Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matters of	)
	)
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 File No. 12-05
	)
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 File No. 12-04
	)
Special Access Rates for Price Cap Local Exchange Carriers	) WC Docket No. 05-25
	)

AT&T MOTION TO STRIKE AND REPLY TO SPRINT'S LATE-FILED OPPOSITION TO PETITIONS FOR PRICING FLEXIBILITY

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June 1, 2012

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I. INTRODUCTION

On behalf of its wholly-owned subsidiaries, Southwestern Bell Telephone Company and Pacific Bell Telephone Company, AT&T Inc. (collectively AT&T) respectfully submits this motion to strike and response to Sprint's late-filed opposition to AT&T's petitions for pricing flexibility. Sprint asks the Commission to immediately repeal its pricing flexibility triggers and to reject the above-captioned petitions submitted by AT&T, or to defer acting on those petitions and suspend use of the triggers until the Commission has resolves the above-captioned special access rulemaking.[1] Sprint's Opposition is both procedurally improper and substantively flawed. It seeks relief that radically departs from settled principles of administrative law. It disingenuously mischaracterizes not only statements and filings by parties to the Commission's

[1] Letter of R. Paul Margie, Wiltshire & Grannis LLP, on behalf of Sprint Nextel Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 and RM-10593 WCB/Pricing Docket No. 12-04, WCB/Pricing Docket No. 12-05and WCB/Pricing Docket No. 12-06 (filed May 23, 2012) ("Sprint Opposition").

pending special access proceeding but also the Commission's own findings, and it recycles long discredited claims regarding the purported dearth of competitive alternatives to ILEC special access services and unrestrained increases in ILEC special access rates. For these reasons, Sprint's Opposition should be stricken in its entirety from the record in the above-captioned proceedings, and its unprecedented request for relief flatly denied.

II. SPRINT'S FILING IS PROCEDURALLY IMPROPER AND THUS SHOULD BE STRICKEN FROM THE RECORD

Sprint plainly recognizes the impropriety of its late-filed Opposition to AT&T's pricing flexibility petitions, and thus styles its filing as an *ex parte* in both AT&T petition dockets as well as the special access rulemaking proceeding, rather than as a formal opposition to AT&T's petitions. But the relief it seeks, an order rejecting AT&T's petitions and repealing the triggers on which those petitions are based or, in the alternative, deferring action on those petitions and suspending the triggers until the Commission concludes the special access rulemaking, makes clear that its filing is, in fact, intended as an opposition to those petitions. AT&T filed those petitions on January 20, 2012, and thus, under section 1.774(c) of the Commission's rules, any opposition or comments on the petitions were due "no later than15 days after the petition[s] [were] filed,"[2] or, in other words, by February 6th. On that date, however, the Wireline Competition Bureau released Public Notices extending that filing deadline, but stipulating that any oppositions had to be filed "no later than **March 7, 2012**," and that AT&T could file a reply 20 days later.[3] Thus, under the rules, AT&T's petitions are to be deemed granted unless the

[2] 47 C.F.R. § 1.774(c).

[3] Pleading Cycle Established for Pacific Bell Telephone Company Petition for Pricing Flexibility Under Section 69.727 of the Commission's Rules, WCB/Pricing File No. 12-04, DA 12-140 (rel. Feb. 6, 2012) (emphasis in original); Pleading Cycle Established for Southwestern Bell Telephone Company Petition for Pricing Flexibility Under Section 69.727 of the Commission's Rules, WCB/Pricing File No. 12-05, DA 12-141 (rel. Feb. 6, 2012) (emphasis in original).

