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PARTIES ASKED TO COMMENT ON ANALYTICAL FRAMEWORK NECESSARY TO RESOLVE ISSUES IN THE *SPECIAL ACCESS NPRM*

WC Docket No. 05-25, RM-10593

Comment Date: [45 days after date of publication in the Federal Register]
Reply Comment Date: [75 days after date of publication in the Federal Register]

In this Public Notice, we invite comment on an appropriate analytical framework for examining the various issues that have been raised in the *Special Access NPRM*.[1] In that NPRM, the Commission explained that an examination of the current state of competition for special access facilities is critical to determine whether the Commission's pricing flexibility rules have worked as intended.[2] In addition, the Commission sought comment on appropriate measures to ensure that price cap rates for special access services remain just and reasonable after expiration of the CALLS plan.[3] Subsequently, the Commission sought updated information on these issues, and parties continue to provide their views to Commission staff.[4]

Some parties assert that the Commission's current rules are working as intended and contend there is extensive actual and potential competition in the market for special access.[5] Other parties assert

[1] *See generally Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*); 47 C.F.R. §§ 1.415, 1.419 (submitting comments and replies in rulemaking proceedings).

[2] *Special Access NPRM*, 20 FCC Rcd at 2018-19, paras. 71-73. The Commission invited comment on whether the available data and actual marketplace developments support the predictive judgments that underlie the special access pricing flexibility rules. *Id.* at 1996, 2018-19, paras. 5, 71.

[3] *Id.* at 1995, 2004, paras. 2, 22. The term "special access services" encompasses all services that do not use local switches; these include services that employ dedicated facilities that run directly between the end user and an IXC's point of presence, where an IXC connects its network with the LEC network, or between two discrete end user locations. *Id.* at 1997, para. 7; *see also AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, WC Docket No. 06-74, 22 FCC Rcd 5662, 5677, para. 28 (2007) ("special access is a dedicated transmission link between two locations, most often provisioned via high-capacity circuits").

[4] *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, Public Notice, 22 FCC Rcd 13352 (2007).

[5] *See, e.g.*, Letter from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC (filed Oct. 20, 2009) at 1 ("[T]he intense competition that currently exists for high capacity services is only going to increase."); Letter from Glenn T. Reynolds, Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC (filed July 16, 2009) at 2 (describing special access as "highly competitive").

that there is little or no competition for special access services and the current pricing flexibility and price cap regulations have resulted in supracompetitive prices and significant overearning by incumbents.[6] The Commission would benefit from a clear explanation by the parties of how it should use data to determine systematically whether the current price cap and pricing flexibility rules are working properly to ensure just and reasonable rates, terms, and conditions and to provide flexibility in the presence of competition.

Therefore, in this Public Notice, we seek concrete suggestions on the appropriate analytical framework for determining whether the current rules are working. For example, should we use a market power analysis to assess the current special access regulatory regime? Suggestions should be both analytically rigorous (*i.e.*, fact-based and systematic) and administratively practical (*i.e.*, requiring a manageable amount of data collection and analysis). Once the Commission adopts an analytical approach enabling a systematic determination of whether or not the current regulation of special access services is ensuring rates, terms, and conditions that are just and reasonable as required by the Act, we can determine what, if any, specific problems there are with the current regime and formulate specific solutions as necessary.[7] The analytical framework that parties propose should address how to answer key questions raised in the *Special Access NPRM*, including:

1. Do the Commission's pricing flexibility rules ensure just and reasonable rates?[8]

   (A) Are the pricing flexibility triggers, which are based on collocation by competitive carriers, an accurate proxy for the kind of sunk investment by competitors that is sufficient to constrain incumbent LEC prices, including for both channel terminations and inter-office facilities?[9]

   (B) If so, are the triggers set at an appropriate level?[10]

2. Do the Commission's price cap rules ensure just and reasonable special access rates?[11]

3. Do the Commission's price cap and pricing flexibility rules ensure that terms and conditions in special access tariffs and contracts are just and reasonable?[12]

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[6] *See, e.g.*, Letter from Anna Gomez, Vice President, Sprint Nextel, to Marlene H. Dortch, Secretary, FCC (filed May 6, 2008) at 1 ("[T]here is insufficient competition to discipline special access pricing."); Letter from Paul Margie, counsel to US Cellular *et al.*, to Marlene H. Dortch, Secretary, FCC (filed Oct. 27, 2009) at 12 ("The special access market is a monopoly in most parts of the country."); Reply Comments of XO Communications, LLC, *et al.*, at 32 (filed Aug. 15, 2007) ("The current record before the Commission instead reflects that the ILECs continue to exercise monopoly control over the market for special access services and to engage in market power abuses, including pricing special access services at supra-competitive levels.").

