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*EX PARTE*

*VIA ECFS*

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

Re: *Special Access Rates For Price Cap Local Exchange Carriers,*  
WC Docket No. 05-25

Dear Ms. Dortch:

For more than a decade, CLECs have been pressing the Commission for repeal of the pricing flexibility rules and radical re-regulation of special access rates, even as they refused to submit data about their facilities-based networks that would provide the evidentiary record necessary to assess their claims. The Commission, acknowledging the “need to obtain more specific data to evaluate these [CLEC] allegations fully,” has announced that it will issue a “comprehensive data collection order” that will finally require CLECs to submit data to facilitate a “robust competition analysis” of the special access marketplace.<sup>1</sup> Some CLECs are already seeking to avoid providing that data and have urged the Commission to adopt a *de minimis* exemption that would exempt providers with less than a certain number of facilities-based building connections in a market from having to respond to the Commission’s order.

The Commission should reject these proposals. Now that the Commission has taken the extraordinary step of suspending the pricing flexibility rules on the basis of what the Commission admits is an inadequate record,<sup>2</sup> it must follow through with the full data collection that is necessary to make an accurate assessment of the special access marketplace and the impact of the pricing flexibility triggers. Any *de minimis* exemption would necessarily be arbitrary, because the Commission does not even have the data needed to evaluate the impact of such an exemption on its analysis of competition in the special access marketplace. In fact, as publicly available information from GeoTel confirm, a *de minimis* exemption would result in data that greatly understate actual and potential competition. In all events, there is no factual or legal justification for any such exemption.

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<sup>1</sup> *Special Access for Price Cap Local Exchange Carriers, et al.*, WC Docket No. 05-25, Report and Order, FCC 12-92, ¶ 7 n.15 (released August 22, 2012) (“*Special Access Freeze Order*”).

<sup>2</sup> *Id.* ¶ 7 & n.15.

First, a *de minimis* exemption would exclude a large number of connected buildings that, collectively, represent a substantial percentage of the special access revenues in any given MSA. As the Commission itself has recognized, special access demand is typically concentrated in a relatively small number of commercial buildings within a city.<sup>3</sup> San Francisco provides a typical example: although it has been asserted that San Francisco has tens of thousands of commercial buildings, the vast majority of AT&T's DSn special access demand in San Francisco is located in about 1,000 buildings.<sup>4</sup> Since even the smallest of competitors tend to concentrate on the largest buildings, even those that actually serve a small number of buildings can compete for a disproportionately large amount of special access demand. Excluding them from the analysis could thus severely understate competition. And the effects of any such exclusion, of course, would be compounded to the extent multiple CLECs would fall within the exemption.

These concerns are not merely theoretical: they are borne out by the limited information about CLEC building connections that is publicly available from GeoTel. In the San Francisco MSA, for example, GeoTel data show that exempting entities with fewer than 50 building connections would fail to capture nearly 300 CLEC-connected buildings. And even if the *de minimis* threshold were reduced to only 10 buildings, over 200 CLEC-connected buildings would still be excluded. Given that the vast majority of special access demand in San Francisco is concentrated in only 1,000 buildings, and that the CLEC-connected buildings are likely among the largest within that 1,000, it is clear that a *de minimis* exemption would have anything but a *de minimis* effect on the analysis.

Nor is San Francisco unusual. An examination of all the MSAs covered by the Commission's previous voluntary data requests, plus San Francisco and San Antonio, confirms that exempting CLECs with 10 or fewer buildings would exclude, on average, about 200 CLEC-connected buildings in each market. As in San Francisco, these buildings undoubtedly account for a disproportionate amount of special access demand.

The GeoTel data are not perfect. They tend to understate the number of competitor building connections, because they reflect only self-reporting and GeoTel's own independent investigation. Some of the GeoTel data also may be outdated (some providers that have merged with others are separately listed), and the data may also report some connections using leased facilities. Moreover, in most markets, GeoTel's building connection data allocates a significant number of building connections to an "unknown" provider category, which likely includes a number of additional providers with a relatively small number of connections that would be excluded by a *de minimis* exemption. Although the Commission obviously cannot accurately assess the full impact of a *de minimis* exemption without having first collected the data, the limited data that is available starkly confirms that a *de minimis* exemption would miss a significant number of CLEC building connections.

