

**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 Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carriers Rates for Interstate Special Access Services	)	RM-10593

**REPLY COMMENTS OF CENTURYLINK  
(ON PUBLIC NOTICE REGARDING ANALYTICAL FRAMEWORK)**

The comments calling for increased special access rate regulation and analytical frameworks in support of severe special access rate reductions filed by competitive local exchange carriers (CLECs), Sprint Nextel and others are disconnected from reality. The primary objective of the Commission’s policies and rules to “promote competition and reduce regulation in order to secure lower prices and higher quality services . . . and encourage the rapid deployment of new telecommunications technologies.”<sup>1</sup> The goal is not to obsessively manage price/cost relationships and limit profits, particularly as technologies and market structures are changing rapidly, making such a goal unobtainable in any event and inconsistent with the public interest in the rapid deployment of new telecommunications technologies. The Commission’s primary emphasis, therefore, should be on encouraging broadband investment.

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<sup>1</sup> Preamble to the 1996 Act, which can be found at Committee on Energy and Commerce, United States House of Representatives, *Compilation of Selected Acts within the Jurisdiction of the Committee on Energy and Commerce*, Communications Law at 413 (April 2003).

Increased regulation and rate reductions will not promote investment and deployment but, to the contrary, dampen investment by incumbents and competitors alike. Although many broadband services, such as digital subscriber line (DSL) services, have been rightfully removed from price cap regulation because of competition, the special access services that remain under price cap regulation are also broadband services. Therefore, the Commission must take extra care not to over-regulate special access services; indeed Congress has specifically directed the Commission to promote broadband deployment<sup>2</sup> not to stifle it through rate regulation.

There have been many calls for lower special access prices, but this should not be surprising; who wouldn't want the government to intervene and reduce the prices he or she pays for major purchases? While government-mandated price reductions in competitive markets may be a natural enough wish of purchasers, however, it is clear that society is not served well when government supplants the market and attempts to select winners and losers based on political calculations. Interestingly, those calling for increased regulation and special access rate reductions have had the opportunity under the current rules to file complaints and prove their case that special access rates are not just and reasonable, but they have not done so. If they are unwilling or unable to prove their case using the available complaint process, then perhaps the Commission should conclude that its special access rules are working fine.

To the extent the Commission chooses to re-evaluate special access regulation despite the fact that purchasers have been unwilling to use the available remedies for unreasonable rates, CenturyLink has four specific recommendations regarding the analytical framework that the Commission would use to evaluate the performance of markets for high-capacity services. The Commission's framework should: (1) take a forward-looking approach to measuring

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<sup>2</sup> 47 U.S.C. § 157nt.

competition; (2) not look at special access rates in isolation, particularly in rural areas; (3) recognize that customers use special access circuits for a variety of purposes, and generally have several alternatives, often using different technologies; and (4) incorporate the fact that current price regulation substantially special access prices.

In addition, CenturyLink supports the comments filed by AT&T, Qwest, and Verizon/Verizon Wireless in this docket on January 19, 2010. For the most part, CenturyLink agrees with the points made in those comments and urges the Commission to take them into account in developing its analytical framework. CenturyLink also urges the Commission to consider the evidence presented in the report filed by USTelecom last summer when constructing its analytical framework.<sup>3</sup>

#### **I. THE COMMISSION'S FRAMEWORK MUST TAKE A FORWARD-LOOKING APPROACH TO MEASURING COMPETITION**

Several commenters urge the Commission to adopt the analytical framework in the Department of Justice/Federal Trade Commission Merger Guidelines. This would be a mistake because the Merger Guidelines were created for a specific purpose—analyzing whether a particular merger might cause short-term competitive harm. As such, they are not particularly useful for the primary objective of Commission oversight, which is concerned with creating a pro-competitive and de-regulatory regulatory framework to encourage broadband investment. In particular, the Commission's analysis should be focused on removing any barriers to facilities-based entry and investment, whereas the Merger Guidelines do not consider potential changes to such barriers. In addition, the Merger Guidelines were created for a static analysis, and offer

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<sup>3</sup> Patrick Brogan & Evan Leo, *High-Capacity Services: Abundant, Affordable, and Evolving*, submitted by letter from Glenn Reynolds, Vice President for Policy, USTelecom to Maureen Dortch, Secretary, Federal Communications Commission, WC Docket 05-25 (filed July 16, 2009) (*USTelecom Fact Report*).

little guidance for the FCC's forward-looking regulatory decisions, which necessarily shape industry structure.

Instead of adopting a static analysis, the Commission should adopt a forward-looking approach to measuring competition. Special access circuits are typically customer specific and often specially constructed for the customer; as such, the appropriate economic view of the service is forward looking. In addition, incumbent local exchange carriers (ILECs) such as CenturyLink must deploy new fiber in the same manner and often with comparable economic conditions as its competitors. In fact, CenturyLink can be seen as having a significant disadvantage versus its competitors because, unlike ILECs, competitors can and do choose to build only where it is economically attractive to do so. In addition, new technologies, including wireless and cable networks, and Ethernet and other transmission protocols are being used to offer competitive services. In fact, competitors (particularly cable competitors) are leading providers of Ethernet-based substitutes for ILEC special access services. Therefore, the Commission should look at markets prospectively, with the key question being which firms can meet new demand.

