

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

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

**COMMENTS OF THE
MASSACHUSETTS DEPARTMENT OF
TELECOMMUNICATIONS AND CABLE**

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Department of Telecommunications and Cable

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TABLE OF CONTENTS

	Page
I. INTRODUCTION	1
II. BACKGROUND	3
III. MDTC's OBSERVATIONS ON THE RECORD	5
IV. THE MDTC SUPPORTS THE GAO REPORT RECOMMENDATIONS	6
V. THE FCC'S SPECIAL ACCESS RATE REGULATIONS HAVE NOT WORKED AS INTENDED	8
A. Collocation is not a proxy for competition in channel termination	9
B. The MSA as not an appropriate geographic unit to measure competition.....	10
C. The Commission needs to redefine the relevant product markets.....	12
VI. CONCLUSION	13

I. INTRODUCTION

The Massachusetts Department of Telecommunications and Cable (“MDTC”)¹ hereby files comments in response to the Public Notice issued by the Federal Communications Commission (“Commission” or “FCC”) on November 5, 2009, in the above-referenced proceedings.² In this Public Notice, the FCC seeks comment on “an appropriate analytical framework for examining the various issues that have been raised in the *Special Access NPRM*,³” specifically, “concrete suggestions on the appropriate analytical framework for determining whether the current rules are working.”⁴ In particular, the FCC seeks comment on certain key questions raised in the *Special Access NPRM*, including:

1. Do the Commission’s pricing flexibility rules ensure just and reasonable rates?
 - 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 local exchange carrier (“ILEC”) prices, including for both channel terminations and inter-office facilities?
 - b. If so, are the triggers set at an appropriate level?
2. Do the Commission’s price cap rules ensure just and reasonable special access rates?

¹ The MDTC is the exclusive state regulator of telecommunications and cable services within the Commonwealth of Massachusetts. See Mass.Gen.Laws c. 25C, §1.

² *In the Matters of 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, Public Notice, DA 09-2388 (rel. Nov. 5, 2009) (“Public Notice”).

³ *See In the Matters of 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, FCC 05-18, (rel. Jan. 31, 2005) (“*Special Access NPRM*”).

⁴ Public Notice, at 1-2. See generally, *Special Access NPRM*; 47 C.F.R. §§ 1.415, 1.419.

3. Do the Commission's price cap and pricing flexibility rules ensure that the terms and conditions in special access tariffs and contracts are just and reasonable?⁵

As the exclusive state regulator of the telecommunications industry within Massachusetts, it is the MDTC's policy to support competition within the telecommunications and local exchange markets in the state and to protect the public interest. In Massachusetts, more than 99 percent of the special access circuits are classified as interstate circuits, which limits the MDTC's regulatory role over these services. However, the MDTC maintains an interest in the regulation of these circuits given their impact on competition and the economy within the state. In particular, the MDTC is concerned with the availability, affordability, and quality of those circuits as well as the potential for price discrimination and price fixing.

The MDTC offers several recommendations based on the Commission's inquiries and offers certain observations based on the record in the instant proceedings. Specifically, the MDTC believes that the following changes to the existing regulatory framework will prevent providers from pricing special access circuits above competitive levels:

- A. The Commission should discontinue using the metropolitan statistical area ("MSA") as the relevant geographic market to test for competitiveness and introduce the wire center, or a comparable, more granular geographic demarcation, as the relevant geographic market to measure for competitiveness.
- B. In addition to changes to the geographic market delineations, the Commission should redefine the relevant product markets. At a minimum, the Commission should define at least four separate product markets, including DS1 channel terminations, DS3 channel terminations, DS1 transport and DS3 transport. The Commission may increase the number of product markets to increase the granularity of analysis, but, at a minimum, these four product market categories should be created.
- C. The Commission should determine the competition in each wire center for each of the four product markets described above. This would result in a more granular analysis that would better assess the true state of competition in the market.

⁵ *Special Access NPRM*, at 2 (citations omitted).

