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REDACTED – FOR PUBLIC INSPECTION

September 14, 2012

VIA COURIER AND ECFS ***EX PARTE***

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

Re: ***In the Matter of Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593***

Dear Ms. Dortch:

On behalf of tw telecom inc. ("tw telecom"), please find enclosed two copies of the redacted version of an *ex parte* letter for filing in the above referenced proceeding. The *ex parte* letter contains information that the Wireline Bureau has deemed highly confidential under the *Second Protective Order*[1] in this proceeding.

Specifically, the *ex parte* letter contains data submitted in response to the Commission's *First Special Access Data Request*[2] regarding the number of locations to which a company owns connections in markets for which the Commission requested such data.[3] In addition, the *ex parte*

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[1] *In the Matter of Special Access for Price Cap Local Exchange Carriers,* Second Protective Order, 25 FCC Rcd. 17725 (2010) ("*Second Protective Order*"); *see also Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Paul Margie, Wiltshire & Grannis LLP, 26 FCC Rcd. 6571 (2011) ("*Letter to Paul Margie*") (supplementing the *Second Protective Order*); *Special Access for Price Cap Local Exchange Carriers*, Letter from Sharon E. Gillett, Chief, Wireline Competition Bureau to Donna Epps, Vice President, Federal Regulatory Affairs, Verizon, 27 FCC Rcd. 1545 (2012) (further supplementing the *Second Protective Order*).

[2] *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd. 15146 (2010) ("*First Special Access Data Request*").

[3] *See Second Protective Order* ¶ 6 (deeming responses to Question III.E of the *First Special Access Data Request* to be eligible for highly confidential treatment).

letter contains highly detailed information regarding the discount plans under which tw telecom purchases special access services.[4] tw telecom keeps this information in the strictest confidence, and it is not available from public sources. If released to competitors, this information would allow those competitors to gain a significant advantage in the marketplace. For example, competitors would be able to determine tw telecom's costs, both in the aggregate and on a circuit-by-circuit basis, of obtaining wholesale inputs. Competitors would also be able to determine the terms and conditions, as defined by specific discount plans, to which tw telecom is subject when seeking to serve customers via incumbent LEC facilities. Competitors would be able to exploit access to this information to design competitive strategies that unfairly disadvantage tw telecom. Accordingly, this information is eligible for highly confidential treatment under the *Second Protective Order*.

Pursuant to the procedures outlined in the *Modified Protective Order*[5] in this proceeding, one original of the highly confidential version of the *ex parte* letter is being filed with the Secretary's Office under separate cover, and two copies of the highly confidential version of the *ex parte* letter will be delivered to Marvin Sacks of the Pricing Policy Division of the Wireline Competition Bureau. Additionally, one machine-readable copy of the redacted version of the *ex parte* letter will be filed electronically via ECFS. Please do not hesitate to contact me at (202) 303-1111 if you have any questions regarding this submission.

Respectfully submitted,

/s/ Thomas Jones

Counsel for tw telecom inc.

cc (via email): Nick Alexander
Elizabeth McIntyre
Andrew Mulitz
Eric Ralph
Deena Shetler
Daniel Shiman

Enclosure

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[4] *See Letter to Donna Epps* at 5, category M (deeming information that, alone or in combination with other information, "would reveal the identity of a customer" that purchases service under a particular tariff to be eligible for highly confidential treatment); *see also id.* at 4, category G (deeming information regarding "the discount plans under which [a customer's] circuits were purchased" to be eligible for highly confidential treatment).

[5] *See In the Matter of Special Access for Price Cap Local Exchange Carriers*, Modified Protective Order, 25 FCC Rcd. 15168, ¶ 5 (2010).

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Re: ***Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services, WC Docket No. 05-25, RM-10593***

Dear Ms. Dortch:

tw telecom inc. ("tw telecom") submits this letter in response to AT&T's August 8, 2012, *ex parte* filing in the above referenced proceeding.[1] Therein, AT&T attempts to divert attention away from the incumbent LECs' overwhelming control of the special access market, and it refuses to discuss the specific terms of its special access discount plans that harm competition and consumer welfare. Instead, AT&T offers only make-weight arguments in defense of the status quo that do not hold up under any reasonable level of scrutiny.

