

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Special Access Rates for Price Cap Local Exchange Carriers)	WC Docket No. 05-25
)	
AT&T Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services)	RM-10593
)	

COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

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COMMENTS OF GLOBAL CROSSING NORTH AMERICA, INC.

Global Crossing North America, Inc. (“Global Crossing”) submits these comments in response to the Public Notice adopted by the Commission on November 5, 2009 in the above-captioned dockets. Global Crossing provides telecommunications solutions over the world’s first integrated global IP-based network. Its core network connects more than 300 cities and 30 countries worldwide, and delivers services to more than 500 major cities, 50 countries and 5 continents around the globe. Global Crossing’s services are global in scale, linking the world’s enterprises, governments, and carriers with customers, employees, and partners worldwide in a secure environment that is ideally suited for IP-based business applications, allowing e-commerce to thrive. The company offers a full range of managed data and voice products to more than 40 percent of the Fortune 500, as well as 700 carriers, mobile operators, and ISPs.

Despite the scale and scope of its network, however, Global Crossing, like most other carriers, remains reliant upon leased transport (including special access) circuits for its “last-mile” connections to customers. As such, Global Crossing is one of the largest consumers of “short-haul” special access services, spending in excess of \$350 million annually on access facilities. At the same time, Global Crossing is a large seller of “long-haul” private line services connecting customers across the country and across the world. Global Crossing therefore has a

wealth of experience both as a consumer and a purveyor of private line and special access services. Global Crossing appreciates this opportunity to comment on the issues raised in the Public Notice, the resolution of which will have a significant impact on the ability of Global Crossing and other competitive providers to serve end users efficiently and effectively with innovative, next-generation communications solutions.

I. INTRODUCTION AND SUMMARY

In the Public Notice, the Commission invites comment on an appropriate analytical framework for examining issues raised in the *Special Access NPRM*.¹ In particular, the Commission notes that it “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.”²

Throughout the history of this proceeding, parties have advanced different and often conflicting frameworks for analyzing competition levels in special access markets, and they have presented a vast amount of conflicting data.³ Regardless of the analytical framework the Commission chooses to adopt this time, there is little reason to believe that parties will do anything other than again provide the same sort of conflicting data that are already in the record, leaving the Commission in the same quandary in which it finds itself today. Nevertheless, the Commission can and should take measures to realize the overriding statutory goal of ensuring that special access rates, terms, and conditions are reasonable.

¹ See *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (“*Special Access NPRM*”).

² Public Notice at 2.

³ Global Crossing has submitted its own data demonstrating that carriers who enjoy pricing flexibility have raised rates rather than lower rates. See, e.g., Comments of Global Crossing North America, Inc., WC Docket No. 05-25 (Aug. 7, 2007) (Declaration of Janet Fischer).

As an initial matter, the Commission should stop looking at “special access” rates in isolation and should instead look at “transport” more broadly. Transport is used for a range of purposes and is available in multiple varieties. “Special access” is one form of transport. “Private lines” is another name for special access. “Dedicated transport” also forms part of the switched access regime. “Interconnection trunks” made available pursuant to Sections 251 and 252 of the Communications Act, as amended (the “Act”),⁴ are transport. The Commission has also identified “second mile” and “middle mile” facilities as forms of transport.⁵

It is unwise to consider each form of transport in isolation, as each is essentially the same, interchangeable product. Viewing each form of transport in isolation prevents the Commission from seeing the interrelationships between these forms and from taking a common approach to transport in general. This allows carriers to game the Commission’s rules, as evidenced by the actions of certain carriers.⁶

In addition to looking at transport more broadly, the Commission should adopt procedures for the use of “final offer” arbitration, subject to the Commission’s *de novo* review, to resolve transport disputes. Such an arbitration mechanism would be fully consistent with the Commission’s statutory authority, as well as prior Commission actions with respect to interconnection disputes and the review of certain mergers. Among other benefits, “final offer” arbitration would: (i) create incentives for parties to be more reasonable in their offers and demands from the outset; (ii) allow parties to resolve disputes in a streamlined fashion; and (iii)

⁴ 47 U.S.C. §§ 251, 252.

⁵ *See, e.g.*, NBP Public Notice #11, DA 09-2186 (Oct. 8, 2009).