- D. The Commission should adopt stringent triggers for granting pricing flexibility in these newly defined geographic and product markets. The Commission must discontinue the use of wire center collocations as a proxy for competition in channel terminations. Instead, the Commission should measure the concentration of facilities-based local loops provided by competitive carriers in each wire center. Further, the Commission should set the triggers for granting pricing flexibility after taking into consideration relevant factors such as line density, business line count, revenue opportunities and any factors that create entry barriers to competitive carriers.
- E. For dedicated transport, the use of collocation as a proxy for competition is not inappropriate. However, the Commission should consider adopting triggers and thresholds comparable to those set forth in the *Triennial Review Remand Order*⁶ for transport unbundled network elements (“UNEs”). These triggers are both more granular and more current than the old triggers adopted in the 1999 *Pricing Flexibility Order*,⁷ and are better suited to predict the competitive forces that will discipline interstate special access rates.

II. BACKGROUND

Prior to 1991, the FCC used rate-of-return principles to limit each carrier’s rates. In 1991, the FCC adopted a new regulatory regime for large incumbent firms where it introduced limits on the prices that regulated carriers could charge rather than their rates of return. This system allowed the regulated carriers to charge rates for special access services within limits set by certain formulas.

In 1999, the FCC amended the rules with regard to how incumbent local exchange carriers (“ILECs”) could set special access prices and allowed ILECs pricing flexibility provided that the ILECs met certain conditions.⁸ The Commission granted this regulatory relief at the

⁶ See *In the Matters of Unbundled Access to Network Elements*, WC Docket No. 04-313, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, CC Docket No. 01-338, Order on Remand, 20 FCC Rcd 2533, FCC 04-290, at ¶¶ 78-124 (rel. Feb. 4, 2005) (“*Triennial Review Remand Order*”).

⁷ See *In the Matters of 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 US 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, FCC 99-206 (1999) (“*Pricing Flexibility Order I*”), *aff’d sub nom. WorldCom, Inc. v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

⁸ See generally, *Pricing Flexibility Order*.

MSA level.⁹ The Commission created two types of regulatory relief: Phase I and Phase II. Phase I flexibility permitted a carrier to offer individually negotiated contracts with downward pricing flexibility and the ability to offer volume and term discounts.¹⁰ Phase II flexibility permitted ILECs to raise prices above the price cap limit.¹¹ Once Phase II flexibility was granted, the FCC no longer required price cap ILECs to offer their generally available price cap tariffs.¹²

The Commission premised its *Pricing Flexibility Order* on the premise that, once competitors had made irreversible investments in the facilities needed to provide special access services, they no longer needed protection from exclusionary pricing behavior by ILECs, since efforts to exclude competitors would be unlikely to succeed.¹³ To implement this principle, the Commission adopted a proxy test for competitive conditions, which measured the frequency of wire center collocations in each MSA.¹⁴ The new rules allowed an ILEC to measure collocation frequency in an MSA in two different ways: (1) based on the percentage of wire centers in an MSA that have a collocator; or (2) based on the percentage of transport revenue generated by wire centers with collocation in the MSA.¹⁵ The Commission set separate triggers at which flexibility could be granted for Phase I and Phase II relief for both channel terminations and transport.¹⁶

⁹ *Id.* at ¶¶ 71-76.

¹⁰ *Id.* at ¶¶ 77-141.

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at ¶ 77.

¹⁴ *Id.* at ¶¶ 78, 84.

¹⁵ *Id.*

¹⁶ *Id.*

III. MDTC OBSERVATIONS BASED ON THE RECORD

Record evidence gathered by the Commission in response to the *Special Access NPRM* and AT&T's petition to reform ILEC interstate special access rates¹⁷ supports certain carrier arguments that competition is limited within the special access market. First, the record indicates that the current regulations for interstate special access circuits have created conditions in which dominant providers are using their market power to charge high prices and impose unreasonable non-price terms and conditions. For instance, T-Mobile asserted that ILECs were virtually the sole source in most of their service areas for the special access services that T-Mobile needs for the critical initial link from its base stations to ILEC central offices as well as for the interoffice transport links that T-Mobile requires for backhaul.¹⁸ Further, parties have attested to excessive special access pricing assessed by ILECs, in which the prices of ILEC special access DS1 loops ranged from 125% to nearly 400% above comparable unbundled network element prices for the same services and facilities.¹⁹ This runs contrary to the Commission's prediction that competition would reduce special access prices to forward looking cost.