[7] 47 U.S.C. § 201(b).

[8] *See, e.g.*, *Special Access NPRM*, 20 FCC Rcd at 1996, 2018, paras. 4, 71; *see also* 47 C.F.R. § 1.774, Part 69, Subpart H (pricing flexibility rules).

[9] *Special Access NPRM*, 20 FCC Rcd at 1996, 2021, paras. 4, 79.

[10] *See, e.g.*, *id.* at 2021, para. 80.

[11] *See, e.g.*, *id.* at 1995, 2004, paras. 2, 22, 24.

[12] *See, e.g.*, *id.* at 2031-34, paras. 114-125.

We ask that parties focus their comments on the analytical framework, including applicable law, they believe the Commission should use to arrive at fact-based answers to each of the key questions above. Parties should address whether, in applying their proposed analytical framework, the Commission can answer the questions based upon data contained in the existing record. If so, what record data must the Commission examine to answer to the question? If not, precisely what additional data should the Commission collect and from whom, and why? Parties should also identify and address administrative concerns and practical considerations, such as obstacles to obtaining or evaluating specified data, and the time frame they believe would be required to perform their proposed analysis. To facilitate the Commission's review, parties are encouraged to organize their comments by the key question numbers used in this notice. If a party believes additional questions must be resolved, it should set forth the questions, provide an analytical framework to answer such questions, and describe the data necessary to answer the questions.

For purposes of illustration, we offer some examples, based on the record in this proceeding, of proposed analytical frameworks. These examples are not intended to limit the types of analytical framework or data collection parties suggest in responding to this Public Notice, but rather to highlight some of the general arguments of which the Commission is aware.

Example 1: Market-power analysis. A party may argue that the Commission should conduct a market-power analysis to evaluate whether the pricing flexibility rules ensure just and reasonable rates. Market power has been defined as the "ability profitably to maintain prices above competitive levels for a significant period of time."[13] A party that advocates a market power analysis as a means of evaluating the effectiveness of the Commission's pricing flexibility rules should describe the analytical framework the Commission would employ to conduct such an analysis, identifying the factors and issues that would be examined as part of that analysis.[14] In particular, the *Special Access NPRM* identified factors relevant to an assessment of market power, namely the need to define precisely the relevant product and geographic market under consideration and, relative to the defined market, the measure of competition, *e.g.*, based on relative market shares, trends in market shares, demand responsiveness, supply responsiveness, pricing behaviors, and price-cost margins.[15] Commenters should address these definitional issues, explain if additional or different factors should be considered in a market-power analysis, and identify the data that would be required from competitive and incumbent LECs to conduct such an assessment. For example, should there be a customer dimension to market definition – *e.g.*, considering wireless service providers that purchase special access channel terminations for towers as a separate relevant market from purchasers of channel terminations to buildings and interoffice transport?

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[13] *See* U.S. DEP'T OF JUSTICE & FED. TRADE COMM'N, HORIZONTAL MERGER GUIDELINES 2 (rev. 1997) (available at: http://www.usdoj.gov/atr/public/guidelines/hmg.htm).

[14] We note that in the *Pricing Flexibility Order*, the Commission concluded that because an economic market power analysis that involved rigorous market definition would have been burdensome to conduct, it would instead rely on evidence of collocations as a proxy for the presence of competition or potential competition in developing the pricing flexibility rules. *Access Charge Reform*, CC Docket No. 96-262, *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, *Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers*, CCB/CPD File No. 98-63, *Petition of U S West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, 14258, 14268-69, paras. 69, 84-86 (1999) (*Pricing Flexibility Order*), *aff'd sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

[15] *Special Access NPRM*, 20 FCC Rcd at 2019-30, paras. 73-112.

