

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554

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

**COMMENTS OF ALASKA COMMUNICATIONS SYSTEMS**

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February 11, 2013

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## Executive Summary

The Commission hopes to devise a new pricing flexibility regime based on a comprehensive understanding of the special access market. The Commission may grant pricing flexibility and even eliminate price cap regulation for special access services where actual *and potential* competition are found, because competition or the threat of competitive entry will ensure that rates, terms and conditions are just and reasonable by market standards.

The Commission's analysis of competition should encompass all sources of competition, not merely collocated CLECs. Often, competitive special access providers are not entities the Commission deems local exchange or exchange access providers – they may be interexchange carriers, cable television/broadband providers, or power utilities who have their own facilities and rights-of-way and no need to collocate with the ILEC – but they nonetheless compete with the ILEC for special access contracts.

The Commission should place the burden of proof and production squarely on the party with access to the relevant information – often, the competitor or party alleging that it seeks market entry. If a party alleges that it faces barriers to market entry, it should be expected to support such allegations with detailed information.

In the absence of compelling evidence that an ILEC possesses market power, the Commission should grant relief. Doing so would help eliminate unnecessary regulations that hinder investment and deny consumers alternative pricing arrangements. Where the evidence to the contrary is not compelling, the analysis should be resolved in the ILEC's favor.

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**COMMENTS OF ALASKA COMMUNICATIONS SYSTEMS**

Alaska Communications Systems, on behalf of its operating ILEC subsidiaries (collectively, “ACS”),<sup>1</sup> submits these comments in response to Sections IV.A and C of the Commission’s December 2012 *Further Notice of Proposed Rulemaking* in the above-captioned proceeding (the “*Special Access FNPRM*”).<sup>2</sup>

**I. BACKGROUND**

In August 2012, the Commission suspended its special access pricing flexibility rules for price cap carriers on an interim basis, stating that they failed to achieve the Commission’s purpose of relaxing the special access pricing rules for those areas (and

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<sup>1</sup> In this proceeding, “Alaska Communications Systems” signifies the incumbent local exchange carrier (“ILEC”) subsidiaries of Alaska Communications Systems Group, Inc., ACS of Alaska, LLC, ACS of Anchorage, LLC, ACS of Fairbanks, LLC, and ACS of the Northland, LLC.

<sup>2</sup> *Special Access for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (*Special Access FNPRM*).

only those areas) where competitive entry has taken hold.<sup>3</sup> The Commission ruled that competition was too limited or had failed altogether in some areas where pricing flexibility had been granted, while in other areas where flexibility had not been granted, evidence of competition strongly suggested an inequitable result.<sup>4</sup>

With the *Special Access FNPRM*, the FCC undertakes a “comprehensive market analysis” of special access services, which will draw on data to be collected from both LEC providers of special access services and competitive providers.<sup>5</sup> The Commission seeks public input on how to best assess the extent of actual and potential competition in a given geographic area. Based on its findings, the Commission proposes to adopt new rules that will allow incumbent LECs to win some form of pricing flexibility or perhaps even pricing deregulation for their special access services, where it is merited based on the competitive analysis the Commission now undertakes.

Under the rules recently suspended by the Commission,<sup>6</sup> ACS obtained pricing flexibility for some of the areas it serves,<sup>7</sup> and will be directly affected by the outcome of

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<sup>3</sup> See generally *Special Access for Price Cap Local Exchange Carriers: AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Report and Order, 27 FCC Rcd 10557 (2012) (*Special Access Suspension Order*).

<sup>4</sup> *Special Access Suspension Order*, ¶¶ 5, 77.

<sup>5</sup> *Special Access FNPRM*, ¶ 78 (mandating data submission).

