WILTSHIRE & GRANNIS LLP

May 23, 2012

Ex Parte

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

Re: 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 Carrier Rates for Interstate Special Access Services (RM-10593); Petition of Pacific Bell Telephone Company for Pricing Flexibility Under § 69.727 of the Commission's Rules for the San Francisco/Oakland, CA MSA (WCB/Pricing Docket No. 12-04); Petition of Southwestern Bell Telephone Company for Pricing Flexibility Under § 69.727 of the Commission's Rules for the San Antonio, TX MSA (WCB/Pricing Docket No. 12-05); Petition of Windstream Nebraska, Inc., Windstream Sugar Land, Inc., and Valor Telecommunications of Texas, LP d/b/a Windstream Communications Southwest for Pricing Flexibility as Specified in § 69.727 of the Commission's Rules for the Houston, TX MSA, Lincoln, NE MSA and Tulsa, OK MSA (WCB/Pricing Docket No. 12-06).

Dear Ms. Dortch:

The Communications Act of 1934, as amended, requires the Federal Communications Commission ("FCC" or "Commission") to ensure that special access rates, terms, and conditions are just and reasonable.[1] Since 1991 the Commission has addressed this responsibility through its price cap regulations.[2] But in 1999 the FCC adopted the *Pricing Flexibility Order*, which allowed incumbent local exchange carriers ("ILECs") to escape important price cap protections in geographic areas where certain "competitive triggers" are present.

The FCC's competitive triggers, however, do not measure special access competition directly. Instead, the Commission chose to measure what it hoped would be proxies for actual competition: (1) the percentage of ILEC wire centers within a Metropolitan Statistical Area ("MSA") where any competitor collocates equipment; or (2) the percentage of ILEC revenues from wire centers within a particular MSA where any competitor has collocated equipment. Curiously, the FCC did not require that the collocated equipment be used for special access,

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1 47 U.S.C § 201.

2 *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd. 6786 (1990); *Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994, 1997-2002 ¶¶ 7-18 (2005) ("*2005 Special Access NPRM*").

allowing even equipment used to provide a different service, such as residential broadband, to count toward meeting the triggers.

The Commission predicted that the presence of collocated equipment in an MSA would show "the extent to which competitors had made irreversible, sunk investment in collocation and transport facilities,"[3] and that this investment would suggest that special access competition had arisen, or would soon arise, in that geographic area. Since 1999, the Commission has granted hundreds of ILEC petitions for pricing flexibility in communities around the United States. In doing so, the FCC has relied on the theory that collocation is an accurate enough predictor of special access competition to justify removing price cap protections where the pricing flexibility triggers are met.

Thirteen years have passed since the pricing flexibility rules took effect. Competition has not emerged. Study after study has shown that the special access marketplace remains highly concentrated.[4] The Commission has recognized and amassed an extensive record demonstrating that its collocation triggers are likely flawed; it has recently gathered data on markets around the country. Analysis of these data will confirm that special access markets remain non-competitive even in areas where the ILECs have been granted pricing flexibility. Just this month, Verizon announced that it would unilaterally increase special access rates by another six percent throughout its service area—after having raised its rates by a similar amount less than a year ago—without any apparent concerns about a competitive response. These rate increases are even more striking given that the costs of providing special access are almost certainly declining. While Verizon withdrew the second of these increases when other industry participants requested an FCC investigation, it is clear that the threat of competitive reaction to price hikes is not an ILEC concern. AT&T issued its own dramatic increase in rates at the expiration of the BellSouth merger conditions in 2010.[5]

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[3] *2005 Special Access NPRM* at 2001 ¶16.

[4] United States Government Accountability Office, GAO-07-80, Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services (2006) ("GAO Report"); Peter Bluhm and Robert Loube, *Competitive Issues in Special Access Markets* (National Regulatory Research Institute, 2009) ("NRRI Report"); and Letter from Anna G. Eshoo, Ranking Member, Subcommittee on Communications and Technology, et al., to Julius Genachowski, Chairman, Federal Communications Commission (May 15, 2012), *avail. at* http://eshoo.house.gov/images/stories/5.15.12_Letter_to_Chairman_Genachowski.pdf.

