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**By Electronic Filing**

Marlene H. Dortch  
Secretary, Federal Communications Commission  
445 12<sup>th</sup> Street, S.W., Room TW-A325  
Washington, D.C. 20554

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

Dear Ms. Dortch:

Ever since the Commission announced its intention to conduct a data-driven examination of the special access marketplace to test claims by Sprint and others that they lack competitive special access alternatives, these regulation proponents have sought to short-circuit any such inquiry, arguing that the Commission should skip the investigation and jump right to their proposed “remedies” of government-mandated rate reductions. Sprint’s June 28 Letter is more of the same.<sup>1</sup>

Its latest focus is the expiration of special access merger commitments offered by AT&T to obtain timely approval of its merger with BellSouth. Those commitments which, by their express terms, expired after 39 months, bestowed on Sprint and other purchasers of special access services a windfall: almost 3½ years of special access discounts. Significantly, those discounts were offered without any Commission finding that AT&T’s existing rates were unreasonable or that such discounts were necessary to remedy any merger-related harm – indeed, the Commission found no such harms arising from the merger. Moreover, Sprint never sought reconsideration of the *AT&T/BellSouth Merger Order* on the ground that AT&T’s special access commitments were of insufficient duration, and any such argument would have lacked credibility given the absence of any evidentiary basis for the commitment. Nor did it challenge AT&T’s tariff implementing those commitments (which included a provision limiting the merger-related discounts to 39 months, coincident with the term of AT&T’s commitment). Yet, now that this commitment has expired, it asks the Commission unilaterally to extend that commitment – once again, without any showing whatsoever that AT&T’s pre-merger, and now post-commitment, special access rack rates are unreasonable. Simultaneously, it argues that AT&T’s withdrawal of the artificial discounts mandated by the merger commitment represents “incontrovertible proof” of market power that would permit the Commission to dispense with a fact-based inquiry.

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<sup>1</sup> See Letter from Charles W. McKee (Sprint) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 2 (filed June 28, 2010) (“Sprint June 28 Letter”).

This is nonsense. Like its earlier filings, Sprint's latest *ex parte* paints a distorted picture of the marketplace in order to divert attention from what a truly data-driven process will confirm: robust intra- and intermodal competition and real prices that have been consistently and substantially declining in every area and at every capacity for the better part of a decade. And once again, Sprint ignores that the "interim" relief it seeks for alleged market failures that have not even been investigated, much less substantiated, would be patently unlawful.<sup>2</sup>

As an initial matter, Sprint's attempt to characterize the expiration of AT&T's merger-related discounts as a "rate increase" is grossly misleading. AT&T's tariff implementing its special access merger commitments did not, as Sprint claims, increase AT&T's rates upon the expiration of those commitments. Rather, it terminated the merger-related discounts consistent with the terms of AT&T's commitment, and simply restored (in most cases) the rack rates that applied pre-merger. Moreover, AT&T, like many other service providers, offers a variety of discount plans that provide subscribers discounts off the base rate or invoice credits for a limited term. While the net amount subscribers to those plans pay for service may increase at the expiration of those plans, one can hardly characterize that as a rate increase. So too the expiration of the term-limited, merger related discounts cannot fairly be termed a rate increase.

Even if one could (incorrectly) characterize the expiration of these discounts as a rate increase, the resulting rack rates still are significantly lower, in real terms, than the rates in effect at the time of the merger. That is, because between January 2007 and May 2010, the Consumer Price Index increased by about 5 percent, which means that AT&T's inflation-adjusted July 2010 rates are actually 5 percent *lower* than AT&T's 2007 rack rates.<sup>3</sup> Moreover, insofar as AT&T has not raised its special access rack rates in areas in which it has obtained Phase II pricing flexibility since it first received pricing flexibility,<sup>4</sup> its special access rack rates in Phase II areas generally are no higher – even in nominal terms – than they were in 2001.<sup>5</sup> In turn, that means

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<sup>2</sup> Sprint June 28 Letter at 2; *see also* Letter from Paul Kouroupas (Global Crossing) to Marlene H. Dortch (FCC), WC Docket No. 05-25 (filed June 30, 2010); Letter from Thomas Jones (tw telecom inc., XO Communications LLC, PAETEC Holding Corp.) to Marlene H. Dortch, WC Docket No. 05-25 (filed June 30, 2010).

<sup>3</sup> *See* U.S. Department of Labor, Bureau of Labor Statistics, Consumer Price Index, All Urban Consumers - (CPI-U), U.S. city average, *available at* <ftp://ftp.bls.gov/pub/special.requests/cpi/cpiat.txt>.