⁶ For instance, when AT&T was ordered to reduce special access prices as a consequence of its acquisition of BellSouth, AT&T simply raised the price for the dedicated transport portion of switched access to compensate for some of its losses in the special access market (as shown in the charts on page 9, *supra*). Had the Commission conditioned the BellSouth acquisition on a reduction in transport pricing across the board, AT&T would not have been able to do this.

provide a vehicle for quickly establishing industry standards with respect to reasonableness while imposing minimal administrative burdens on the Commission. “Final offer” arbitration also could facilitate the expansion of pricing flexibility for transport services.

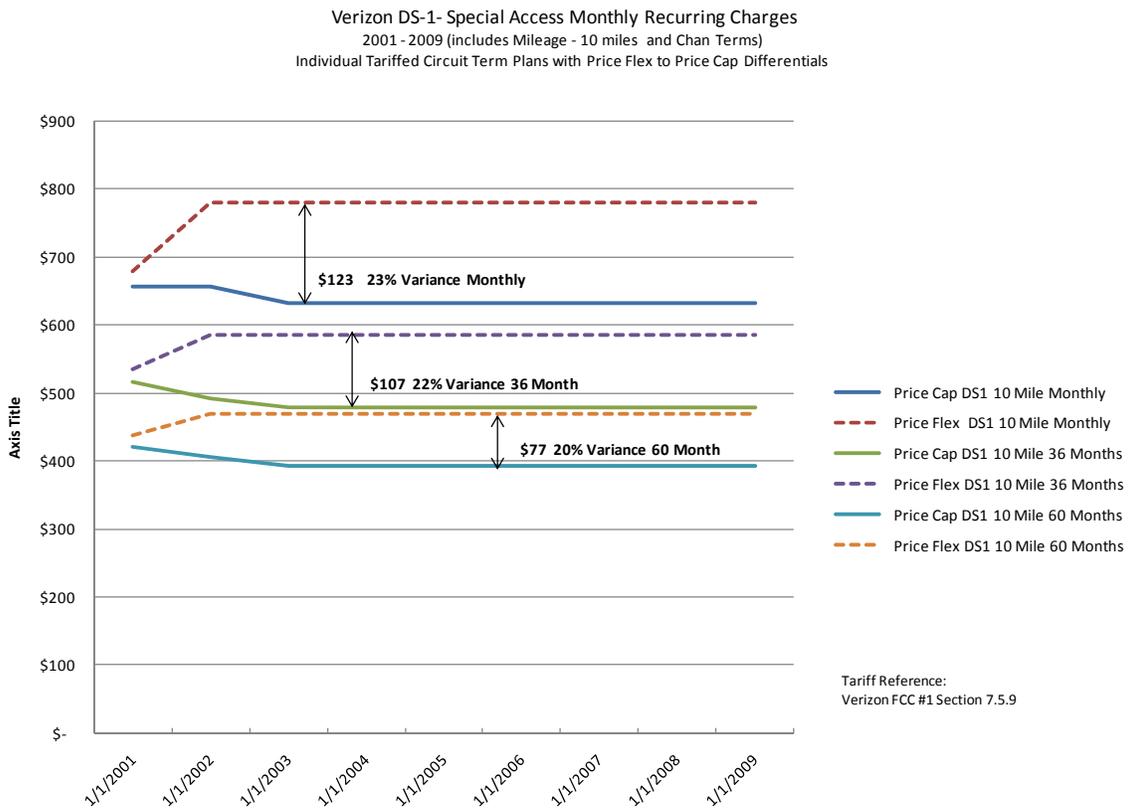
Global Crossing urges the Commission to take this opportunity to embrace “final offer” arbitration and its many benefits in the special access context, consistent with the specific procedures proposed below, while moving beyond the seemingly endless debates over the level of competition in special access markets. In addition, however the Commission decides to proceed, it should eliminate the “one-way ratchet” inherent in its pricing flexibility procedures and provide a mechanism to review the continued appropriateness of pricing flexibility determinations in particular cases.

II. THE EVALUATION OF DIVERGENT DATA CONCERNING COMPETITION IN SPECIAL ACCESS MARKETS IS OF LIMITED VALUE

During the multi-year history of this proceeding, numerous commenters have repeatedly explained to the Commission how the Regional Bell Operating Companies (“RBOCs”) and certain other providers have been able to leverage their market power to impose unreasonable rates, terms, and conditions on special access customers—even in markets that the Commission has found to be “competitive” and in which these carriers have been granted pricing flexibility. Because the incumbent carrier serving a given local market often is the only meaningful provider of special access services in that market in many locations, it has a decisive advantage over customers in negotiating the rates, terms and conditions of access.