Chief, Wireline Competition Bureau, denies those petitions on or before June 25th, 90-days after the close of the pleading cycle.[4]

Although the Bureau thus gave Sprint and other interested parties 47 days (more than 3-times the amount of time stipulated in the Commission's rules) to file, no party opposed or even commented on the petitions during that extended comment period. Sprint waited until May 23rd (two and a half months after the opposition deadline and only a month before the deadline for Commission action on the petitions) to file its opposition to AT&T's petitions. Moreover, Sprint fails to request a waiver of the filing deadline or offer any explanation why it failed to file within the generous 47 day filing period established by the Bureau. Worse yet, Sprint's Opposition fails to advance a single argument or shred of evidence that Sprint could not have adduced within the deadline – instead, it recycles the same tired arguments that Sprint has advanced for years, and which AT&T and others repeatedly have rebutted. In short, Sprint's late-filed Opposition makes a mockery of the Commission's pricing flexibility pleading rules and deadlines, as well as of the Bureau's notice seeking comment on AT&T's petition, and thus the Commission should strike the Sprint filing entirely from the record of the above-captioned pricing flexibility proceedings. If it fails to do so, the Commission will send a clear message that its procedural rules and filing deadlines are either meaningless or enforced in a wholly arbitrary and capricious manner.

III. IN ALL EVENTS, SPRINT'S ARGUMENTS ARE FRIVOLOUS

Wholly apart from its procedural infirmities, Sprint's Opposition seeks relief that radically departs from and is fundamentally at odds with well-settled principles of administrative law and Commission precedent. Sprint does not allege (nor could it) that AT&T has failed to

[4] 47 C.F.R. § 1.774(f).

show that the pricing flexibility triggers are met, and thus that AT&T is not entitled under the Commission's rules to pricing flexibility, in the San Antonio, TX, and San Francisco/Oakland, CA, MSAs. Instead, Sprint launches a collateral attack on the triggers themselves (triggers that were upheld on appeal by the D.C. Circuit), and asks the Commission immediately to repeal or suspend use of them.

Specifically, Sprint claims that the Commission's *2005 Special Access NPRM,* and its *2009 Public Notice* seeking comment on whether the Commission should modify its framework for analyzing the special access market, as well as its recent special access data requests, all purportedly "recognize that the triggers may not accurately predict special access competition."[5] Thus, Sprint contends that AT&T has no "legitimate expectation that [its] applications would be decided under the current regime" because it was on notice prior to filing its pricing flexibility petitions that the Commission was "in the midst of a proceeding specifically reviewing the continued viability of the existing triggers."[6] Sprint thus takes the position that merely *initiating* an investigation into *whether* the existing pricing flexibility rules are working as intended frees the Commission at any time to assume the conclusion that they are not – regardless whether it has even collected the data that would be necessary to answer that question – and simply refuse to comply with its rules.[7]

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[5] Sprint Opposition at 3.

[6] Id. at 12.

[7] Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25, Notice of Proposed Rulemaking, 20 FCC Rcd 1994, 2004, 2035 (2005) (2005 Special Access NPRM) (seeking comment on whether the Commission should maintain, modify, or repeal the Commission's pricing flexibility rules, and rejecting a proposed moratorium on pricing flexibility because the evidence submitted in support of the moratorium was not "sufficient to justify the requested relief"); Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM, WC Docket No. 05-25, Public Notice, 24 FCC Rcd 13638 (2009) (2009 Analytical Framework); Data Requested in Special Access NPRM, WC Docket No. 05-25, Public Notice, 25 FCC Rcd 15146, 15147

Sprint's request that the FCC repeal its pricing flexibility triggers before it even gathers the data necessary to evaluate the efficacy of the existing pricing flexibility rules would turn the Administrative Procedure Act on its head, as the Commission itself recently acknowledged in its opposition to COMPTEL's special access mandamus petition. In particular, the Commission rejected COMPTEL's claim (which was virtually identical to Sprint's claims here) that the FCC "has known for nearly a decade that its predictions in the *Pricing Flexibility Order* were wrong," noting that, "[t]o the contrary, the FCC has yet to draw any firm conclusions about the accuracy of its predictions regarding special access."[8] The Commission further stated that the issues raised in that proceeding "cannot be adequately addressed until the Commission itself compiles an evidentiary record that is sufficient to evaluate current conditions in the special access market,"[9] but that its efforts to "build[] a sufficient evidentiary record . . . have been impeded by the failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable."[10] Specifically, the Commission observed that the "vast majority"