<sup>4</sup> While rack rates in areas in which AT&T has received Phase II pricing flexibility may be higher than in areas in which it remains subject to price caps, that is because AT&T has not applied the negotiated (and arbitrary) X-factor reductions required under the price cap formula adopted in the *CALLs Order*, not because AT&T has raised its rack rates in those areas. AT&T notes in this regard that, as the Commission acknowledged in the *CALLs Order*, the X-factor adopted under the *CALLs* plan was not a "productivity factor" that purported to reflect anticipated increases in productivity (if any), but rather was a transitional mechanism negotiated by members of the *CALLs* coalition, and accepted by the Commission. Moreover, as AT&T previously has explained, the parties to the *CALLs* coalition understood that those X-factor reductions would not apply in areas where carriers obtained Phase II pricing flexibility. *See* Supplemental Comments of AT&T Inc., WC Docket No. 05-25 at 39-41 (filed Aug. 8, 2007).

<sup>5</sup> *See* AT&T Comments, WC Docket No. 05-25 at 23 (filed *sub nom* SBC Communications Inc. June 13, 2005).

customers purchasing special access services at AT&T's July 2010 base tariff rates (when adjusted for inflation) are paying well-below AT&T's 2001 rack rates in real terms. Thus, Sprint's claim that the expiration of the merger related discounts amount to a price increase should be rejected out of hand.

Sprint's assertion that the now expired merger condition rate reductions were "15% or more" is equally spurious.<sup>6</sup> The only rates that were reduced by 15% were AT&T's non-tariffed Ethernet rates, which continue to be offered today notwithstanding the expiration of AT&T's merger commitment. With regard to the rates at issue here – DS1 and DS3 rates – AT&T's rack rates were reduced only in the pricing flexibility areas where AT&T's rates exceeded price cap levels at that time, and in those areas AT&T's rack rates were reduced to price cap levels. In some cases this required no reduction at all (and thus no change in 2007 or when the merger conditions expired) – for example, most month-to-month Zone 1 price flex area DS1 channel terminations were already priced at or below corresponding price cap rates throughout the BellSouth region,<sup>7</sup> resulting in very small changes when the tariffed reductions expired on their own terms on July 1, 2010. Thus, Sprint's assertion that AT&T's rack rates increased by 15% or more on July 1, 2010, is untrue.

Nor is there merit to Sprint's claim that by allowing the temporary merger-related discounts to expire on schedule AT&T will undermine "its special access subscribers' ability to expand their own broadband networks and service offerings, to hire new employees, and to invest in research and development."<sup>8</sup> Sprint has it exactly backwards. The temporary discounts off its rack rates provided AT&T customers that had contracts with rates tied to those rates a 39-month windfall in the form of arbitrary discounts. Thus, during that 39 month period, customers with existing contracts obtained windfall rate reductions that they could have used to further invest in their businesses. They did not lose anything when those temporary decreases expired.

Sprint complains that the expiration of AT&T's merger-related discounts is "galling" given AT&T's "repeated claims that the prices customers actually pay for special access services have declined across all services and in all areas since 2001."<sup>9</sup> But it is indisputably true that the prices paid by AT&T customers for both DS1 and DS3 circuits – separately analyzed, accounting for all discounts and even backing out reductions required by regulation – have declined every year, throughout AT&T's service area. AT&T submitted detailed data documenting these trends, and the results of these analyses are confirmed by similar findings by independent third parties, including the Government Accountability Office and the National Regulatory Research Institute.<sup>10</sup> What is "galling" is that Sprint continues to make the same

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<sup>6</sup> Sprint June 28 Letter, at 1 n.1.

<sup>7</sup> Compare BellSouth Tariff F.C.C. No. 1, § 23.5.2.9.1(A)(1) (restored DS1 rates) *with id.* § 23.5.2.9(A)(1) (temporarily discounted rates); compare BellSouth Tariff F.C.C. No. 1, § 23.5.2.9.1(A)(2)(a) (restored DS1 rates) *with id.* § 23.5.2.9(A)(3)(a) (temporarily discounted rates).

<sup>8</sup> Sprint June 28 Letter, at 2.

<sup>9</sup> Sprint at 2.