First, AT&T continues its effort to downplay the significance of the incumbent LECs' overwhelming market shares, arguing that market shares are irrelevant in an evolving market.[2] AT&T claims that the Commission has held that "it should not base forward-looking rules on static data from prior periods, but on an assessment of the competitive forces that will shape future market development."[3] But in reality, the Commission has soundly rejected this

[1] Letter from David L. Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Dkt. No. 05-25 (filed Aug. 8, 2012) ("*AT&T August 8 Ex Parte*").

[2] *Id.* at 3.

[3] *Id.* at 3 (citing *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853, ¶ 50

argument. For example, in the *Phoenix Forebearance Order*, which was recently affirmed by the Tenth Circuit Court of Appeals, the Commission "disagree[d]" with incumbent LECs that "argue[d] against consideration of market shares, claiming they are 'backwards looking.'"[4] The Commission explained that "Market shares provide a useful snapshot of current market conditions. Moreover, such data, when combined with data on trends in market shares and data on entry conditions, provides insight into how competition may evolve in the near future."[5] Despite AT&T's protestations, consideration of current market shares remains an essential element of the Commission's analysis.[6]

Furthermore, AT&T argues that the rate at which competitors such as tw telecom have constructed last mile facilities in recent years shows that a snapshot of market shares would be

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(2005) ("*Wireline Broadband Order*"); *Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Omaha Metropolitan Statistical Area*, Memorandum Opinion and Order, 20 FCC Rcd. 19415, ¶ 62 (2005) ("*Omaha Forbearance Order*")).

[4] *In re Petition of Qwest Corporation for Forbearance Pursuant to 47 U.S.C. § 160(c) in the Phoenix, Arizona Metropolitan Statistical Area*, 25 FCC Rcd. 8622, n. 143 (2010) ("*Phoenix Forbearance Order*"), *aff'd by Qwest Corp. v. FCC*, Case No. 10-9543 (10th Cir. Aug. 6, 2012).

[5] *Id.*

[6] In each of the two orders that AT&T cites in support of its assertion that the Commission should eschew consideration of incumbent LEC market shares in favor of predictive judgments, the Commission relied on predictive judgments that turned out to be incorrect. Specifically, in the *Omaha Forbearance Order*, the Commission relied on its predictions that facilities-based competition would develop and that, as a result, Qwest would offer wholesale inputs on reasonable terms and conditions in the Omaha MSA, but the Commission later found that those predictions "[had] not been borne out by subsequent developments." *See Phoenix Forbearance Order*, ¶¶ 33-36. Similarly, in the *Wireline Broadband Order*, the Commission predicted that wireline broadband providers would face meaningful competition from providers of satellite broadband and broadband over power lines. *See Wireline Broadband Order*, ¶ 50. But today, broadband over power lines is virtually non-existent, and the Commission recently explained that "satellite providers are generally unable to provide affordable voice and broadband service that meets [the Commission's] minimum capacity requirements . . . and future satellite services appear unlikely to offer capacity reasonably comparable to urban offerings in the absence of universal service support." *Connect America Fund; A National Broadband Plan for Our Future; Establishing Just and Reasonable Rates for Local Exchange Carriers; High-Cost Universal Service Support; Developing a Unified Intercarrier Compensation Regime; Federal-State Joint Board on Universal Service; Lifeline and Link-Up; Universal Service Reform – Mobility Fund*, Report and Order and Further Notice of Proposed Rulemaking, 26 FCC Rcd 17663, ¶ 104 (2011) ("*USF/ICC Reform Order*"); *Cf Wireline Broadband Order*, n.169 ("Satellite providers are in the process of increasing by a large multiple the amount of bandwidth they make available for broadband, with several launches of new satellites scheduled during the near future.").

unreliable,[7] but an analysis of deployment rates actually proves just the opposite. For example, as tw telecom has explained, it has constructed facilities to approximately 16,000 of the 3-5 million commercial buildings in the United States and is able to build facilities to approximately 1,500 additional buildings each year. In contrast, AT&T's response to the *First Data Request*[8] indicates that AT&T owns connections to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** buildings in the MSAs for which the Commission requested data alone.[9] AT&T's argument that tw telecom's ability to construct facilities 1,500 additional buildings a year somehow renders consideration of AT&T's market share meaningless is absurd. Rather, this comparison confirms the Commission's holding that analysis of market share trends provides insight into the extent to which competition may *or may not* evolve in the future.