Second, the record shows that very little competition exists from intermodal providers of these services. For instance, cable operators predominantly offer services to residential customers and, thus far, have made limited investments towards providing robust special access services that are sought out by business customers. Similarly, fixed wireless is not currently a viable substitute for wireline special access services due to operational and security concerns and, hence, is available only to a few business customer lines.

¹⁷ Since filing the petition, AT&T appears to have adopted a different position on these issues.

¹⁸ See T-Mobile Comments, *In the Matters of 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, Attachment C at 5-6 (filed June 13, 2005) ("T-Mobile Comments").

¹⁹ See, e.g., T-Mobile Comments at Appendix B.

IV. THE MDTC SUPPORTS THE GAO REPORT RECOMMENDATIONS

The MDTC agrees with the assessment made by the Government Accountability Office (“GAO”) in November of 2006 that significant reform of the special access pricing regime is warranted.²⁰ The GAO found that facilities-based competition to end users is not extensive and that competitive alternatives exist in only a relatively small set of buildings.²¹ Further, based on an analysis of 16 major metropolitan areas, the report determined that areas which were granted Phase II pricing flexibility generally had less frequent competition than Phase I areas and concluded that the “*FCC's competitive triggers may not accurately predict competition at the building level.*”²²

The GAO Report also examined how the pricing flexibility rules affected prices and found that in areas with Phase II flexibility, average list prices were higher than in areas with Phase I flexibility.²³ Its research showed that “price-flex prices as of June 2006 are higher on average than list prices in effect just prior to FCC granting pricing flexibility.”²⁴ These findings indicate that the deregulatory actions of the FCC have not served their intended purpose – that of increasing competition. The Report states that the “FCC's deregulatory actions were predicated on proxy measures that [the] FCC predicted would indicate whether sufficient facilities-based

²⁰ See U.S. Government Accountability Office, Report to the Chairman, Committee on Government Reform, House of Representatives – Telecommunications, “FCC needs to improve its ability to monitor and determine the extent of competition in dedicated access services” (November 2006). The GAO’s findings are supported by another report published by two FCC economists who reviewed the trends in special access tariffs during the first four years of pricing flexibility. See Uri and Zimmerman, Market Power and the Deregulation of Special Access Service by the Federal Communications Commission, 13 Information & Telecommunications Technology Law No. 2 at 129 (2004). This report concluded that price cap ILECs have market power in supplying special access service and have taken advantage of that power, and that the market for special access service is not competitive. *Id.*

²¹ GAO Report at 12, 19.

²² *Id.* (emphasis added).

²³ *Id.* at 13, 27.

²⁴ *Id.* at 28.

competition existed for dedicated access services in order for market forces to function in this way”²⁵ and that “the FCC's predictive judgment - that MSA’s with pricing flexibility have sufficient competition - may not have been borne out.”²⁶ The Report went to the extent of saying that the competitive alternatives for dedicated access have declined in some MSAs in the past few years.²⁷

Several parties have disagreed with the GAO’s use of percentage of buildings lit by competitive facilities as the primary measure of competition.²⁸ According to AT&T, the mere existence of alternative facilities near a building is more than sufficient to ensure market-based prices even if the building is not currently served by alternative facilities.²⁹ In addition, both commenters were critical of some of the assumptions made by GAO – namely, that the GAO’s assumptions led to both an overestimation of the number of relevant buildings and an underestimation of the extent of competitive alternatives, and thus to conclude incorrectly that special access competition was limited.³⁰

The Commission should not be persuaded by arguments opposing the use of percentage of buildings lit by competitive facilities as the primary measure of competition.³¹ Indeed, the number of competitive providers offering facilities-based competition in the same product and

²⁵ *Id.* at 42.

