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July 31, 2012

VIA ELECTRONIC FILING

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

Re: Competition Data Requested in Special Access NPRM, WC Docket No. 05-25 and RM-10593

Dear Ms. Dortch:

As Verizon has explained, the Commission should analyze competitive alternatives to ILEC special access using a forward-looking framework in order to capture current competitive activity and to address the high-capacity services marketplace's dynamic nature. To conduct this analysis the Commission must obtain data to determine where competitors are offering service, where they can offer services, and where they plan to offer service in the future.

Recognizing that its previous two data requests did not produce the data it needs, the Commission is preparing a third. Unlike the previous two, the Commission intends to make this request mandatory. The request must be unambiguously mandatory in order to succeed. The Commission needs to receive data from all participants in the marketplace for high-capacity services, including cable companies and other providers that are offering competitive alternatives to ILEC special access. The Commission should be explicit in its data request that responses are mandatory and that there will be remedies for those that do not respond.

The request itself should focus on data that will help the Commission to analyze the marketplace's contestability. When the Commission in 1999 first gave price cap LECs special access pricing flexibility, it granted relief based on a standard that the marketplace was contestable by competitive providers. The Commission therefore required a showing that competitive entry is possible such that if "an incumbent LEC charges an unreasonably high rate for access to an area that lacks a competitive alternative, that rate will induce competitive entry."¹ That approach made sense because it protected customers,² and did not impose unnecessary costs on the marketplace by delaying pricing flexibility.³

¹ *Access Charge Reform, et al.*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶ 144 (1999) ("*Fifth Report and Order*").

When it adopted a contestability standard, the Commission considered and explicitly rejected a test that would have required the ILECs to demonstrate that they did not have market power.⁴ The Commission found that “regulation imposes costs on carriers and the public, and the costs of delaying regulatory relief outweigh any costs associated with granting that relief before competitive alternatives have developed to the point that the incumbent lacks market power.”⁵ This remains true.

While the triggers have come under considerable criticism, the basic conclusions that the Commission reached in 1999 remain solid today. The current growth of new technologies and new competitors are a fundamental demonstration that existing policies are encouraging market entry. Demand for traditional special access services such as DS1 and DS3 rapidly is giving way to demand for much higher-capacity services that are subject to intense competition.⁶ No party can seriously challenge that demand for higher-capacity services has risen rapidly, and that new competitors (such as cable and fixed wireless) have ramped up to satisfy that demand. As more and more demand shifts away from ILEC special access towards newer platforms and technologies that cable companies and other providers offer, a static market power analysis makes as little or less sense today than it ever did. And a backwards-looking framework based on a market share test could discourage investments in new IP technologies, freezing in current competition levels and chilling the move to newer platforms. Finally, market power tests remain administratively burdensome, “require considerable time and expense, and they generate considerable controversy that is difficult to resolve.”⁷

Therefore the Commission needs to investigate not just what has happened in the marketplace but also what can happen. The key question is whether the marketplace is contestable. Where do cable and other providers compete today, where can they compete, and where is it likely they will compete in the next few years? The Commission should issue a mandatory data request that captures where competitors can offer service, where they plan to offer service, and where they are technically capable of providing service, in all forms and varieties. Among the questions the Commission should ask:

- Identify by geographic area where you currently provide or are technically capable of providing retail or wholesale high-capacity services (such as DS1, DS3, Ethernet, and other high-capacity services).

² Once competitors have made “irreversible investments in facilities ... we no longer need to protect competition from exclusionary pricing behavior by incumbent LECs, because efforts to exclude competitors are unlikely to succeed.” *Id.*, ¶ 77.

³ “[D]elaying regulatory relief imposes costs on carriers and the public, the latter of which is deprived of the benefits of more vigorous competition.” *Id.* ¶ 92.

⁴ *See id.* ¶ 90.

⁵ *Id.*

⁶ *See Ex Parte Letter from Maggie McCready, Verizon, to Marlene Dortch, FCC, at 5-6 (June 6, 2012).*

⁷ *Fifth Report and Order* ¶ 90.

- Provide data or maps that show the geographic area where you or your affiliate offers or plans to offer retail or wholesale high-capacity services, whether wireline or wireless, within the next two years. Providers should note on the maps where they can offer service over existing facilities, on other leased facilities, or on facilities they plan to build.
- Explain where you have submitted competitive bids to provide backhaul services to wireless providers or high-capacity services to other customers. Providers should also submit the business rules they rely upon to determine whether to submit a competitive bid.

ILECs may choose to provide information by wire center because they organize their data that way. Other providers may base their responses on different geographic areas. The Commission then could aggregate the data into a common geographic area. For example, the Commission's rules allow ILECs to set special access prices by rate zone, and if the Commission determines that Metropolitan Serving Areas (MSAs) are too large for competitive analysis and regulatory relief, it could disaggregate them into wire center clusters like rate zones. Rate zones are already used by ILECs and their customers and can be used with ease for competitive analyses.

With respect to current services, the Commission should ask for route miles, number of circuits, number of served locations, the type of location (building, cell site, etc.), the number of customers served, the type of customers served (wireless, wireline, etc.), the services offered (DS1, DS3, higher speeds, etc.), and maps or other data showing network facilities deployed. This information provided by geographic area will allow the Commission to determine where competitors provide service today and will allow the Commission to aggregate the data into larger geographic areas as appropriate, such as MSAs or rate zones within MSAs.

