CALTEL California Association of Competitive Telecommunications Companies
Communications, Commerce, Community

February 9, 2012

VIA ECFS

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

RE: Notice of Ex Parte Communication; Special Access Rates for Price Cap LECs, WC Docket No. 05-25

Dear Ms. Dortch,

On February 7, 2012, Sarah DeYoung, President and Executive Director of the California Association of Competitive Telecommunications Companies (CALTEL) met with Michael Steffen, Legal Advisor to Chairman Genachowski. The discussion was consistent with the attached handout which was provided at the meeting.

Sincerely,

/s/_____

Sarah DeYoung
Executive Director

Enclosure

Cc: (via email)
Michael Steffen

50 California Street, Suite 1500, San Francisco, CA 94111

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The State of Competition for Special Access/Wireless Backhaul in California:

CALTEL's Analysis of Data Produced in the CPUC's Investigation into the Proposed AT&T/T-Mobile Merger

SPECIAL ACCESS RATES FOR PRICE CAP LECS

WC 05-25

CALTEL

Sarah DeYoung, Executive Director

Last December, CALTEL filed a response to the Commission's latest Special Access voluntary data request (Public Notice DA-11-1576):

- Large CALTEL members have provided data and participated in proceeding directly
  - Level 3 Communications
  - XO Communications
  - Earthlink Business Solutions
  - Cbeyond
  - TelePacific Communications
- CALTEL's direct interest was prompted by its analysis of special access/wireless backhaul data produced in California PUC's investigation into proposed AT&T/T-Mobile merger
- CALTEL filed three sets of comments, supported by declarations from its Executive Director and economic expert Joe Gillan
- The backhaul data used for this analysis was produced in response to detailed data requests by the CPUC, subject to a protective order adopted by the CPUC
  - Backhaul requests focused on:
    - Tariffs <u>and</u> off-tariff contracts
    - Market share data by cell site

- CALTEL's review of the data shows that:
  - AT&T is leveraging its control over special access in California to gain control over the market for emerging alternatives, such as Ethernet services, where California might otherwise enjoy a competitive market;
  - AT&T violated federal regulations by failing to make certain special access pricing flexibility terms it offered T-Mobile available to other carriers

AT&T Leveraged its Control Over Special Access to Gain Control Over T-Mobile's Ethernet Purchases

- First, AT&T leveraged its ubiquitous geographic footprint in California to lock up T-Mobile's DS1 traffic via price flex tariffs subject to significant early termination and volume commitment penalty terms and conditions
- Next, AT&T modified terms for these "embedded base" DS1s via off-tariff contracts that ensured that T-Mobile purchased all (or nearly all) of its largely unregulated Ethernet-based backhaul from AT&T within the AT&T California footprint
  - Penalties were waived if T-Mobile converted existing DS1s to Ethernet circuits purchased from AT&T in high-revenue MSAs
  - Market share highest in most lucrative markets (Bay Area, San Francisco, San Diego)
  - As Gillan declaration shows, if there is to be competition for Ethernet backhaul, it will necessarily emerge first in areas where economic demand can fuel the investment in supply

- T-Mobile's use of competitive suppliers for Ethernet services was significantly lower in California than the percentage it claimed was the case nationwide

AT&T Violated Federal Regulations Regarding Price Flex Contract Tariffs

- Analysis of tariffs, off-tariff contracts, and contract amendments uncovered evidence that AT&T violated 47 C.F.R. §§ 69.727 and 61.55 on at least two separate occasions
  - AT&T did not file or make available to similarly-situated customers pricing flexibility contract tariffs associated with execution of and updates to the AT&T/T-Mobile agreement
  - In a public filing at the CPUC, AT&T admitted that it did not file the agreements, but argues that it was not required to do so
  - The Commission's review of the confidential documents will clearly show otherwise
- Review of AT&T's federal tariff for California suggests that its violations may not be limited to the two special access agreements with T-Mobile
  - Although an AT&T witness described the large number of price flex contract tariffs as evidence of a "driver" of downward pricing pressure for special access prices, AT&T filed only 4 contract tariffs for California and Nevada in the two-year period between August, 2009 (date of the original AT&T/T-Mobile agreement) and August 1, 2011

- Only one was for wireless backhaul
- CALTEL finds it hard to imagine that there are not other contracts and contract updates that should have been noticed and filed

The Commission Will Not Be Able to Analyze Impacts and Confirm These Conclusions Without Requiring Price Cap LECs to Produce Similar Data

- Mandatory data requests will be needed
  - Tariff and off-tariff agreements for special access and related services
  - Market share data
- Price cap LECs have already argued against producing off-tariff agreements
  - "competitively sensitive", "highly confidential", "irrelevant"
  - Any contracts that contain provisions that provide purchasers with discounts on DS1 and DS3 special access services are relevant and should be produced
- These off-tariff agreements are not simple documents
  - They employ a number of inter-related, inter-dependent contracting mechanisms
  - Inter-related terms and conditions are contained in a number of "piece-part" documents that must be reviewed as a whole to determine the overall impact

- Special access customers are prohibited from voluntarily producing copies of these agreements
    - Terms bind parties to keep the *entire agreement* confidential

Conclusions:

- CALTEL urges the Commission to issue a mandatory data request to price cap LECs that requires them to produce copies of any tariff and off-tariff contracts that act together to provide discounts on legacy special access circuits
- CALTEL's analysis of a set of agreements between AT&T and T-Mobile in the California PUC's investigation into the proposed AT&T/T-Mobile merger demonstrates that the Commission cannot ascertain the current state of competition, or the need to modify or enforce existing regulations, without the ability to review and analyze this critical data