[5] *See, e.g.*, Ameritech Tariff FCC No.2, Section 21.5.2. 7(B) and Section 21.5.2.7.1 (A). Note also that in 2004 Qwest imposed "dramatic rate increases" for "the third time in less than two years (and the second time in six months)" in areas in which it had been granted Phase II pricing flexibility. Petition of AT&T Corp., In the Matter of Qwest Petition Transmittal No. 206, 1-2 (filed Aug. 23, 2004); *see also* Qwest Corporation Transmittal No. 206, Revised Qwest Tariff F.C.C. No. 1, FCC Wireline Competition Bureau Pricing Policy Division (filed Aug. 16, 2004).

The Commission has recognized in its special access proceeding that it has a responsibility to "re-examine periodically rules that were adopted on the basis of predictive judgments to evaluate whether those judgments are, in fact, corroborated by marketplace developments."[6] The Commission has gathered substantial evidence of marketplace developments through its *2005 Special Access NRPM*, the *2009 Public Notice* on establishing a framework for analyzing the special access market, and recent special access data requests, all of which recognize that the triggers may not accurately predict special access competition.[7]

The Commission can no longer rely on its incorrect prediction that special access competition would flourish—or on the triggers it established for indirectly assessing competition in this market. Indeed, the past thirteen years have revealed that the FCC's theory that collocation levels would be a reliable indication of special access competition was incorrect. Despite the Commission's predictions, there is no demonstrable correlation between collocation in an end office and special access competition in the area served by that office.

The FCC should therefore immediately issue an order in its special access proceeding to repeal the pricing flexibility triggers. As part of this order, the Commission should reject pending and future pricing flexibility petitions that rely on the arbitrary triggers—including the above-captioned petitions for pricing flexibility ("Petitions") filed by Pacific Bell Telephone Company; Southwestern Bell Telephone Company; and Windstream Nebraska, Inc., Windstream Sugar Land, Inc., and Valor Telecommunications of Texas, LP. Granting any petition based on triggers that are no longer reliable, and that the FCC is in the process of amending or replacing, would be arbitrary and capricious. In the alternative, the Commission should defer acting on the pending Petitions and suspend use of the triggers until it concludes the special access rulemaking.

I. The Pricing Flexibility Triggers Do Not Accurately Indicate the Presence of Special Access Competition.

The Commission adopted its current pricing flexibility rules in 1999, reasoning that "irreversible, or 'sunk,' investment in facilities used to provide competitive services is the appropriate standard for determining when pricing flexibility is warranted."[8] The Commission relied on its predictive judgment to find that "collocation by competitors in incumbent LEC wire

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[6] *2005 Special Access NPRM* at 1996-7 ¶5

[7] *See id.*; *Parties asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, DA 09-2388, WC Docket No. 05-25 (rel. Nov. 5, 2009); *Competition Data requested in Special Access NPRM*, Public Notice, DA 11-1576, WC Docket No. 05-25 (rel. Sept. 19, 2011).

[8] *Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, 14263 ¶79 (1999) ("*Pricing Flexibility Order*").

centers is a reliable indication of sunk investment by competitors," because it "usually represents a financial investment by a competitor to establish facilities within a wire center."[9]

The pricing flexibility rules also require "incumbent LECs to show that at least one competitor relies on transport facilities provided by a transport provider other than the incumbent at each wire center listed in the incumbent's pricing flexibility petition as the site of an operational collocation arrangement."[10] An ILEC may obtain pricing flexibility throughout an MSA in which it can meet the triggers.[11]

Marketplace developments demonstrate that the FCC's reliance on collocation-based triggers was an error. As discussed below, the current triggers are inappropriate because collocation is not an effective proxy for special access competition. It bears no relationship at all to investment by competitors in alternative channel terminations. Furthermore, MSAs are a wildly inappropriate geographic market to use to measure the existence of competition, because they often encompass both competitive and non-competitive areas, resulting in both over-inclusive and under-inclusive application of pricing flexibility. The only positive aspect of the pricing flexibility triggers is that they are easy to administer.[12] But administrative ease cannot justify the use of arbitrary triggers.

A. Collocation Is Not an Effective Proxy for Competition, Particularly with Regard to Channel Terminations.

Marketplace developments in the thirteen years since the FCC adopted the *Pricing Flexibility Order* make it clear that the premises on which the triggers were based were simply wrong. Collocation by competitors does not reliably indicate sunk investment in special access or accurately predict competition. This is particularly true for channel terminations.

