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August 4, 2010

EX PARTE

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D. C. 20554

Re: Special Access Rates for Price Cap Local Exchange Carriers,
WC Docket No. 05-25

Dear Ms. Dortch:

On August 3, 2010 Christopher Heimann, David Lawson of Sidley Austin, and the undersigned, on behalf of AT&T, met with Sharon Gillett, Nick Alexander, Don Stockdale, Eric Ralph, Al Lewis, and Pam Arluk of the Wireline Competition Bureau and Paul de Sa and Jonathan Baker of the Office of Strategic Planning and Policy Analysis regarding the above-referenced proceeding. AT&T emphasized that no matter which analytical framework is chosen for use in this proceeding the Commission must collect the data needed to evaluate the extent and impact of actual and potential competition in the marketplace. In addition, the Commission should make the data collected available for review under an appropriate Protective Order and resist calls for assuming the conclusion of its analysis here by implementing interim rates before the work of gathering the data and conducting the analysis has been completed. The attached documents, outlining the topics discussed during the meeting, were distributed to the Commission staff in attendance.

Pursuant to section 1.1206 of the Commission's Rules, this letter is being filed electronically with the Commission.

If you have any questions, please do not hesitate to contact me at (202) 457-2321.

Sincerely,

ATTACHMENTS

cc: S. Gillett
P. de Sa
J. Baker
N. Alexander
D. Stockdale
E. Ralph
A. Lewis
P. Arluk



at&t

**Special Access
WC Docket No. 05-25**

August 3, 2010

Special Access Rates for Price Cap Local Exchange Carriers

- The Framework Notice rightly sought to shift the special access debate away from rhetoric to a data-driven analysis of marketplace conditions to test claims about the dearth of competitive alternatives and the purported need to re-regulate ILEC special access services.
- There has been much debate since regarding the types of data the FCC should collect to enable that analysis, as well as analytical framework for evaluating the data and the efficacy of the existing rules.
- Parties disagree on the appropriate framework, but the comments and workshop reveal that whatever approach is adopted, the FCC cannot determine if there is a need to modify the rules and, if so, how until it gathers data regarding actual and potential competitive alternatives in the marketplace, including:
 - The location of competitive facilities
 - Their capabilities and whether they can be expanded
 - How services are purchased and supplied
 - Actual transaction prices
 - The impact of intermodal alternatives
 - Changes in supply economics due to burgeoning demand by wireless and broadband
- These questions cannot be answered based on publicly available data or bare/qualitative assertions about alternatives by both sides.
- The first order of business is to collect the data needed to evaluate the extent and impact of actual and potential competition. Until the Commission understands the data and its limitations, it won't be possible to determine with specificity how best to evaluate the existing rules and proposed alternatives.
- The FCC can use sampling or other processes to streamline this process.

Special Access Rates for Price Cap Local Exchange Carriers

- Workshop discussions and subsequent ex partes indicate the reregulation proponents want to steer the Commission in a different direction by assuming the conclusions to this inquiry.
 - Data collection: They claim there is no need to collect data on competitive fiber, simply count the number of existing building connections because potential competition is no constraint; don't bother to collect data on cable and fixed wireless; don't collect data on actual transaction prices, only look at rack rates
 - Data verification: do not collect and share data regarding competitive facilities
 - Data analysis/framework: Apply the DOJ merger guidelines and narrowly define markets – excluding intermodal competition; calculate market share using only actual CLEC building connections and assume that entry and expansion is difficult; make qualitative, non-data driven judgments to ignore potential competition – in other words, apply a results driven analysis with an air of precision
 - Interim relief: mandate price cuts even before you begin collecting data
 - Such an approach would be indefensible.

Special Access Rates for Price Cap Local Exchange Carriers

Guiding Principles for Proceeding:

- Establish realistic goals and an appropriate focus for this proceeding – do not let perfection be the enemy of the good.
- Collect the data and see where it leads you – do not rely on preconceived notions
- Establish Appropriate Criteria for an Analytical framework – It should be analytically sound, administratively practical, and account for the risk of error
- Do not put the cart before the horse and impose interim measures before collecting and evaluating the data

Special Access Rates for Price Cap Local Exchange Carriers

Realistic goals and an appropriate focus:

- Everyone acknowledges that the existing triggers are not “perfect” – that’s nothing new. Everyone knew they might be both under and over inclusive when they were adopted; at the workshop all the economists agreed there is no perfect proxy trigger
- Thus, before changing the triggers, the FCC must come up with something better that accounts for the asymmetric error costs – which likely will be difficult.
- But there is no justification for shortcuts, qualitative judgments or rules of thumb (such as simple in or out rules when defining markets, or assumptions about potential competition) when data is available to be collected and analyzed
- If the data is inconclusive, that should give the FCC pause given the very real positive trends in this industry, and the risks of error
- The burden of gathering and analyzing data can be mitigated through sampling, and analyzing what matters and what doesn’t, followed by targeted data collection for larger areas

Special Access Rates for Price Cap Local Exchange Carriers

The FCC needs data regarding actual and potential competitive alternatives; including:

- Intra/Intermodal competition
- The extent and impact of competitive bidding (a single building connection today doesn't mean there weren't multiple bidders to serve the building)
- The extent to which competitors extend their networks in response to demand
- In high fixed cost, low marginal cost businesses competition at the margin constrains pricing
- *The FCC must see where the data leads and avoid assuming the conclusion before the analysis begins*

The FCC must permit review and verification of the data:

- The SBC/AT&T merger showed that verification is necessary to ensure the FCC has complete data regarding alternatives

Special Access Rates for Price Cap Local Exchange Carriers

Appropriate Criteria for an Analytical framework:

- Analytically sound
- Administratively practical – As the FCC recognized in the Pricing Flexibility Order, any rules must be administratively practical – perfection is impossible.
- Account for the risk of error – since pricing flexibility was granted, prices have fallen consistently for all services in all areas; output has increased, new entry and investment has continued. Absent clear evidence of market failure, the FCC should not risk undermining these benefits, particularly given policymakers' ambitious goal of encouraging ubiquitous broadband.

Special Access Rates for Price Cap Local Exchange Carriers

Interim rate cuts before the investigation has begun would be unlawful:

- Section 205 rate prescription
- Existing rates are presumptively just and reasonable
- Proposals to “freeze” existing contracts during the pendency of this proceeding would violate the Sierra-Mobile doctrine by abrogating contracts, and the APA by assuming a conclusion not supported by facts
- There is no basis to mandate new rates, new X-factors or a freeze on new price flex applications until the data is collected and analyzed, and questions about whether the existing rates are just and reasonable have been answered



April 27, 2009

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: WC Docket 05-25 - *Special Access Rates for Price Cap Local Exchange Carriers.*

Dear Ms. Dortch:

This is to inform you that on April 24, 2009, the following individuals representing their respective companies and associations, attended a meeting with staff of the Wireline Competition Bureau to discuss the issue of special access markets: Donna Epps, Maggie McCready and Rashann Duval of Verizon; Frank Simone, Christopher Heimann and Jay Bennett of AT&T; Jeff Lanning of Embarq; Jennie Chandra of Windstream; Melissa Newman of Qwest; and Robert Mayer and Glenn Reynolds of USTelecom. Commission staff in attendance were Pam Arluk, Deena Shetler, Jay Atkinson, Dick Kwiatkowski, Marvin Sacks, Dan Ball and Bill Sharkey. During this meeting, the participants emphasized that the record in this proceeding emphatically demonstrates the competitiveness of the special access market, as detailed further below. The participants also distributed and discussed in detail at this meeting the attached document identifying essential data and respondents if the Commission chooses to seek additional information on this issue.

* * * * *

The steps taken by the Federal Communications Commission, beginning under the leadership of then-Chairman William Kennard, to align regulation with marketplace realities for providers of special access services have been a demonstrable Commission success story. There is abundant evidence in the record of this proceeding, as well as in the public domain, demonstrating that the decision to grant incumbent local exchange carriers (ILECs) pricing flexibility for high-capacity services (frequently referred to as special access) has led to continued innovation and investment by incumbents and competitors alike; continued increases in competition and output; and declining prices.

Some purchasers, however, continue to urge the Commission to reverse these successful policies based on their claims that competition is not sufficiently widespread. Such a step would be affirmatively harmful to the overall economic welfare of this country because it would

discourage investment by all providers at a time when our country desperately needs continued infrastructure investment.

More fundamentally, however, these claims of insufficient competition are flatly contradicted by the record in this proceeding. Indeed, ILECs have provided the Commission with tremendous amounts of irrefuted and irrefutable data demonstrating the success of the Commission's current regulatory policies for pricing of special access services. In contrast, those that have repeatedly urged the Commission to reverse course have consistently refused to participate in efforts by the Commission and others to put their assertions to the test.

The record in this proceeding provides the Commission with a more than adequate basis upon which to find that competition for these services is flourishing and that prices have continued to decline. Accordingly, a determination by the Commission simply to terminate this proceeding without further action would be completely appropriate. We are confident, however, that the more thorough and complete the Commission's examination of this market, the more clearly our position will be validated.

