

**STATEMENT OF
COMMISSIONER AJIT PAI
APPROVING IN PART AND DISSENTING IN PART**

Re: *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

The marketplace for enterprise data services—high-capacity data services targeted at businesses small and large—is vast and varied. Coffee shops and barbershops that accept credit cards, office parks, schools, retail outlets, high-rise buildings, online businesses, and factories are all likely to have some high-capacity data connection. Today, these enterprise customers have more options than ever before to meet their needs. Traditional time-division-multiplexing-based dedicated services (DS1s and DS3s) are one option. For a higher-capacity dedicated service, they can try Frame Relay service, Asynchronous Transfer Mode service, Multi-Protocol Label Switching service, or Ethernet service. A gas station in the middle of the desert can connect using a satellite-based solution. Companies willing to trade off dedicated service for lower costs and higher capacity can obtain broadband Internet access services (usually marketed as “business class” variants on residential service). Companies that need the security of a private line on that Internet access service can consider software-based virtual private networking solutions that rely on encryption rather than physically separated signals to provide security and privacy. Those seeking to do business on the go can rely on over-the-top providers like Square to turn a tablet or smartphone into a portable credit card reader.

It is not surprising that the majority of enterprise data services are left untouched by federal regulation. After all, incumbent local exchange carriers (LECs), competitive LECs, cable operators, and wireless providers—terrestrial or satellite-based, fixed or mobile—are all competing for a limited number of business opportunities. Many of these providers have deployed fiber, the gold standard, to particular enterprise customers and to downtown office districts, providing competitive alternatives to older infrastructure. And competitive alternatives abound even where there is no fiber: Ethernet over copper is now viable,¹ and dedicated services may be delivered over networks where coaxial cable is the last leg.² Indeed, we recognized earlier this year that “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.”³

What is surprising is that the Commission continues to regulate one small corner of this market: the traditional special access services offered by incumbent LECs. And this is not light-touch regulation, but an invasive structuring of the marketplace. Incumbent LECs must offer traditional special access services throughout their study areas at the same prices. They must construct new copper facilities upon demand by an enterprise customer or a competitor. In many areas, the rates they may charge for such services are set by regulation, and they may not offer term or volume discounts to attract or retain customers. In other areas, incumbent LECs have more flexibility. But they must still tariff their

¹ See, e.g., Letter from Jeff Reedy, Co-founder and Chief Strategy Officer, Overture Networks, Inc., to Marlene H. Dortch, Secretary, FCC, GN Docket Nos. 09-47, 09-51, 09-137, RM-11358 (filed Dec. 7, 2012); Letter from Tamar E. Finn, Counsel for MegaPath Corporation, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 10-188, Attach. at 5 (filed Aug. 15, 2012).

² See Letter from Glenn T. Reynolds, USTA, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 05-25 (filed Dec. 3, 2012).

³ *Petition for Declaratory Ruling to Clarify 47 U.S.C. § 572 in the Context of Transactions Between Competitive Local Exchange Carriers and Cable Operators; Conditional Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Order, 27 FCC Rcd 11532, 11545, para. 28 (2012) (footnote omitted).

contracts, offering the terms of each deal to all comers; individually negotiated arrangements between an incumbent and an enterprise customer are not even a possibility. And all this is just one part of the relevant regulations: Among other rules, incumbents must also offer their facilities up for competitor use on an unbundled basis.

It is against this background that I join today's order adopting a data collection on special access services and their economic substitutes and proposing a one-time, multi-faceted market analysis. The negotiations that led to this item were long and hard, and I thank Chairman Genachowski for his willingness to work with Commissioner McDowell and me to find common ground. Although the Chairman certainly could have moved forward with his original proposal on a party-line vote, he instead was willing to make substantial changes in order to secure unanimous support for this data collection. This may not have been the easy decision, but it was the right one. The collaboration among our offices produced a much better item.