The Commission itself has acknowledged that the triggers provide a poor proxy for competition. In the *Pricing Flexibility Order*, the FCC observed that "collocation by competitors does not provide direct evidence of sunk investment by competitors in channel terminations between the end office and the customer premises" because "a competitor collocating in a LEC end office continues to rely on the LEC's facilities for the channel termination between the end office and the customer premises, at least initially, and thus is susceptible to exclusionary pricing behavior by the LEC."[13] Indeed, as Sprint has noted, collocation "indicates only that the

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9 *Pricing Flexibility Order* at 14265 ¶81.

10 *Id.* ¶82; *see also* 47 C.F.R. § 1.774.

11 *See* 47 C.F.R. § 22.909(a) (definition of MSA). *See also Pricing Flexibility Order* at 14261 ¶76 (pricing flexibility will be granted to price cap LECs within the non-MSA parts of a study area if they satisfy the applicable triggers throughout that area); *see also* 47 C.F.R. § 1.774.

12 *Pricing Flexibility Order* at 14225 ¶3.

13 *Pricing Flexibility Order* at 14279-80 ¶103 (internal citations and subsequent history omitted).

competitive carrier has some capacity to compete in the provision of interoffice transport services for customers served out of that wire center."[14] Because of this, as PAETEC explained, "a price cap ILEC can be granted pricing flexibility for its channel termination rates in an MSA even if no collocator has deployed a single loop in the MSA."[15] Similarly, in its *Unbundled Access to Networks Elements; Review of the Section 215 Unbundling Obligations of Incumbent Local Exchange Carriers* ("*UNE TRRO*") order, the Commission rejected proposals that it could "reach conclusions of no impairment by wire center where there is evidence of only one fiber-based collocator," finding that "[i]n the absence of other indicia that competitive entry is feasible, the presence of one fiber-based collocator constitutes insufficient evidence of competitors' non-impairment."[16]

In fact, the presence of collocation arrangements may actually be "inverse[ly related] to competition."[17] As explained at the Commission's Special Access Workshop, a collocation "is indicative not that the competitor has placed its own facilities into buildings but rather that it has dependence upon the incumbent's facility."[18] This is because competitors generally do not connect their own facilities through collocation facilities, but instead use "special access services that [they] lease[] from the incumbent into the collocation to ultimately interconnect it with [their] own network[s]."[19] This is true despite the triggers' requirement that "at least one collocator use competitive transport facilities provided by a transport provider other than the incumbent LEC."[20] The competitive transport requirement is entirely unrelated to whether there are competitive alternatives for channel terminations, and therefore does not remedy the triggers' inability to predict special access competition reliably.

Finally, collocation is not an effective proxy for facilities-based special access competition because the triggers measure the number of collocations only at a snapshot in time

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[14] Comments of Sprint Nextel Corporation at 33, WC Docket No. 05-25 and RM-10593 (filed Jan. 19, 2010) ("Sprint Comments").

[15] *See* Comments of PAETEC Holdings Inc. et al. at 13-14, WC Docket No. 05-25 and RM-10593 (filed Jan. 19, 2010).

[16] *Unbundled Access to Network Elements: Review of the Section* 251 *Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533, 2603 ¶121 (2005) ("*UNE TRRO*").

[17] Lee Selwyn, President, Economics and Technology, Inc., Federal Communications Commission, Special Access Workshop at 23 (July 19, 2010), *available at* http://reboot.fcc.gov/c/document_library/get_file?uuid=f01ad781-6dd7-4ace-a7fc-bc296dc88315&groupId=19001 ("Economist Workshop Transcript"). *See also* Comments of AT&T Inc. at 29, WC Docket No. 05-25 and RM-10593 (filed Jan. 19, 2010) ("AT&T Comments").

[18] Selwyn, Economist Workshop Transcript at 23-4.

[19] *Id.*

[20] PAETEC Comments at 33 (filed Jan. 19, 2010).

and do not include any mechanisms to account for changes in marketplace conditions.[21] This alone renders the FCC's reliance on the triggers arbitrary. Many of the early pricing flexibility petitions were granted more than a decade ago. Marketplace developments have clearly shown that "a number of companies have gone out of business, [and] collocations have gone down."[22] The Commission theorized in the 1999 *Pricing Flexibility Order* that "the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed," because "that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market."[23] But this theory has been proven incorrect with respect to the provision of competitive special access services. Many collocation arrangements have gone unused after the carrier that made the original investment went out of business.

Simply put, collocations by now-bankrupt CLECs—or CLECs such as AT&T and MCI that have since been acquired by ILECs—more than a decade in the past, at a time of rampant speculation and in a vastly different economic environment, tell us nothing about the availability of alternatives to incumbent LEC special access services today.