(2010) (First Data Request) (noting that the requested data "would need to be reviewed" before the Commission could address the issues raised by the proceeding); Opposition of Federal Communications Commission to Petition for Writ of Mandamus, In re COMPTEL, et al., United States Court of Appeals for the District of Columbia Circuit Case No. 11-1262 (filed Oct. 6, 2011) (FCC Mandamus Opposition) (opposing COMPTEL's request for mandamus directing the FCC to complete its special access rulemaking, inter alia, on the ground that "the Commission is still in the process of gathering data it needs to assess whether its special access rules should be revised").

[8] FCC Mandamus Opposition at 17.

[9] Id. at 1. See also Id. at 20, citing Transcript of Hearing of the Communications & Technology Subcommittee of the House Energy & Commerce Committee, May 13, 2011, at 40 (statement of Chairman Genachowski) ("the paucity of data the FCC had" collected regarding the efficacy of its pricing flexibility rules when he arrived at the FCC was "very troubling," there is "no point to doing something in this area that's not based on a record, that's not based on facts and data, and that wouldn't be upheld in court."); Ted Gotsch, TRDaily, April 26, 2012, quoting Sharon Gillett, Chief, Wireline Competition Bureau (stating, in addressing COMPTEL's conference, that the FCC still lacks adequate data to craft an order that can be defended in court: "There is an incredible dearth of data . . . We cannot do the analysis without the data.").

[10] Id. at 2.

of those urging the Commission to repeal the existing pricing flexibility triggers and framework "did not provide any data in response to the agency's [First Data] [R]equest,"[11] which sought information regarding competitive alternatives to ILEC special access services. The Commission argued that, because it "[l]ack[ed] sufficient data to resolve this fundamental dispute,"[12] it "appropriately recognized that it should make no decisions about revising its special access rules before it ha[d] compiled and analyzed an adequate evidentiary record."[13] The Commission thus recognized that it could not alter its existing analytical framework and pricing flexibility triggers until it had gathered data sufficient to determine whether that framework and those triggers are working as intended. Sprint's request that the Commission skip that step, and immediately repeal those triggers, puts the cart before the horse and is blatantly unlawful.

Sprint's Opposition and the relief it seeks also is inconsistent with long-standing Commission precedent. Since the inception of the Commission's pricing flexibility regime, parties have opposed pricing flexibility petitions on the ground that the FCC's rules fail to ensure that special access rates are just and reasonable, and in every case the Commission has rejected these collateral attacks on its rules. As recently as 2010, for example, the Wireline Competition Bureau rejected GCI's opposition to a pricing flexibility petition filed by ACS of Anchorage that raised arguments identical to those raised by Sprint here. There, GCI did not dispute that ACS met the applicable pricing flexibility triggers; rather, it argued the FCC should delay ruling on ACS's petition while the FCC's special access rulemaking remains pending on the ground that

[11] Id. at 14.

[12] That is, "whether its current special access rules ensure just and reasonable rates." Id. at 15.

[13] Id. at 19.

one of the "key questions" in that proceeding is whether "the pricing flexibility triggers . . . [are] an accurate proxy for the kind of sunk investment by competitors that is sufficient to constrain incumbent LEC prices."[14] The Bureau rejected GCI's Opposition, observing "[w]e have stated repeatedly that we will not consider collateral challenges to the adequacy of the pricing flexibility rules when reviewing a pricing flexibility petition."[15] The Bureau stated, "[t]he only issue appropriately before us is whether the Petition satisfies the current requirements for pricing flexibility set forth in the Commission's rules."[16] And, having found that ACS had shown that it met the applicable triggers in the pricing flexibility rules, the Bureau concluded that ACS was entitled to the relief it requested.[17]

