

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

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

**COMMENTS OF THE
OFFICE OF ADVOCACY, U.S. SMALL BUSINESS ADMINISTRATION**

The Office of Advocacy of the U. S. Small Business Administration (“Advocacy”) submits these comments to the Federal Communications Commission (“FCC” or “Commission”) in the above-referenced dockets.¹

Introduction and Summary

The Commission has invited interested parties to update the record on the regulatory framework applied to interstate special access services for price cap local exchange carriers (LECs) in light of recent industry mergers.² Advocacy’s comments are based on relevant data received from small businesses regarding the FCC’s special access pricing flexibility rules and new information collected in response to the Commission’s request.³ This new data reflects the recent consolidation that further impacts the competitive provision of special access services and the availability of viable alternatives to these services. Since 2005, three mergers have taken

¹ See *Parties Asked to Refresh Record in the Special Access Notice of Proposed Rulemaking*, FCC Dkt. No. 07-123 (rel. July 9, 2007) [hereinafter, Notice].

² See *Special Access Rates for Price Cap Local Exchange Carriers*, FCC Dkt. No. 05-18, WC Dkt. No. 05-25 (rel. January 31, 2005) [hereinafter, NPRM]. Special access as referred to throughout this comment is intended to include both price-cap and pricing flexibility

³ Reply Comments of the Office of Advocacy, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Dkt. No. 05-25 (July 27, 2005).

place in the telecommunications market: the SBC-AT&T and Verizon-MCI mergers were approved by the FCC on October 31, 2005, and on December 29, 2006 the Commission approved the AT&T-BellSouth merger. Our comments also take into account the post-Special Access NPRM study released by the Government Accountability Office (GAO) last November that investigates the lack of facilities-based competitive alternatives for dedicated access.⁴

Advocacy commends the Commission for refreshing the docket on this important issue, in order to take into consideration the most recent data available. Advocacy submitted reply comments in the Special Access NPRM on July 27, 2005, expressing small businesses concerns over increased special access prices and the availability of unbundled network elements (UNEs). In that letter, we suggested that the Commission consider the impact of its proposed rule on small entities and consider the alternatives recommended by these entities. To assist the FCC in further analyzing these issues, Advocacy has solicited input from small entities, reviewed recent studies⁵ regarding special access services, and analyzed how the Commission's proposed rule may impact small businesses.

1. Advocacy Background.

Congress established the Office of Advocacy under Pub. L. 94-305 to represent the views of small business before Federal agencies and Congress. Advocacy is an independent office within the Small Business Administration ("SBA"), so the views expressed by Advocacy do not

⁴ *FCC Needs to Improve its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services*, GAO-07-80 (November 2006) [hereinafter GAO Study]. It is important to note that this study was prepared prior to the latest AT&T-BellSouth merger, and as such does not include relevant information regarding how this transaction impacts the provision of special access services, but clearly establishes the lack of viable alternatives in the provision of special access. This finding is further exacerbated by the consolidation that has occurred.

⁵ Advocacy has also taken into consideration various studies referenced throughout industry's comments. *See, e.g.*, Reply Declaration of Joseph Farrell, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (July 29, 2005).

necessarily reflect the views of the SBA or the Administration. Part of our role under the Regulatory Flexibility Act (“RFA”) is to assist agencies in understanding how regulations may impact small businesses, and to ensure that the voice of small businesses is not lost within the regulatory process.⁶ Congress crafted the RFA to ensure that, while accomplishing their intended purposes, regulations did not unduly inhibit the ability of small entities to compete, innovate, or to comply with the regulation.⁷

On August 13, 2002, President George W. Bush signed Executive Order 13272 that highlights the President’s goal of giving small business owners a voice in the complex and confusing federal regulatory process by directing the Office of Advocacy to work closely with the agencies to ensure that the agencies can properly consider the impact of their regulations on small entities.

2. History

Following Congress’ enactment of the Telecommunications Act of 1996 (“Telecom Act” or “The Act”),⁸ the FCC considered various changes to the regulatory framework for access prices. In 1999 the Commission released its “Pricing Flexibility Order,” which instituted deregulated prices for dedicated access services in metropolitan statistical areas (MSAs) where price-cap incumbents could demonstrate the existence of certain “competitive triggers.”⁹ The

⁶ Pub. No. 96-354, 94 Stat. 1164 (1980).

⁷ Pub. L. 96-354, Findings and Purposes, Sec. 2 (a)(4)-(5), 126 Cong. Rec. S299 (1980).

⁸ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

⁹ *Access Charge Reform*, CC Docket No. 96-262, 94-1, 98-63, 98-157, Fifth Report and order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (“Pricing Flexibility Order”). The FCC requires that price-cap incumbents file a petition for pricing flexibility with the Commission. 47 C.F.R. § 1.774. These competitive triggers are separated into partial price deregulation (Phase I) and full price deregulation (Phase II). Phase I is based on the notion that prices charged by price-cap incumbents are not expected to increase, while under Phase II, price-cap incumbents may raise or lower their list prices. Each phase is dependent upon the percentage of “collocation equipment” installed from at least one competitor in channel terminations to end users and dedicated transport.

