

December 7, 2012

VIA ECFS

EX PARTE

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

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:

Yesterday, I discussed the forthcoming mandatory data request in the above-referenced proceeding with Angie Kronenberg, legal advisor to Commission Mignon Clyburn. I stated that, contrary to recent assertions by incumbent LECs, the Commission should not require providers to report information regarding best-efforts services, such as cable modem services, as part of the data request. As the Commission has recognized, best-efforts cable modem services are not “comparable to services provided over high-capacity loops” such as dedicated DS1s and DS3s¹ or dedicated Ethernet loops. Customers that purchase DS1 and DS3 services (as well as Ethernet services) typically demand a level of reliability and security that best-efforts connections, such as cable modem service, do not deliver. In order to receive these benefits, customers are willing to pay significantly more for services provided over dedicated high-capacity loops than for cable modem services, a fact that has led the Commission to acknowledge that these two types of products are “not interchangeable.”²

For these reasons, the Commission has considered special access services and broadband Internet access services, including cable modem services, as belonging to different product markets for the purposes of its analysis of proposed transactions and forbearance petitions. For

¹ *In re Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, Order on Remand, 20 FCC Rcd. 2533 ¶ 193 (2005) (“[B]andwidth, security, and other technical limitations on cable modem service render it an imperfect substitute for service provided over DS1 loops.”).

² *Id.* (“[B]usinesses that do require DS1 loops are willing to pay significantly more for them than the cost of a cable modem connection, which also indicates that the two are not interchangeable.”).

example, in the *AT&T/BellSouth Merger Order*, the Commission explained that “enterprise customers frequently purchase high-capacity transmission services, including Frame Relay, Asynchronous Transfer Mode (ATM), Gigabit Ethernet, and similar services provided via emerging technologies.”³ It found that, to the extent cable operators offer services that are competitive with such products, they do so using fiber facilities (as opposed to the coaxial facilities used to provide cable modem services).⁴ The Commission therefore performed a separate analysis of competition in the market for “mass market high-speed Internet access services,” such as cable modem services.⁵ Similarly, in the *Phoenix Forbearance Order*, the Commission performed separate analyses of competition for enterprise customers who “frequently purchase high-capacity transmission service” such as DS1 and DS3 services and competition for mass market customers who purchase services such as local and long distance voice services and best-efforts broadband Internet access services.⁶ The Commission made this distinction even under its previous, less stringent (and less reliable) standard for forbearance.⁷

In sum, any suggestion by incumbent LECs that best-efforts cable modem services fall into the same product market as special access services is incorrect and contrary to precedent. The Commission should recognize such baseless assertions as yet another diversion intended to delay progress in this proceeding.

Respectfully submitted,

/s/ Thomas Jones

Attorney for tw telecom inc.

³ *In re AT&T Inc. and BellSouth Corp. Application for Transfer of Control*, Memorandum Opinion and Order, 22 FCC Rcd. 5662 ¶ 63 (2007) (“*AT&T/BellSouth Merger Order*”).

⁴ *See id.* n.92.

⁵ *See id.* ¶¶ 113-20.

⁶ *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 ¶¶ 51-63 (2010) (“*Phoenix Forbearance Order*”).

⁷ *See, e.g., In re 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 ¶ 22, nn.65-66 (2005) (distinguishing between broadband Internet access services as mass market services and special access services as enterprise services for the purposes of analyzing competition).