But to get a complete view of the marketplace and to determine whether it is contestable, the Commission needs also to ask about plans to offer service, including where providers have responded to Requests for Proposals and submitted competitive bids. A provider's decision to respond to a Request for Proposal demonstrates that that provider can provide service and compete in an area. The Commission should ask providers to identify:

- the competitive bids they have submitted;
- the geographic area in which they have submitted them;
- and for what services (DS1, DS3, etc.).

A response to a Request for Proposal can be long, but the Commission does not have to review every aspect of the bids. Those key points will demonstrate where providers themselves have indicated by bidding that they are willing and able to provide service and will help to determine where the market is contestable.

Providers' plans are critical to the analysis. Demonstrating this, Nomura Equity Research last month reported on Sprint's Network Vision buildout.⁸ Sprint is moving its wireless backhaul from TDM-based special access to newer high-capacity services and opening up all of that business to competition. Nomura reports, "Backhaul is leased (fiber, some fiber-microwave combo, some pure microwave); microwave will be roughly 10% of sites. Almost completed backhaul contracts for all 38k sites, all cable operators are involved, Verizon not a significant vendor...."⁹ A purely backwards-looking data request that captures only where companies provide service now and does not ask about future plans likely would miss this development and produce inaccurate results. It would not capture competitive services that cable and other companies will provide, and it would afford too much weight to the ILEC special access that Verizon had provided (but that Sprint will soon abandon). A backwards-looking analysis tells only where companies have provided service, not where they compete today and where they can in the future.

Similarly, a building-by-building census-like approach to the data request would not answer the central questions of whether providers can compete and whether the market is contestable in a particular area, and a request for building-by-building information on facilities deployed and customers served would slow down the Commission's efforts unnecessarily. Verizon estimates that it would need at least six to eight months to produce such granular data across its incumbent footprint. A building-by-building analysis would not show where competitors have installed facilities and where they can provide service. The Commission needs to request network maps and other data to demonstrate that, and once it does, a building-by-building analysis would at best be superfluous. The data would provide little benefit on the key question of whether cable and other providers can serve any particular part of the marketplace. A building-by-building review would demonstrate what buildings they currently serve but not other locations that they can serve within a geographic area. The Commission can obtain whatever a building-level request would tell it about contestability and where cable and other competitive providers can provide service through a request that focuses on where competitive providers have deployed network deployment, plans to compete, competitive bids, and other indicia of a provider's ability to compete in a geographic area.

With respect to revenues, if the Commission seeks to determine trends in the prices of high-capacity services it can request data regarding the average revenue per unit by service (DS1, DS3, etc.). Average revenue per unit at a company-wide, tariff-wide, or similar aggregated level would give the Commission a sufficient view into price trends, whereas a granular view would be complicated and burdensome for all to compile and would not provide added benefit and might in fact produce less meaningful data.

Regarding costs, the Commission does not have to review them to evaluate the marketplace's contestability. In any event the Commission should not review service-specific

⁸ See Nomura Equity Research Report, "Sprint Nextel Corporation: Takeaways from Meetings with Management" ("Nomura Report") *attached to* Ex Parte Letter from Donna Epps, Verizon, to Marlene Dortch, FCC (July 24, 2012).

⁹ Nomura Report at 2.

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costs. As a practical matter, because special access services use network components that other services like local exchange and switched access share, any attempt to measure service-specific special access costs would entail arbitrarily allocating the incumbent carriers' networks' significant joint and common costs, which would produce virtually meaningless results. If the Commission determines that it must review costs, it could much more simply use cost indices as proxies to examine what has happened to the costs of the network components that companies use to provide special access and compare those proxies to the declining prices customers pay for special access services. For example, AUS Consultants has produced the Telephone Plant Index since 1946, and the telecommunications industry uses its commercially available data extensively.¹⁰ They report individual cost indices for the typical network component used to provide special access services: digital circuit equipment, fiber cable, copper cable, poles and conduit. The indices also include the appropriate labor costs – which continue to rise. To develop accurate estimates of the cost changes in providing special access services, the Telephone Plant Indices for all relevant network components, including the labor costs of installing the network components, must be included in the analysis. Looking at the cost changes for just one network component can provide a misleading picture of the overall changes in the costs of providing special access services.

The Commission should not rely on accounting measures like ARMIS, which some have suggested.¹¹ ARMIS involves arbitrary allocations for regulatory purposes that are meaningless for evaluating competition, and the Commission never intended to use ARMIS data that way. ARMIS rates-of-return bear no relationship to pricing, and the Commission has long recognized that the accounting rates-of-return “will be used for monitoring and evaluation purposes only. This data does not serve a ratemaking purpose.”¹² ARMIS reports require arbitrary cost allocations among categories of interstate services, and there are mismatches between revenues and costs among ARMIS categories. So long as all costs are allocated, the allocations serve the Commission's purposes even if allocating costs is inherently arbitrary. But using those allocations for ratemaking stretches the purpose of the FCC allocations beyond their reasonable use.

Please contact me should you have any questions.

Sincerely,



cc: Deena Shetler
Nick Alexander
Eric Ralph

¹⁰ See <http://ausinc.com/pub-telephone.html>.

¹¹ See, e.g., Ex Parte Letter from Erin Boone, Level 3, to Marlene Dortch, FCC (June 8, 2012); Ex Parte Letter from Thomas Jones, tw telecom, to Marlene Dortch, FCC (June 14, 2010).

¹² *Policy and Rules Concerning Rates for Dominant Carriers*, Order on Reconsideration, 6 FCC Rcd 2637, ¶ 199 (1991), citing *Policy and Rules Concerning Rates for Dominant Carriers*, Second Report and Order, 5 FCC Rcd 6786, ¶ 380 (1990) (“This disaggregated data does not serve a ratemaking purpose....”).