A forward-looking analysis of markets for high-capacity services necessarily will not inquire into market shares of circuits in service, which will not answer the question of the extent of current competition. Instead, the focus must be on providers that can meet demand for the next circuit to be placed into service or switched from its current provider. The fact that ILECs constructed a large share of the special access circuits in service in any given market is not particularly meaningful for an analysis of performance in that market because there are no substantial barriers to entry by other providers in most markets and contracts for new circuits are routinely contested by multiple providers and often won by providers other than ILECs.

**II. THE COMMISSION'S FRAMEWORK MUST NOT LOOK AT SPECIAL ACCESS RATES IN ISOLATION, PARTICULARLY IN RURAL AREAS**

Proponents of increased regulation and rate reductions are also disconnected from reality when they argue that the Commission should consider special access services in isolation from the rest of the local exchange carrier business. Special access services are simply a subset of the higher-capacity uses of ILEC networks, which are typically purchased by other carriers. As such, special access services must be considered in the context of the broader ILEC business, which currently faces substantial business challenges. Most ILECs have been losing substantial percentages of their landline customers and traffic annually, generally without realizing comparable reductions in operating costs or sunk investments, which flatly contradicts claims that ILECs are experiencing increased productivity that should be reflected in automatic rate reductions. Moreover, rates for local telecommunications services have not kept pace with inflation for decades, and there are numerous challenges seeking substantial switched access rate reductions in many forums throughout the country. Although ILECs are adding broadband customers, they still have fewer broadband customers than their competitors in most markets.

In the face of all this, special access services must provide greater contributions to network and operational costs, yet special access rates have also declined on balance. It is not surprising, therefore, that one of the loudest voices for increased regulation—Sprint—sold its substantial ILEC operations, including the special access facilities that it uses, several years ago. In addition, several mid-sized ILECs are currently in bankruptcy proceedings, and even the largest ILECs have been shifting their emphasis away from the business as well. These economic conditions belie the claims that special access profits are too high and ILECs are generating excessive earnings. Instead, the Commission must recognize that the public interest

is likely to be harmed by reckless special access rate reductions. This is particularly true in low-density, rural areas.

**III. CUSTOMERS USE SPECIAL ACCESS CIRCUITS FOR A VARIETY OF PURPOSES, AND GENERALLY HAVE SEVERAL ALTERNATIVES, WHICH OFTEN USE DIFFERENT TECHNOLOGIES**

As the Commission evaluates competition for special access services, it must take notice of the specific circumstances surrounding any particular allegation of an unjust or unreasonable rate. Ideally, the Commission would allow for greater market flexibility, such as contract tariffs, for all providers in all places. If there are credible allegations from purchasers or competitors that particular rates or practices are unjust or unreasonable, then the Commission (or a federal court) could address the problem through the complaint process in sections 206 and 207 of the Communications Act. Such a fact-based, situation-specific approach is likely to be the best approach to regulating the rapidly-evolving markets for high-capacity circuits.

Should the Commission choose to examine the high-capacity markets more broadly, it must nonetheless take account of the differing competitive circumstances facing providers, particularly in low-density rural areas. The economics of the service differ from wireless backhaul, to long distance transport and channel terminations to IXC points of presence (POPs), to business loops, and customers choose from different sets of alternative providers/technologies. In each case, most purchasers have several alternatives, which often use different technologies. Similarly, the appropriate geographic area is the one in which the set of alternatives is comparable; it may be larger for transport and wireless backhaul than for channel terminations in buildings. The Commission must take account of these alternatives and count all of the competitors, even if they don't offer circuits for every use or every customer. For example, Level 3 has applied for substantial support under the Recovery Act to provide middle mile

transport, which is a form of interoffice transport. Therefore, Level 3 has to be considered a competitor for transport in those areas irrespective of whether it may or may not offer channel terminations to office parks and other building locations (which it probably does or will soon do). If this requires the Commission to look at transport and channel terminations differently, as it has done with the current pricing flexibility rules, than the Commission should do so. This conclusion is particularly relevant to the analysis of the geographic scope of markets, which likely should remain relatively broad for transport, but may appropriately be more targeted for channel terminations to building locations.

Another dimension, purchasers of some types of special access circuits are large carriers that are capable of self supply. Often such providers will issue requests for proposals (RFPs) and bring their considerable negotiating power to bear on special access services. The five largest purchaser of CenturyLink special access services are AT&T & AT&T Wireless, Verizon, Verizon Business (purchases separately), Sprint, and Qwest. Together, their purchases account for over 70% of CenturyLink's special access revenue, and they all are considerably larger than CenturyLink. Moreover, they generally can and do self-provision circuits. In fact, all of them compete directly and/or indirectly for special access circuits through affiliates.