Unsurprisingly, over the past eight years, Global Crossing has watched as RBOC rates for DS-1 and DS-3 services subject to pricing flexibility have increased, both with respect to the term plans offered by the RBOCs, as well as their month-by-month pricing. The chart below is typical of the pricing history for special access services since pricing flexibility has been granted. This chart illustrates Verizon’s pricing in LATA 132 since 2001 and shows that prices increased

from 2001 to 2002 and then remained constant to the present. Verizon is not unique in its behavior; Global Crossing has submitted similar data showing AT&T and Qwest's pricing in the past as well.⁷ And while this chart is not meant to be definitive, it does track in a broad way the pricing practices of Verizon since pricing flexibility was granted and compares those prices to price cap rates for the same service. As the chart shows, prices under pricing flexibility remain roughly 20 percent higher than rates under price cap regulation.



The record already is replete with evidence substantiating this increase in rates, and otherwise demonstrating that incumbents have pricing power with respect to special access

⁷ See, e.g., Comments of Global Crossing North America, Inc., WC Docket No. 05-25 (Aug. 7, 2007) (Declaration of Janet Fischer).

services.⁸ These data, and others that could be submitted for the Commission's consideration, demonstrate that special access markets subject to pricing flexibility are not competitive. Among other things, an examination of these data reveals: (i) discrepancies between historical pricing trends for special access services and historical pricing trends for other services known to be subject to effective competition; (ii) discrepancies between historical pricing trends for special access services and historical pricing trends for retail services that incorporate special access or transport as an input; (iii) discrepancies between the presence of collocated competitors at a given *wire center* and the availability of competitive service at any particular *building*; (iv) the relatively small volume of contracts that have been filed with the Commission under the pricing flexibility rules; and (v) the inability of customers to respond to market dynamics by taking advantage of competitive service offerings as a result of the structure of special access markets and volume and term discounts intended to impose high switching costs on customers.⁹

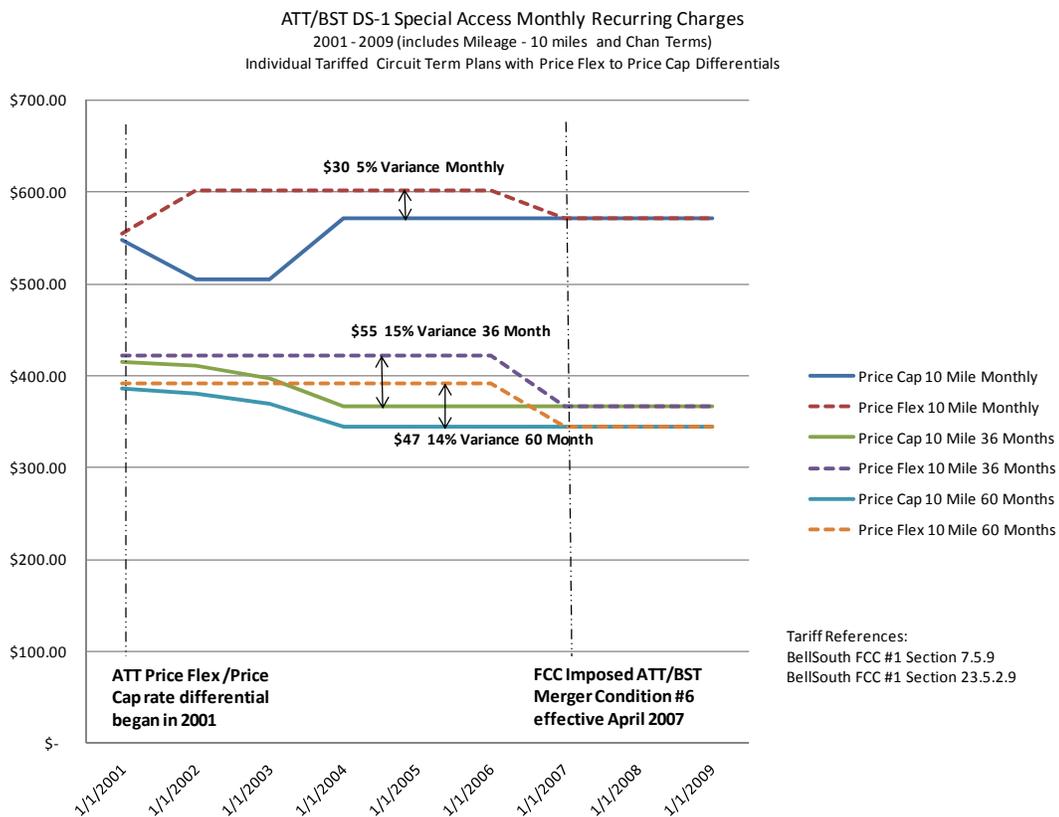
While Global Crossing continues to believe that there is a more than ample basis upon which the Commission could conclude that special access markets subject to pricing flexibility are *not* competitive, there remains a divergence of views on these issues, with each side presenting different and conflicting data on the same points.¹⁰ Notably, despite a wealth of data to the contrary, the RBOCs consistently have maintained that their special access rates have