So too here. Insofar as no one (including Sprint) has challenged AT&T's showing that it has met the applicable triggers for pricing flexibility in San Antonio and San Francisco/Oakland, AT&T plainly is entitled under the Commission's current rules to the relief it has requested. As the Commission itself has recognized, until such time as the Commission finds, based on an "adequate evidentiary record" (which the Commission itself has acknowledged is currently lacking),[18] that the existing pricing flexibility rules (including the triggers) are inadequate and should be changed, its review of pricing flexibility petitions is properly confined to determining

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[14] Petition of ACS of Anchorage, Inc., et al., for Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission's rules, WCB/Pricing File No. 10-02, Order, DA 10-1007 at ¶18 (rel. Jun. 2, 2010) (ACS Pricing Flexibility Order).

[15] Id., citations omitted.

[16] Id.

[17] Id. at ¶¶19-20.

[18] FCC Mandamus Opposition at 19.

whether the applicable triggers are met. Sprint's arguments to the contrary are flatly inconsistent with Commission precedent, and thus must be rejected.

To make matters worse, Sprint's Opposition relies on its familiar litany of claims regarding the supposed lack of competitive alternatives to ILEC special access services and unrestrained increases in ILEC special access rates, as well as flat out mischaracterizations of the record in the Commission's special access proceeding and independent reviews of the special access market. AT&T has repeatedly refuted Sprint's claims regarding ILEC's purported dominance with respect to special access services, and, unlike Sprint, will not repeat itself here. However, we do point out, and respond to, some of the more egregious mischaracterizations in Sprint's Opposition:

- Claim: "The Commission has recognized and amassed an extensive record demonstrating that its collocation triggers are likely flawed;"[19] "[t]he Commission itself has acknowledged that the triggers provide a poor proxy for competition;"[20] "the Commission itself has expressed doubt as to its [triggers] continuing validity."[21]

    - Fact: As noted above, the FCC recently acknowledged it has "yet to draw any conclusions about the accuracy of its predictions regarding special access."[22]

- Claim: Sprint suggests that the NRRI Report and GAO Report support its claim that: "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."[23]

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[19] Sprint Opposition at 2.

[20] Sprint Opposition at 4.

[21] Sprint Opposition at 11.

[22] FCC Mandamus Opposition at 17.

[23] Sprint Opposition at 9, citing United States Government Government Accountability Office, GAO-07-80, Telecommunications: FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicate Access Services at 13-14 (2006) (GAO Report); Peter Bluhm and Robert Loube, Competitive Issues in Special Access Markets at iv (National Regulatory Research Institute, 2009) (NRRI Report).

- Fact: As the FCC stated in its recent Mandamus Opposition: "the GAO did not reach any definitive conclusion [regarding the efficacy of the FCC's pricing flexibility rules]. Instead, the GAO Report confirms the FCC's need for additional data as it considers reform of its special access rules."[24] Moreover, the GAO Report itself concluded that, since 2001, consumers of special access services have paid *less* for special access services in areas where ILECs had received pricing flexibility.[25] And, as the FCC noted in its Mandamus Opposition, the NRRI Report did not reach any conclusion that ILECs have used pricing flexibility to increase special access rates: "Even one of the reports on which [special access re-regulation proponents rely] notes that the available special access pricing data 'do not support any clear conclusions about price trends. Some data suggest rising prices, while other data suggest declining data. Data quality could well be the reason for these ambiguities.'"[26]

- Claim: "AT&T issued its own dramatic increase in rates at the expiration of the BellSouth merger conditions in 2010."[27]

  - Fact: In 2010, AT&T's temporary discount on special access rates in certain areas pursuant to its voluntary commitments in the BellSouth Merger proceeding expired according to its own terms. Plainly, the expiration of a temporary discount according to its own terms does not constitute an increase in rates.