B. MSAs Are Not the Appropriate Geographic Market to Evaluate Special Access Competition.

Marketplace developments also have demonstrated that the pricing flexibility triggers' use of MSAs as the relevant geographic market was an error.[24] Experience has shown that competition can vary widely within an MSA. Even if collocation somehow were to accurately identify wire centers where competition exists, competition in one wire center does not constrain prices in other parts of the MSA.[25] As Sprint and others have explained, where ILECs have been granted Phase II pricing flexibility, they "can price discriminate between locations where they face competition and those where there are no competitive alternatives (*i.e.*, the incumbent can charge a monopoly price in areas where it does not face competition while charging lower prices

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[21] Lee Selwyn, Economist Workshop Transcript at 31.

[22] *Id.*

[23] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) (citation omitted).

[24] *Pricing Flexibility Order* at 14260 ¶¶72-74; *see also* 47 C.F.R. § 1.774.

[25] *See* Ex Parte Letter from A. Richard Metzger, Jr., and Christopher J. Wright, Counsel to Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, Federal Communications Commission at 57 (filed Oct. 5, 2007) ("Sprint 2007 Special Access Pricing Ex Parte"); Sprint Comments at 13-15; Reply Comments of WorldCom, Inc. at 9-10, RM-10593 (filed Jan. 23, 2003) ("2003 WorldCom Reply"); Reply Comments of AT&T Corp. Exhibit 3, ¶20, RM-10593 (filed Jan. 23, 2003) ("2003 AT&T Reply"); *see also UNE TRRO* at 2619-20 ¶155.

in areas where it is subject to competitive pressures)."[26] Furthermore, the economics of deploying special access services prevent new entrants from deploying on an MSA-wide basis.[27]

In similar contexts, the Commission has rejected the use of MSAs as the relevant geographic market. With respect to dedicated transport and high-capacity UNE loops (equivalent to channel terminations), the Commission noted that an MSA-based approach to impairment determinations "would require an inappropriate level of abstraction, lumping together areas in which the prospects for competitive entry are widely disparate."[28] The same is true here. Just as the Commission rejected the MSA as the relevant geographic market with regard to relieving ILECs of their obligation to offer access to unbundled dedicated transport and high-capacity UNE loops, so too should the Commission reject it here.

Independent reports by Government Accountability Office ("GAO") and National Regulatory Research Institute ("NRRI") also confirm that the triggers are flawed because they produce a high rate of false positives in identifying competition. NRRI explained that there is "almost no evidence of the validity of the FCC's current policy equating special access competition with the presence of collocation in ILEC central offices. Market concentration for channel terminations remains high in all areas, regardless of pricing flexibility."[29] These results, the NRRI concluded, suggest "that markets are not conforming to the FCC's predictions [that incumbent LECs would face competition in MSAs subject to pricing flexibility]...[T]he FCC collocation proxy consistently overestimates the competitiveness of the DS-1 and DS-3 channel termination markets."[30] Similarly, GAO has noted that the "data also show that the theoretically more competitive phase II areas generally have a lower percentage of lit buildings than phase I areas, indicating that FCC's competitive triggers may not accurately predict competition at the building level."[31]

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[26] Sprint Comments at 32; *see also* Sprint 2007 Special Access Pricing Ex Parte at 57-59.

[27] *See* Sprint 2007 Special Access Pricing Ex Parte at 58 (explaining that new entrants target deployment to specific routes with high demand) (citing Sprint Comments, Attachment A, Declaration of Bridger M. Mitchell ¶¶30-32).

[28] *UNE TRRO* at 2583, 2619-20, 2624 ¶¶82, 155, 164. UNE loops are equivalent to special access channel terminations and UNE transport is the equivalent of special access channel mileage. *See, e.g., Review of the Section* 251 *Unbundling Obligations of Incumbent Local Exchange Carriers,* Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd. 16978, 17352-3 ¶¶593-4 and at 17352 n.1825 (2003) (drawing an analogy between a special access channel termination and a UNE loop) *("Triennial Review Order").*

[29] NRRI Report at iv.

[30] *Id.*

[31] GAO Report at 12-13.

