

Before the
Federal Communications Commission
Washington, D.C.

In the matter of

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

**COMMENTS OF THE
COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)¹**

CCIA respectfully submits these comments in the above-referenced proceeding regarding the Commission's possible changes to its rules for the special access services provided by incumbent local exchange carriers (ILECs) in price cap areas.

Data usage is exploding. IP traffic is projected to grow three-fold from 2014 to 2019, for an annual growth rate of 20%, and mobile data traffic is projected to grow seven-fold from 2014 to 2019, for an annual growth rate of 47%.² As consumer demand intensifies, and carriers look to deploy 5G technology in the next few years, carriers will need to densify their networks. In addition to deploying more antennae and towers, tens of thousands of small cells will need to be deployed to supplement existing macro sites. Backhaul will be even more important as all of these sites must be connected so they can work together and form a robust network. However, this network densification may be artificially delayed due to the anticompetitive pricing of special access backhaul connections. Mobile usage is growing rapidly, so special access remains

¹ CCIA represents large, medium, and small companies in the high technology products and services sectors, including computer hardware and software, electronic commerce, telecommunications, and Internet products and services. Our members employ more than 750,000 workers and generate annual revenues in excess of \$540 billion. A list of CCIA's members is available online at <http://www.ccianet.org/members>.

² *VNI Forecast Highlights*, CISCO, http://www.cisco.com/web/solutions/sp/vni/vni_forecast_highlights/index.html (last visited Jan. 22, 2015).

a critical component because wireless carriers use special access circuits to connect towers to their networks. CCIA applauds the Commission for taking the proactive step of investigating ILEC “lock-up” agreements.³ CCIA urges the Commission to end its decade of delay in this proceeding by fostering competition in the special access market, which will speed deployment of next generation networks and drive down costs for consumers and businesses that utilize high-capacity broadband lines.

I. After Seventeen Years, Special Access Competition Remains Elusive.

Aiming to facilitate competition, the Commission, in 1999, adopted the *Pricing Flexibility Order*,⁴ which was followed by the CALLS plan, an industry-proposed regime that sought a transition to market-based rate setting.⁵ However, a few years later, a previous incarnation of AT&T petitioned the Commission for a rulemaking and requested that the Commission revoke the pricing flexibility rules and revisit the CALLS plan regarding special access services.⁶ AT&T argued that the *Pricing Flexibility Order*’s predictions about the marketplace had not come to fruition and that special access rates charged by some of the Bell progeny exceeded competitive levels and were unjust and unreasonable.⁷ In 2005, the

³ *Order Initiating Investigation and Designating Issues for Investigation*, WC Docket No. 15-247, Order, DA 15-1194 (rel. Oct. 16, 2015) (Lock-Up Investigation Order).

⁴ *Petition of U.S. West Communications, Inc. for Forbearance from Regulation as a Dominant Carrier in the Phoenix, Arizona MSA*, CC Docket No. 98-157, Fifth Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 14221 (1999) (*Pricing Flexibility Order*).

⁵ *Federal-State Joint Board on Universal Service*, CC Docket No. 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, 13038-39, ¶¶ 183-84 (2000) (*CALLS Order*), *aff’d in part, rev’d in part, and remanded in part*, *Tex. Office of Pub. Util. Counsel v. FCC*, 265 F.3d 313 (5th Cir. 2001), *cert. denied*, *Nat’l Ass’n of State Util. Consumer Advocates v. FCC*, 535 U.S. 986 (2002), *on remand*, *Access Charge Reform*, CC Docket Nos. 96-262, 94-1, 99-249, 96-45, Order on Remand, 18 FCC Rcd 14976 (2003)

⁶ *AT&T Corp. Petition for Rulemaking to Reform Regulation of Incumbent Local Exchange Carrier Rates for Interstate Special Access Services*, RM-10593 (filed Oct. 15, 2002).

⁷ *See id.* at 1-7, 20, 34-36, 39-40 (“[T]here is now indisputable proof that: (i) large LECs, and particularly the Bell Operating Companies (‘Bells’), retain pervasive market power in the provision of these services, (ii) the large ILECs are abusing that market power with patently unjust and unreasonable rates that impose a multi-billion dollar annual overcharge or tax on American businesses and consumers and also severely harm both local and long distance competition, (iii) the Commission’s existing rules are incapable of addressing this worsening crisis, and, indeed, only

Commission finally opened the special access reform proceeding that AT&T sought.⁸ That docket has been pending for over a decade.

