SIDLEY AUSTIN LLP
SIDLEY

SIDLEY AUSTIN LLP
1501 K STREET, N.W.
WASHINGTON, D.C. 20005
(202) 736 8000
(202) 736 8711 FAX

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dlawson@sidley.com
(202) 736 8088

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June 14, 2012

Ex Parte

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

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

Dear Ms. Dortch:

It has been widely reported that the Commission is considering an order that would "freeze" consideration of special access pricing flexibility petitions while the Commission collects and analyzes the data it would need to evaluate whether there is any merit to unsupported claims that the Commission's pricing flexibility "triggers" are not a reasonable proxy for the existence of competitive alternatives to ILEC special access facilities.[1] AT&T submits this letter to demonstrate there is no possible basis to apply any such order to the two AT&T petitions currently pending for pricing flexibility relief in San Francisco/Oakland and San Antonio.[2] And, in all events, a general freeze would be patently arbitrary and thus unlawful.

[1] *See, e.g., Pai, McDowell Concerned About Parts of Special Access Order*, Communications Daily, Vol. 32, No. 110 (June 7, 2012).

[2] *Petition of Pacific Bell Telephone Company for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the San Francisco/Oakland California MSA*, WCB/Pricing File No. 12-04 (filed January 20, 2012); *Petition of Southwestern Bell Telephone Company for Pricing Flexibility Under Section 69.727 of the Commission's Rules for the San Antonio, Texas MSA*, WCB/Pricing File No. 12-05 (filed January 20, 2012) (collectively "Petitions").

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AT&T's pending Petitions for San Francisco/Oakland and San Antonio rely on competitive triggers that have been upheld as reasonable by the D.C. Circuit.[3] Under the relevant trigger, the Commission must grant Phase II pricing flexibility for channel terminations in an MSA if the petitioner shows that competitors have collocated their own equipment in an ILEC's wire centers accounting for 85 percent of the ILEC's tariffed special access revenues and where at least one collocator in each of these wire centers uses non-ILEC transport facilities.[4] Deployment and use of competitive facilities and equipment far exceeds the trigger in San Francisco/Oakland and San Antonio: competitors have established facilities-based collocations in wire centers accounting for *97 percent* (San Francisco/Oakland) and *91 percent* (San Antonio) of AT&T's tariffed special access revenues.[5]

Moreover, at least in these two MSAs, satisfaction of the competitive triggers clearly *does* correspond to nearly ubiquitous competitive alternatives to AT&T's special access services. Although it will not be possible to determine the full extent of competitive facilities deployed in these or other MSAs until the Commission finally requires all competitors to submit such data, one source of information that is available to assess the deployment of competitive facilities is Geotel. Geotel relies on voluntary data submissions by competitive providers showing, among other things, where they have deployed fiber facilities. For the San Francisco/Oakland MSA, the Geotel data confirms that competitive providers have deployed more than 1,600 miles of fiber, and for the San Antonio MSA, competitive providers have deployed nearly 1,000 miles of fiber.

AT&T has overlaid the routes of the competitive fiber reported to Geotel for San Francisco/Oakland and San Antonio onto maps that identify the locations of AT&T's wire centers. These maps (attached hereto) confirm that there is a near one-to-one correlation between wire centers where competitors have facilities-based collocations and the widespread deployment of competitive fiber. Moreover, the Geotel data confirm that competitors have deployed fiber even near and around wire centers where competitors have *not* collocated or do not use non-AT&T transport. And, for the small number of wire centers where little or no competitive fiber has been reported to Geotel, AT&T has confirmed that there is likewise very little demand for TDM special access services – in San Antonio, for example, only about 10 percent of AT&T's DS1 circuits and only *a single DS3 circuit* are provided in wire centers without facilities-based collocations that are more than 500 feet from competitive fiber reported to Geotel.

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[3] *Worldcom Inc.* v. *FCC*, 238 F.3d 449, 458-462 (D.C. Cir. 2001).

[4] 47 C.F.R. § 69.711(c)(2); *Price Cap Performance Review for Local Exchange Carriers*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd. 14221, ¶¶ 25, 150 (1999) ("*Pricing Flexibility Order*").

[5] Petitions, Appendix C.