⁸ See, e.g., Comments of Sprint Nextel Corporation, WC Docket 05-25 (Aug. 8, 2007); Comments of Time Warner Telecom and One Communications, WC Docket 05-25 (Aug. 8, 2007).

⁹ For example, the RBOCs typically condition certain rates on a customer's agreement to maintain a specified percentage (as much as 95 percent) of its special access business with the RBOC, or maintain special access expenditures with the RBOC at some percentage of a previous spending level. As a practical matter, such conditions preclude a customer from switching to a competitor unless that customer can move most of its business at once. However, this is virtually impossible since special access arrangements for individual circuits cover multi-year terms that are not synchronized with each other, or with the terms of downstream service arrangements.

¹⁰ Public Notice at 1-2.

trended downward as a result of market competition. For example, AT&T has claimed that “special access prices have been steadily declining in all parts of the country and at all levels of special access circuit bandwidth,” such that special access customers “pay less and have more choices today than ever before.”¹¹ And yet, the chart below shows that AT&T raised pricing in the same way as Verizon, and that AT&T’s special access rates were in fact higher than they would have been under price caps until those rates were reduced as a result of the *BellSouth Merger Order* in 2007.¹²



¹¹ See Letter from Robert W. Quinn, Jr., Senior Vice President, Federal Regulatory, AT&T Services, Inc., to Marlene H. Dortch, Secretary, Federal Communications Commission, WC Docket No. 05-25, at 3 (Feb. 6, 2009).

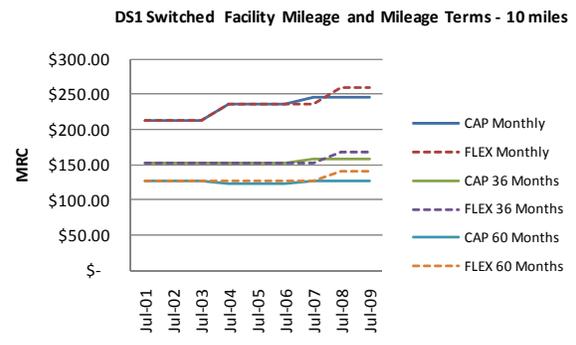
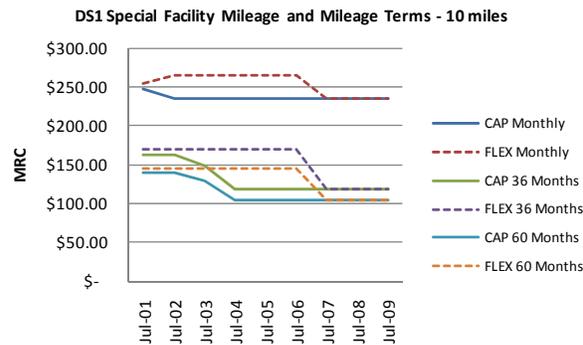
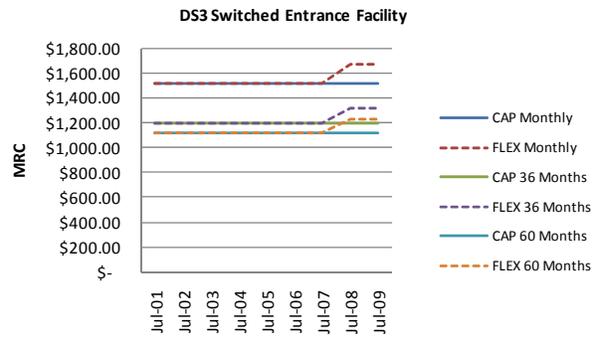
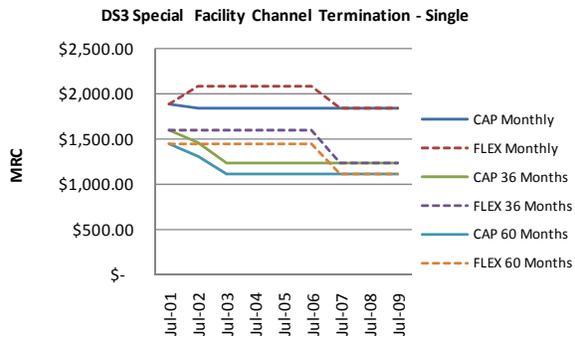
¹² See *AT&T Inc. and BellSouth Corporation Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd 5662 (2007) (“*BellSouth Merger Order*”).