Furthermore, broad industry consensus confirms that the triggers do not function as intended.[32] In 2002, even AT&T, at the time a victim rather than a beneficiary of monopoly behavior, demonstrated that the triggers permitted pricing flexibility in areas where competitive entry did not occur.[33] But even post-merger AT&T, now a beneficiary of ILEC market power, admits that the triggers' use of MSAs renders them arbitrary. The new AT&T has complained that the triggers are both over- and under-inclusive: they may permit pricing flexibility in areas that are not competitive but may also deny flexibility in entire MSAs (such as Chicago and New York), where AT&T's experts believe that at least some portions of the MSAs should be subject to Phase II pricing flexibility.[34] In 2007, AT&T explained that it had not been able to achieve Phase II pricing flexibility for channel terminations in several of the most populous markets, including Chicago, Dallas, and San Francisco-Oakland, which it describes as "some of the most competitive areas in the country."[35] AT&T asked that the Commission "modify its pricing flexibility rules" to more accurately account for competitive conditions.[36] The economists at the Commission's Special Access Workshop underscored this point, noting that New York City has been granted only Phase I pricing flexibility,[37] whereas smaller—and ostensibly less competitive—markets have been granted Phase II pricing flexibility.[38]

Finally, Embarq, another ILEC, has asked that the Commission "abandon the collocation-based triggers."[39] Embarq has explained that "the ineffectiveness of the triggers is one area

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[32] *See, e.g.*, Sprint 2007 Special Access Pricing Ex Parte at 47-48, 54-64; Comments of Sprint Nextel Corporation at 16-17, WC Docket No. 05-25 and RM-10593 (filed Aug. 8, 2007); Comments of Sprint Corporation at 9-10, WC Docket No. 05-25 and RM-10593 (filed June 13, 2005); Comments of Time Warner Telecom and One Communications at 18-20, WC Docket No. 05-25 and RM-10593 (filed Aug. 8, 2007); Comments of Time Warner Telecom at 4-6, 10, WC Docket No. 05-25 and RM-10593 (filed June 13, 2005); Comments of T-Mobile USA, Inc. at 11-12, WC Docket No. 05-25 and RM-10593 (filed Aug. 8, 2007) ("T-Mobile 2007 Comments"); Comments of T-Mobile USA, Inc. at 14-17, WC Docket No. 05-25 and RM-10593 (filed June 13, 2005); Reply Comments of T-Mobile USA, Inc. at 15-17, WC Docket No. 05-25 and RM-10593 (filed July 29, 2005).

[33] *2005 Special Access NPRM* at 1997 ¶6 (citing AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services at 2, 6-7, 11-13, 20, 25-32, RM-10593 (filed Oct. 15, 2002)).

[34] *See* AT&T Comments, Exhibit A, Declaration of Dennis W. Carlton and Hal S. Sider, at 20 ¶36 ("Carlton-Sider Declaration").

[35] Supplemental Comments of AT&T Inc. at 28, WC Docket No. 05-25 and RM-10593 (filed Aug. 8, 2007).

[36] *Id.*

[37] Selwyn, Economist Workshop Transcript at 103, 141.

[38] *Id.* at 141.

[39] Reply Comments of Embarq at 26, WC Docket No. 05-25 and RM-10593 (filed Aug. 15, 2007).

where purchasers of special access and ILECs agree, at least in part. Both believe the current triggers do not identify when there is true facilities-based competition, with the ILECs claiming the triggers are underinclusive and the purchasers of special access arguing that the triggers are overinclusive; granting pricing flexibility where no competition exists."[40] Continued reliance on triggers that plainly do not match marketplace realities would be both arbitrary and capricious.

II. The Commission Should Immediately Repeal or Suspend Reliance on the Flawed Pricing Flexibility Triggers and Deny or Suspend Its Review of Pending Pricing Flexibility Petitions.

As discussed above, the pricing flexibility triggers do not reliably indicate the presence of effective competitive restraints on the ILECs' ability to exercise market power in the provision of special access services. Because of this failure, ILECs have been able to use the Commission's pricing flexibility rules to impose unjust and unreasonable terms and conditions on special access purchasers. While the theory of the FCC's pricing flexibility rules was that competition would lead the ILECs to lower their (or at least restrict their ability to raise) prices in the areas the triggers predicted to be competitive, the reality is that ILECs have used pricing flexibility to increase their rates.[41] Phase II special access prices are now as much as 150 percent higher than comparable UNE circuits on average, and are as high as or higher than prices in price-cap areas.[42] Comptel has shown that BellSouth has used pricing flexibility to increase DS1 and DS3 channel termination rates by as much as 10 percent to 30 percent,[43] and Verizon has used pricing flexibility to increase DS1 and DS3 channel termination rates by as much as 10 percent to 31 percent.[44]