<sup>10</sup> Gov't Accountability Office, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80, at 32 (Nov. 2006) (in Phase II areas, its "analysis

arguments that these trends reflect only rate reductions caused by regulatory requirements or purchasing patterns,<sup>11</sup> which AT&T and others have repeatedly shown to be false.<sup>12</sup>

Sprint's letter, as usual, has nothing to say about the mountain of evidence already in the record confirming the widespread availability of alternatives to ILEC special access services. That record confirms that CLECs, cable companies and microwave wireless providers have deployed extensive alternative facilities, both in the downtown areas where special access demand is traditionally concentrated, and in suburban and rural areas where broadband wireless backhaul demand has attracting extraordinary investment by alternative backhaul providers.<sup>13</sup> Even the most ardent proponents of regulation of special access services have conceded that they have widespread alternatives to ILEC special access. For example, T-Mobile recently reported to investors earlier this year that it "*already uses* 'alternative backhaul providers' for more than 40 percent of its 3G cell sites," and "plans to increase its use of alternative backhaul to more than 75 percent by the first half of 2011."<sup>14</sup> And, Sprint itself is betting its entire future on the widespread availability and quality of microwave backhaul services; its 4G service relies on Clearwire's Wi-Max network, and Clearwire has stated that *90 percent* of its wireless network is served by microwave backhaul.<sup>15</sup> Not surprisingly, therefore, Sprint continues to offer nothing

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of average revenue data for channel terminations and transport for both DS-1 and DS-3 [in Phase II pricing flexibility areas] shows that, in general, average revenue has declined in nominal dollars."); Peter Bluhm With Dr. Robert Loube, National Regulatory Research Institute, Competitive Issues In Special Access Markets, Revised Edition, at 58 (First Issued Jan. 21, 2009) ("NRRI Report") ("The GAO found that both list prices and average revenues for special access declined from 2001 to 2006"); *Id.* NRRI Report at 59 & Table 7 (special access *purchasers* reported that the rates they actually pay declined from 2006 to 2007 and that "[o]ne possible explanation is that competition is driving prices down for customers purchasing at discounted prices.").

<sup>11</sup> Sprint, at 2.

<sup>12</sup> First, Sprint asserts that the downward price trends are attributable to the 6.5 percent X-factor, but that only applied to price cap rates, not to pricing flexibility rates, and the evidence shows that the prices customers pay in pricing flexibility areas for DS1 and DS3 circuits has declined since 2001. Second, Sprint asserts that the reductions are due to regulatory requirements, but AT&T's analyses have adjusted for any such reductions. Third, Sprint asserts that the lower prices reflect shifts to higher capacity lines, but as AT&T has pointed out, the trend analysis examines the prices actually paid for DS1s, DS3s, and higher capacity lines, *separately*. AT&T did not average the prices paid for lower capacity lines with higher capacity lines, thus ensuring that the rate trends are accurate and do not reflect shifts in usage. *See, e.g.*, Reply Comments of AT&T Inc., *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25, at 23-25 (filed Aug. 15, 2007).

<sup>13</sup> *See, e.g.*, Letter from Christopher Heimann, AT&T, to Marlene H. Dortch, FCC, filed April 15, 2010 ("AT&T April 15 Letter"); Reply Comments of AT&T Inc., WC Docket No. 05-25, at 28-38 (filed January 29, 2010); Letter from Donna Epps (Verizon) to Marlene H. Dortch (FCC), WC Docket No. 05-25, filed June 7, 2010; Letter from Christopher Heimann (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 05-25, filed June 17, 2010.

<sup>14</sup> *See* Presentation by Robert Dotson (CEO and President, T-Mobile USA) & Brian Kirkpatrick (CFO, T-Mobile USA), *T-Mobile USA: Regaining U.S. Market Position*, Deutsche Telecom Investor Day, at 21, March 18, 2010, *attached to AT&T April 15 Letter*.

<sup>15</sup> Yankee Group 4G Network Backhaul Summit, PowerPoint Presentation of John Saw, CTO Clearwire (Sept. 15, 2009) ("90% of Clearwire cell sites use microwave backhaul; Largest wireless backhaul

in this proceeding but bare assertions, with no support or documentation, that it lacks competitive alternatives to ILEC special access services.

For all of these reasons, the long expected expiration of AT&T's temporary merger-related discounts provides no support for the regulation proponents' proposals that the Commission take "immediate . . . interim steps" to mandate ILEC special access price reductions and freezes, and place a moratorium on further grants of pricing flexibility. Indeed, as AT&T and others have demonstrated, any attempt by the Commission to mandate "interim" rate reductions solely on the basis of the expiration of these merger-related rate changes would not survive judicial review.