The data collection incorporates many of my suggestions to ensure that we capture a fuller picture of the market for enterprise data services. For example, the data collection recognizes that we must incorporate not just existing competition but also potential competition into our analysis. It thus seeks information about facilities capable of providing dedicated service⁴ as well as competitive offerings regardless of the facilities used.⁵ The data collection recognizes that dedicated services are only one portion of the enterprise data services market. It thus seeks information about "best efforts" business broadband Internet access services, an increasingly important alternative for small- and medium-sized businesses.⁶ And the data collection recognizes the need to ensure that all dedicated services are included. It thus specifically includes special access services offered via state-level contracts or tariffs within its scope.⁷ Although we will not capture every enterprise data service in this collection (for example, best-efforts services offering point-to-point connection are excluded), I hope that the data we collect will be sufficient to analyze the marketplace fully and complete this proceeding.

I am also pleased that today's order rejects the call to conduct a simple market share analysis⁸ and goes beyond even the traditional market-power analysis used to determine whether a carrier is dominant in a market.⁹ Instead, we propose a one-time, multi-faceted market analysis that will take into account actual and potential competition, the effect of regulation on investment as well as prices, and the substitution by enterprise customers of one service for another.¹⁰ This analysis, in line with the antitrust principle that regulation should focus on anticompetitive conduct, not mere dominance, should inform us of the "efficacy of various forms of regulations, including their effects on both prices and investment"¹¹ as well as the "steps the Commission could take to remove such barriers to promote a robust competitive market and permit the competitive determination of price levels."¹²

⁴ See *supra* note 38.

⁵ See *supra* para. 42.

⁶ See *supra* para. 18.

⁷ See *supra* para. 19.

⁸ See *supra* para. 67.

⁹ See *supra* note 162.

¹⁰ See *supra* para. 67.

¹¹ See *supra* note 162.

¹² See *supra* para. 67.

The essence of compromise is that you don't always get everything you want. This compromise is no different. My primary concern with the data collection is the substantial burden it is likely to place on industry at a time when everyone is looking for ways to cut costs. For example, I believe that a nationwide data collection—seeking information about every cell tower, office building, factory, farm, and other enterprise facility in the country—is substantially overbroad at this time. I would have preferred that we follow the approach taken in the voluntary data requests: Start with a sample of markets granted different levels of pricing flexibility. The chief flaw of the voluntary data requests, after all, was not their limited geographic scope; the flaw was that they were purely voluntary.

Similarly, I wish the data collection took more steps to protect the confidentiality of respondents and reduce the burden of compliance. For example, I had proposed a staged approach to collecting data—collecting the most public data first (such as requests for proposal, which are by their nature shared with third parties), reviewing it, and then moving on to collect more data only if necessary—and adopting a particularly stringent protective order. And I had proposed putting the burden of geocoding street addresses on the Commission rather than private industry. Each of these proposals survives in some form in today's order. For instance, my colleagues accepted a staged approach with strict limitations on bureau authority before any company is required to turn over documents and internal emails¹³ and the Wireline Competition Bureau agreed “to facilitate whenever possible the conversion of street addresses to geocoded coordinates for small providers and purchasers.”¹⁴ But we should have done more.

Finally, I dissent from the portion of today's order that purports to propose rules to amend our special access regulations.¹⁵ Although it makes sense to seek comment on the one-time, multi-faceted market analysis we propose to use to analyze the data we collect, I hardly see the sense in proposing rules when we have not even collected the data yet, let alone reviewed it. The sensible course would be to collect the data, review it to ensure that we have what we need, and then propose new, specific rules that the public can comment on with full access to the data. Instead, we seek comment without any concrete proposals and set a deadline for such comment without any regard to how long the data collection (which still requires approval from the Office of Management and Budget) actually takes. Additionally, the further notice discards the notion that the data we collect (including data on terms and conditions) is relevant to our rules (*i.e.*, rules about terms and conditions) by setting a comment deadline *before* the data is even collected. The only plausible reason for putting this cart before the horse is a desire to regulate—to decide even before the data is in that we need more regulation of the copper-based services of yesteryear. I hope that I am wrong, that we will review the data with fresh eyes, and that we will refocus our rules on incentivizing deployment of the next-generation infrastructure that will lead us to an all-Internet Protocol future.

¹³ See *supra* para. 43.

¹⁴ See *supra* para. 53.

¹⁵ See *supra* sections IV.B, IV.C.