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<sup>3</sup> See, e.g., *Special Access Freeze Order* ¶¶ 36-37, 42-43 & n.110. Indeed, the Commission's own data in Appendix D of the *Special Access Freeze Order* shows that, in the approximately one third of MSAs in which the Commission has granted Phase II pricing flexibility for channel terminations, the collocation wire centers that justified the MSA-wide relief accounted for, on average, 93 percent of the ILEC's special access revenue in the entire MSA (and, in many cases, 95 percent, 97 percent, or even 100 percent of MSA-wide demand). See *Special Access Freeze Order*, Appendix D; see also Letter from Frank S. Simone, AT&T, to Marlene H. Dortch, FCC, WC Docket No. 05-25, at 2 (Sept. 7, 2012).

<sup>4</sup> Letter from David L. Lawson, for AT&T, to Marlene H. Dortch, FCC, dated August 8, 2012, at 4 & Appendix 1 ("*AT&T Data Letter*").

A *de minimis* exemption based on a snapshot of the number of buildings currently served also would fail to account for important forward-looking market dynamics.<sup>5</sup> For example, tw telecom is a large, well-funded competitor committed to facilities-based buildout of its network, but if it has just recently entered a particular city, it may currently connect to a “*de minimis*” number of buildings in that city – and the Commission’s analysis would fail to capture this important competitor. No entity that has a significant presence in any geographic area should be permitted to avoid the Commission’s data reporting requirements for other areas on the grounds that it has only a *de minimis* number of connections in those areas.

Beyond that, and no less important, a *de minimis* exemption based on buildings served would fail to take into account how competition actually occurs. The real determinant of competition is how many providers have networks that are close enough to customer locations so that they can bid for the business. Special access competition does not occur only or even mainly between providers that already have an existing connection to a building. Rather, traditional CLECs deploy large fiber rings or other transport facilities and then make bids and offers to serve special access demand for customers in buildings located near their networks.<sup>6</sup> Cable and fixed wireless providers likewise have facilities that readily can be used to provide connections to additional customers.<sup>7</sup> Special access competitors typically rely on long-term contracts, which allow them to deploy direct connections only after winning the contract, rather than assuming the substantial risk of deploying ubiquitous connections first and trying to win the business later.<sup>8</sup>

For these reasons, both the D.C. Circuit and the Department of Justice have recognized that competitors will constrain ILEC special access pricing whenever they can compete for the right to extend their networks to particular customer locations – even if they do not already have such a connection.<sup>9</sup> And that is why the Commission recognized in the *Special Access Freeze Order* that its data collection “must be forward-looking and account for significant

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<sup>5</sup> *Special Access Freeze Order* ¶¶ 97-101 (Commission’s data collection and marketplace analysis should be forward-looking).

<sup>6</sup> For this reason, CLECs often advertise and report to investors the number of buildings that are *near* their fiber.

<sup>7</sup> See, e.g., Order, *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket 11-118, FCC 12-111, ¶ 28 (Sep. 17, 2012) (“cable operators have expansive—and in some areas, ubiquitous—network facilities that can be upgraded to compete in telecommunications services markets at relatively low incremental cost”).

<sup>8</sup> See, e.g., Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd. 16978, ¶ 316 (2003) (customers often “enter into long-term contracts committing to revenue streams and associated early termination charges that provide the ability for carriers to recover their substantial non-recurring ‘set-up’ or construction costs” of deploying facilities).

<sup>9</sup> See, e.g., *WorldCom v. FCC*, 238 F.3d 449, 458 (D.C. Cir. 2001) (“the presence of substantial sunk investment, and the resulting potential for entry into the market, can limit anticompetitive behavior by LECs”, citing *Pricing Flexibility Order* ¶ 80); *AT&T-BellSouth Merger Order*, 22 FCC Rcd. 5662, ¶¶ 41-42, 46 & nn.111-14 (2007) (describing and adopting “screens” employed by DOJ to determine whether a building could be served by alternative facilities, which recognize that competitors with facilities near a building can and do compete for customers in that building).

competitors in a market,” including competitors that “can quickly enter a market and respond to customer demand.”<sup>10</sup>

A “*de minimis*” exemption, however, would exclude entire fiber networks from the analysis and therefore understate how many competitors are actively competing to serve the relevant customer locations in that market. A competitor that appears to have a “*de minimis*” number of building connections nevertheless may have deployed an extensive fiber network that is capable of serving a vastly greater number of locations. By limiting the collection of network data to only the subset of competitors with the largest number of building connections, the Commission’s maps would reflect only a subset of the fiber networks in that city, when in fact many additional competitors will have networks that put them in position actively to bid to serve the relevant business locations. The Commission previously sought this critically important fiber data and was rebuffed,<sup>11</sup> but the Commission will have a severely inaccurate view of the marketplace without it.