Second, AT&T makes much of its claim that a large amount of its special access demand in certain markets is concentrated in a small number of buildings. For example, AT&T claims that "three quarters" of its demand in Chicago and Atlanta are located in fewer than 1,500 buildings in each of these markets.[10] As an initial matter, AT&T provides no support for this claim. But even if AT&T's claim were true, it would not lessen the need for the Commission to act. AT&T would presumably argue that competitors have the ability to construct their own facilities to the 1,500 buildings with high demand in each market. This may or may not be true, depending on the cost of constructing last mile facilities to a particular building and the revenue opportunities available there. But the data that AT&T submitted in response to the *First Data Request* indicates that AT&T owns connections to **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** buildings in the Chicago-Naperville-Joliet MSA and **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** buildings in the Atlanta-Sandy Springs-Marietta MSA.[11] There is no reason to think that competitors could deploy last mile facilities to serve the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** buildings in the Chicago-Naperville-Joliet MSA and the **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** buildings in the Atlanta-Sandy Springs-Marietta MSA that *do not* exhibit the high levels of demand that AT&T describes. AT&T heralds the "dynamic evolution" of the special access market but provides zero basis for concluding that the barriers to deployment of competitive

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[7] *AT&T August 8 Ex Parte Letter* at 5 (arguing that "a static examination of tw telecom's fiber-connected buildings" in 2007 "would have greatly understated the true extent to which tw telecom could compete").

[8] *Data Requested in Special Access NPRM*, Public Notice, 25 FCC Rcd. 15146 (2010) ("*First Data Request*").

[9] *See* AT&T Highly Confidential Response to *First Data Request*, Answer to Questions III. E.1-3 (as revised Feb. 1, 2011) ("*AT&T Response to First Data Request*").

[10] *AT&T August 8 Ex Parte Letter*, n. 11.

[11] *See AT&T Response to First Data Request*, Answer to Questions III. E.1-3.

facilities to these locations have somehow diminished. For the millions of businesses at these locations that remain persistently underserved by competitive offerings, the only thing that appears to be dynamically evolving is AT&T's imaginative defense of the status quo.

Third, AT&T offers no more than empty semantics in response to legitimate concerns about the terms of its special access discount plans. As tw telecom and others have explained, certain AT&T discount plans (generally, the ones the yield the lowest prices for large customers like tw telecom) require a customer to commit to maintaining a substantial portion of its in-service volume with AT&T in order to receive valuable benefits under those plans.[12] AT&T claims that Southwestern Bell Tariff No. 73 "*contains no volume discounts at all*."[13] But pursuant to the terms of the Term Payment Plan ("TPP") available under that tariff, in order to receive circuit portability, a customer must commit to maintaining at least 80 percent of its volume in service with AT&T.[14] AT&T's tariff describes circuit portability as "a waiver on DS1 TPP Termination Liability" that the customer would otherwise have to pay if it cancelled circuits prior to the expiration of the commitment terms associated with those circuits.[15] The effect of this benefit is that a customer can commit to longer per-circuit commitment terms without the threat of AT&T imposing its high early termination penalties if the customer must discontinue purchasing individual circuits prior to the expiration of those terms. Circuit portability therefore allows customers to purchase services at lower overall rates from AT&T than would otherwise apply.

Whether or not AT&T wishes to call this benefit a "discount," the point is that AT&T requires a customer to commit to maintaining at least 80 percent of its volume in service in order to receive the lower overall rates associated with circuit portability. This provision is clearly problematic, as it severely limits the ability of customers that need circuit portability to purchase

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[12] *See, e.g.*, Letter from Thomas Jones & Matthew Jones, Counsel for tw telecom, to Marlene H. Dortch, Secretary, FCC, Highly Confidential Attachment at 4-13 (filed April 11, 2012).

[13] *AT&T August 8 Ex Parte* at 10 (emphasis in original).