Given these highly divergent viewpoints, which to date have been irreconcilable, it is not clear that picking one analytical framework and asking parties to resubmit their conflicting data under that framework would assist the Commission in determining how to address special access issues. To the contrary, there is little reason to believe that, regardless of the analytical framework the Commission chooses to adopt this time, parties would do anything other than again provide the same conflicting data that is already in the record. The Commission would be left in the same quandary in which it finds itself today, only prolonging the resolution of this proceeding and the implementation of necessary reforms for years to come.

III. THE COMMISSION SHOULD FOCUS INSTEAD ON MECHANISMS, SUCH AS “FINAL OFFER” ARBITRATION, THAT WOULD HELP TO ENSURE THE OBJECTIVE REASONABLENESS OF TRANSPORT RATES, TERMS, AND CONDITIONS—REGARDLESS OF COMPETITION LEVELS

A. The Commission Should Focus, First and Foremost, on Ensuring that Transport Rates, Terms, and Conditions Are Reasonable

Instead of focusing on how to analyze competition levels in special access markets—an inquiry which already has taken years and, for the reasons discussed above, could take years longer—the Commission should focus on the overriding question of how best to ensure that rates, terms, and conditions for all forms of transport are reasonable. As mentioned at the outset, viewing different forms of transport in isolation allows carriers to offset decreased rates for one form of transport with increased rates for another. This phenomenon is illustrated in the charts below, which show that at the time AT&T reduced special access rates pursuant to the *BellSouth Merger Order*, it raised dedicated transport rates for switched access. In order to prevent such actions in the future, the Commission should harmonize the rules for all forms of transport.



Tariff references: BellSouth FCC#1Section 7.5.9, Section 23.5.2.9, Section 6.8.1, Section 23.5.1

In particular, the Commission should recognize the availability of other mechanisms that would better enable market forces to operate, and that would prove beneficial regardless of how the Commission chooses to analyze competition levels, or even what those levels are determined to be. As discussed below, “final offer” arbitration is one such mechanism that the Commission should seriously consider.

Focusing on the reasonableness of rates, terms, and conditions would be consistent with the Act, and the Commission’s mandate thereunder. Section 201(b) of the Act provides that a carrier’s rates, terms, and conditions of service must be “just and reasonable,”¹³ while Section 202(a) of the Act makes it unlawful for carriers to unreasonably discriminate with respect to the provision of its services.¹⁴ While Commission regulations implementing these statutory

¹³ 47 U.S.C. § 201(b).

¹⁴ 47 U.S.C. § 202(a).

provisions have evolved over time, they consistently have aimed to ensure the fundamental “reasonableness” of a carrier’s rates, terms, and conditions of service.

Certainly, the Commission should continue to recognize the valuable role that market competition plays in ensuring reasonable rates, terms, and conditions; in permitting price cap carriers to seek pricing flexibility, the Commission recognized that in some cases effective market competition could substitute for rate regulation through mechanisms such as price caps.¹⁵ At the same time, the Commission should remember that market competition is not an *end* in and of itself, but rather a *means* of ensuring that a carrier meets its statutory obligations under Sections 201 and 202 of the Act. There is no reason, under the Act or otherwise, that competition needs be the *sole* mechanism upon which the Commission relies to ensure “reasonableness.” In particular, the Commission should strongly consider mechanisms, such as “final offer” arbitration, that would increase the likelihood that special access rates, terms, and conditions would be reasonable, without interfering with *actual* competition where it exists, and without requiring the Commission to settle on a framework for analyzing competition levels in transport markets, or resolve fully the myriad issues with respect to competition data and methodology raised in this proceeding.