If it decides to continue this proceeding, the Commission has an obligation to ensure that it obtains a complete picture of the market. The Commission will need to *require all* providers of high-capacity services to submit data on the scope of their competitive networks. If those asking the Commission to reverse course once again refuse to provide complete and accurate data about such facilities, the Commission must infer the obvious--that the claims of insufficient competition are specious.

Background

The Commission has twice requested data concerning high-capacity services.¹ In response, ILECs submitted hard evidence on the record showing that special access prices have consistently *fallen* and that competition has *expanded* in the almost ten years since pricing flexibility was implemented. Tellingly, competitive providers have not provided the Commission with relevant data to corroborate their claims.

The U.S. Government Accountability Office (GAO) and the National Association of State Utility Commissioners (NARUC) also have conducted investigations into the special access market—and in both instances the competitive providers again refused to provide information. Specifically, the GAO asked competitive providers to identify the buildings to which they deployed facilities, yet, no competitor provided such data.² More recently, National

¹ See *Special Access Rules for Price Cap Local Exchange Carriers*, Order and Notice of Public Rulemaking, WC Docket No. 05-25, 20 FCC Rcd 1994 (2005); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, WC Docket No. 05-25, 22 FCC Rcd 13352 (2007).

² Although the GAO report states that two of the purportedly largest competitive suppliers provided lists of "lit buildings," those lists were from a third-party source, not direct information from the providers themselves. United States 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*

Regulatory Research Council (NRR), acting at the request of NARUC, solicited data from competitive providers yet received seller data from only one CLEC and acknowledged that “[n]o wireless broadband provider or cable TV provider submitted any seller or buyer data.”³ Like the GAO study, NRR’s Report recommended that the Commission collect additional data, including “location data regarding the facilities of competitive providers.”⁴

In contrast, ILECs have responded to these fact-gathering efforts by providing copious data on the record concerning the scope of their facilities and the services they offer, as well as secondary data concerning the availability of competitive facilities and services. The data show that prices have declined since the Commission began implementing pricing flexibility, that there are significant competitive alternatives that have been increasing over time, and that there is a robust, properly functioning special access marketplace. Specifically, the data show the following:

- Prices have consistently *fallen* for all services at all bandwidths and in all areas;
- Output has steadily increased;
- New entry, expansion, and investment in broadband infrastructure have soared;
- Specialized offerings tailored to customers’ needs have become more prevalent and innovative;
- Competitive networks now blanket the commercial areas where special access demand is heavily concentrated;
- Competitive options are rapidly expanding, wherewith cable, wireless, and other competitors deploying new and existing technologies, in part to satisfy wireless carriers’ exploding demand for wireless “backhaul” connections;⁵ and
- Numerous press releases from the same companies that are complaining about the lack of competitive alternatives announcing new agreements to obtain high capacity services from competitive suppliers.⁶

Competition in Dedicated Access Service, at 21 (2006). In addition it appears that no competitor supplied the GAO with network maps.

³ P. Bluhm and R. Loube, *Competitive Issues in Special Access Markets*, National Regulatory Research Institute at 37 (2009).

⁴ *Id.* at v.

⁵ See, e.g., AT&T Supplemental Comments, WC Docket No. 05-25, Casto Declaration at ¶¶ 55-60 (filed August 8, 2007); *id.* at ¶¶ 7-23; AT&T Supplemental Reply Comments, FCC WC Docket No. 05-25, at 7-23 (filed August 15, 2008) (summarizing sworn testimony of AT&T, Verizon, Qwest and Embarq and identifying the detailed Exhibits submitted by these incumbents).

⁶ See, e.g., Reuters, *T-Mobile USA To Keynote At LightReading’s Backhaul Conference For Mobile Operators*, Feb. 5, 2009 (“[w]ith its new regional wholesale agreements announced with Bright House Networks, FPL FiberNet, IP Networks, and Zayo Bandwidth, T-Mobile USA has signaled an intent to be a leader amongst wireless carriers in terms of diversifying its sources of high-capacity backhaul network”), available at

<http://www.reuters.com/article/pressRelease/idUS198497+05-Feb-2009+PRN20090205>; Stephen Lawson, *Sprint Picks Wireless Backhaul For WiMAX*, PC World, July 9, 2008 (“Sprint Nextel has picked a supplier for the wireless backhaul links that will connect its WiMax network to the Internet in the carrier’s first three deployments. . . . DragonWave is one of a number of vendors Sprint is working with in its WiMax deployment. They include FiberTower for wireless backhaul services”), available at http://www.pcworld.com/businesscenter/article/148150/sprint_picks_wireless_backhaul_for_wimax.html; Gary