²⁶ *Id.*

²⁷ *Id.*

²⁸ See, e.g., Verizon Reply Comments, *In the Matters of 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, at 23-25 (filed Aug. 15, 2007) (“Verizon Reply Comments”); AT&T Comments, *In the Matters of 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, at 51-57 (filed Aug. 8, 2007) (“AT&T Comments”).

²⁹ See AT&T Comments at 51-52.

³⁰ *Id.* at 52-53.

³¹ *Id.* at 53.

geographic markets as the incumbent providers is a highly relevant measure of competition in special access services. The absence of competitors in a particular building should be seen as a failure of competitive forces to work. Moreover, aggregating the percentage of buildings served by competitive providers over a wider geographic area would provide regulators with greater insight into the true state of competition within the special access market. As the Commission has already recognized, “the barriers to entry impeding competitive deployment of loops are substantial: [t]he costs of the loops themselves, as well as costs associated with accessing right-of-ways and obtaining building access do not generally vary with demand.”³²

The GAO Report recognized that behind the FCC's deregulatory actions was a vision of facilities-based competition, where competitors would compete with the incumbents mainly using their own networks and facilities and the incumbents would be constrained from pursuing predatory and exclusionary pricing practices, and prices would be driven toward marginal cost.³³ The GAO's findings show that significant regulatory reforms are warranted and offers further justification for the Commission to reform the special access pricing rules as proposed in the instant proceedings.

V. THE FCC'S SPECIAL ACCESS RATE REGULATIONS HAVE NOT WORKED AS INTENDED

The Commission has largely deregulated ILEC special access prices by allowing ILECs upward pricing flexibility without regard to their normal price cap rates in many MSAs based on criteria defined in its *Pricing Flexibility Order*. As discussed above, the Commission adopted what it called a “proxy test” wherein frequency of wire center collocation was used as an

³² *Triennial Review Remand Order*, at ¶ 153.

³³ GAO Report at 41-42

administratively simple and readily verifiable measure of competitive conditions in the MSA.³⁴ The Commission defined minimum thresholds or triggers at which pricing flexibility could be granted to an ILEC and separate triggers were established for channel terminations and transport.³⁵ As the GAO Report and others have established, competition for special access services is very limited in most MSAs.³⁶ The GAO Report also confirmed the evidence presented by many parties that rates have generally increased in areas with pricing flexibility even though the Commission's expectation was that prices would decline as one would expect in a competitive marketplace.³⁷ Despite these observations, the Commission has granted upward pricing flexibility for channel terminations in more than 100 MSAs and for transport in more than 200 MSAs.³⁸

As a result, the MDTC recommends that the Commission revise the existing special access regulations as suggested in the following sections.

A. Collocation is not a proxy for competition in channel terminations

The use of collocations as a proxy for competitive entry is inappropriate in the case of channel terminations, because no correlation exists between the extent of collocation and competitive loop deployment. The GAO Report reached a similar conclusion, stating that *"FCC's competitive triggers may not accurately predict competition at the building level."*³⁹ Most competitors collocate in an ILEC wire center primarily for gaining access to the ILECs' unbundled loops and *not* for constructing its own loop facilities. A number of parties have

³⁴ See *Pricing Flexibility Order* at ¶¶ 78, 84

³⁵ *Id.*

³⁶ See e.g., T-Mobile Comments, WC Docket No. 05-25, at 6-9 (filed Aug. 8, 2007).

³⁷ See GAO Report at 42.

³⁸ S. Wallsten, *Has Deregulation Affected Investment in Special Access?*, Progress and Freedom Foundation, July 16, 2007.

³⁹ GAO Report at 12-13 (emphasis added).

indicated in comments to the Commission that competitors collocating in an ILEC end office continue to rely on the ILEC's facilities for the channel termination between the end office and the customer premises, at least initially.⁴⁰

The Commission previously acknowledged in its *Pricing Flexibility Order* that entering the market for dedicated transport required less investment per unit of traffic than is required for channel terminations between an end office and customer premises. While investment in dedicated transport and entrance facilities enables competitors to provide service to several end users, a similar investment in channel terminations between an end office and customer premises serve only a single end user. As the Commission has recognized, it is obvious that competitors would prefer to invest in dedicated transport and entrance facilities which generate higher revenues than channel terminations.⁴¹ Therefore, the MDTC recommends that the Commission discontinue the use of wire center collocations as a proxy to determine the extent of competition for channel terminations.