B. The Commission Should Use “Final Offer” Arbitration as One Mechanism for Ensuring the Objective Reasonableness of Transport Rates, Terms, and Conditions

The Commission should implement “final offer” arbitration (pursuant to procedures described below) as one mechanism for ensuring the objective reasonableness of transport rates, terms, and conditions. “Final offer” arbitration is a form of arbitration in which both parties

¹⁵ See, e.g., *Access Charge Reform*, Fifth Report and Order, 14 FCC Rcd 14221, at ¶ 26 (“[O]ur ultimate goal is to continue to foster competition and allow market forces to operate where they are present[.]”). Accordingly, the Commission’s rules afford pricing flexibility relief to price cap carriers that are able to satisfy certain triggers intended to indicate competition in a given Metropolitan Statistical Area (“MSA”) at the time of application. *Id.* at ¶¶ 77-78.

submit their best and final offers to an arbitrator, who then selects the most reasonable one to form the basis for the parties' service arrangement. As such, "final offer" arbitration encourages parties to present reasonable offers that appropriately reflect market dynamics from the start, and expedites the dispute resolution process, offering significant benefits over other forms of arbitration.

Notably, the Commission has determined that alternative dispute resolution ("ADR") techniques like "final offer" arbitration "can play an important role in Commission proceedings," and has stated that it "will make every effort possible to resolve appropriate disputes" through such techniques.¹⁶ The Commission already uses "final offer" arbitration in the interconnection context (under Section 251), as well as the program access context (through merger conditions),¹⁷ recognizing the value of this form of arbitration. In the transport context, "final offer" arbitration would offer numerous benefits to parties, the public, and the Commission. For example:

- "Final offer" arbitration would create incentives for parties to be reasonable in their offers and demands. Because arbitrators are not allowed to "split the difference" or otherwise force the parties to compromise, the cost of an adverse judgment could be quite large. As a result, parties are likely to take reasonable positions from the start, and their positions are more likely to converge. As a result, parties also are more likely to reach negotiated settlements even prior to the arbitration stage.
- "Final offer" arbitration would allow the parties to quickly and simply resolve disputes in a streamlined fashion—as compared to litigation, the Section 208 complaint process, or even conventional arbitration. As such, "final offer" arbitration would reduce one party's ability to compel another party to agree to

¹⁶ See *In the Matter of Use of Alternative Dispute Resolution Procedures in Commission Proceedings and Proceedings in which the Commission is a Party*, Initial Policy Statement and Order, 6 FCC Rcd 5669, at ¶ 9 (1991).

¹⁷ See, e.g., 47 C.F.R. § 51.807; *News Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 3265, at App. B, § IV.A (2008); *Adelphia Communications Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203, at ¶ 190, App. B (2006); *General Motors Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 473, at Apps. B and C (2004).

unreasonable rates, terms, or conditions of service simply to avoid the costs of a long and uncertain dispute resolution process.

- “Final offer” arbitration would provide a vehicle for quickly establishing industry standards with respect to reasonableness, while at the same time affording the Commission the opportunity to review arbitrated decisions and control overall policy. More specifically, the Commission would retain ultimate authority to resolve questions of reasonableness through an appeals process, although such appeals should be infrequent and relatively easy to resolve—particularly once the market begins to reflect industry standards established through arbitration.¹⁸

In light of these numerous benefits, Global Crossing urges the Commission to adopt specific procedures for “final offer” arbitration in the transport context, consistent with those proposed by Global Crossing below.¹⁹ Critically, the Commission’s use of “final offer” arbitration procedures would be fully consistent with the Administrative Dispute Resolution Act (“ADRA”), provided the arbitration decision remains subject to the *de novo* review of the Commission.²⁰ Importantly, the use of final offer arbitration could allow the Commission to

¹⁸ The underlying arbitration would create an evidentiary record, assist in narrowing the issues, and help to identify appropriate standards. Thus, the Commission’s review would be informed by the arbitrator’s prior efforts and expedited as a result.