In the intervening years, multiple reports and studies have found a lack of competition for the provision of special access services and made recommendations for increasing competition for this crucial broadband input. In 2006, the U.S. Government Accountability Office (GAO) produced a report plainly titled, “FCC Needs to Improve Its Ability to Monitor and Determine the Extent of Competition in Dedicated Access Services.”⁹ The GAO found a lack of competition and recommended reform because “facilities-based competitive alternatives for dedicated access are not widely available.”¹⁰ Moreover, “in areas where FCC granted full pricing flexibility due to the presumed presence of competitive alternatives, list prices and average revenues tend to be higher than or the same as list prices and average revenues in areas still under some FCC price regulation.”¹¹ In 2009, the National Association of Regulatory Utility Commissioners (NARUC) commissioned a study that found errors with the Commission’s data collection and determinations of effective competition, found that over 90% of all channel terminations were provided by ILECs, and recommended significant special access reforms, including resetting special access rates.¹²

In 2010, the National Broadband Plan recommended: “The FCC should comprehensively review its wholesale competition regulations to develop a coherent and effective framework and

exacerbate the problem, and (iv) the Commission therefore has a clear legal obligation promptly to reform its regulation to protect the public interest and to put an end to these monopoly abuses.”)

⁸ *Special Access Rates for Price Cap Local Exchange Carriers*, WC Docket 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, Order and Notice of Proposed Rulemaking, 20 FCC Rcd 1994 (2005) (*Special Access NPRM*).

⁹ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-07-80, FCC NEEDS TO IMPROVE ITS ABILITY TO MONITOR AND DETERMINE THE EXTENT OF COMPETITION IN DEDICATED ACCESS SERVICES (Nov. 2006), <http://www.gao.gov/assets/260/254069.pdf>.

¹⁰ *Id.*

¹¹ *Id.*

¹² Peter Bluhm and Dr. Robert Loube, *Competitive Issues in Special Access Markets: Revised Edition*, NATIONAL REGULATORY RESEARCH INSTITUTE (JAN. 21, 2009), <http://apps.fcc.gov/ecfs/document/view?id=7021922486>.

take expedited action based on that framework to ensure widespread availability of inputs for broadband services provided to small businesses, mobile providers and enterprise customers.”¹³ That same year, the GAO followed up on its 2006 report, and urged the Commission again to act on special access.¹⁴ In 2012, the Commission suspended price increase grants, finding that the mechanism that allowed incumbents the flexibility to raise special access prices was flawed. Finally, the Commission adopted the *Data Collection Order* or *Special Access FNPRM*, beginning the data collection for a more comprehensive analysis of the market.¹⁵

Since releasing the *Special Access FNPRM*, the Commission has granted numerous requests for extensions of deadlines, which have ultimately prolonged this decade-long debate. Initially, the Commission set the comment deadlines for the *Special Access FNPRM* “several months beyond the document’s release date.”¹⁶ In addition, deadlines have been extended “several times to account for delays in collecting the data and information, and in making it available for inspection.”¹⁷ This November, the Bureau extended the comment and reply comment deadlines to January 6 and February 5, 2016,¹⁸ yet the following month, the Bureau further extended the comment and reply deadlines.¹⁹ Now that the data is in, and after multiple extensions, the Commission should finally decide to support competition and reform the special access marketplace.

¹³ See *The National Broadband Plan*, FED. COMM’NS COMM’N., Mar. 17, 2010, <http://www.broadband.gov/plan/4-broadband-competition-and-innovation-policy/> (Chapter 4 on Broadband Competition and Innovation Policy).

¹⁴ U.S. GOV’T ACCOUNTABILITY OFFICE, GAO-10-779, ENHANCED DATA COLLECTION COULD HELP FCC BETTER MONITOR COMPETITION IN THE WIRELESS INDUSTRY (July 2010), <http://www.gao.gov/assets/310/308167.pdf>.

¹⁵ *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, Order and Further Notice of Proposed Rulemaking, 27 FCC Rcd 16318 (2012) (*Data Collection Order* or *Special Access FNPRM*).

¹⁶ *Special Access 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, Order, DA 15-1473 (rel. Dec. 21, 2015) (December 2015 Extension Order).

¹⁷ *Id.*

¹⁸ *Special Access 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, Order, DA 15-1239 (rel. Nov. 2, 2015) (November 2015 Extension Order).

