September 24, 2015

Ex Parte

Ms. Marlene Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: *In the Matter of Technology Transitions* (GN Docket No. 13-5);
Special Access for Price Cap Local Exchange Carriers (WC Docket No. 05-25)

Dear Ms. Dortch:

The United States Telecom Association (USTelecom) respectfully submits this letter to address certain statements in the August 28, 2015 *ex parte* letter filed by Birch Communications, Inc., BT Americas Inc., and Level 3 Communications, LLC (Joint CLEC Letter) purporting to explain the scope of the Federal Communications Commission's (FCC or Commission) "broad discretion in adopting regulations governing rates for incumbent LEC special access services."[1] The Joint CLEC Letter distorts the scope of the agency's discretion, which is constrained by the Communications Act, the Administrative Procedure Act (APA), and the Commission's own decisions, and mischaracterizes the level of deference that courts typically afford agencies under *Chevron*[2] and other precedent that hold agencies to a considerably higher standard in carrying out their rulemaking responsibilities. Agency discretion and judicial deference are not without limits. The FCC must fully and fairly evaluate the record in the special access proceeding, and cannot upend forbearance and other deregulatory decisions with little or no data analysis[3] and using only "reasoned guesswork."[4]

The Commission will not get substantial deference if it fails to analyze the special access data.

Courts afford deference to agency decisions that are reasonable and fall within the agency's statutory authority. But agency discretion and court deference are not absolute; the

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[1] *See* Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from Thomas Jones, Counsel for Birch Communications, Inc., BT Americas Inc. & Level 3 Communications, LLC, WC Docket No. 905-25, RM-10593 (filed Aug. 28, 2015) (*Joint CLEC Letter*).

[2] *Joint CLEC Letter* at 2 (citing *Nat'l Cable & Telecoms. Ass'n v. Brand X Internet Servs.,* 545 U.S. 967, 980 (2005) (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council*, 467 U.S. 837 (1984)).

[3] *Joint CLEC Letter* at 8 (stating that the FCC has discretion to adopt special access pricing reforms "even in the absence of a comprehensive data set").

[4] *Id.* at 9.

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APA, for example, "contains a variety of constraints on agency decisionmaking - the arbitrary and capricious standard being among the most notable."[5] That standard requires, among other things, that an agency "examine the relevant data" and make "a 'rational connection between the facts found and the choice made.'"[6] Moreover, where an agency reverses course or abandons established precedent upon which regulated entities have come to rely, it must account for significant reliance interests engendered by those previous policies and provide "a more substantial justification" for adopting that new course.[7]

The Joint CLEC Letter essentially calls for re-regulation of enterprise broadband services such as Ethernet and increased regulation of ILEC special access now subject to pricing flexibility.[8] But the current regulatory scheme has been in place for some time, and enterprise broadband services, in particular, were deregulated by a grant of forbearance almost a decade ago. ILECs, their competitors, and their customers have come to rely on this deregulatory, market-based approach, and as a result the marketplace for special access and high-capacity services is robust and highly-competitive.[9] Thus, given that significant reliance interests are present, the bar for undoing forbearance or otherwise changing course is substantially higher than the Joint CLEC Letter asserts.[10]

The FCC has collected special access data to inform its comprehensive analysis of the special access market, and has identified the data collection as "a critical piece of the evidentiary

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[5] *Perez v. Mortgage Bankers Ass'n*, 135 S.Ct. 1199, 1209 (2015).

[6] *Nat'l Ass'n of Home Builders v.* EPA, 682 F.3d 1032, 1036 (D.C. Cir. 2012) (citing *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983)).

[7] *Perez*, 135 S.Ct. at 1209.

[8] *See Joint CLEC Letter* at 3-4 ("the agency has wide latitude in deciding how to ensure that special access rates [for DSn and packet-based special access services] are just and reasonable and not unjustly or unreasonably discriminatory").

