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EX PARTE

Marlene H. Dortch
Office of the Secretary
Federal Communications Commission
445 12th Street, S.W.
Room TW A325
Washington, DC 20554

**RE: Special Access Rates for Price Cap Local Exchange Carriers, WC
Docket No. 05-25, RM-10593**

Dear Ms. Dortch:

The Commission should reject arguments that it should prejudge the issues in its ongoing review and impose new and burdensome “interim” regulation on special access services. The FCC has already established a process in this proceeding for first determining the appropriate framework for analyzing special access issues, and then for collecting and analyzing the facts that are relevant to that framework in order to determine whether any modifications should be made to the existing regulatory regime. As the Commission explained in its public notice, it is first necessary for the Commission to “adop[t] an analytical framework” that will inform the Commission’s determination of “what, if any, specific problems there are with the current regime and formulate specific solutions as necessary.”¹ Sensibly, the Commission has set out to determine whether changes are warranted *before* taking action. This is the right approach and nothing has changed that would warrant a departure from this process.

Nevertheless, some proponents of additional regulation want to short circuit this process and increase regulation now, in advance of any Commission findings.² These proposals to regulate

¹ *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd 13638, at 2 (2009).

² *See, e.g.*, Letter from Thomas Jones, tw telecom inc. to Marlene Dortch, FCC, WC Docket No. 05-25, RM-10593, at 1-2 (May 6, 2010), Comments of Level 3, WC Docket No. 05-25, RM-

first, and evaluate after, are inconsistent with sound administrative policy and would be arbitrary and capricious if adopted.³ Indeed, the record to date demonstrates that further regulation would be harmful to growing competition.

Throughout the course of this proceeding, Verizon and others have provided extensive record evidence demonstrating that the existing regulatory regime is working to restrain prices for ILEC regulated special access services and also to promote competition from new and emerging competitors.⁴ In addition, in the three months since the most recent round of reply comments were filed, new marketplace evidence has continued to become available which further confirms that new investment in competitive facilities has resulted in increased competition. The existing and new evidence of competition and declining prices confirms that there is no basis to impose additional regulation. Indeed, as one competitor warned its investors, imposing additional price regulation on ILEC special access services could disrupt the marketplace and undermine investment.⁵

10593, at 23 (Jan. 19, 2010); Comments of PAETEC, *et al.* WC Docket No. 05-25, RM-10593, at 85 (Jan. 19, 2010); Comments of Sprint, WC Docket No. 05-25, RM-10593, at 6 and 46 (Jan. 19, 2010).

³ See *ANR Pipeline Co. v. FERC*, 71 F.3d 897, 901 (D.C. Cir. 1996) (explaining that where an agency acts without “a reasoned explanation, its decision will be vacated as arbitrary and capricious.”); *Vonage Holding Corp. v. FCC*, 489 F.3d 1232, 1241 (D.C. Cir. 2007) (explaining that agency actions will survive scrutiny only if the agency “considered the relevant factors and articulate[d] a rational connection between the facts found and the choice made” (internal quotations omitted)). See also, 5 U.S.C. § 706 (2)(A) (providing that a reviewing court “shall hold unlawful and set aside agency action, findings, and conclusions found to be – arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”)

⁴ See, e.g., Comments of Verizon and Verizon Wireless, WC Docket No. 05-25, RM-10593, at 5-8 (discussing evidence of declines in the prices customers pay for ILEC regulated special access services) (“Verizon Comments”); 20-28 (discussing evidence of competition from non-ILEC providers) (Jan. 19, 2010); Comments of AT&T Inc., WC Docket No. 05-25, RM-10593, at 20, 25 (discussing evidence of price declines) (Jan. 19, 2010); Reply Comments of United States Telecom Ass’n, WC Docket No. 05-25, RM-10593, at 5-14 (discussing evidence of vigorous competition in the marketplace) (Feb. 24, 2010) (“USTelecom Reply Comments”); USTelecom Report, *High-Capacity Services: Abundant, Affordable and Evolving*, at 8-34 (discussing vigorous competition to provide high-capacity services); 42-44 (discussing evidence of declines in the prices customers pay ILECs for regulated special access services) (July 2009) (first attachment to USTelecom Reply Comments).

⁵ See FiberTower 10Q, <http://yahoo.brand.edgar-online.com/displayfilinginfo.aspx?FilingID=7121854-74357-138535&type=sect&dcn=0001047469-10-002138>, at 32 (warning that “imposing additional price regulation on ILEC special access services would be harmful because “our customers might then find our pricing unattractive.”) (Mar. 12, 2010)(last visited June 2, 2010).