Although the Geotel data alone confirm that the competitive triggers are remarkably accurate predictors of extensive competitive facilities in the San Francisco/Oakland and San Antonio MSAs, the Geotel data actually *understates* the full extent of competitive facilities, because Geotel relies on voluntary, incomplete data submissions. For example, the Geotel data for San Francisco/Oakland and San Antonio do not include fiber deployed by the major cable companies, even though those cable companies are competing intensely in those markets.[6] And CLECs that have reported their fiber data to Geotel also appear to be under-reporting to Geotel how much fiber they have deployed.[7] The actual extent of competitive deployments is therefore much broader than even the Geotel data suggests.

For all of these reasons, there is no basis to use a "freeze" effectively to deny AT&T's pending petitions for pricing flexibility in the San Francisco/Oakland and San Antonio MSAs. The full, uncontested record here – the facilities-based collocations, the amount of available revenue attributable to wire centers with collocated facilities and equipment, and the Geotel and other data demonstrating even broader competitive deployments than the triggers suggest – would together render any decision denying AT&T's petitions utterly arbitrary. Indeed, recent press reports have quoted Commission officials as suggesting that the triggers may be "broken" in part because the triggers' extremely high thresholds tend to leave special access services in the very largest cities heavilyregulated.[8] AT&T's petitions for San Francisco/Oakland and San Antonio represent precisely the sorts of MSAs in which the triggers' high thresholds have long

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[6] In the San Francisco/Oakland MSA, Comcast, for example, offers "fiber optic [Ethernet] solution[s]," including "Business Class and Enterprise Ethernet" solutions, and "Call Backhaul" solutions, and has explained that "[w]ith 37% growth in revenue in the [1st Quarter 2012], Business Services has become a significant engine for growth." Comcast Reports 1st Quarter 2012 Results, Transcript, at 2 (May 2, 2012), *available at* http://files.shareholder.com/downloads/CMCSA/1913132932x0x565496/92bed363-2f65-408e-afaa-42a3479ce30d/CMCSA.20120502.pdf. Likewise, in San Antonio, Time Warner Cable offers business and enterprise Ethernet services (*see* Time Warner Website, http://www.twcbc.com/Texas/Products/Ethernet), and Time Warner has been experiencing significant growth in its business offerings, with year-over-year revenues up by 37.5 percent in the first quarter of 2012. *See* Time Warner Cable, First-Quarter 2012 Results, Slide Presentation, at 6 (April 26, 2012), *available at* http://ir.timewarnercable.com/phoenix.zhtml?c=207717&p=irol-calendarPast.

[7] AT&T has compared the amount of fiber reported by CLECs in their responses to the Commission's previous data requests to the amount of fiber reported by CLECs to Geotel. The CLECs' responses to the Commission's data requests typically contain *two to three times more fiber* for a given MSA than has been reported to Geotel.

[8] *See Pai, McDowell Concerned About Parts of Special Access Order*, Communications Daily, Vol. 32, No. 110 (June 7, 2012).

precluded beneficial pricing flexibility relief. It would be truly perverse and arbitrary to deny AT&T's petitions in San Francisco and San Antonio – two of the largest cities in the nation, in which competitors have deployed fiber in every last nook and cranny of the addressable marketplace –in the name of *gathering* data to determine whether the triggers generally predict the presence of competitive alternatives.

In fact, any freeze would ultimately founder on the Commission's inability to support such agency action on this record.[9] The Administrative Procedure Act requires the Commission to support any interim measure that would so radically change the *status quo* with record evidence.[10] But the Commission has repeatedly made clear that it does not have the data in the current record that would allow it to assess CLECs' claims that the current triggers are resulting in anticompetitive practices or unjust and unreasonable rates.[11] Indeed, the Commission just recently told the D.C. Circuit that these issues "cannot be adequately addressed until the Commission itself compiles an evidentiary record that is sufficient to evaluate current conditions in the special access market,"[12] but that its efforts to "build[] a sufficient evidentiary record . . .

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[9] *See AT&T Motion To Strike And Reply To Sprint's Late-Filed Opposition To Petitions For Pricing Flexibility*, WCB/Pricing File Nos. 12-05, 12-04 and WC Docket No. 05-25 (filed June 1, 2012).

[10] *See, e.g.*, *Texas Office of Public Utility Counsel* v. *FCC*, 265 F.3d 313, 327-29 (5th Cir. 2001) (finding aspects of "interim" access charge rule changes in the CALLS Plan to be arbitrary and capricious because unsupported by the record).