<sup>6</sup> The Commission’s grant of pricing flexibility for special access had been premised on prior findings that the presence of collocated fiber-based competitors in a particular area reflected the establishment of meaningful competition justifying relaxation of the pricing restraints on incumbent LECs. See *Access Charge Reform; Price Cap Performance Review for Local Exchange Carriers; Interexchange Carrier Purchases of Switched Access Services Offered by Competitive Local Exchange Carriers; Petition of US West Communications, Inc. for Forbearance from a Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221, ¶¶93-99 (1999) (*Access Charge Reform Fifth Report and Order*), *aff’d WorldCom v. FCC*, 238 F.3d 449 (D.C. Cir. 2001).

the instant proceeding. ACS found that the pricing flexibility it obtained for specific municipalities was of very little value to the company in the marketplace, where customers' service needs typically do not follow the boundaries established by the MSA-based regulatory scheme. ACS's chief competitors for special access services are not so constrained. One is a competitive LEC, the other is an interexchange carrier, and both have the unfettered right to offer term discounts or individual case basis ("ICB") contracts, and not subject to any prescribed rate structure. ACS believes that pricing flexibility should be granted on a statewide basis, in light of actual and potential competition throughout ACS's service areas.

## **II. AN APPROPRIATE ANALYTICAL FRAMEWORK FOR SPECIAL ACCESS SERVICES**

The FCC pledged to draft new pricing flexibility rules based on a better understanding of the nature of the special access market. Deregulation where market conditions support it confers a number of public benefits, including eliminating unnecessary costs, stimulating greater investment in advanced services and facilities, and giving consumers access to alternative services and pricing arrangements. The Commission's analysis therefore should proceed toward identifying a set of criteria that will permit maximum flexibility and ultimately elimination of price cap regulation for special access services where actual and potential competition are sufficient to ensure that rates, terms and conditions are just and reasonable by market standards. The Commission should not adopt a test for competition that would put relief out of reach for

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<sup>7</sup> ACS had obtained this type of relief in three locations: the Anchorage MSA, the Fairbanks MSA, and the non-MSA portions of the Juneau study area. *See Petition of ACS of Anchorage, Inc., ACS of Alaska, Inc., and ACS of Fairbanks, Inc. for Pricing Flexibility Pursuant to Sections 69.709 and 69.711 of the Commission's Rules, Order, WCB/Pricing File No. 10-02, 25 FCC Rcd 7128 (Wireline Competition Bur. 2010) (ACS Pricing Flexibility Order).*

carriers such as ACS, but should ensure that the burden of proof is appropriately placed on the party with relevant information.

**A. The Commission's Analysis Should Acknowledge That Competition Exists**

ACS supports the proposed approach to balance analytic rigor and administrative feasibility. The Commission has long recognized the benefits that can flow from deregulation in appropriate circumstances, and the harms associated with excess regulation, which stifles investment and innovation.<sup>8</sup> The special access market has attracted competitors of different sizes and types for more than two decades. The Commission has reaffirmed the competitive nature of the special access market in many carrier-specific rulings during this period.<sup>9</sup> Despite the availability of the complaint process under Section 208 of the Communications Act, ACS is aware of no findings against special access carriers in complaint proceedings alleging abuse of market power where pricing flexibility was granted. Yet the Commission has been considering revoking or curtailing pricing flexibility for more than seven years.

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<sup>8</sup> See *Access Charge Reform Fifth Report and Order*, ¶ 22.

<sup>9</sup> See, e.g., *Petition of Hawaiian Telcom, Inc. for Phase I Pricing Flexibility Pursuant to Section 69.709 of the Commission's Rules*, Order, WCB/Pricing File No. 08-01, 23 FCC Rcd 7856 (Wireline Competition Bur. 2008); *Sprint Local Telephone Companies Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Order, WCB/Pricing File No. 05-35, 21 FCC Rcd 3412 (Wireline Competition Bur. 2006); *Verizon Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, WCB/Pricing No. 03-10, 18 FCC Rcd 6237 (Wireline Competition Bur. 2003); *Frontier Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, CCB/CPD No. 01-07, 16 FCC Rcd 13885 (Common Carrier Bur. 2001); *BellSouth Petition for Pricing Flexibility for Special Access and Dedicated Transport Services*, Memorandum Opinion and Order, CCB/CPD No. 00-20, 15 FCC Rcd 24588 (Common Carrier Bur. 2000).