As Verizon previously explained, the transition to next generation wireless networks and the increased capacity needs for existing wireless networks has significantly increased demand for backhaul services, creating new opportunities for new and existing providers alike.⁶ To satisfy this increased demand, Verizon alone has made substantial investments to deploy fiber to cell sites for several different carriers. As a result of these investments, Verizon has already deployed fiber to about three thousand cell sites and is on track to deploy fiber to several times this number of cell sites by the end of this year.

Existing record evidence demonstrates that numerous competitors, particularly cable operators and fixed wireless providers, are also aggressively competing to satisfy the increased demand for backhaul services. Cox has indicated that it is prepared to provide backhaul services to wireless providers deploying their 4G networks “because we’re there and we can do sort of spurs off of our network” and “we’re deploying capital to that area to be able to satisfy that demand.”⁷ Other cable companies have indicated similar capability and plans.⁸ Moreover, several cable companies, including Comcast, Time Warner Cable, and Bright House Networks are owners of Clearwire, and can provide Clearwire with any backhaul services that Clearwire cannot self-supply.

Recent reports from cable providers confirm that cable companies continue to compete aggressively to provide backhaul services and also that cable companies continue to regard backhaul services as a significant growth area. For example, Cox has reported that its backhaul business is “very healthy and fast-growing,” and that it signed \$100 million in backhaul contracts in 2009 alone.⁹ Similarly, Time Warner Cable has indicated that it regards backhaul services as a significant growth area, with several senior executives stating that “[b]ackhaul is a growth play

⁶ See Verizon Comments at 14-15.

⁷ FCC National Broadband Plan Workshop, *Wireless Broadband Deployment – General*, Transcript, http://www.broadband.gov/docs/ws_03_deploy_wireless_transcript.pdf, at 35 (Aug. 12, 2009).

⁸ See, e.g., *Comcast Corporation at Merrill Lynch Media Fall Preview-Final*, Fair DisclosureWire, Transcript 090908a1928849.749, at 7-8 (Sept. 9, 2008) (statement by Steve Burke, President and Chief Operating Officer, that Comcast can provide backhaul services using the facilities that Comcast “already [has] out there” and that Comcast will be able to provide backhaul “cheap[er] than the typical alternative.”); Thomson StreetEvents, Transcript, *Time Warner Cable, Inc. at Merrill Lynch Media Fall Preview-Final*, at 8 (Sept. 9, 2008) (statement by Landel Hobbs, Chief Operating Officer, Time Warner Cable that Time Warner Cable’s fiber is close to cellular towers, and as a result, it will not require “much incremental expense” for Time Warner Cable to provide backhaul services to those towers.”)

⁹ Kelly Riddell and Amy Thomson, Bloomberg News, *Cable Looks to Ease Smartphone Jams: Time Warner Pitches Wireless Backhaul Service to AT&T, Verizon in Bid to Expand Market*, <http://www.ohio.com/business/87609542.html> (Mar. 14, 2010) (last visited June 2, 2010).

that we are pursuing aggressively”¹⁰ and that the company intends to “continue to drive cell backhaul as far as we can.”¹¹

In addition, existing record evidence demonstrates that fixed wireless providers are competing extensively against ILECs to provide backhaul services. Sprint, majority owner of Clearwire, has indicated that it is “proceeding aggressively with its deployment of 4G WiMax technology” through its “\$7.4 billion investment in Clearwire,” which “will use self-provisioned microwave backhaul to handle the high-bandwidth requirements associated with 4G applications to the maximum extent possible.”¹² Clearwire has indicated that it “continues to target expanding its CLEAR 4G network coverage to as many as 120 million people by the end of 2010.”¹³ Clearwire has indicated that it can provide backhaul services to wireless providers, and even intends to offer those services to its majority owner Sprint at discounted rates.¹⁴ And, FiberTower has indicated that it “leads the nation in providing backhaul services,” and also that it already “provides backhaul service to over 6,000 mobile base stations (or cell sites) in 13 [major] markets.”¹⁵

Recent reports likewise confirm that fixed wireless providers continue to compete extensively to provide backhaul services. For example, Clearwire recently announced that it is making enhancements to its microwave backhaul network that will “increase total backhaul capacity by 250 percent or more, with long-term capability to support gigabit per second speeds in

¹⁰ *Id.* (quoting Craig Collins, Time Warner Cable Senior Vice President, Business Services Sales and Marketing)

¹¹ See Thomson StreetEvents, Transcript, *Q1 2010 Time Warner Cable Inc. Earnings Conference Call*, at 7 (Apr. 29, 2010) (Landel Hobbs, Chief Operating Officer stating that Time Warner Cable intends to “continue to drive cell backhaul as far as we can.”).