- Claim: "broad industry consensus confirms that the triggers do not function as intended. . . . even post-Merger AT&T . . . 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 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."[28]

  - Fact: Neither AT&T nor its experts have suggested that the triggers' use of MSAs render them arbitrary, and Sprint selectively pulls statements out of context from the Declaration of Doctors Carlton and Sider to support its claim. In fact, Carlton & Sider concluded that: "The FCC's decision to establish pricing flexibility rules on a MSA-wide basis reflects a reasonable balance between the costs and benefits of

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[24] FCC Mandamus Opposition at 18.

[25] GAO Study Highlights ("Available data suggest that incumbent's list prices and average revenues for dedicated access services have decreased since 2001.").

[26] FCC Mandamus Opposition at 19, quoting NRRI Report at 67.

[27] Sprint Opposition at 2.

[28] Sprint Opposition at 8, citing AT&T Comments, Exhibit A, Declaration of Dennis W. Carlton and Hal S. Sider (Carlton &Sider), at 20 (sic), ¶ 36.

> identifying with greater granularity those geographic areas where LECs face competition from rivals with sunk investments and the administrative manageability of pricing flexibility rules."[29] They further found: "The establishment of pricing flexibility rules needs to balance the costs of attaining greater precision as well as the feasibility of administering potentially complex rules against the possibility of benefits from greater geographic precision. Additional precision is economically justified only when the additional value generated exceeds the costs imposed. . . . *We are aware of no basis to conclude that the MSA-wide approach has systematically led to more widespread pricing flexibility than would rules based on more targeted geographic areas or that the current triggers are harming consumers or competition*."[30]

IV. CONCLUSION

The special access rulemaking has now been going on for almost eight years. In that time, Sprint and other proponents of modifying the existing pricing flexibility triggers and framework have failed to provide any credible evidence that the special access market is broken or that the existing framework and triggers are not working as intended. The vast majority of competitive providers have refused to submit any data regarding the availability of competitive alternatives to ILEC special access services, which the Commission repeatedly has stated it needs to evaluate whether any change to its existing framework and triggers is even necessary or appropriate. Instead, Sprint and the other re-regulation proponents have relied on specious arguments regarding the purported lack of such alternatives,[31] and frivolous claims regarding purported increases in ILEC special access rates and excessive rates of return on special access

[29] Carlton & Sider at 19, ¶ 35.

[30] Carlton & Sider at 19, ¶ 36.

[31] Sprint's claims in this regard cannot be squared with its announcement last fall that by mid-2012 it will have put out for competitive bid, and awarded to dozens of different providers, cotracts to provide backhaul to 40,000 of its approximately 45,000 cell sites. Letter of Gary L. Phillips, AT&T, to Marlene H. Dortch, Secretary, FCC, Wc Docket No. 05-25, WT Docket No. 11-65 at 2 (filed Nov. 11, 2011) (citations omitted). Specifically, Sprint stated that "it will end up with '25 to 30 significant backhaul providers' that will likely be a mix of incumbent LECs, cable MSOs, and alternative carriers." Id.

services -- claims rejected even by the very sources they cite.[32] Enough is enough. The Commission has bent over backwards to provide Sprint and other re-regulation proponents every opportunity to substantiate their claims that it should repeal the existing pricing flexibility triggers, but they have systematically failed to do so. At this point, the reasonable course is for the Commission to require them to provide the data necessary to evaluate their claims or finally close the pending special access proceeding, and thus remove the cloud of regulatory uncertainty that overhangs the market for dedicated transmission services. In the meantime, the Commission simply must apply its existing pricing flexibility rules as written.

Respectfully submitted,

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June 1, 2012

[32] As discussed above, for example, neither GAO nor NRRI found that ILECs have systematically used pricing flexibility to increase rates as Sprint and others have claimed.

CERTIFICATE OF SERVICE

I, Shandee R. Parran, hereby certify that on this 1st day of June 2012, a copy of AT&T's Motion to Strike and Reply filed in WCB/Pricing File No. 12-05, WCB/Pricing File No. 12-04 and WC Docket No. 05-25 was served via Electronic Mail or First Class U.S. Mail postage prepaid to the following:

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