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VIA Electronic Submission

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Portals II, Room TW-A325
Washington, DC 20554

Re: Ex parte

*Special Access Rates For Price Cap Local Exchange Carriers,
WC Docket No. 05-25, Pacific Bell Telephone Company Petition For Pricing
Flexibility Under Section 69.727 Of The Commission's Rules, WCB/Pricing File
No. 12-04, Southwestern Bell Telephone Company Petition For Pricing Flexibility
Under Section 69.727 Of The Commission's Rules, WCB/Pricing File No. 12-05*

Dear Ms. Dortch:

On Thursday, June 14, 2012, Robert Quinn had a discussion with Matthew Berry, Chief of Staff for Commissioner Pai regarding the Commission's on-going investigation of the marketplace for special access services and AT&T's pending pricing flexibility petitions. AT&T argued that as no one has challenged its showing that it has met the applicable triggers for pricing flexibility in the San Antonio and San Francisco/Oakland metropolitan statistical areas, it 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),¹ 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 whether the applicable triggers are met. The attached document "TDM-based DS1 and DS3 Are Legacy Services in Decline" was referenced during the conversation.

Pursuant to section 1.1206 of the Commission's rules, this *ex parte* notification is being filed electronically for inclusion in the record of the above-referenced proceeding.

Sincerely,

ATTACHMENT

cc: M. Berry

¹ COMPTTEL, et al., United States Court of Appeals for the District of Columbia Circuit Case No. 11-1262 (filed Oct. 6, 2011) (opposing COMPTTEL'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").

TDM-based DS1 and DS3 Are Legacy Services in Decline

"In any industry subject to significant technological change, it is important that the evaluation of competition be forward-looking rather than based on static definitions of products and services. Insight can best be gained by looking at product life cycles, the replacement of older technologies by newer ones, and the barriers facing suppliers that offer those newer technologies. In the case of broadband services, it is clear that the market is shifting generally in the direction of faster speeds and additional mobility." U.S. Dept. of Justice, Comments on Nat'l Broadband Plan, Jan. 2010

- **The Special Access Marketplace has changed dramatically since 2010 with the irreversible marketplace shift to Ethernet services and other packet-based services**
 - Ethernet services are displacing legacy TDM services
 - AT&T sales of DS1s and DS3s to wireless carriers peaked in April 2011
 - By EOY 2011, wireless carrier purchases of DS1s declined by nearly 20%
 - The displacement of special access by Ethernet services is not limited to wireless customers
 - Report shows purchasers' allocation of their spending to DS3 and below declined from 68% in 2008 to only 36% in 2011
 - Comcast blogged on 5/3/12 that its internal survey results confirm the ascendance of Ethernet, describing the "death of the T1." It stated that "[a]ccording to the survey, Ethernet is the most common technology used by organizations today (65%) and overwhelmingly the solution that organizations plan to invest in over the next 12 to 24 months (57%)."
- **Wireless Carriers are leading the conversion using numerous alternative suppliers**
 - **Sprint** RFPs for contracts to provide Ethernet backhaul to 40K of its ~ 45K cell sites
 - Has awarded contracts for 25K sites with 15K to be awarded in mid-2012
 - "will end up with 25 to 30 significant backhaul providers that will likely be a mix of incumbent LECs, cable MSOs, and alternative carriers, all of whom will be expected to deliver Ethernet predominantly over fiber"
 - **T-Mobile** has publicly announced that it is committed to using Ethernet backhaul for all of its 3G cell sites and has largely completed this transition
 - More than half of its connections for 3G-capable cell sites awarded to various cable operators, alternative fiber providers, and a wholly owned subsidiary of a utility company
 - Backhaul cost per megabyte reduced by 90%
- **The Ethernet Marketplace is robust and intensely competitive**
 - There are 9 facilities-based Ethernet providers with $\geq 4\%$ marketshare, including tw telecom, Cox, XO, Time Warner Cable, Level 3 and Cogent
 - No provider has $> 24\%$ marketshare
 - XO's network can provide Ethernet services to $>10M$ businesses and approximately half of its enterprise customers are served via Ethernet
 - 70% of its new orders are related to Ethernet
 - XO also provides fiber-based wholesale services to large carriers, cable operators and mobile operators
 - Level 3 is a major supplier to Verizon Wireless

- Cable's Ethernet marketshare is projected to increase substantially over the next several years, from close to 25% to approaching 30% (Heavy Reading Insider July 2011)
 - For example, Comcast said on 5/2/12, "Metro-E and PRI trunk voice, which are now available in all of our markets are making an increasing contribution to the business services results."