Example 2: Competitive facilities data to show validity of pricing flexibility triggers. In the *Pricing Flexibility Order*, the Commission determined that competitors' collocation at the wire center is a proxy for competitive sunk investment sufficient to discourage exclusionary pricing behavior.[16] The *Special Access NPRM* asks whether collocation is an accurate proxy for such investment.[17] To validate or rebut the collocation proxy, parties have debated the need for and usefulness of facilities data to show whether competition (or potential competition) exists in an MSA.[18] The record also reflects disparate views on the breadth and depth of facilities data to be collected. For example, some parties contend that the appropriate framework for determining whether collocation is an accurate proxy for sunk investment in channel terminations is to identify every building, by street address, where competitors have facilities, as well as all competitive fiber rings.[19] Is this administratively practical? If so, what analysis would determine the presence of a statistically significant relationship between lit building market share and collocation facilities in the same market? Should the Commission collect: (1) nationwide data;[20] (2) only data from MSAs that have been granted pricing flexibility;[21] or (3) data from a statistically significant sample? A commenter asserting that nationwide data is required should explain why a statistically significant sample would be insufficient (*e.g.*, if a statistically significant relationship between lit building market share and collocation facilities is or is not found in a suitable subset of MSAs, what analytical benefit is gained by requiring more data?).

Example 3: Probability that potential competition ensures special access rates remain just and reasonable. Parties have debated what evidence establishes the presence of potential competition sufficient to discourage exclusionary pricing behavior.[22] A commenter asserting that the appropriate analytical framework to resolve this question is to examine the economic feasibility of constructing lateral connections into buildings or cell towers when a competitor has nearby fiber should outline how to evaluate that issue (*e.g.*, a formula, such as the net present value of present and future cash flows, to establish the incremental level of demand and revenue required to justify incurring necessary incremental construction costs). How should constraints on capital availability for competitors to construct such

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[16] *Pricing Flexibility Order*, 14 FCC Rcd at 14264, para. 80.

[17] *Special Access NPRM*, 20 FCC Rcd at 2018, 2021, 2029-30, paras. 69, 79-80, 109-11 (citing *Pricing Flexibility Order*, 14 FCC Rcd at 14258-59, 14263-64, paras. 69-70, 79-80).

[18] *See, e.g.*, Letter from Glenn T. Reynolds, Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC (filed Aug. 31, 2009), Attachment at 14; Letter from Jonathan Lechter, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC (filed July 9, 2009) at 10.

[19] *See, e.g.*, Letter from Donna Epps, Vice President, Verizon, to Marlene H. Dortch, Secretary, FCC (filed May 22, 2009) at 1; Letter from Glenn T. Reynolds, Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC (filed Apr. 27, 2009) (USTelecom April 27 *ex parte*), Attachment A.

[20] USTelecom April 27 *ex parte*, Attachment A.

[21] *See* Government Accountability Office, *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, Report 07-80 at 50 (Nov. 2006) (data collected from 16 MSAs granted Phase I or Phase II pricing flexibility).

[22] *See, e.g.*, Letter from Glenn T. Reynolds, Vice President, USTelecom, to Marlene H. Dortch, Secretary, FCC (filed Aug. 3, 2009) at 3 (arguing that competition is sufficiently advanced to discipline the special access market); Letter from Thomas Jones and Jonathan Lechter, Counsel for tw telecom inc., to Marlene H. Dortch, Secretary, FCC (filed May 1, 2009) at 2 (arguing "the presence of metropolitan fiber networks is not a reliable indication that competitors can deploy their own end-user connections").

facilities be incorporated into the analysis? What evidence is there that such potential competitors actually exist in more than a few select locations? What data are required to conduct a potential competition analysis in every market? How would such data would be collected and from whom?