The Commission has recognized that the pricing flexibility triggers may be arbitrary and in 2005 initiated an extensive review of whether and how to replace the triggers. The Commission has described its special access rules as "anticipatorily deregulatory"[45] and based on "predictive judgment."[46] That the Court in *WorldCom, Inc. v. FCC* found that this predictive

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[40] *Id.* (citing Comments of BT Americas Inc. at 12, WC Docket No. 05-25 and RM-10593 (filed Aug. 8, 2007); T-Mobile 2007 Comments at 8. *See also* Carlton-Sider Declaration at 19 ¶36.

[41] *See* NRRI Report at iv; GAO Report at 13-14; Ex Parte Letter from Karen Reidy, Vice President Regulatory Affairs, COMPTEL, to Marlene H. Dortch, Secretary, Federal Communications Commission at 2-3, Attachment A (filed June 1, 2010) ("COMPTEL Ex Parte"); Sprint Comments at 34 n.110.

[42] Sprint Comments at 34 n.110 (internal citations omitted).

[43] COMPTEL Ex Parte, Attachment A (comparing rates in BellSouth Telecommunications Inc. Tariff FCC No. 1 before and after pricing flexibility).

[44] *Id.*, Attachment A (comparing rates in Verizon Telephone Companies Tariff FCC No. 1 before and after pricing flexibility).

[45] *2005 Special Access NPRM* at 2018 ¶69 (citing *Pricing Flexibility Order* ¶154).

[46] *Id.*

judgment deserved deference and was not arbitrary twelve years ago certainly does not mean that with more than a decade of new evidence the Commission's "prognostications" remain valid today.[47] They do not, and the *WorldCom* decision in no way limits the FCC's authority to recognize that it made a mistake. Consequently, with the benefit of experience and current information, the FCC has acknowledged that its predictions may have been incorrect. With its *2005 Special Access NPRM*, the Commission undertook a comprehensive review of the special access triggers and marketplace, informing stakeholders that it sought to "determine whether the Commission's pricing flexibility rules have worked as intended" and, if not, whether they should be modified or repealed.[48] Indeed, the Commission underscored its "ongoing commitment to ensure that [the Commission's] rules, particularly those based on predictive judgments, remain consistent with the public interest as evidenced by empirical data."[49]

In 2009, the Commission specifically asked stakeholders to comment on whether the collocation triggers are "an accurate proxy for the kind of sunk investment by competitors that is sufficient to constrain incumbent LEC prices, including for both channel terminations and inter-office facilities."[50] Stakeholders were also asked to address whether the "pricing flexibility rules ensure just and reasonable rates."[51] Responses to its *2009 Public Notice* provided the Commission with an even more extensive record on the failure of the triggers. The Commission sought further data to evaluate the success of its pricing flexibility triggers in its October 28, 2010 *Public Notice*.[52]

As demonstrated above: (1) the Commission based the triggers on the erroneous theory that collocation predicted special access competition; (2) after thirteen years it is now clear that there is no marketplace evidence that collocation is correlated with special access competition; (3) ILECs have raised prices in areas where they have met the triggers, confirming that the triggers do not in fact identify areas where competition will restrain monopoly or duopoly pricing; and (4) the agency has recognized the substantial risk that the triggers are arbitrary and has conducted a proceeding since 2005 where it has considered replacing the triggers.

The Commission therefore should immediately repeal its pricing flexibility rules, and deny all pending pricing flexibility petitions that rely on the flawed triggers—including the

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[47] *WorldCom, Inc. v. FCC*, 238 F.3d 449, 459 (D.C. Cir. 2001).

[48] *Id.* ¶71; *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd. 13638 (2009) ("*Analytical Framework PN*").

[49] *2005 Special Access NPRM* at 2018-19 ¶71.

[50] *Analytical Framework PN* at 13639 (internal citations omitted) (emphasis added).