¹⁹ December 2015 Extension Order, *supra* note 16.

II. Special Access is a Crucial Broadband Input.

Chairman Wheeler has made competition the focal point of his tenure. Shortly after he assumed the chair, he delivered his first major policy address at his alma mater, proclaiming: “We must protect competition where it exists. We must promote competition where it may not be fulsome.”²⁰ Indeed, during a speech the following year, the Chairman stressed the importance of special access by framing it in terms of the consumer’s experience: “These lines transport massive amounts of voice and data traffic from cell phone towers and office buildings, as well as carry transactions from ATM machines and credit card readers.”²¹ He also expressed “serious questions about the current special access regime’s ability to ensure continued access at just and reasonable rates, terms, and conditions.”²² The Chairman correctly noted that “[t]his is a critical issue for providers and customers, wired and wireless alike.”²³

As data usage increases nationwide, networks need to upgrade and add capacity. Indeed, the entire economy is rapidly becoming more reliant on data.²⁴ For wireless networks, which are particularly experiencing explosive demand, wireless carriers have to decide whether they need to build new towers, attach or upgrade antennae on existing towers, or connect smaller cells to their networks. In places where carriers do not have existing infrastructure, they purchase special access services to connect these elements to their networks. Special access circuits serve as crucial links in larger data networks and provide dedicated, guaranteed transmission of high

²⁰ Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, Prepared Remarks of FCC Chairman Tom Wheeler at Ohio State University (Dec. 2, 2013), https://apps.fcc.gov/edocs_public/attachmatch/DOC-324476A1.pdf.

²¹ Tom Wheeler, Chairman, Fed. Commc’ns Comm’n, Remarks of FCC Chairman Tom Wheeler at COMPTTEL Fall Convention & Expo – Dallas, TX (Oct. 6, 2014), https://apps.fcc.gov/edocs_public/attachmatch/DOC-329767A1.pdf.

²² *Id.*

²³ *Id.*

²⁴ Bruno Berthon, *Three Myths About the Digital Economy*, RECODE.NET (Jan. 19, 2016), <http://recode.net/2016/01/19/three-myths-about-the-digital-economy/>.

volumes of critical data. As a result, special access circuits are increasingly bottlenecks for the entire Internet ecosystem that pose problems well beyond wireless networks.

A) Connectivity is Crucial to our Economy.

Every day, nearly all Americans use these high-capacity broadband lines without even realizing it. Most consumers do not know that the wireless networks they are using to watch streaming videos, post pictures, or even make phone calls rely on these crucial circuits that are usually controlled by the ILECs. In addition to special access circuits connecting wireless users' cell phones, these high-capacity broadband lines also connect businesses, banks, factories, data centers, universities, and hospitals. As the Internet of Things grows and connectivity becomes more crucial for a wider segment of U.S. commerce, the problems and economic loss from special access bottlenecks will only increase.

Most businesses need reliable access to the Internet, and many require high-capacity broadband lines that can quickly and reliably transport data. Special access lines enable businesses to deliver products and services to customers, manage factories and supply chains, and ultimately drive economic growth that creates jobs. For example, retailers rely on special access to ensure speedy processing and approval of credit card transactions, and banks similarly use special access for ATM transactions. A manufacturer may use a special access circuit to share information between its plants that could be located hundreds of miles away. Hospitals and healthcare providers need these high-capacity lines to process health records that are increasingly managed digitally. Libraries and schools use special access lines to handle large volumes of data. Though most consumers may not realize it, special access services serve our nation's economy, enable our health care networks, and connect our educational institutions to the outside world.

B) The Current Special Access Regime and Delays in Commission Action are Stifling Innovation.

Despite special access service affecting many facets of our everyday lives, ILECs retain remarkable control over the special access market,²⁵ so they can keep costs artificially high for competitors and consumers. Competitive communications networks, in particular, have been struggling to expand and improve connectivity because only a few companies provide special access. For any new tower or antenna that a wireless competitor, for example, places on a tower, that competitor needs some way to link it to its network. If the competitor does not have its own high-capacity line nearby, it will often have no choice but to lease “special access” to an ILEC’s line. Because there is such limited competition in many areas, these descendants of the old Bell system are free to charge monopoly rents, including imposing high charges on small carriers that attempt to compete with them. Indeed, about one-quarter of a tower’s operating cost comes from connecting the tower to the wireless carrier’s network. As a result, special access is one of the largest operating costs of wireless carriers that are trying to compete with Verizon and AT&T. A new wireless entrant already has to compete with Verizon and AT&T because they are the two largest nationwide wireless carriers. Without an alternative in most areas, a new entrant now has to pay for special access from Verizon and AT&T, which is essentially a tax payable to the two largest carriers for the right to compete with them.