¹⁹ To the extent the Commission wishes to make the arbitration remedy voluntary, it could establish a procedure to permit carriers to “opt in” to the arbitration mechanism. For example, carriers willing to use “final offer” arbitration to resolve future disagreements over special access or transport rates, terms and conditions could file letters or a short form voluntarily agreeing to use arbitration on a going-forward basis to resolve such disputes. The Commission could also consider a given carrier’s willingness to accept arbitration in evaluating whether a grant of pricing flexibility to that carrier would be likely to result in reasonable rates, terms, and conditions for special access services. However, there would be no *quid pro quo* requiring carriers to use arbitration in order to receive pricing flexibility. *Cf.* 5 U.S.C. § 575(a)(3) (precluding an agency from requiring any person to consent to *binding* arbitration—*i.e.*, arbitration not subject to *de novo* review—“as a condition of entering into a contract or obtaining a benefit.”). Rather, a carrier’s willingness to accept the arbitration remedy would be only one factor that the Commission could consider. A carrier’s acceptance of “final offer” arbitration should increase the Commission’s comfort that granting pricing flexibility to a given carrier would serve the public interest.

²⁰ While the ADRA precludes the Commission from imposing *binding* arbitration on parties against their will, arbitration is not binding where *de novo* review by the Commission is available. *See Mid-Atlantic Sports Network v. Time Warner Cable, Inc.*, 23 FCC Rcd 15783, at ¶¶ 52-53 (MB 2008) (“The ADRA’s prohibition[s do] not apply where, as here,

more broadly deregulate the transport (including special access) market. With the added backstop of “final offer” arbitration, pricing flexibility actually could be expanded so that its purported benefits could be made more widely available.

C. The Commission Should Adopt Specific Procedures to Govern “Final Offer” Arbitration

With respect to the specific procedures to be employed to implement final offer arbitration, Global Crossing proposes the procedures set forth below. These procedures are based largely on procedures that the Commission has already adopted to implement this mechanism in other contexts.²¹ Specifically:

- The commercial arbitration remedy would be available to:
 - Any carrier customer requesting transport service (“Requesting Carrier”), following the expiration of its existing agreements with an ILEC or other carrier; and
 - Any Requesting Carrier that makes a request for a transport agreement with an ILEC or other carrier and that does not currently have such an agreement with that carrier.
- Thirty days after the Requesting Carrier requests the negotiation of a transport services agreement, either party would be permitted to notify the other within five business days that it intends to request arbitration over the rates, terms and/or conditions of transport. Such terms and/or conditions could be price or non-price based.
- Upon receiving timely notice of the Requesting Carrier’s intent to arbitrate, the other party would have to immediately allow continued access under the same terms and conditions of an expired or expiring agreement, as long as the Requesting Carrier continues to meet the other obligations of the agreement. The ILEC or other carrier from which service is being requested would be required to provide to Requesting Carriers making first-time transport requests pursuant to tariff, although if different rates are subsequently determined as a result of the

the arbitration is non-binding, *i.e.*, either party may seek *de novo* review of the arbitration decision”); *Comcast Corporation, Petition for Declaratory Ruling that The America Channel is not a Regional Sports Network*, Order, 22 FCC Rcd 17938, at ¶ 4 n.13 (2007).

²¹ See, e.g., 47 C.F.R. § 51.807; *General Motors Corporation*, Memorandum Opinion and Order, 19 FCC Rcd 473 (2004); *News Corporation*, Memorandum Opinion and Order, 23 FCC Rcd 3265 (2008); *Adelphia Communications Corporation*, Memorandum Opinion and Order, 21 FCC Rcd 8203 (2006).

arbitration, such rates would apply retroactively to the transport services provided during the period prior to final agreement.