Example 4: Effectiveness of the Commission's price cap rules in ensuring just and reasonable special access rates. In the *Special Access NPRM*, the Commission asked commenters to address what regulatory mechanism is appropriate to ensure that rates for special access services are just and reasonable following expiration of the CALLS plan in 2005.[23] To validate or rebut whether the current price cap rules are ensuring just and reasonable rates, parties have debated what evidence establishes whether the level of incumbent LECs' special access profits is unreasonable.[24] In particular, the focus of the debate has been on the reliability and economic meaning of cost and revenue data the incumbent LECs have filed pursuant to the Commission's rules in the ARMIS system.[25] Commenters asserting ARMIS data are unreliable or not economically meaningful as a measure of profits on special access services should explain why, and propose a different analytical framework for measuring special access profitability. For example, a party should explain why the accounting or allocation rules that underlie such data are problematic and cannot be adjusted, outline why these data are not meaningful, identify data other than ARMIS that would provide a more reliable and meaningful measure of incumbent LEC costs and revenues, and specify the formula to be used with such data to measure special access profits. Commenters asserting ARMIS data are sufficient to measure special access returns should provide an analytical framework for considering such data, including an explanation of why problems with ARMIS data and the accounting or allocation rules that underlie such data are baseless or explain how such problems could be addressed. Such commenters should specify the formula to be used with such data to measure special access profits. We would expect any analytical framework, based on ARMIS or not, to include specifics as to the measure of profit and the reasonableness of that profit.

Example 5: Effectiveness of the Commission's price cap and pricing flexibility rules in ensuring that terms and conditions in special access tariffs and contracts are just and reasonable. In the *Pricing Flexibility Order*, the Commission considered whether an incumbent LEC could deter

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[23] *See Special Access NPRM*, 20 FCC Rcd at 2004, 2014, paras. 24, 59. Under the Commission's price cap rules, rates are adjusted downward by a productivity or X-factor and upward for inflation. The last tariff filing in which the X-factor exceeded inflation, thereby producing a net reduction in special access rates, was the July, 2003 filing in connection with the CALLS Plan, which, although intended to expire on June 30, 2005, continues in force until the Commission adopts a subsequent plan. *See Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 96-262, *et al.*, Sixth Report and Order in CC Docket Nos. 96-262 and 94-1, Report and Order in CC Docket No. 99-249, Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962, 13025, para. 149 (2000) (*CALLS Order*), *aff'd in part, rev'd in part, and remanded in part sub nom. Texas Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied sub nom. Nat'l Ass'n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002); 47 C.F.R. § 61.45(b)(1)(iv). For the final year of the CALLS Plan the special access X-factor was set equal to inflation. *CALLS Order*, 15 FCC Rcd at 13025, para. 149. The inflation adjustment and the X-factor therefore cancel each other out. Accordingly, special access price cap rates are essentially frozen at 2003 levels until a new X-factor is set. *See Special Access NPRM*, 20 FCC Rcd at 2000, para. 15 (citing *CALLS Order*, 15 FCC Rcd at 13025, para. 149).

[24] *See, e.g.*, Comments of ATX Communications, Inc. *et al.* (filed Aug. 8, 2007) at 4-5, 11-15 (arguing "the Commission stated that a 'price cap approach cannot free carriers to earn excessive [supracompetitive] profits in light of their costs'" (citation omitted)); Comments of Qwest (filed June 13, 2005) at 11 ("There is no relationship between the 'costs' reflected in an accounting rate-of-return such as ARMIS and a carrier's actual profits.").

[25] *See, e.g.*, Reply Comments of 360 Networks (USA), Inc. *et al.* (filed Aug. 15, 2007) at 14-20; Supplemental Comments of AT&T (filed Aug. 8, 2007) at 34-36.

competitive entry and lock up large customers by offering them volume and term discounts at or below cost. It concluded that sunk investment in the facilities sufficient to discourage exclusionary pricing behavior would also preclude anticompetitive volume and term discounts.[26] Some parties contend that certain terms and conditions contained in special access tariffs and contract tariffs are anticompetitive and preclude incumbent LEC special access customers from purchasing services from competitive carriers where they are available, thus creating a barrier to entry.[27] Other parties contend that such terms and conditions produce a net increase in overall consumer welfare.[28] Commenters asserting that particular terms and conditions are, or are not, reasonable should identify how they propose to analyze the reasonableness of such terms and conditions and what remedial action – if any – the Commission could take.