¹² Comments of Sprint Nextel Corp., *Inquiry Concerning the Deployment of Advanced Telecommunications Capability to All Americans in a Reasonable and Timely Fashion, and Possible Steps To Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996, As Amended by the Broadband Data Improvement Act*, GN Docket Nos. 09-137, 09-51 at 5 (Sept. 4, 2009).

¹³ Clearwire Press Release, *Clearwire Reports Third Quarter 2009 Results*, <http://newsroom.clearwire.com/phoenix.zhtml?c=198722&p=irol-newsArticle&ID=1353840&highlight> (Nov. 10, 2009) (last visited June 2, 2010).

¹⁴ See *Sprint Nextel/Clearwire WiMax Call - Final*, FD (Fair Disclosure) Wire, Transcript 050708a1844939.739 (May 7, 2008) (Clearwire Chief Executive Ben Wolff, stating “will make its metro wireless backhaul networks available to Sprint at preferred rates, creating additional revenue opportunities for Clearwire and reducing costs for Sprint.”)

¹⁵ Written Testimony of Ravi Potharlanka, Chief Operating Officer, FiberTower Corporation: House Energy and Commerce Committee’s Subcommittee on Communications, Technology and the Internet; Hearing: Competition in the Wireless Industry, http://energycommerce.house.gov/Press_111/20090507/testimony_potharlanka.pdf, at 3 and 4 (May 7, 2009).

high-density high-traffic areas.”¹⁶ Earlier this year, Clearwire executives indicated that “90% of Clearwire’s cell sites are connected via wireless backhaul links, providing 30 Mb/s or greater capacity.”¹⁷ This added capacity will give Clearwire’s “cost effective network the ability to leverage its unrivaled spectrum portfolio and support the growth in mobile data traffic.”¹⁸ Separately, FiberTower has reported that it “grew business with all of its major wireless customers in 2009” including AT&T, Sprint-Nextel, and T-Mobile¹⁹ and also reported that it expects the migration to 4G technologies will result in “significant backhaul awards in 2010.”²⁰ In the past two months alone, FiberTower has entered into contracts to provide backhaul services for Verizon Wireless and MetroPCS’ respective 4G Long Term Evolution network launches.²¹ FiberTower has further reported that it expects that the migration to next generation wireless networks will “provid[e] [an] opening to accelerate expansion.”²²

¹⁶ Clearwire Press Release, *Clearwire Extends 4G Leadership in the United States*, <http://newsroom.clearwire.com/phoenix.zhtml?c=214419&p=iro1-newsArticle&ID=1404906&highlight=> (Mar 23, 2010) (last visited June 2, 2010).

¹⁷ Kevin Fitchard, Telephony Online, *Clearwire Leans Heavily on Wireless to Backhaul WiMax Network*, (quoting Clearwire’s Chief Technology Officer John Saw) <http://www.connectedplanetonline.com/3g4g/news/clearwire-wireless-backhaul-wimax-0914/> (Sept. 14, 2009) (last visited June 2, 2010).

¹⁸ *Id.*

¹⁹ FiberTower Corporation, CTIA Investor Day Presentation, <http://www.fibertower.com/corp/downloads/investors/FTWR%20Investor%20Deck%202010.pdf>, at 20 (March 24, 2010).

²⁰ FiberTower Corporation, Fourth Quarter and Full Year 2009 Earnings Conference Call, <http://www.fibertower.com/corp/downloads/investors/FTWR%20Q409%20Conference%20Call%20Presentation%20March%205%202010.pdf>, at 9 (Mar. 5, 2010).

²¹ See FiberTower Press Release, *FiberTower’s Backhaul Solution Helps Verizon Wireless Bring the Nation’s First 4G LTE Network to Ohio and Michigan*, http://www.fibertower.com/corp/downloads/press_releases/CTIA%202010%20LTE%20Backhaul%20-%20FiberTower%20Final.pdf (Mar. 24, 2010) (noting that “Verizon Wireless recently selected FiberTower to support its LTE rollout in portions of Ohio and Michigan”); FiberTower Press Release, *FiberTower Supports MetroPCS Backhaul Network Evolution to Ethernet*, http://www.fibertower.com/corp/downloads/press_releases/10-04-21_FiberTower_MetroPCS_Ethernet_final.pdf (Apr. 21, 2010) (noting that FiberTower and MetroPCS entered into an agreement for “FiberTower to provide Ethernet-based backhaul services in select MetroPCS markets” and that “[t]he evolution to Ethernet for network backhaul helps prepare MetroPCS for its 4G Long Term Evolution (LTE) network launch that is planned during the second half of 2010”).

²² See FiberTower Corporation, CTIA Investor Day Presentation, <http://www.fibertower.com/corp/downloads/investors/FTWR%20Investor%20Deck%202010.pdf>, at 22 (Mar. 24, 2010).