[11] *See, e.g.*, Notice of Proposed Rulemaking, *Special Access Rates for Price Cap Local Exchange Carriers*, 20 FCC Rcd. 1994, 2004, 2035 (2005) (seeking comment on whether the Commission should maintain, modify, or repeal the Commission's pricing flexibility rules, and rejecting a proposed freeze on pricing flexibility because the evidence submitted in support of the moratorium was not "sufficient to justify the requested relief"); Public Notice, *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, 24 FCC Rcd. 13638 (2009); Public Notice, *Data Requested in Special Access NPRM*, 25 FCC Rcd. 15146, 15147 (2010) (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.*, D.C. Cir. No. 11-1262, at 17 (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").

[12] *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

have been impeded by the failure of some parties to produce information clearly documenting their claims that special access rates are unreasonable."[13] The Commission argued that, because it "[l]ack[ed] sufficient data to resolve this fundamental dispute,"[14] 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."[15] The Commission has not gathered any material additional information about the extent of competitive facilities since it made those representations to the Circuit Court. Again, it would be perverse – and arbitrary – to reward these recalcitrant CLECs for their years of stonewalling with interim freezes that give them far more regulation than they could hope to obtain at the conclusion of this rulemaking (given that it is inconceivable that the Commission will end all future pricing flexibility relief or retain antiquated rate regulation in the largest cities such as San Francisco and San Antonio).

Finally, the Commission could not bridge the data gap by relying, as some have suggested,[16] on the United States Government Accountability Office's ("GAO") 2006 report on the special access market as a basis for interim freezes.[17] Any such reliance would be highly ironic, considering that the report's principal conclusion was that the Commission lacks a sufficient record to take such steps, precisely because CLECs and other proponents of re-regulation have refused to supply information about the availability of alternative facilities and services.[18] Moreover, the GAO actually found that there had been sustained *decreases* in the prices special access purchasers paid (even as output had been rising) in the early years of

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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 17, 2012, quoting Sharon Gillett, Chief, Wireline Competition Bureau (addressing COMPTEL's conference and stating 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.").

[13] *Id.* at 2.

[14] *Id.* at 15.

[15] *Id.* at 19.

[16] *See, e.g.*, Letter from Michael J. Mooney (Level 3) to Marlene H. Dortch (FCC), WC Docket No. 05-25, at 7 (June 8, 2012).

[17] *See* GAO, *FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, at 43 (Nov. 2006) ("GAO Report").

[18] GAO Report at 40 (finding that the Commission has "limited data on competitors' provision of dedicated access services" and in particular has "no specific or current data on competitors' prices for dedicated access services or on the extent to which competitors have extended their networks"); *id.* at 15 (this "report does not call for the reregulation of dedicated access prices").

pricing flexibility,[19] but even if it had found the opposite, the Commission could not now rely on data that is almost a decade old when it is clear that subsequent marketplace developments have rendered the older data inappropriate.[20] Indeed, as AT&T recently showed, the special access marketplace has changed dramatically even since the Commission's most recent data requests, which collected data that is now more than a year and half old and in which the CLECs again stonewalled the Commission. The bottom line remains that there is no record on which the Commission could justify interim measures that would halt the operation of the current rules.[21]

Respectfully submitted,

/s/ David L. Lawson
Attorney for AT&T Inc.