The publicly available GeoTel data again confirm that a *de minimis* exemption would exclude substantial fiber networks. As with GeoTel’s building connection data, the GeoTel fiber network data is incomplete and understates the true extent of providers’ actual fiber networks. For example, as AT&T has previously shown, for the few CLECs that responded to the Commission’s voluntary data requests, the fiber route miles they reported to the Commission were often substantially higher than shown in the GeoTel data.<sup>12</sup> Nonetheless, the GeoTel data show that, in the San Francisco MSA, exempting entities with fewer than 10 building connections would fail to capture more than fifty percent of the fiber miles deployed by alternative providers. Likewise, an examination of the average of all of the MSAs covered by the Commission’s previous voluntary data requests, plus San Francisco and San Antonio, confirms that a ten-building-connection exemption would omit nearly forty percent of the fiber miles deployed by alternative providers.

It is thus clear that a *de minimis* exemption would substantially undermine the Commission’s efforts to collect meaningful data about the special access marketplace. By contrast, there does not appear to be any legitimate justification for such an exemption. Proponents have argued that it is needed to alleviate the “burden” to small providers. But if a provider’s operations are relatively small, then the task of responding to the Commission’s data requests will be correspondingly small in comparison to other providers. Any special access provider can produce these types of data; competitive special access providers already maintain databases, lists, and maps that contain the relevant information in the ordinary course of marketing and provisioning their services, and they routinely provide lists of buildings they

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<sup>10</sup> *Special Access Freeze Order* ¶¶ 97, 99 (citing Verizon 2009 PN Comments at 17 (“Once competitors have deployed fiber or wireless networks in an area, they are able cost effectively to use or extend those networks to serve customers in individual buildings where there is sufficient demand”)).

<sup>11</sup> See First Voluntary Data Request, III.B (“For each Listed Statistical Area in which your company owns fiber or your company leases fiber from another entity under an IRU agreement, provide a map of the routes followed by fiber that constitute your network. Also provide a map of the routes followed by fiber connecting your network to end-user locations.”).

<sup>12</sup> Letter from David L. Lawson to Marlene H. Dortch, WC Docket No. 05-25, at 3 (June 14, 2012).

can serve to their customers and prospective customers.<sup>13</sup> The Commission thus must require all providers to submit specific data on the locations of connected buildings they serve and the locations of their fiber networks.

At bottom, because of the CLECs' intransigence in refusing to respond to the Commission's previous data requests, the Commission does not even have enough information right now to know if a *de minimis* exemption would be truly *de minimis* or not. As described above, common sense and the available evidence from third party sources provides strong evidence that a *de minimis* exemption would in fact exclude a large amount of relevant data that would have a material impact on the integrity and accuracy of the Commission's analysis. Pressing ahead with a *de minimis* exemption in the face of such evidence would fatally compromise the Commission's inquiry before it even begins, because courts have made clear that regulation is arbitrary when it is adopted on the basis of an analysis that has ignored the existence of potentially important competitors.<sup>14</sup> Given that the Commission has suspended the pricing flexibility rules because of an asserted need for a complete set of marketplace data, the Commission should follow through and collect a *complete* set of data – not a partial set of data that would inevitably blind the Commission to a substantial portion of the competition that currently exists in the special access marketplace.

Sincerely,



cc: N. Alexander  
J. Erb  
W. Layton  
K. Lynch  
E. McIntyre  
E. Ralph  
L. Reyes  
S. Rosenberg  
J. Susskind

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<sup>13</sup> In its role as a substantial purchaser of competitive special access services from traditional CLECs and cable and wireless providers, AT&T has obtained such building lists from dozens of competitive providers (subject, however, to non-disclosure agreements).

<sup>14</sup> See, e.g., *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”); *United States Telecom Association v. FCC*, 290 F.3d 415, 428 (D.C. Cir. 2002) (unlawful for Commission to “inflict on the economy the sort of costs” associated with mandated unbundling with “naked disregard of the competitive context”); see also *Portland Cement Ass’n v. Ruckelshaus*, 486 F.2d 375, 393 (D.C. Cir. 1973) (“It is not consonant with the purpose of a rule-making proceeding to promulgate rules on the basis of inadequate data”); *WorldCom, Inc. v. FCC*, 238 F.3d 449, 458-59 (D.C. Cir. 2001) (“the presence of facilities-based competition with significant sunk investment makes exclusionary pricing behavior costly and highly unlikely to succeed,” because “that equipment remains available and capable of providing service in competition with the incumbent, even if the incumbent succeeds in driving that competitor from the market”).