While the Commission should conduct a multi-faceted analysis of the special access market to determine what criteria would be useful triggers for pricing flexibility and deregulation, the Commission would do well to approach this analysis with the goal of granting relief *except* where the balance of evidence clearly suggests market power. If an ILEC asserts, based on objective criteria, that it is subject to actual or potential competition, and neither its customers nor its competitors present compelling evidence to the contrary, the ILEC should be granted relief. Since 1999, special access services have been subject to pricing flexibility, without any convincing evidence of harm to consumers or competition. If the Commission miscalculates and over-regulates now, it will harm consumers, who will no longer benefit from robust competition. In contrast, if the Commission declines to regulate *except* where there is evidence of market power, consumers and competitors remain free to avail themselves of the complaint process.

**B. The Commission Should Take Into Account Diverse Indicia of Actual and Potential Competition**

In the *Special Access FNPRM*, the Commission proposes to conduct a one-time analysis of the special access market to determine where special access rates, terms and conditions are just and reasonable, and to identify proxies that can reliably pinpoint where competition has taken hold.<sup>10</sup> The Commission asks what factors should be included in its analysis.<sup>11</sup> The Commission hopes to identify indicia of market entry barriers, as well as factors that tend to encourage infrastructure investment.<sup>12</sup>

ACS supports the proposed approach provided the Commission heeds the adage, “Let not the best be the enemy of the good.” In past proceedings in which the

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<sup>10</sup> *Special Access FNPRM*, ¶¶ 66-67, 78.

<sup>11</sup> *Id.*, ¶ 68.

<sup>12</sup> *Id.*, ¶ 75.

Commission has reviewed competition in the special access market where ACS provides service, over the course of a grueling 15-month analysis, FCC staff attempted to identify competitors, market share, relative size, costs and financial and technical resources of firms in the market, customer types, service types, demand elasticity, and supply elasticity, among other factors.<sup>13</sup> The burden of producing evidence on each of these factors was on the incumbent LEC, even though ACS had no authority to compel competitive carriers to provide data that would have assisted the Commission in its analysis. A short while later, ACS went on to win pricing flexibility in several markets and the Commission has received no complaint that competition in the affected special access markets is anything less than robust.<sup>14</sup>

Any future analysis the Commission undertakes must be thoughtfully designed to give the Commission a reasonably comprehensive sense of the market served by the ILEC without requiring any burdensome data production by any single party. An ILEC should not be expected to produce a list of locations served by its competitors, for example. Descriptions of actual and potential market entrants, their relative size and resources, and overall size of the market provide objective criteria from publicly available sources. If a party alleges that it faces barriers to market entry, it should be

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<sup>13</sup> See *Petition of ACS of Anchorage, Inc. Pursuant to Section 10 of the Communications Act of 1934, as amended (47 U.S.C. § 160(c)) for Forbearance from Certain Dominant Carrier Regulation of Its Interstate Access Services, and for Forbearance from Title II Regulation of Its Broadband Services, in the Anchorage, Alaska, Incumbent Local Exchange Carrier Study Area*, Memorandum Opinion and Order, 22 FCC Rcd 16304 (2007) (*ACS Dominant Carrier Forbearance Order*) (denying forbearance in special access market largely based on incomplete evidence in the record)

<sup>14</sup> See *ACS Pricing Flexibility Order*, *supra*, note 7. See also *ACS of Alaska, Inc., ACS of Anchorage, Inc., ACS of Fairbanks, Inc., and ACS of the Northland, Inc., Petition for Conversion to Price Cap Regulation and Limited Waiver Relief*, Order, 24 FCC Rcd 4664 (2009).

expected to support such allegations with detailed information about its attempts to enter the market. The ILEC should not be expected to do more than present prima facie evidence that it faces competition by some meaningful objective indicator. Where the evidence to the contrary is not compelling, the analysis should be resolved in the ILEC's favor. Thus, for example, if the ILEC presents evidence that it has only 50 percent market share, and competitors have roughly equal (or greater) resources, and no party refutes this evidence, the Commission should find the ILEC faces substantial competition, regardless of whether the ILEC produced specific evidence of supply elasticity. The deck should not be stacked against the ILEC in this analysis, given the lengthy history of competition for special access services in price cap carrier territories.