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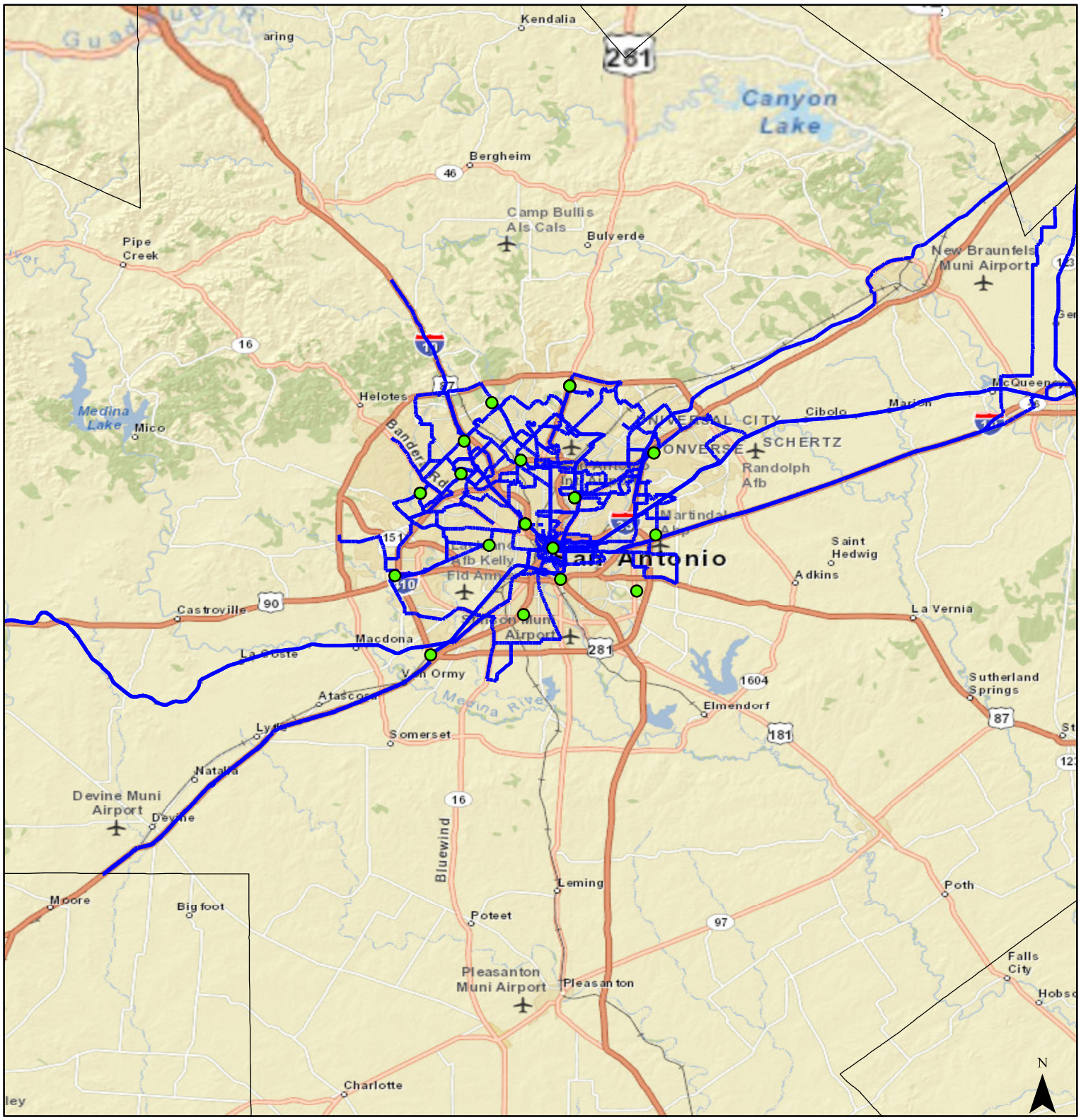
[19] GAO Report at 13 ("the decrease [in DSn-level pricing in both price cap and pricing flexibility areas] appears to be consistent with the prospect of competition that the FCC predicted").

[20] *Comcast Corp.* v. *FCC*, 579 F.3d 1, 6-7 (D.C. Cir. 2009) (reversing Commission order because it relied on "data from 1984-2001 and, as a result, fails to consider the impact of DBS companies' growing market share (from 18% to 33%) over the six years immediately preceding issuance of the Rule, as well as the growth of fiber optic companies").

[21] *See* Letter from David L. Lawson (AT&T) to Marlene H. Dortch (FCC), dated March 28, 2012.

GeoTel Reported CLEC Fiber Routes and Wirecenter Locations
San Antonio
By V&H Coordinates



0 5 10 20 Miles

- Wirecenter Location with Transport
- GeoTel Reported CLEC Fiber Routes
- MSA Boundary

GeoTel Reported CLEC Fiber Routes and Wirecenter Locations
San Francisco-Oakland-Fremont, CA MSA
By V&H Coordinates

0 5 10 20 Miles

Wirecenter Location with Transport

GeoTel Reported CLEC Fiber Routes

MSA Boundary