[9] *See, e.g.,* Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from Curtis L. Groves, Verizon, WC Docket No. 05-25, RM-10593, and Attachment (filed Sep. 24, 2015) (describing extensive competition from cable providers, CLECs, and fixed wireless providers). USTelecom also has provided the Commission with evidence of intensive competition for high-capacity services since at least 2009. *See, e.g.,* Patrick Brogan, USTelecom, and Evan Leo, Kellogg, Huber, Hansen, Todd, Evans & Figel, P.L.L.C., "High-Capacity Services: Abundant, Affordable, and Evolving" (Jul. 2009) (USTelecom Fact Report) (attached to Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from Glenn Reynolds, USTelecom, WC Docket No. 05-25, GN Docket No. 09-51 (Jul. 16, 2009)). *See also* Reply Comments of the United States Telecom Association, WC Docket No. 05-25, RM-10593 (filed Feb. 24, 2010) (attaching an Appendix to the USTelecom Fact Report titled, "Evidence of Ongoing Competitive Investment, and Innovation and Marketplace Success in High-Capacity Services since Mid-2009"). More recent USTelecom filings demonstrate that facilities-based competition has only expanded since 2010. Cable operators are growing their commercial services and have expanded to serve larger businesses. CLECs and other competitive fiber providers have become stronger through consolidation and continue to deploy networks, including last mile facilities to enterprise customer locations. *See* Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from Diane Griffin Holland, USTelecom, GN Docket No. 13-5, WC Docket No. 05-25, and Attachment (filed Jun. 24, 2015); Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from Patrick S. Brogan, USTelecom, GN Docket No. 13-5, WC Docket No. 05-25 (Jul. 30, 2015).

[10] *See FCC v. Fox*, 556 U.S. 502, 515 (2009) (finding that an agency must provide a more detailed explanation for departing from prior policy "when, for example, [ ] its prior policy has engendered serious reliance interests that must be taken into account").

record necessary for reforming the Commission's special access rules."[11] The FCC also set forth a detailed plan for using the data collection to gauge actual and potential competition before identifying a replacement regulatory framework for special access services.[12] Although the data do not reflect the most recent expansion into the enterprise broadband services marketplace by cable and other non-ILEC providers (and thus is already stale),[13] there is no question that the data are relevant and thus must be analyzed and considered before any new regulations that disrupt the current regulatory scheme can be imposed. The FCC cannot step in and set prices without a fact-specific, full and fair analysis of the competitive landscape. Nor would the FCC be entitled to deference from the courts if it takes the procedural shortcuts suggested in the Joint CLEC Letter.[14]

The Commission has not given adequate notice and opportunity to take the actions suggested by the Joint CLECs.

The Joint CLEC Letter's surprising claim that ILECs have been on notice that the Commission could adopt rate regulation of their enterprise broadband services evinces a fundamental misunderstanding of what the APA requires an agency to undertake before establishing or modifying its rules. APA notice does not refer to some generalized knowledge or guesswork about what an agency might do in a particular area it regulates; rather, it requires that the agency "make its views known to the public in a concrete and focused form so as to make criticism or formulation of alternatives possible."[15] The Commission has not offered specific, detailed proposals to reverse forbearance or impose tariffing or price cap regulation of these deregulated ILEC service offerings that would comport with APA rulemaking standards. It therefore cannot reverse forbearance or otherwise change established rules without a notice-and-comment rulemaking proceeding.

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[11] *Special Access for Price Cap Local Exchange Carriers, AT&T Corp. Petition for Rulemaking to Reform the Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, WC Docket No. 05-25, RM-10593, Order and Modified Data Collection Protective Order, DA 15-1035, ¶ 2 (Sep. 18, 2015) (citation omitted).

[12] *See 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*, WC Docket No. 05-25, RM 10593, Report and Order, 28 FCC Rcd 13189, ¶ 2 (2013).

[13] *See, e.g.*, Comcast, Comcast Business Announces New Unit Targeting Fortune 1000 Enterprises (Sep. 16, 2015) (available at http://business.comcast.com/resource-library/press-releases/details/2015/09/16/comcast-business-announces-new-unit-targeting-fortine-1000-enterprises?NewsItemID=6a7a6147-2963-62fe-b0b5-ff0600efc36d&IsPremium=False).