B. The MSA is not an appropriate geographic unit to measure competition

As discussed above, the FCC currently uses the MSA as the relevant geographic market for determining the extent of competition towards granting pricing flexibility for special access. MSAs are typically spread over a wide geographic area with widely varying competitive conditions. Within such a large area, it is possible for competition to exist in one part of an MSA but is unlikely to constrain ILEC special access pricing in another part of the same MSA. The Commission has previously rejected the use of MSAs as the relevant geographic market for both dedicated transport as well as high capacity loops in the *Triennial Review Remand Order*, where

⁴⁰ *Pricing Flexibility Order*, at ¶ 103.

⁴¹ *Id.* at ¶ 102 (stating “competitors are likely to enter the market for entrance facilities, direct-trunked transport, channel mileage, and the flat-rated portion of tandem-switched transport before they enter the market for channel terminations between a LEC end office and a customer premises”).

it observed that an MSA approach "would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate."⁴² Therefore, the MDTC believes that the most appropriate definition of the geographic market for loops/channel terminations is the route between the wire center and the specific customer location or building.

Further, channel terminations from the same wire center to various buildings cannot substitute for channel terminations sought at a specific customer location. Similarly, the most appropriate definition of the geographic market for interoffice transport/channel mileage is the route between the two central offices being connected, because the availability of transport between any other central offices cannot substitute for a dedicated transport between the offices where it is desired. Therefore, the logical outcome would be to define the route between each building and the wire center as a geographic unit, and then to evaluate the competitive conditions for each of these units.

However, the MDTC recognizes that building specific tests are likely impracticable and would be highly burdensome to carriers. For instance, in the *Triennial Review Remand Order*, the record indicated that there were at least 700,000 commercial buildings, and perhaps as many as 3 million buildings which would need to be evaluated for the presence of competition and such case-by-case evaluation would be impracticable even if the relevant evidence were entirely objective and readily forthcoming.⁴³ The realistic alternative would be to designate the wire center, or a similar geographic unit, as the appropriate geographic area for the purpose of evaluating competition. There are far fewer wire centers and it would be much easier for carriers to collect and report, and regulators to analyze, data from wire centers than is the case with any

⁴² *Triennial Review Remand Order*, at ¶¶ 82, 155, 164.

⁴³ *Triennial Review Remand Order*, at ¶ 157.

building-by-building approach. Therefore, the MDTC recommends that the Commission discontinue the use of the MSA as the relevant geographic market to test for competitiveness and instead use the more granular wire center as the relevant geographic market.

C. The Commission needs to redefine the relevant product markets

The Commission's pricing flexibility triggers are based on improper product market definitions. The definition of the relevant product markets should take into account both the function and the transmission capacity of the relevant circuits. The relevant functions for special access include: a) channel terminations between a wire center and a customer's location; and b) transport between two ILEC central offices. These functions are not substitutable with one another and channel termination circuits are not substitutes for transport circuits. Similarly, transport is predominantly sold as DS1 or DS3 circuits. A DS3 circuit has 28 times the capacity of a DS1 circuit, and these circuits are used to fulfill different needs of different types of customers, and also have different economies of deployment. DS1 and DS3 circuits are not substitutes. Based on this analysis, there are, at a minimum, four different product markets: 1) DS1 channel terminations, 2) DS3 channel terminations, 3) DS1 Transport and 4) DS3 transport. Therefore, the MDTC recommends that the Commission redefine the product markets such that there are at least four distinct markets as stated above.

VI. CONCLUSION

The record in this proceeding clearly establishes that existing regulations have not disciplined the market power held by incumbent special access providers who are able to charge supra-normal prices. The Commission must act immediately to tighten the grant of “pricing flexibility” to incumbents by tightening the product market and geographic market definitions, and by discontinuing the use of wire center collocation as a proxy to determine competition for channel terminations.

Respectfully submitted,

_____/s/_____
Geoffrey G. Why, Commissioner