Commission further amended its price-cap rules under its “CALLS decision,”¹⁰ and began granting pricing flexibility to price-cap incumbents in 2001. Since the institution of this pricing flexibility, small carriers have reported increased rates for special access,¹¹ and in April 2005, the FCC opened its Special Access NPRM to examine whether the Commission should “maintain, modify, or repeal the pricing flexibility rules.”¹² On July 9, 2007, the FCC announced its plan to refresh the docket on special access to account for possible changes due to industry mergers, to consider the GAO Study, and to collect data on whether the market for special access services is competitive.¹³

3. Several Changes Have Occurred in the Special Access Market Since 2005

The special access market includes the primary components of wireless and downstream telecommunications services, as well as “upstream services” such as Internet backbone services. The recent mergers within the U.S. telecommunications sector have significantly altered the market for these services.¹⁴ Indeed, special access became a major focal point throughout the merger proceedings, and large and small carriers submitted data to show how these transactions would likely impact the market.¹⁵ COMPTTEL, a trade association representing a number of

¹⁰ Access Charge Reform, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Sixth Report and order in CC Docket Nos. 96-262 and 94-1, Report and order in CC Docket No. 99-249. Eleventh Report and Order in CC Docket No. 96-45, 15 FCC Rcd 12962 (2000).

¹¹ See, Reply Comments of CompTel, Global Crossing North America, Inc., and NuVox Communications, *In the Matter of Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (July 29, 2005).

¹² See, NPRM, *supra* note 2.

¹³ See, Notice, *supra* note 1.

¹⁴ See, FCC News Release, *FCC Approves SBC/AT&T and Verizon MCI Mergers* (October 31, 2005), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-261936A1.pdf. See also, FCC News Release, *FCC Approves Merger of AT&T Inc. and BellSouth Corp.* (December 29, 2006), available at: http://hraunfoss.fcc.gov/edocs_public/attachmatch/DOC-269275A1.pdf. See also, GAO Study, *supra* note 5, at 7 (describing how AT&T and MCI were once the largest purchasers of special access service as long distance companies, and that the mergers changed this fact). Some carriers believe that there is actually a “market failure” in the special access market. See, *Comments of COMPTTEL*, WC Docket No. 05-25; RM-10593 (August 8, 2007) [hereinafter COMPTTEL].

¹⁵ See, *eg*, Ex Parte Notification on Behalf of Earthlink, WC Dkt. 06-74 FCC (December 29, 2006)(Urging the

small competitive local exchange carriers (CLECs) has requested that the Commission include the entire merger docket in this proceeding, since the data is critical in defining the current special access market.¹⁶

Under the Telecommunications Act of 1996, the FCC is required to “promote competition and reduce regulation in order to secure lower prices and higher quality services for American telecommunications consumers and encourage the rapid deployment of new telecommunications technologies.”¹⁷ Hence, the Commission is charged with directly addressing information from carriers that explains how pricing, purchasing behavior, and rates of return suggest a lack of competition in the market.¹⁸ Ultimately, the FCC is required to tailor its regulatory policies to ensure that competition is not phased out of the telecommunications market, in accordance with its statutory mandate.

The mergers’ effects have been broad in scope. COMPTEL and other industry representatives believe that the difficulties faced in the special access market are so egregious that they amount to a market failure, precisely the opposite result of ensuring competition.¹⁹ In addition to small and large competitive carriers, these mergers have also affected small rural incumbents who state that “High costs and the lack of competition for backbone access in rural areas results in the majority of rural ILECs having only one connection to backbone facilities...As large carriers continue to merge the number of options for access to the Internet

Commission that AT&T-BellSouth be “obligated to end all requirements in their wholesale contracts that require local phone service for DSL” and stressing the Commission adopt UNE-L). See also, Ex Parte Notification by Kelley Drye Warren on Behalf of Cbeyond Communications, Nuvox Communications and XO Communications (stressing problems with special access language in the merger conditions and other problems).

¹⁶ See, COMPTEL, *supra* note 14 at 2-3.

¹⁷ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

¹⁸ See, COMPTEL, *supra* note 14, at 7.

¹⁹ *Id.* See also, Reply Comments of the Ad Hoc Telecommunications Users Committee, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, CC Docket No. 05-25 (July 29, 2005)(describing how “the supposed benefits of the special access pricing regime remain sadly unrealized”).

backbone that are available to rural carriers diminishes.”²⁰ The GAO Study, which was completed before the final AT&T merger, further indicated that the then-proposed merger “may lessen competition in the dedicated access market.”²¹ The comments of various carriers and the GAO Study suggest that the mergers may have had a negative economic impact on pricing for special access, as well as the availability of viable alternatives for access to various telecommunications components. It is critical that the Commission utilize this data so that it can reduce increased costs, and address other burdensome issues in its special access reform efforts. A complete analysis of the current post-merger market conditions and an examination of how improvements to the special access rules can reverse the burdens on small carriers will better assist the FCC in fulfilling the Telecom Act’s goals.