[14] *See, e.g., Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1231 (D.C. Cir. 1980) (vacating, in part, the FCC's order because it failed to examine the voluminous evidence of record and to analyze the substance of underlying cost studies). Further, contrary to the Joint CLECs' claims, the underlying analysis required to establish price caps for unregulated broadband enterprise services would necessitate a section 205 rate prescription proceeding, because the Commission would be establishing industry-wide rules requiring ILECs to offer services at Commission-determined rates. *See* Ex Parte Letter to Marlene H. Dortch, Secretary, FCC, from James P. Young, Attorney for AT&T, WC Docket Nos. 15-1, 05-25, GN Docket Nos. 13-5, 12-353, RM-10593, at 6-7 (filed July 29, 2015).

[15] *HBO, Inc. v. FCC*, 567 F.2d 9, 36 (D.C. Cir. 1977); *see also Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 549 (D.C. Cir. 1983) (an agency must "describe the range of alternatives being considered with reasonable specificity").

The record does not support the relief proposed by the Joint CLECs.

The FCC has acknowledged the need to analyze comprehensive market data before upending the current special access regulatory regime.[16] The Joint CLEC Letter, on the other hand, curiously argues that the Commission does not need comprehensive data at all to regulate special access rates, and that it may instead rely on "reasoned guesswork."[17] This assertion sets a stunningly low bar for reasoned agency decisionmaking, which must meet a higher standard to survive a judicial review. It further reflects a fundamental misunderstanding of what the APA requires of agencies engaged in rulemaking.

The Joint CLEC Letter further encourages FCC action based on uncited, speculative assertions that ILECs get windfall profits due to productivity gains that have surpassed the economy as a whole.[18] Such claims are unsupported in the Joint CLEC Letter and in the record, and are otherwise unsupportable because they are wrong. Instead of windfalls, one financial analyst recently explained that wireline businesses face declining profits, in significant part because of competition for business services from cable and other providers.[19]

The Joint CLEC Letter, at bottom, suggests that the FCC can aim low, that *close enough for government work* will survive court review.[20] But the standard is higher, and the FCC must take into account the full record in the special access proceeding, including the data collection to the extent that it is sufficient and reliable. It must also take into account more recent information that further demonstrates robust competition in the marketplace. It must also, at a minimum, allow adequate time for parties to analyze the special access data and provide feedback on the record as to the relevance and value of that data, before making any permanent changes to its regulations governing special access.

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[16] *See, e.g., 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*, WC Docket No. 05-25, RM 10593, Report and Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318, 16324 (2010) ("we require providers and purchasers of special access service and certain other services to submit data, information and documents to allow the Commission to conduct a comprehensive evaluation of competition in the special access market").

[17] *Joint CLEC Letter* at 8-9.

[18] *Joint CLEC Letter* at 7.

[19] *See* MoffettNathanson Research, "The Phone Book: A Twenty Year View of ROIC [Return on Invested Capital] Across the Telecommunications Industry" (May 18, 2015) at pp. 36-41. The report states that the large ILEC "wireline units have seen their ROICs fall sharply over the last decade, driven by the loss of high-margin voice customers to both cable and wireless, and alternative providers feeding on their business segments." The report goes on to state, "The telcos' business services revenue dropped like a stone during the Great Recession, and have continued to bleed in the years since….[W]e pin the decline on two primary factors: the transition to lower-priced IP-based services and away from higher-priced copper-based services, and the inroads made by cable and alternative providers."

[20] *Joint CLEC Letter* at 10-11 ("judicial review 'does not and cannot require perfection,'" and "courts will uphold 'a decision of less than ideal clarity if the agency's path may be reasonably discerned'").

Please do not hesitate to contact the undersigned if you have questions about this submission.

Sincerely,

Diane Griffin Holland
Patrick S. Brogan