Fact-Finding Proposal

Under these circumstances, the Commission would be well-justified to simply terminate this proceeding. But if the Commission is not prepared to take this course, the Commission should initiate a broad fact-finding effort to evaluate the competitiveness of the special access market. Admittedly, this will require a substantial and well thought out effort. Indeed, it is complicated by the very fact that there are so many players providing services in competition to special access. At a minimum, the Commission needs to require CLECs (including those out-of-region CLECs owned by ILECs), cable operators, fixed wireless providers (including WiMAX providers), and facilities-based wireless providers that self-provision to their cell sites, to provide substantive information on the scope and capabilities of their own networks and the various alternatives to ILEC special access services that are available to them. The Commission should also collect information from retail purchasers of special access services that elect to participate in this proceeding. Such data would complement the data already produced by ILECs.

Moreover, because this market involves many players providing services using many different technologies and network arrangements, it is critical that the Commission proffer the right questions to the right providers. If not, the Commission runs the risk of missing a segment of the market or providing some competitors an opportunity to under-report facilities or not report at all. For this reason, we are attaching to this letter a detailed proposal for questions the Commission must include in any data inquiry if it is to obtain responses accurately reflecting the competitiveness of the special access market. While not all the of the attendees agree on every detail of the attached data request, there is general agreement that it is appropriate for the Commission to seek basic data from the companies with knowledge prior to making changes to special access regulation.

Given the several previous refusals of most of these providers voluntarily to offer up detailed, useful data, the Commission must create an imperative for widespread participation. The Commission has a number of tools at its disposal to ensure that all providers fully respond to this inquiry, including subpoena authority, and it should give consideration to using any of these. If the Commission chooses not to use its subpoena authority, it may establish through a short rulemaking a rule for the one-time collection of data concerning high-capacity services. This one-time rule would need to require all participants in the proceeding to submit data, subject to a protective order for confidential information. Absent a requirement that *all* competitive providers in this space submit data, the Commission cannot expect the kind of full and complete response it needs to accurately assess the state of competition.

Kim, *4G Spurs Wireless Backhaul*, May 16, 2008 ("Clearwire CTO John Saw says the company can deploy its planned mobile WiMAX network in the U.S. for far less than traditional cellular deployments thanks to its work on microwave backhaul . . . Right now, about 90 percent of Clearwire backhaul is provided by wireless links, the company says. In fact, Clearwire already operates what is probably the largest wireless backhaul network in the United States"), available at <http://4g-wirelessevolution.tmcnet.com/topics/4g-wirelessevolution/articles/28241-4g-spurs-wireless-backhaul.htm>.

Ms. Marlene Dortch
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In conclusion, the companies represented at this meeting are confident that a full and thorough inquiry into the competitiveness of the special access market will confirm what we have previously demonstrated in the record of this proceeding---that there are many providers offering many different high-capacity services in competition with ILEC special access. Pursuant to Commission rules, we are including this ex parte letter and attachment in the record of the docket identified above.

Sincerely,

A handwritten signature in black ink, appearing to read "Glenn Reynolds", with a horizontal line extending to the right.

Glenn Reynolds
Vice President – Policy

cc: Jennifer Schneider
Nick Alexander
Mark Stone
Pam Arluk
Deena Shetler
Jay Atkinson
Dick Kwiatkowski
Marvin Sacks
Dan Ball
Bill Sharkey
Julie Veach
Al Lewis
Margaret Dailey
Randy Clarke
Don Stockdale
Marcus Maher

Data Requests Directed to Competitive Providers

The following data should be provided for each MSA in which the responder offers or is capable of offering high-capacity service or procures high-capacity facilities.

I. Network Facilities

A. Metro Transmission Facilities

1. Provide, for each wireline (*e.g.*, copper, fiber—lit or dark, co-axial) or wireless (*e.g.*, fixed wireless, microwave, WiMAX) metro transmission facility you own or utilize or control through an IRU, dark fiber or similar arrangement at service types of DS1 or above, data sufficient to geocode (*e.g.*, V&H coordinates) the location of each facility identified; or maps identifying the precise location for each facility and sufficient to show the specific streets along which the facilities run.
2. Identify each location at which you interconnect with other providers (*e.g.*, through physical or virtual collocation arrangements), including interconnection points at ILEC wire centers, carrier hotels, or competitive provider locations, provide data sufficient to geocode (*e.g.*, V&H coordinates, CLLI code, street address) each location identified; or provide maps identifying the precise location of each point identified.

