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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:

On Wednesday, September 26, 2012, Robert Barber, Jay Bennett, and the undersigned of AT&T and David Lawson of Sidley Austin LLP, met with Deena Shetler, Eric Ralph, Nicholas Alexander, Elizabeth McIntyre, William Layton, Kenneth Lynch, Travis Litman, Luis Reyes, and Matthew Porter of the Commission's Wireline Competition Bureau to discuss the upcoming mandatory data requests and approaches for an analytical framework for pricing flexibility. We explained that any legitimate analytical framework must be data driven and reflect the competitive realities of the special access marketplace, including both current and potential competition. To ensure that this is the case, the Commission must collect comprehensive data from all participants in the marketplace, large and small. These data should be used to identify readily observable proxies for effective competition that can be used as "triggers" for pricing flexibility in appropriately defined geographic areas.

Because the data have not yet been collected and analyzed, the Commission is in no position to adopt final rules establishing a new pricing flexibility framework in lieu of the current, "frozen" regime. But the Commission can and should endorse certain guiding principles that are essential to any workable pricing flexibility regime. First, there must be a reasonably close fit between the triggers and the existence of actual and potential competition.[1] Second, the new regime must be practicable and not susceptible to gaming by competitors who are loathe to provide data about their networks and customers. The data required to obtain relief must be readily available to applicants, and the geographic scope of relief must conform with market and contractual realities. A regime that provides relief in insufficiently large geographic areas will only complicate the contract negotiation process,

[1] Report and Order, *Special Access For Price Cap Local Exchange Carriers,* WC Docket No. 05-25, RM-10593, ¶ 98 (rel. Aug. 22, 2012) ("*Freeze Order*") ("In our view, a comprehensive market analysis will best facilitate a complete inquiry into the existence of competition in a given market, including sources of intermodal and intramodal competition, potential market entrants, uncommitted entrants, carriers that self-supply their own special access, and non-facilities-based competitors. This analysis also will consider the impact of competitors that do not collocate in an incumbent's wire center.").

turning it into a logistical nightmare. This may comport with the agenda of competitors who seek to handicap ILECs in the marketplace, but it would not be in the interest of customers. Finally, any pricing flexibility regime must be consistent with the Commission's overarching goal of spurring ubiquitous broadband deployment.

Although the Commission's ultimate approach must be data driven, these guiding principles establish certain boundaries as to the type of analytical frameworks that might work, and those that clearly will not. For example, application of these principles demonstrates why the Commission should not take MSA-wide relief off the table. The Commission's original pricing flexibility order determined that relief at the MSA level was both practical and reasonably tied the competitive triggers to the geographic areas where competition was occurring, and would occur in the future. In the *Freeze Order*, however, the Commission raised concerns that MSA-wide relief may be too broad because relief was granted based on significant competition in the areas within the MSA where demand for special access was concentrated, even though there may have been little or no competition elsewhere in the MSA. But Appendix D of the *Freeze Order* shows that in the MSAs where Phase II relief was granted, the collocation wire centers that justified the MSA-wide relief accounted for, on average, more than 93 percent of all of the ILEC's special access revenue in the MSA. In nearly a third of those MSAs, the collocation wire centers accounted for 97 percent or more of revenue (and for some, fully 100 percent); the collocation wire centers never accounted for less than 85 percent of revenue. Any assumption that MSA-wide relief creates significant opportunities for anticompetitive prices and terms in areas within the MSA where competitors have not collocated (or otherwise deployed facilities) may have superficial appeal, but it is simply not supported by the facts. The wire centers without collocation are the ones without significant (in many cases without any) special access demand. Granting pricing flexibility in areas with little or no demand raises no significant competitive concerns in a world where tails do not wag dogs.[2]

These guiding principles also provide insight as to the types of geographic areas that would clearly not be appropriate. For example, granting relief on any basis smaller than a wire center should be a non-starter because it is both analytically and practicably unworkable. A building-by-building approach would ignore that special access competition does not occur only -- or even mainly -- between carriers that already have an existing connection to a building. To the contrary, 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. Cable and fixed wireless providers likewise have facilities that readily can be used to provide connections to additional customers. And special access competitors typically rely on long-term contracts, which allow them to deploy (and earn a return on) 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. A building-by-by building approach would also be impossible to administer. CLEC presence in a building is not readily observable or verifiable, meaning that the Commission would need continually to conduct industry-wide discovery to process the many thousands of applications

[2] For example, the Commission notes in the *Freeze Order* that, according to Table 4, MSA-wide relief was granted to AT&T in Owensboro, Kentucky when there was collocation in only 1 of the 9 (11%) wire centers in that MSA. But as shown in Appendix D, that single wire center accounted for 99 percent of the special access demand in the MSA at the time the petition was granted. The Commission's concern thus relates to only 1% of the demand for special access in the entire MSA.

that an in-building based regime likely would engender. And any approach that purported to apply different pricing regulations from one building to the next would be wholly impractical to implement through tariffs, contracts and bills.