The Communications Act establishes a system of carrier-initiated rates and terms. Once carrier-initiated tariffs take effect, the Commission cannot supplant the terms in those tariffs unless and until it meets the requirements of Section 205 of the Act for a prescription. The Commission cannot prescribe new rates or terms under Section 205 unless it has conducted a hearing and made definitive findings both that the carrier's existing charge or practice "is or will be in violation of any provisions of this Act" and of "what will be the just and reasonable" charge" or practice "to be thereafter followed."<sup>16</sup> As the courts have repeatedly held, and as the Commission itself has repeatedly recognized, these statutory requirements apply regardless whether the contemplated prescription is permanent or temporary.<sup>17</sup> Thus, if the Commission lacks an adequate record to make these predicate findings it must "leave the matter of prescription for resolution on an adequate record after further proceedings."<sup>18</sup>

That is why the Commission has already rejected "interim" prescriptions in this proceeding. The Commission recognized in its 2005 Notice of Proposed Rulemaking that it can only prescribe special access rates and terms when it can make definitive findings, on a complete record, both that carriers' existing tariffed rates and terms are unjust and unreasonable and that

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network in North America"; "Rapid rollout," "Very low recurring costs," "Tremendous scalability, 50 Mbps – 1 Gbps of backhaul per site").

<sup>16</sup> 47 U.S.C. § 205; *see also* *AT&T v. FCC*, 487 F.2d 865, 872-80 (2d Cir. 1973) (a "full opportunity for hearing" and express Commission findings that the carrier-initiated rate is unjust and unreasonable and the prescribed rate is just and reasonable "are essential to any exercise by the Commission of its authority" to prescribe rates); *Southwestern Bell Corp. v. FCC*, 43 F.3d 1515, 1519 (D.C. Cir. 1995) (the "Commission is not free to circumvent or ignore th[e] balance [created by Congress in § 205]. Nor may the Commission rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation").

<sup>17</sup> *See AT&T v. FCC*, 449 F.2d 439, 451 (2d Cir. 1971) (striking down interim prescription; since record was insufficient, "§ 205(a) required the Commission to leave the matter of prescription for resolution on an adequate record"); *American Telephone and Telegraph Company Revisions to Tariff F.C.C. No. 259, Wide Area Telecommunications Service (WATS)*, 86 FCC 2d 820, ¶ 88 (1981) (rejecting interim phase-in" proposal, because "we now have no record on which to base such a prescription. Section 205 of the Act, 47 U.S.C. § 205, permits the Commission to prescribe just, fair, and reasonable charges, regulations or practices only after hearing. Since we have not yet investigated NTS costs, we are not in a position to determine whether such proposals are reasonable").

<sup>18</sup> *See AT&T v. FCC*, 449 F.2d 439, 451 (2d Cir. 1971).

proposed replacement rates and terms are themselves just and reasonable.<sup>19</sup> The Commission explained to the D.C. Circuit in defending its decision not to grant nearly identical requests for interim relief at an earlier stage in this proceeding: “in order to justify the interim prescription relief sought by petitioners, the record would have to support the conclusion that *every* special access rate in *every* MSA in which Phase II relief has been granted violates Section 201.”<sup>20</sup> The record in this proceeding obviously does not afford any basis for such Commission findings, and the mere fact that temporary, merger-related rate reductions are now expiring certainly cannot substitute the rigorous findings demanded by Section 205.

Indeed, Sprint expressly asks the Commission here for a naked order mandating that AT&T charge rates different from the ones in its tariffs. That would be a classic prescription under Section 205, but Section 205 simply does not allow the Commission to prescribe tariffed rates or terms *before* it can make the predicate findings that existing rates or terms are unjust and unreasonable and that specific replacement rates or terms are just and reasonable.<sup>21</sup>

Sincerely,

/s/ Gary L. Phillips

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<sup>19</sup> See, e.g., *2005 Notice* ¶ 130 (“we find the record inadequate for prescribing new special access rates pursuant to section 205 of the Communications Act”).

<sup>20</sup> *In re AT&T Corp., et al.*, No. 03-1397, Brief of Respondent FCC at 23 (emphasis in original).

<sup>21</sup> *Access Charge Reform*, 12 FCC Rcd 15982, ¶ 273 (1997) (“*Access Charge Reform Order*”) (“our access charge rules are designed to ensure that access charges remain within the ‘zone of reasonableness’ defining rates that are ‘just and reasonable’”); *FPC v. Conway Corp.*, 426 U.S. 271, 278 (1976) (“there is no single cost-recovering rate, but a zone of reasonableness: statutory reasonableness is an abstract quality represented by an area, not a pinpoint”). For similar reasons, Sprint’s suggestion that the Commission should refuse to entertain any new petitions for pricing flexibility during this proceeding would be arbitrary in the extreme. As discussed above, regulation proponents have offered no valid evidence that could even remotely supports such radical action. Just as it would be arbitrary to mandate “interim” rates on the basis of this patently inadequate evidence, it would also be arbitrary to stop the application process of a fully valid and lawful program based on that evidence, before the Commission has even collected the data need to examine those issues.