**C. Relief Should Be Tailored To Local Competitive Conditions**

The Commission suspended its current pricing flexibility rules, concluding that granting relief throughout a Metropolitan Statistical Area ("MSA") went too far in some cases. The Commission opined that demand for special access tends to be highly concentrated in a relatively limited geographic area, that competitors generally tend to enter price cap LEC service areas where business establishment density exceeds 100 establishments per square mile, and that collocated competitors may be able easily to deploy fiber within 1,000 feet of the collocation facility, but many other parts of an MSA often remain unserved by the competitors.<sup>15</sup> The Commission seeks comment on what geographic area would be more appropriate for analysis and, presumably, for granting regulatory relief where competitive entry is demonstrated.

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<sup>15</sup> See *Special Access Suspension Order*, ¶ 36 and note 106; see also *Special Access FNPRM*, ¶ 38.

ACS disagrees with the assumption that pricing flexibility only should be granted in narrowly defined locations (such as a single business address) where the Commission finds an actual competitive presence. First, ACS believes that, at least in Alaska, the Commission has erred in concluding that demand for special access is limited to very dense concentrations of business establishments. In only a handful of areas in Alaska does the density of business establishments exceed 100 per square mile, yet the state enjoys special access competition as intense as that found anywhere else in the nation. Indeed, ACS experiences intense competition in markets that are deemed “rural” under the Communications Act.<sup>16</sup> These areas may be low-density by national standards, but in Alaska they are population centers that have attracted multiple competitors. The Commission’s analysis must be flexible enough to take into account local market characteristics, including identifying competition in low-density price cap service areas.

Second, the Commission has long held that an incumbent’s behavior and ability to exercise market power is kept in check by *potential competition* as well as actual competition.<sup>17</sup> Granting regulatory relief only where a LEC has lost a customer creates a massive advantage for the competitor, and fails to bring the benefits of price competition to the other customers in the market. The Commission must grant regulatory relief beyond the specific address where a competitor has a customer. To assess potential as well as actual competition, the Commission should require all service providers in an

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<sup>16</sup> For example, as noted above, ACS qualified for pricing flexibility in the Fairbanks MSA, and the non-MSA portions of the Juneau study area. *See supra*, note 7.

<sup>17</sup> *See Special Access Rates for Price Cap Local Exchange Carriers; AT&T Corporation Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994, ¶ 69 (2005); *see also Access Charge Reform Fifth Report and Order*, ¶¶ 53, 184.

area, not merely LECs, to submit data to the Commission, and should assess the local market without reference to other parts of the country.

The Commission pledged that its new rules would not underestimate competition in price cap LEC markets. The Commission aptly observes that its current rules have failed to grant relief in some instances where competition has taken hold.<sup>18</sup> This may be due to the exclusive focus on collocated fiber-based competitors. ACS urges the Commission to gather data on all providers in the market, asking them to account for their facilities and service, so the Commission can assess the unique local market served by the ILEC.

While competitors in the special access market may at one time have been found most often collocated in the ILEC's central offices, where they interconnected with ILEC facilities, the market also is served by other significant competitors that have no need to collocate with the ILEC. These may be fiber-based cable television/broadband companies or power utilities, for example, with extensive local networks and access to rights-of-way. Both Chugach Electric and Enstar Natural Gas Company, for example, have constructed their own telecommunications facilities and offered bandwidth to customers.

Moreover, special access competition can be found in interexchange services as well as local exchange access services. In fact, in Alaska, ACS's chief competitors for special access services are General Communication Inc. ("GCI"), a cable company that also is a large long-distance provider, with much greater resources than ACS, and AT&T, a long-distance company with greater resources than both of the others combined.

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<sup>18</sup> *Special Access FNPRM*, ¶ 72.

Neither competitor needs to collocate in ACS's facilities for interconnection purposes, nor purchase unbundled network elements from ACS, in order to enter any of the markets served by ACS. Each has an independent, facilities-based presence. Each has its own switching and fiber facilities. In fact, each has facilities bottlenecks of its own. For example, AT&T and GCI both own and operate their own fiber facilities on key routes between traffic aggregation points in Anchorage and outlying central offices. GCI advertises that it has more fiber in the state than any other service provider, including more fiber-based last-mile connections to end-user premises, though ACS has no way to verify these claims. Because of their extensive in-state and interstate transport facilities, these two competitors dominate not only the long-distance market, each with more than 40 percent market share, but also the enterprise market for exchange access services. These carriers may interconnect with the ILEC differently from "traditional" CLECs, and may sell their services under names other than "special access," but each is a valid competitor in the special access services market. The Commission's analysis should factor in such competitors.