- Following the Requesting Carrier's notice of intent to submit the dispute to arbitration, but prior to filing for formal arbitration with the American Arbitration Association ("AAA"), the Requesting Carrier and the other party would enter a "cooling off" period during which negotiations would continue.
- The Requesting Carrier's formal demand for arbitration, which would include the Requesting Carrier's "final offer," could be filed with the AAA no earlier than the fifteenth business day after the Requesting Carrier serves its intent to arbitrate on the other party.
- The AAA would notify both parties upon receiving the Requesting Carrier's formal filing.
- The other party would be required to file a "final offer" with the AAA within two business days of being notified by the AAA that the Requesting Carrier had filed a formal demand for arbitration.
- The Requesting Carrier's final offer would not be disclosed until the AAA receives the final offer from the other party. Upon receipt of both offers, the AAA would simultaneously provide a copy of the Requesting Carrier's final offer to the other party, and a copy of the other party's final offer to the Requesting Carrier.
- The final offers would be in the form of a contract for transport services for a minimum period of 1 year.
- The arbitration itself would proceed in accordance with the following rules:
 - The arbitration would be decided by a single arbitrator selected by the AAA from members of its Telecommunications Panel and would be conducted under the expedited procedures of the AAA Commercial Arbitration Rules, excluding the rules relating to large, complex cases. The location of the arbitration would be established by the Requesting Carrier.
 - The arbitrator would choose the "final offer" of the party which most closely approximates the prevailing commercially reasonable rates, terms and/or conditions in the industry with respect to the transport services at issue, and which is most consistent with existing federal telecommunications policy.
 - To determine commercial reasonableness, the arbitrator would be permitted to consider any relevant evidence (and could require the parties to submit such evidence to the extent it is in their possession) including, but not limited to:

- Current contracts between the Requesting Carrier and the other party or other transport services providers;
 - Current contracts between other transport customers and the other party or other transport services providers;
 - Evidence of the relative value of the requested transport services compared to the services of other transport services providers (*i.e.*, price, scope of service, quality of service, etc.);
 - Changes in the value of non-ILEC transport agreements;
 - Changes in the value or costs of the provision of transport services;
 - Evidence of rates, terms and/or conditions for comparable services; and
 - Evidence of rates, terms and/or conditions for retail services.
- In determining commercial reasonableness, the arbitrator would not consider offers made by either party prior to the arbitration with respect to the services at issue.
 - If the arbitrator were to find that one party's conduct, during the course of the negotiations or arbitration, had been unreasonable, the arbitrator would be permitted to assess all or a portion of the other party's costs and expenses (including attorney fees) against the offending party.
 - Following the decision of the arbitrator, the terms of the new transport agreement, including payment terms, if any, would become retroactive to the expiration date of the previous agreement. The Requesting Carrier would make an additional payment to the other party in an amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration. The other party would issue a credit to the Requesting Carrier in the amount representing the difference, if any, between the amount that is required to be paid under the arbitrator's award and the amount actually paid under the terms of the expired contract during the period of arbitration.
 - Each party would pay its own fees and costs, and the parties would split the arbitrator's fees and costs equally.
 - The result of the arbitration would be subject to *de novo* review by the Commission. If upheld, the judgment on the arbitrator's award could be entered in any court having jurisdiction.

IV. THE COMMISSION SHOULD ELIMINATE THE “ONE-WAY RATCHET” CREATED BY ITS PRICING FLEXIBILITY RULES

In addition to making a “final offer” arbitration remedy available to willing parties, the Commission should remedy certain fundamental defects in its current pricing flexibility rules. In particular, the Commission should eliminate the “one-way ratchet” that the current rules create with respect to the grant of pricing flexibility relief.

Under the current structure, in order to qualify for such relief, a price cap carrier must satisfy the relevant triggers at the time a pricing flexibility petition is filed. Once the Commission has granted flexibility, price cap carriers continue to enjoy pricing flexibility even if market competition declines precipitously (*e.g.*, competitive carriers cease to serve the relevant market). Tellingly, the Government Accountability Office has noted that “there has been a decline in some MSAs in the level of competitive collocation in the wire centers used by the price-cap incumbents to obtain pricing flexibility.”²² This creates a perverse result in which markets subject to pricing flexibility may be *less* competitive than those that remain subject to price cap regulation, and may become even less competitive over time.

The Commission should take measures to eliminate this “one-way ratchet,” and implement a process for carriers to demonstrate that they would re-qualify for pricing flexibility on a periodic basis in order to retain that flexibility. For example, the Commission could require carriers to demonstrate, on an annual or biennial basis, that they continue to qualify for pricing flexibility in those MSAs in which they wish to retain such flexibility. In the alternative (or in addition), the Commission could permit customers to petition the Commission to revisit the appropriateness of granting pricing flexibility to a carrier in a given MSA.

²² See Government Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 13 (Nov. 2006).

V. CONCLUSION

For the reasons discussed above, Global Crossing urges the Commission to look more broadly at the transport market and take steps to implement “final offer” arbitration as a sanctioned dispute resolution mechanism.

Respectfully submitted,

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