) the percent of their revenue (separately for DS1/DS3/above DS3), by geographic area⁴ that is subject to Volume Commitment Agreements; (2) total special access revenue; (3) the number of special access circuits, by geographic area that are subject to Volume Commitment Agreements; and (4) the number of special access circuits, by geographic area that are not subject to Volume Commitment Agreements.
 - B. Incumbent price-cap carriers should provide the number of special access circuits (separately for DS1/DS3/above DS3) they sell that are subject to an early termination penalty, and the number of circuits not subject to such a penalty.
 - C. Each incumbent price-cap carrier should compute for 2008 the total amount of early termination penalties and forgone discounts (separately for DS1/DS3/above DS3) that would be due to it if all special access service subject to Volume Commitment Agreements were transferred by buyers to alternative providers.
 - D. Incumbent price-cap carriers should provide (separately for DS1/DS3/above DS3) the number of access circuits it sells that are: (a) purchased without any term commitment; (b) purchased under contracts with a term commitment of one year or less; (c) purchased under contracts with a term commitment of more than one year but no more than 3 years; (d) purchased under contracts with a term commitment of more than 3 years but no more than 5 years; and, (e) purchased under contracts with a term commitment of more than 5 years.
 - E. Incumbent price-cap carriers should provide a description of their Volume Commitment Agreements (separately for DS1/DS3/above DS3), and, for each such plan, (1) the volume levels required; (2) the covered/available geographic areas; (3) associated commitment requirements; (4) the associated true-up interval time frames; (5) the penalties for failing to meet commitment levels and/or terminating early; and (6) associated renewal requirements.

⁴ As above, the Commission may wish to specify which geographic areas it considers relevant for its analysis, e.g., state, Metropolitan Statistical Area (MSA), census tract, etc. Since the parties supporting this data request maintain differing levels of data for their general business purposes, we urge the Commission to consult further with the parties who would be subject to the data request to determine what levels of aggregation are feasible.