➤ ***Competitive wireline provider announcements demonstrate business model evolution***

- Cbeyond announced long-term dark fiber purchases from Zayo and Fiberlight to connect more than 700 buildings, displacing DS-1 circuits purchased from ILECs (May 2012)
 - 75% - 85% of these buildings have not been previously served by fiber
 - Costs of \$35K - \$45K per building
 - Lower costs than prior estimates due to:
 - Proximity to existing fiber rings
 - Suburban locations cheaper to serve than "downtown high rises"
 - Latest generation technology costs continue to decline
 - Cbeyond's target is to "light" 1,000 buildings by EOY 2013
- tw telecom disclosed that "Strategic Ethernet & VPN" account for over 25% of their total revenues and grew by 23.7% in the past year (May 2012)
 - Wireless carrier revenues now account for 6% of twtc's total revenue
 - Two-thirds of revenue is fully on-net

➤ ***Competitive responses to the two voluntary data requests were limited, incomplete and inadequate to assess the availability of competitive alternatives***

- < 10 CLECs responded to the 1st data request
 - Many of those failed to provide fiber maps or mapping data
- Only 7 competitive providers responded to the 2nd data request
 - While cable companies have become major competitive providers, the sole cable respondent was RCN
- Only last October the Commission advised the D.C. Circuit Court of the shortcomings of data before it, saying "[u]nfortunately, the Commission has faced obstacles in its efforts to gather the data it needs to make an informed decision on special access. For instance, in response to the FCC's October 2010 request for special access data, fewer than 10 percent of petitioner COMPTEL's service provider members (7 of approximately 90) submitted data concerning their experience in the special access market."

➤ ***Special Access volume and term discounts are pro-competitive and voluntary***

- AT&T offers many discount plans, including term discounts with no volume commitment
- Customers may also choose discount plans with both volume and term discounts covering only a fraction of their overall volumes to those plans
 - This allows significant volumes that can be readily moved to competitive providers
- Suggestions that customers are somehow "locked-in" to AT&T services are false

➤ ***AT&T's unopposed pending petitions for Phase II Pricing Flexibility for end-user chan terms in the San Francisco/Oakland and San Antonio MSAs should be granted***

- The Commission's pricing flexibility rules were designed over a decade ago, as one of the few mechanisms it has to consider changes in the competitive landscape and provide relief from pricing regulation
- Since these rules were implemented, nine companies have been granted relief via 38 petitions covering 270 market areas
 - AT&T, specifically, has been granted relief via 25 petitions covering 150 market areas
- AT&T's petitions before the FCC today show that 27 collocated competitors exist in the San Francisco/Oakland MSA and there are 17 collocated competitors in the San Antonio MSA
- The FCC should grant this relief and not change course mid-stream as AT&T has met the competitive benchmark test that has been in place since 1999

- ***Sprint's filing is procedurally improper and thus should be stricken from the record***
 - Although the Bureau 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 during that extended comment period. Sprint waited until May 23rd (two and a half months after the opposition deadline) to file its opposition to AT&T's petitions.
 - 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.
 - Sprint's Opposition fails to advance a single argument or shred of evidence that Sprint could not have adduced within the deadline.
 - 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.
- ***Sprint's Opposition seeks relief that departs from and is fundamentally at odds with well-settled principles of administrative law and Commission precedent.***
 - Sprint does not allege that AT&T has failed to show that the pricing flexibility triggers are met. Instead, Sprint launches a collateral attack on the triggers themselves.
 - Sprint 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.
 - The Commission itself recently acknowledged in its opposition to COMPTTEL's special access mandamus petition that, "[t]he FCC has yet to draw any firm conclusions about the accuracy of its predictions regarding special access"¹ and "that, because it "[l]ack[ed] sufficient data to resolve this fundamental dispute,"² 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."³
 - As recently as 2010 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.

¹ FCC Mandamus Opposition at 17.

² That is, "whether its current special access rules ensure just and reasonable rates." *Id.* at 15.

³ *Id.* at 19.