When the Commission considers competitive alternatives, and truly examines the circumstances in markets for special access, it will find a number of alternative providers are winning business and constraining pricing throughout the country, even in the more rural, lower-density areas served by CenturyLink and other mid-sized ILECs. For example, despite several allegations to the contrary in the comments, CenturyLink is experiencing significant competition from cable and other facility-based providers in many markets. These cable companies have nearly ubiquitous, high-capacity fiber-fed networks and are national leaders in Ethernet services.

They have won contracts for all kinds of services from small business to the largest fiber rings. In addition, fixed wireless/microwave technology, is increasingly being used, particularly for wireless backhaul. This is an interesting development because it is the leading technology for wireless backhaul in Europe, preferred over wired special access-like services. According to a Sprint executive, they do not use as much wireless/microwave backhaul here because “special access is too cheap.”<sup>4</sup>

#### **IV. CURRENT PRICE REGULATION SUBSTANTIALLY LIMITS SPECIAL ACCESS PRICES**

When reading the comments seeking increased regulation and special access rate reductions, one might get the impression that there has been widespread deregulation of special access rates. Nothing could be further than the truth, particularly in the rural, high-cost areas that are the focus of the National Broadband Plan. Most special access regulation (even of prices) remains in place today; in fact, it appears that one-third of the Metropolitan Statistical Areas (MSAs) do not have Phase II pricing flexibility, and another one-third of the MSAs and the additional 17% of the country’s population outside of MSAs live in areas with strict price controls that do not even permit Phase I (downward) pricing flexibility.<sup>5</sup> In addition, Title II regulation (equivalent to regulation as a CLEC) persists in nearly all places for most services so

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<sup>4</sup> S. Lawson, *Sprint Picks Wireless Backhaul for WiMax*, Industry Standard (July 9, 2008), <http://www.thestandard.com/news/2008/07/09/sprint-picks-wireless-backhaul-wimax> (citing Sprint CTO Barry West).

<sup>5</sup> Government Accountability Office (GAO) Report. The United States Census Bureau reported that 82.72% of the United States population lived in one of the listed Metropolitan Statistical Areas as of the 2000 Census. *Compare* United States Census Bureau, *Annual Estimates of the Population of Metropolitan and Micropolitan Statistical Areas: April 1, 2000 to July 1, 2008* (CBSA-EST2008-01) with United States Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2000 to July 1, 2009* (NST-EST2009-01).

that any purchaser of special access services can obtain a lower rate by filing a complaint and proving that the rate is unjust or unreasonable. This is substantial protection against allegedly unjust and unreasonable rates, and the fact that most rates have gone unchallenged suggests that they are just and reasonable.

The salient fact of persistent Commission regulation of special access is true in CenturyLink markets. CenturyLink has two kinds of special access markets: (1) highly competitive, or (2) highly regulated (with many rates regulated to levels well below any meaningful measure of economic cost). Where there is substantial competition, CenturyLink has some of the same freedom given to the other competitors to set rates, including to re-balance rates in response to competition; some rates—particularly “rack” rates—should be higher than they are under price cap regulation to reflect higher economic costs associated with the uncertainty of continued compensation for a customer-specific circuit. Accordingly, rate increases under Phase II pricing flexibility reflect competition, and not the lack of it. In the highly regulated markets, there can be no credible allegation that special access rates are too high, particularly in areas that have been subject to rate-of-return regulation. In fact, rates in such areas are likely to be too low in many cases because direct price regulation is far more likely than competitive markets to make mistakes and produce inefficient outcomes.

Many of the commenters seeking rate reductions continue to point to ARMIS statistics despite the Commission’s own admonishment that ARMIS is not to be used for rate making. Simply put, ARMIS does not measure economic cost. Indeed, ARMIS was not designed to accurately measure service-specific rates of return under price cap regulation, which led the Commission to state that ARMIS should not be used for ratemaking purposes. This is why even the state regulatory research body, NRRI, also found ARMIS figures to be useless for

understanding special access profitability. Unfortunately, CLECs and Ad Hoc users continue to ignore these informed regulatory decisions and advocate for ARMIS-based rates. Rates for unbundled network elements are similarly inappropriate points of comparison for special access services.<sup>6</sup> Unlike UNE rates, special access rates must provide contributions to the business as a whole, and must account for the far greater level of risk involved in constructing new facilities.

## V. CONCLUSION

Contrary to the claims of CLECs and other commenters seeking lower special access rates, the Commission's analytical framework should: (1) take a forward-looking approach to measuring competition; (2) not look at special access rates in isolation, particularly in rural areas; (3) recognize that customers use special access circuits for a variety of purposes, and generally have several alternatives, often using different technologies; and (4) incorporate the fact that current price regulation substantially limits special access prices.

Respectfully submitted,

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<sup>6</sup> CenturyLink, and one of its predecessor companies—Embarq—have filed substantial evidence in this docket over the past several years demonstrating that many of the most commonly purchased special access services the company offers are priced below UNE rates, particularly in rural areas.