[51] *Id.*

[52] See *Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25, RM-10593, 25 FCC Rcd. 15146 (2010) ("*2010 Data Request*"); *Competition Data Requested in Special Access NPRM*, Public Notice, WC Docket No. 05-25, RM-10593, 26 FCC Rcd. 14000 (2011).

above-captioned Petitions for Phase I and Phase II Pricing Flexibility filed by Pacific Bell Telephone Company; Southwestern Bell Telephone Company; and Windstream Nebraska, Inc., Windstream Sugar Land, Inc., and Valor Telecommunications of Texas, LP. It would be arbitrary and capricious for the Commission to grant pricing flexibility based on its deeply flawed triggers, particularly given that experience has shown that the Commission cannot rely on competition to ensure that rates are just and reasonable in areas where the incumbent LECs have been granted pricing flexibility. In the alternative, the Commission should suspend its pricing flexibility rules and use of the triggers, and defer consideration of all pending pricing flexibility triggers, until it completes the special access proceeding.

The Commission clearly has the authority to repeal or suspend use of the triggers under the current circumstances. In fact, where, as here, the rationale underlying a particular policy adopted by the Commission has been widely challenged by ILECs, CLECs, and end users, and the Commission itself has expressed doubt as to its continuing validity, the Commission has an obligation to review the policy and, to the extent required, modify or repeal it.[53] Where factual assumptions underlying a policy are no longer valid, the Commission is obliged to reexamine it before granting petitions pursuant to the policy.[54] As discussed above, the Commission currently has questioned the triggers in its special access proceeding. Even if the FCC does not repeal the triggers immediately, it cannot simply continue to apply the old rules after recognizing that they are arbitrary as though nothing is wrong.[55] As the D.C. Circuit held in *Bechtel v. FCC*, "the mere fact that the Commission is reconsidering that policy does not authorize the Commission to continue making arbitrary and capricious decisions."[56] Particularly where the Commission has made a "policy based on predictive judgments"—as it did in the *Pricing Flexibility Order*—it has "a correlative duty to evaluate its polices over time to ascertain whether they work—that is, whether they actually produce the benefits the Commission originally predicted they would."[57] Furthermore, in the particular context of special access, the Commission recognized in its *2005 Special Access NPRM*, that it carries the burden of determining whether the predictions it made when it established the regulatory regime governing special access were borne out and whether

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[53] *See 2010 Data Request* at 15146.

[54] *See Bechtel v. FCC*, 957 F.2d 873, 881 (D.C. Cir. 1992) ("*Bechtel I*"); *FCC v. WNCN Listeners Guild*, 450 U.S. 582, 603 (1981) ("If time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed that the Commission will act in accordance with its statutory obligations") (citing *NBC v. United States*, 319 U.S. 190, 225 (1943); *Cincinnati Bell Tel. Co. v. FCC*, 69 F.3d 752, 767 (6th Cir. 1995) (when "the factual predicate which justified the structural separation requirement is no longer valid . . . the time is now for the FCC to reconsider whether to rescind the structural separation requirement"). *See also Aeronautical Radio, Inc. v. FCC*, 928 F.2d 428 (D.C. Cir. 1991).

[55] *See Bechtel v. FCC*, 10 F.3d 875, 887 (D.C. Cir. 1993) ("*Bechtel II*").

[56] *Id. See also Bechtel I*, 957 F.2d at 881.

[57] *Bechtel I*, 957 F.2d at 881 (internal citations omitted). *See also Cincinnati Bell Tel. Co.*, 69 F.3d at 767.

the rules work to ensure that the ILECs' rates are just and reasonable, as required by the Communications Act.[58]

The Commission has the authority either to deny the Petitions on the merits or defer action until it completes the special access rulemaking. The Commission is under no obligation to review the Petitions while it considers whether and how to replace the triggers with another method of determining where competition exists and how to account for that competition.[59] The applicants were under notice prior to filing these recent applications that that Commission in the midst of a proceeding specifically reviewing the continuing viability of the existing triggers.[60] Having received such notice—indeed, the applicants were themselves requested to and did provide comments to the Commission for this review[61]—the applicants possess no legitimate expectation that their applications would be decided under the current regime.[62]

Denial of the Petitions would not impair any rights of the Petitioners because, as the D.C. Circuit has held, simply filing an application does not create a vested legal right that restricts the Commission's discretion.[63] On the contrary, the "FCC not only can, but should modify its rules

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58 *See 2005 Special Access NPRM* ¶¶2, 5 n.10. *See also* Reply Comments of The NoChokePoints Coalition at 28, WC Docket No. 05-25 and RM-10593 (filed Feb. 24, 2010).