B. On-Net End-User Locations You Serve or to Which You Connect

1. Provide the total number of on-net end user locations (*e.g.*, buildings) you serve or to which you have a connection using metro transmission facilities (wired or wireless) you own or utilize or control through an IRU, dark fiber or similar arrangement.
2. For *each* on-net end-user location you serve or to which you have a connection using metro transmission facilities (wired or wireless) you own or utilize or control through an IRU, dark fiber or similar arrangement provide the following:
 - a. Street address and information sufficient to geocode (*e.g.*, V&H coordinates, CLLI code) the location;
 - b. Identify the type of service(s) (*e.g.*, DS1, DS3, Ethernet) that you provide to the location and for each service provide the number of units you currently provide to the location (*e.g.*, channel terminations, circuits or Ethernet ports); and
 - c. Identify whether the facilities you use to serve the location or that you have connected to the location are wireline (*e.g.*, copper, fiber—lit or dark, co-axial) or wireless (*e.g.* fixed wireless, microwave, WiMAX).

3. Identify any end-user locations that you do not currently serve or connect to using metro transmission facilities (wired or wireless) but have indicated within the past two years that you are willing to serve or connect (*e.g.*, in response to an RFI or RFP).

C. On-Net Wireless Carrier Locations You Serve or to Which You Connect⁷

1. Provide the following information for *each* on-net wireless carrier location (*e.g.* cell site) you serve or to which you have a connection using metro transmission facilities (wired or wireless) you own or utilize or control through an IRU, dark fiber, or similar arrangement at capacities of DS1 and above:
 - a. Street address of the wireless carrier location and information sufficient to geocode that location (*e.g.*, V&H coordinates, CLLI code);
 - b. Identify the type of service(s) that you provide to the location (*e.g.*, DS1, DS3, Ethernet) and for each service provide the number of units you currently provide to the location (*e.g.*, channel terminations, circuits or Ethernet ports); and
 - c. Identify whether the facilities you use to serve the location or have connected to the location are wireline (*e.g.* copper, fiber—lit or dark, co-axial) or wireless (*e.g.*, fixed wireless, microwave, WiMAX).
2. Identify any wireless carrier locations that you do not currently serve but have indicated within the last two years that you are willing to serve or connect (*e.g.*, in response to an RFI or RFP).

II. Use of Other Competitive Providers' Transmission Facilities

1. If available, provide the number of off-net end-user locations you serve using other competitive providers' facilities;
2. Provide the number of other competitive providers from whom you currently purchase transmission facilities; and
3. Identify the type of service(s) (*e.g.*, DS1, DS3, Ethernet) you purchase from other competitive providers and for each service provide the number of units you purchase (*e.g.*, channel terminations, circuits or Ethernet ports).

III. Ethernet

Explain whether you use DS1 or DS3 TDM services purchased from ILECs or other competitive providers to provide Ethernet or other packet-based services (*e.g.*, frame relay or ATM), and

⁷ If you cannot separately identify wireless locations from other types of end-user locations you serve or to which you connect, include those locations in your response to I.B.

provide the number of all DS1 or DS3 channel terminations or circuits purchased from ILECs or other competitive providers that you use in this manner.

IV. Data Requests Directed to Facilities-Based Wireless CMRS Carriers and WiMAX Providers

1. Provide the following information for all self-provisioned last mile facilities to your cell sites:
 - a. Provide data sufficient to geocode (e.g. V&H coordinates, CLLI codes) the location of each cell site or provide maps identifying the precise location of cell sites and self-provisioned facilities; and
 - b. Indicate whether each facility identified above relies on alternative technologies such as fixed wireless or microwave, and describe the technology used and capacity provided.

V. DATA REQUESTS DIRECTED TO RETAIL PURCHASERS THAT ELECT TO PARTICIPATE IN THIS PROCEEDING

1. Identify each location where your company purchases alternatives to ILEC special access services, and for each location provide the following:
 - a. the address of the location and information sufficient to geocode the location (e.g., V&H coordinates, CLLI code); and
 - b. the type of service(s) you purchase at the location (e.g., DSn or Ethernet) and for each service provide the number of units purchased (e.g., channel terminations, circuits or Ethernet ports).
2. Provide the number of providers of alternatives to ILEC special access services that have offered to provide you with alternatives to ILEC special access services within the last year and the addresses of the locations where those providers offered to provide those alternative services and information sufficient to geocode those locations (e.g., V&H coordinates, CLLI code).