The Commission determined that it would base its new rules on a competitive analysis of the special access market that is "forward-looking" and considers "various sources of competition."<sup>19</sup> Just as collocation should not be the only indicator of a competitive presence, the Commission should not presume that any minimum number of competitors nor any particular type of competitor is necessary for actual or potential competition. Rather, the Commission should consider any facilities-based investment in the market to be meaningful evidence of potential competition. Indeed, in Anchorage,

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<sup>19</sup> *Id.*, ¶ 62.

despite the limited number of market entrants, the Commission granted ACS substantial regulatory relief based on its finding of substantial competition and absence of harm to consumers under the forbearance provisions of the Act.<sup>20</sup>

Similarly, the Commission should not presume that competitive entry takes place only in one part of the network, such as shared transport. Just as collocated competitors may not be an appropriate competition indicator for all locations, so assessing competition only a particular part of the network may overlook meaningful market entry in other places. In Alaska, ACS's special access competitors (who also are major long-distance carriers) have deployed their own facilities between central office locations. Though they may characterize these facilities as "interexchange transport" rather than "special access" infrastructure, they are effective substitutes.

In analyzing the special access market served by each ILEC, the Commission also should take into account the needs of the ILEC's customers. In Alaska, pricing flexibility under the current rules has been of limited value because it is not universally available throughout ACS's territories. ACS seeks the flexibility to provide its customers with competitively priced special access services and contract-based rates, terms and conditions across multiple locations in the state. This is not practicable if ACS enjoys pricing flexibility only in the densest portions of its service areas. In analyzing the special access market in a given state or region, therefore, the Commission should consider that customer demand rarely is limited to a single metropolitan area.

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<sup>20</sup> See *ACS Dominant Carrier Forbearance Order*, ¶¶ 36-38.

**D. Regulation Is Needed Only In the Absence of Facilities-Based Competition**

Both competition and market power today may appear very different from the way they presented themselves decades ago. ACS urges the Commission to adjust to current market realities, and take a more flexible approach to regulation both in the presence of competition and in its absence.

Although in general Alaska markets are highly competitive for special access as well as for other telecommunications and broadband services, there are some locations where competitive entry has not been possible. Notably, competitors face barriers to market entry in the region of southwest Alaska served by the publicly funded TERRA-SW network built by United Utilities, Inc. (“UUI”). ACS and other rural ILECs provide public switched voice services in this region, and AT&T provides satellite-based interexchange service, but none has been able to deploy terrestrial broadband due to prohibitive costs.<sup>21</sup> Due to these costs and the lack of infrastructure, UUI qualified for \$88 million in federal loans and grants to construct a fiber optic cable and terrestrial microwave-based broadband network under the Broadband Initiatives Program. Operations are sustained in part through federal universal service subsidies for services to rural health care providers, schools and libraries. Yet despite the public funding, UUI operates a *de facto* monopoly, refusing to make capacity available to would-be competitors, or charging monopoly rates for wholesale access. In this circumstance, UUI

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<sup>21</sup> ACS of the Northland is responsible for providing local exchange and exchange access service to four Alaska Bush communities in the region served by TERRA-SW: Kokhanok, Nondalton, Pedro Bay and Port Alsworth. These service areas include fewer than 350 access lines in total. AT&T’s interexchange network serving communities in the TERRA-SW region is satellite-based; it owns and maintains earth stations throughout the area.

should be subject to regulation as any ILEC would, and ACS and other would-be competitors should have rights of access at just and reasonable rates, terms and conditions.

### **III. CONCLUSION**

ACS commends the Commission's efforts to understand the special access market. The Commission should bear in mind that the ultimate goal is deregulation, with all its attendant public interest benefits. ACS urges the Commission to adopt a flexible approach so it will recognize competition (or the lack thereof) in light of unique local conditions. The Commission should place the burden of producing relevant and objectively verifiable data on the party that most readily has access to that data, and acknowledge the diverse forms that competition takes, but should not overwhelm parties with excessive administrative process.

Respectfully submitted,

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February 11, 2013