59 *See, e.g.*, *Chadmoore Commc'ns, Inc. v. FCC*, 113 F.3d 235, 238-39, 242 (D.C. Cir. 1997) (upholding an FCC decision to deny an application in the same order in which it changed the relevant rule); *Folden v. United States*, 56 Fed. Cl. 43 (2003) (upholding dismissal of pending cellular lottery applications due to change in Commission regulation). Note also that the D.C. Circuit has held that application of a new rule to a pending application does not constitute retroactive application of the rule. *See Chadmoore*, 113 F.3d at 240-41.

60 *See 2005 Special Access NPRM* ¶¶69-71.

61 *See* AT&T Data Submitted in Response to Request in Special Access NPRM, WC Docket No. 05-25 and RM-10593 (filed Jan. 27, 2011); AT&T Data Submitted in Response to Second Data Request in Special Access NPRM, WC Docket No. 05-25 and RM-10593 (filed Dec. 14, 2011); CenturyLink Response to Data Request, WC Docket No. 05-25 and RM-10593 (filed Jan. 27, 2011); CenturyLink Response to Second Data Request, WC Docket No. 05-25 and RM-10593 (filed Dec. 5, 2011); Verizon Data Requested in Special Access NPRM, WC Docket No. 05-25 and RM-10593 (filed Jan. 27, 2011); and Verizon Competition Data Requested in Special Access NPRM, WC Docket No. 05-25 and RM-10593 (filed Dec. 5, 2011).

62 *See Chadmoore*, 113 F.3d at 238-39, 242.

63 *See Chadmoore*, 113 F.3d at 240-41 ("the Commission's action did not increase CCI's liability for past conduct or impose new duties with respect to completed transactions. Nor could it have impaired a right possessed by CCI because none vested on the filing of its application"); *see also Hispanic Info. & Telecomms. Network, Inc. v. FCC*, 865 F.2d 1289, 1294-95 (D.C.Cir.1989) ("The filing of an application creates no vested right to a hearing; if the substantive standards change so that the applicant is no longer qualified, the application may be dismissed."); *Schraier v. Hickel*, 419 F.2d 663, 667 (D.C.Cir.1969) (filing of

and regulations when doing so will advance the public interest, even if such a change alters the plans and goals of applicants."[64] The Commission need not delay in rejecting of the triggers and denying the Petitions, particularly where grant of the Petitions would "significantly frustrate[] the interests that [are] to be advance[d] by the new rule[s]" that the Commission is considering as it continues to evaluate the validity of the pricing flexibility triggers in the special access proceeding.[65]

Therefore, because the triggers are arbitrary, as demonstrated above, the Commission should immediately repeal the triggers in an order in its special access proceeding, and deny the pending petitions as part of that order. Alternatively, the Commission can suspend its use of the triggers and defer action on the Petitions. The Commission has broad discretion to manage its own docket.[66] The Commission "may perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions,"[67] and "may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice."[68] Deferring action on the Petitions while the Commission reevaluates the framework under which those Petitions are to be adjudicated would be an appropriate exercise of this discretion.

III. Conclusion

There is no record support for the contention that the Commission's collocation-based special access triggers accurately predict special access competition. Marketplace information now shows that the FCC's predictive judgment that the triggers would correlate with such competition, and that the special access marketplace would become less concentrated, were errors. As a consequence, the Commission conducted an important proceeding that specifically considers whether to replace the flawed triggers. It would be arbitrary and capricious for the Commission to continue to rely on the special access triggers, or to approve petitions using these triggers, where there is no evidence that they are effective. The Commission should instead

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application that has not been accepted does not create a legal interest that restricts discretion vested in agency).

[64] *Folden*, 56 Fed. Cl. at 55.

[65] Chadmoore, 113 F.3d at 242. *See also Bechtel II*, 10 F.3d at 877 (rejecting the FCC's argument that Bechtel's attack on the integration preference for the approval of radio broadcast license "would more appropriately be considered in a rulemaking proceeding").

[66] 47 U.S.C. §§ 154(i) and (j). *See also Warren C. Havens Applications to Provide Automated Maritime Telecomm'ns Sys. Stations at Various Locations in Texas, & Applications to Provide Automated Mar. Telecomms Sys. Stations at Chaffee, Aspen, Colorado Springs, Copper Mountain, & Leadville, Colorado*, Memorandum Opinion and Order, FCC 12-26, ¶9 (2012).

[67] 47 U.S.C. § 154(i).

[68] *Id.* § 154(j).

suspend its use of the triggers, and not accept or approve any petitions for pricing flexibility, until such time that it has completed its review of and revisions to its rules.

Respectfully submitted,

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