[14] Specifically, under the "DS1 High Capacity Service Portability Commitment," a customer must "commit to a 3-Year Commitment Level (CL) that is reviewed on a monthly basis." The CL is equal to "the total of all DS1 Channel Terminations in-service for the month previous to the month in which the Customer notifies the Telephone Company" that it wishes to purchase circuits pursuant to this portability commitment. *SWBT Tariff F.C.C. No. 73* § 7.2.22(E)(1). If, in any month, a customer's in-service volume falls below 80 percent of its CL or exceeds 124 percent of its CL, the customer must pay a charge of $900 *each month for each circuit* by which its in-service volume falls below 80 percent or exceeds 124 percent of the CL. *See id.* §§ 7.2.22(E)(4)(b-c); 7.3.10(F)(10.4)(5).

[15] *Id.* § 7.2.22(E)

circuits from alternative providers even at the few locations to which alternative providers own last mile facilities. But AT&T never addresses this fundamental issue.[16]

Finally, AT&T claims that the Commission cannot override the terms of a tariff without first holding an adjudication.[17] But courts have long held that notice and comment rulemaking procedures are adequate to satisfy Section 201's adjudication requirement.[18] So far in this proceeding, the Commission has collected three rounds of comments and reply comments and

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[16] AT&T's other discount plans raise similar concerns. For example, under the Area Commitment Plan ("ACP") in legacy BellSouth territory, a customer must commit to maintaining a volume of circuits in service with AT&T in order to receive circuit portability for those circuits. *See BellSouth Tariff F.C.C. No. 1* § 2.4.8(B). The volume commitment under the ACP differs from the volume commitment under the TPP because, under the ACP, a customer can determine its own volume commitment. *Id.* However, a customer does not receive circuit portability for any circuit that is not included in its volume commitment. Therefore, in order for competitors to obtain circuits at rates low enough that allow them to offer services to end users at viable rates, they must set their ACP volume commitments as high as possible, thereby again locking up demand with AT&T. In addition, AT&T fails to address the terms of the HC-TPP, pursuant to which it continues to sell special access services in the legacy SWBT territory. *See SWBT Tariff F.C.C. No. 73* § 7.2.20. The HC-TPP is no longer available to new customers, but **[BEGIN HIGHLY CONFIDENTIAL]** [redacted] **[END HIGHLY CONFIDENTIAL]** Under the HC-TPP, a customer is able to determine its own volume commitment, and the level of circuit portability that the customer receives is based on the percentage of the customer's total in-service volume that it chooses to commit. Specifically, customers that commit less than 71 percent of their total in-service volume receive circuit portability at the LATA level; customers that commit between 71 percent and 90.99 percent of their total in-service volume receive circuit portability at the state level; and customers that commit more than 91 percent of their total in-service volume receive circuit portability across legacy SWBT territory. *See id.* § 7.2.20(C)(1). Thus, in order to receive full circuit portability under this plan, a customer must commit to maintaining an even higher percentage of its volume in service than it must commit under the TPP.

[17] *AT&T August 8 Ex Parte* at 13.

[18] *See, e.g.*, *Bell Telephone Co. v. FCC*, 503 F.2d 1250, 1265 (3rd Cir. 1974), *cert. denied*, 422 U.S. 1026 (1974). In fact, in the *USF/ICC Reform Order*, the Commission noted that "courts have come to *favor* rulemaking over adjudication for the formulation of new policy" under Section 201. *USF/ICC Reform Order*, n. 1586 (emphasis added).

has issued two industry-wide data requests.[19] The voluminous record that has been generated is more than sufficient to allow the Commission to act.

Respectfully submitted,

/s/ Thomas Jones

Thomas Jones
Matthew Jones

Attorneys for tw telecom inc.

[19] *See Special Access Rates for Price Cap Local Exchange Carriers*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 1994 (2005); *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, Public Notice, 22 FCC Rcd. 13352 (2007); *Parties Asked to Comment on Analytical Framework Necessary to Resolve Issues in the Special Access NPRM*, Public Notice, 24 FCC Rcd. 13638 (2009); *First Data Request*; *Competition Data Requested in Special Access NPRM*, Public Notice, DA 11-1576 (rel. Sept. 19, 2011)