In searching for an appropriate trigger the Commission should examine a wide range of potential correlations between competition and various easily observable and verifiable metrics, including, among others, collocation, business density, and revenues. Indeed, the Commission may find that the existing collocation trigger, augmented to account for competition from cable companies, fixed wireless, and carrier hotels, remains appropriate. Again, the focus should be on identifying metrics that are readily observable and verifiable, that can be objectively applied without time-consuming and costly proceedings, and that are consistent with the purposes and economic bases of the pricing flexibility regime, as well as the Commission's broadband agenda.

Any attempt to use some version of the Horizontal Merger Guidelines "market power" approach, for example, would be neither practical nor economically defensible. The merger Guidelines "SSNIP" test was developed for the purpose of evaluating mergers, and asks whether the post-merger combined firm will be able to charge significantly higher prices, as measured by pre-merger prices. This test was never intended to be used, and cannot practically be used for assessing whether an existing firm has market power. There is no "pre-merger" competitive price on which to base the analysis. This is especially problematic in the context of the special access marketplace, where baseline prices are regulated prices that may be below or above competitive levels. A market power approach would also be impractical, necessarily triggering lengthy and intractable proceeding and appeals. That is precisely why opponents of pricing flexibility favor that approach.

Nor is it practical or productive to propose econometric analyses designed to link some observable marketplace measures to the existence of "competitive prices" in particular geographic areas. The data to conduct meaningful pricing analyses of this type simply does not exist. AT&T's special access customers typically purchase services across entire regions under a single arrangement. Those arrangements typically include some form of bulk discount that is not directed – and cannot be allocated in a non-arbitrary way – to individual buildings, wire centers or even MSAs. And some such arrangements include non-regulated services other than special access. There is thus no non-arbitrary way to determine a "price" specific to any particular location.

AT&T is under no illusion that there is a perfect pricing flexibility framework waiting to be identified. That is one of the reasons AT&T supported retaining the now-frozen triggers, even though those triggers understated competition in important respects. But the Commission's decision to freeze the existing triggers while it searches for the elusive better approach should be reason neither for interminable delay, during which time no additional pricing flexibility is available to incumbent LECs, nor should it result in a more imperfect regime, simply because the Commission feels compelled to make some change. Moreover, the Commission must be mindful, in all events, that artificially depressing pricing for legacy special access services will slow the substitution of broadband services for those legacy services and undermine the Commission's overarching broadband goals.

Finally, we stressed that the Commission will not be able to choose an appropriate trigger or geographic area unless its data request is comprehensive and includes full information about building connections and network locations from ***all*** competitors.[3] AT&T previously has demonstrated that excusing certain competitors from responding to the data requests under a so-called "de minimis" exemption would leave gaping holes in the Commission's data, omitting significant sources of competition and skewing the results of the analysis.[4] Competitors with only a small number of connections often focus on the very large buildings where special access demand is concentrated, and thus have a significant impact on competition. The collective impact of smaller providers on the competitive environment is substantial. Nor is there any legitimate justification for such an exemption, given that the burden of responding to the Commission's data request will be correspondingly smaller for smaller providers. Oddly, Ad Hoc, whose members are not even subject to the upcoming mandatory special access data request has publicly supported a *de minimis* exemption.[5] The only conceivable basis for such support is that Ad Hoc believes that if the Commission's analysis understates competition, it can use those skewed results to seek mandated price breaks for the special access services purchased by its corporate members. Moreover, Ad Hoc's assertion that the Commission's analyses need not be forward-looking is contrary to fundamental economics, federal law, and the Commission's own findings.[6] Indeed, the Commission would be hard pressed to find any reputable economist that would agree that competition is best gauged by a static analysis that omits important sources of competition.

Sincerely,

ATTACHMENT

cc: N. Alexander
W. Layton
T. Litman
K. Lynch
E. McIntyre
M. Porter
E. Ralph
L. Reyes
D. Shetler

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[3] This would include as satellite providers. As demonstrated by the attached, the deployment of the newest satellite technologies has further increased the high speed service choices available to customers.

[4] Letter from Frank Simone (AT&T) to Marlene H. Dortch (FCC), WC Docket No. 05-25 (Sep. 7, 2012) ("*AT&T 9/7 Letter*").

[5] *See, e.g.*, Communications Daily, Thursday, September 27, 2012 (statement of Colleen Boothby, Ad Hoc's attorney).

[6] *See AT&T 9/7 Letter*, at 1-3.

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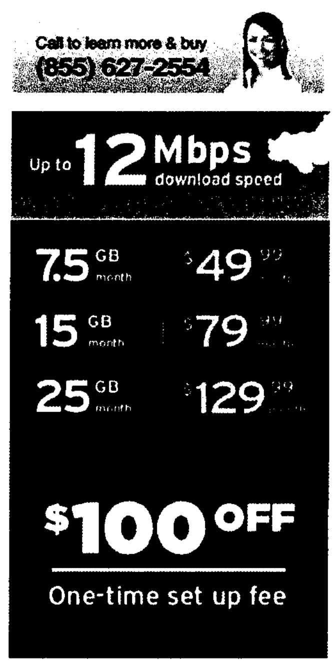

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