Verizon and others have also demonstrated that a number of different types of providers are competing against ILECs to provide high-capacity services to commercial customers, including small and medium-sized businesses. Cable companies in particular have aggressively targeted small and medium-sized businesses. For example, Cox has reported that it was “moving to go after companies with 20-99 employees. [Cox] will pursue the businesses with symmetrical Ethernet services and other, more sophisticated offerings for larger companies.”²³ By 2009, Cox had already received commercial services revenues of \$985 million, up 15% from \$853 million in 2008 and Cox executives predicted that Cox would “definitely hit \$1 billion [in commercial services revenues] in 2010.”²⁴ Cox executives have further indicated that Cox has “significant market share to go after. We view our market opportunity to be \$7 billion in our franchise area...[O]n our current trajectory of mid-teen year-over-year percent growth we're on track to reach that second billion in six years.”²⁵

Recent reports confirm that competitive providers, particularly cable companies continue to compete extensively to serve commercial customers. Comcast recently reported that its business services revenues increased by almost half to \$263 million in the first quarter of 2010.²⁶ Comcast executives have further indicates that Comcast expects to “drive strong growth rates” for its business services and will also continue investing in business services in 2010.²⁷ Similarly, Time Warner Cable also reported increased business services revenues \$254 million for the first quarter of 2010, a more than nineteen percent increase from the first quarter of 2009.²⁸ Rob Marcus, Senior Executive Vice President and Chief Financial Officer for Time Warner Cable has indicated that the company expects to grow its business services revenues by 20 percent or more in 2010.²⁹ According to Time Warner Cable’s Chief Operating Officer Landel Hobbs, the company’s “primary focus at this point in time is in the SMB market, the small business market” and the

²³ Communications Daily, *Big Cable Operators Expect Large Commercial Service Revenue Gains* (Jan. 5, 2010) (citing Cox Business Vice President Phil Meeks).

²⁴ *Id.*

²⁵ Light Reading LRTV Interviews, *Cox's Phil Meeks: On the Road to \$1B*, http://www.lightreading.com/video.asp?doc_id=185410 (Dec. 3, 2009) (last visited June 2, 2010).

²⁶ Comcast Presentation, 1st Quarter 2010 Results, http://files.shareholder.com/downloads/CMCSA/812865807x0x369979/193163df-512e-46db-bd5b-b9843c90b1b4/Comcast_Q110Slides_4.27.10.pdf, at 5 (Apr. 28, 2010).

²⁷ *Id.* at 7.

²⁸ Time Warner Cable Presentation, First-Quarter 2010 Results, <http://phx.corporate-ir.net/External.File?item=UGFyZW50SUQ9NDM1NTN8Q2hpbGRJRD0tMXxUeXBIPtM=&t=1>, at 3, 5, 6 (Apr. 29, 2010) (last visited at June 2, 2010).

²⁹ See Thomson StreetEvents, Transcript, *Time Warner Cable, Inc. at Credit Suisse Group Global Media and Communications Conference – Final*, at 2-3 (Mar. 10, 2010)

company is focused on “selling our core business class phone, high-speed data, and metro ethernet product to more customers.”³⁰

Independent analysts have confirmed cable providers’ reports that business services are and will continue to be a lucrative growth area for cable companies. In particular, analysts have observed that even during the current recession “[c]able operators continue to gain share and demonstrate growth in the Small to Medium Enterprise (SME) [market segment].”³¹ Analysts have further noted that business services are “arguably the most lucrative incremental opportunity for a cable company”³² and have predicted that cable business services will experience “increasing growth rates, accelerated by an improved business environment.”³³

For all these reasons, the Commission should reject arguments that it should prejudice the results of its ongoing analysis and impose new “interim” regulation before completing the review necessary to determine whether any new regulation is appropriate.

Sincerely,



Donna Epps

³⁰ Thomson StreetEvents, Transcript, *Q1 2010 Time Warner Cable Inc. Earnings Conference Call*, at 7 (Apr. 29, 2010).

³¹ See also Jessica Reif Cohen et al., Bank of America/Merrill Lynch, *Battle for the Bundle: Cable HSD – First Growth in Years*, at 11 (Mar. 29, 2010); see also *id.* at 16 (estimating 2009-2012 year-over-year SME growth of 48-55 percent for Comcast and 19-30 percent for Time Warner Cable).

³² Jason Armstrong et al, Goldman Sachs, *Cable Show Takeaways: FCC Chairman Speech Catalyst for Cable*, at 1 (May 12, 2010).

³³ Frank Louthan et al., Raymond James, *Notes from the Cable Show*, at 1 (May 13, 2010).