Pursuant to sections 1.415 and 1.419 of the Commission's rules,[29] parties may file comments in response to this notice no later than **45 days after this Public Notice appears in the Federal Register**, with the Secretary, FCC, 445 12th Street, SW, Washington, DC 20554. Reply comments may be filed with the Secretary, FCC, no later than **75 days after this Public Notice appears in the Federal Register**. All pleadings are to reference **WC Docket No. 05-25 and RM-10593.** Comments may be filed using: (1) the Commission's Electronic Comment Filing System (ECFS); (2) the Federal Government's eRulemaking Portal; or (3) by filing paper copies.[30]

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: http://fjallfoss.fcc.gov/ecfs2/ or the Federal eRulemaking Portal: http://www.regulations.gov. Filers should follow the instructions provided on the websites for submitting comments. For ECFS filers, if multiple docket or rulemaking numbers appear in the caption of this proceeding, filers must transmit one electronic copy of the comments for each docket or rulemaking number referenced in the caption. In completing the transmittal screen, filers should include their full name, U.S. Postal Service mailing address, and the applicable docket or rulemaking number. Parties may also submit an electronic comment by Internet e-mail. To get filing instructions, filers should send an e-mail to ecfs@fcc.gov, and include the following words in the body of the message, "get form." A sample form and directions will be sent in response.

- Paper Filers: Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, commenters must submit two additional copies for each additional docket or rulemaking number. Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail (although we

[26] *See Pricing Flexibility Order*, 14 FCC Rcd at 14263-64, paras. 79-80.

[27] *See, e.g.*, Letter from Karen Reidy, COMPTEL, to Marlene Dortch, Secretary, FCC (filed May 18, 2009) at 4.

[28] *See Special Access NPRM*, 20 FCC Rcd at 2032, para. 117 (citing Declaration of Alfred E. Kahn and William E. Taylor at 30 (filed Dec. 2, 2002 by BellSouth, Qwest, SBC and Verizon in response to AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, RM-10593)).

[29] 47 C.F.R. §§ 1.415, 1.419.

[30] *See Electronic Filing of Documents in Rulemaking Proceedings*, GC Docket No. 97-113, Report and Order, 13 FCC Rcd 11322 (1998).

continue to experience delays in receiving U.S. Postal Service mail). **Parties are strongly encouraged to file comments electronically using the Commission's ECFS.**

- The Commission's contractor will receive hand-delivered or messenger-delivered paper filings for the Commission's Secretary at 236 Massachusetts Avenue, NE, Suite 110, Washington, DC 20002. The filing hours at this location are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

All filings must be addressed to the Commission's Secretary, Marlene H. Dortch, Office of the Secretary, Federal Communications Commission, 445 12th Street, SW, Washington, DC 20554. Parties should also send a copy of their filings to Margaret Dailey, Pricing Policy Division, Wireline Competition Bureau, Federal Communications Commission, Room 5-A232, 445 12th Street, SW, Washington, DC 20554, or by e-mail to margaret.dailey@fcc.gov. Parties shall also serve one copy with the Commission's copy contractor, Best Copy and Printing, Inc. (BCPI), Portals II, 445 12th Street, SW, Room CY-B402, Washington, DC 20554, (202) 488-5300 or (800) 378-3160, or via e-mail to fcc@bcpiweb.com.

Documents in WC Docket No. 05-25 and RM-10593 are available for public inspection and copying during business hours at the FCC Reference Information Center, Portals II, 445 12th St. SW, Room CY-A257, Washington, DC 20554. The documents may also be purchased from BCPI, website www.bcpiweb.com, telephone (202) 488-5300 or (800) 378-3160, facsimile (202) 488-5563, TTY (202) 488-5562, e-mail fcc@bcpiweb.com. These documents may also be viewed on the Commission's website at http://www.fcc.gov. People with Disabilities: To request materials in accessible formats for people with disabilities (Braille, large print, electronic files, audio format) or to request reasonable accommodations for filing comments (accessible format documents, sign language interpreters, CART, etc.), send an e-mail to fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

This matter shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's *ex parte* rules.[31] Persons making oral *ex parte* presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one- or two-sentence description of the views and arguments presented generally is required.[32] Other requirements pertaining to oral and written presentations are set forth in section 1.1206(b) of the Commission's rules.[33]

For further information, contact Marvin Sacks of the Pricing Policy Division, Wireline Competition Bureau at (202) 418-2017 or marvin.sacks@fcc.gov.

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[31] 47 C.F.R. § 1.1200 *et seq.*

[32] *See* 47 C.F.R. § 1.1206(b)(2).

[33] 47 C.F.R. § 1.1206(b).