4. Small Carriers Point to a Lack of Alternatives and a Lack of Negotiating Power in the Special Access Market

Since the establishment of the Commission’s Price Flexibility Order, small carriers have faced increased prices for dedicated access services.²² The Commission’s enactment of Phase II special access pricing has increased rates as high as 46 percent for some carriers, and these rates are significantly higher than the cost-based UNE rates.²³ These carriers claim that the current price of special access specifically demonstrates a lack of competition in the market, because

²⁰ Comments of OPATSCO, *In the Matter of Inquiry Concerning the Deployment of Advanced Telecommunications Capabilities to All Americans in a Reasonable and Timely Fashion, and Possible Steps to Accelerate Such Deployment Pursuant to Section 706 of the Telecommunications Act of 1996*, GN Docket No. 07-45 (May 16, 2007).

²¹ GAO Study, *supra* note 5 at 8. While this study can not fully account for the last AT&T merger since the study was completed in November 2006 and the merger took place in December 2006, Advocacy believes that the document sufficiently delineates the market conditions, forecasts the expected merger impacts and represents the concerns of interested entities at that time.

²² *See*, COMPTTEL, *supra* note 14 at 7(explaining that under Phase II special access pricing the rates are 32 percent to 46 percent higher than the price-cap rates that would have applied).

²³ *Id.* *See also*, Sprint Nextel Corporation Comments, *In the Matter of CMRS Market Competition*, WT Docket No. 07-71 (May 7, 2007) (explaining how increased prices and a lack of competitive alternatives have given commercial mobile radio service (CMRS) providers “no choice” in special access). UNE rates refer to the charges for access to unbundled network elements.

incumbents have been able to raise prices without losing customers.²⁴ Furthermore, the GAO report also indicates that in addition to these higher prices, the market has few competitive alternatives for carriers.²⁵ The combination of high prices and few alternatives creates an insurmountable burden to small carriers trying to conduct business in the telecommunications market.

Price increases are not the only obstacle faced by small carriers in need of special access. These companies also cope with onerous contract provisions for special access service, due to lack of negotiating power.²⁶ The GAO Study examined whether contract terms for special access “may inhibit switching circuits to competitors” in the market.²⁷ The study ultimately found that certain contracts “may inhibit” a small carrier from “choosing competitive alternatives” due to anticompetitive terms that utilize revenue targets and administer penalties in some instances.²⁸ The inability to negotiate contracts properly in a normal business setting is indicative of market conditions that need to be addressed.

5. The FCC Must Consider the Availability of Conflicting Data

The 2006 GAO study explored various data on the special access market and further examined (1) the presence of alternatives in areas where the Commission granted pricing flexibility, (2) the change in process following the grant of pricing flexibility and the effect on

²⁴ *Id.*

²⁵ GAO Study, *supra* note 5, at 42.

²⁶ *See*, COMPTTEL, *supra* note 14, at 10 (stating that exclusionary contracts currently used by Regional Bell Operating Companies (RBOCs) have posed an onerous burden on small competitive carriers).

²⁷ GAO Study, *supra* note 5, at 30.

²⁸ *Id.* *See also*, Reply Declaration of Joseph Farrell, In the Matter of Special Access Rates for Price Cap Local Exchange Carriers, WC Docket No. 05-25 (July 29, 2005) (discussing the effects of incumbent local exchange carrier contracts for special access on competition). Joseph Farrell was Chief Economist at the FCC from 1996-1997.

federal agencies, and (3) how the FCC monitors competition.²⁹ The GAO determined that facilities-based competitive alternatives “are not widely available” for dedicated access.³⁰ The FCC rejected the GAO’s findings and relied upon the D.C. Circuit’s finding that “the Commission’s determination to use collocation as a proxy for competition” was reasonable.³¹ Advocacy believes that the conflicting data between FCC and GAO sources warrant further analysis, especially given the additional changes to the telecommunications market.

6. Conclusion.

To ensure that that Congress’ goals in promoting competition via the Telecom Act are fully realized, Advocacy urges the FCC to consider the above-referenced comments from small carriers and to consider the impact of the current special access pricing regime on small entities. Advocacy recommends that the Commission collect economic data on how increased industry consolidation may have worsened special access pricing and availability of viable alternatives for competitive providers of telecommunications services.

The Office of Advocacy is available to assist the Commission in its outreach to small business or in its consideration of the impact upon them. For additional information or assistance, please contact me or Cheryl Johns of my staff at (202) 205-6949 or

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²⁹ GAO Study, *supra* note 5, at 30.

³⁰ *Id.* (explaining in “What GAO Found” that list prices and average revenue tend to be higher in areas under the FCC’s pricing flexibility).

³¹ FCC Letter to Mark L. Goldstein, Director, Physical Infrastructure Issues, U.S. Government Accountability Office (November 13, 2006). *See also*, *WorldCom, Inc. v. FCC*, 238 F.3d at 459.

Respectfully submitted,

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August 8, 2007

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Certificate of Service

I, Cheryl M. Johns, an attorney with the Office of Advocacy, U.S. Small Business Administration, certify that I have, on this August 8, 2007, caused to be mailed, first-class, postage prepaid, a copy of the foregoing Comments to the following:

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