The ILECs maintain a dominant position and significant revenues from special access services. Last year, in announcing its lock-up investigation, the Commission found:

“Preliminary review of the results of the Commission’s special access data collection shows that as of 2013 incumbent LECs received roughly three-quarters of the approximately \$20 billion in

²⁵ See ATLANTIC-ACM, *U.S. Telecom Wired and Wireless Sizing and Share Report*, September 2014 (estimating that AT&T, Verizon, and CenturyLink held 70 percent of the local wholesale transport market based on 2013 data).

annual revenues from the sales of DS1 and DS3 channel terminations, and received close to two-thirds of all revenue from TDM sales.”²⁶ Although the same company that once cried out for FCC action on special access in 2002 has now tried to downplay special access after it merged with an ILEC,²⁷ special access remains crucial to communications networks and a significant revenue-generator for ILECs.

The ILECs generate significant profits from special access charges at the expense of competitors. This money ultimately comes out of hands of U.S. consumers and out of the accounts of U.S. businesses. In 2009, The NARUC study found that most special access circuits were sold by ILECs to other carriers, and Verizon derived “over 90% of its special access revenue from carrier customers.”²⁸ Even when a consumer or small business chooses a smaller provider, part of their monthly bill still goes to one of these bigger carriers for using their special access pipes. Moreover, small businesses and start-ups that need the high-capacity lines provided by special access circuits often have few alternatives to an ILEC’s service and limited bargaining power, so they can be stuck paying excessive rates with punitive terms and conditions.²⁹

The rates that ILECs can charge for special access due to their monopoly power hinders economic growth. Manufacturers could allocate that money to developing new products or streamlining processes. Competitive telecommunications networks could reduce rates for their customers or expand their infrastructure and provide connectivity to new areas. In the Internet context, more money would be freed up for developing new online applications and services that

²⁶ Lock-Up Investigation Order, *supra* note 3.

²⁷ Bob Quinn, *What the Data Shows: Special Access is Not Very Special Any More*, AT&T PUBLIC POLICY BLOG (Jan. 20, 2016) <http://www.attpublicpolicy.com/special-access/what-the-data-shows-special-access-is-not-very-special-any-more/>.

²⁸ Bluhm & Loube, *supra* note 12.

²⁹ *Id.*

would drive the “virtuous cycle,” which has been a hallmark of the Internet’s success and our country’s economic growth.

Although some complain that ILECs are losing market share and suffering from regulatory burdens as they maintain their legacy networks,³⁰ ILECs reap billions every year from the special access market.³¹ Commission action on special access is needed because, as Sprint rightly noted: “As regulated services are replaced by technologically superior—but less regulated— alternative services, incumbents have the opportunity to leverage their market power, once again, to suppress competition and restrict innovation.”³²

III. Policy Recommendations.

The *Special Access FNPRM*, in addition to starting the data collection, sought comment on changes to the Commission’s rules for special access services provided by ILECs in price cap areas. CCIA makes the following recommendations:

- **The Commission Should Fix the Pricing Flexibility Competitive Triggers.**

The previous competitive triggers were deeply flawed and do not reflect market realities nor did they accurately identify competition.

- **The Commission Must Lower Special Access Rates.**

The Commission allowed ILECs to raise prices in uncapped areas, predicting that competition would develop and therefore keep prices down. This has not happened.

Where the Commission determines that there is not effective, wholesale broadband competition, the Commission must act to establish lower rates.

³⁰ Steve Pociask, *A Faster Internet? Not With FCC Regulations*, FORBES (Jan. 13, 2016), <http://www.forbes.com/sites/stevepociask/2016/01/13/fcc-regulations-impeding-competition-and-concentrating-the-broadband-market/#616c51ef1b4542963b011b45>.

³¹ Lock-Up Investigation Order, *supra* note 3.

³² Comments of Spring Corp., *Special Access for Price Cap Local Exchange Carriers*, WC Docket No. 05-25 (Feb. 5, 2015), <http://apps.fcc.gov/ecfs/document/view?id=60001026966>.

- **The Commission Must Address Anticompetitive Terms and Conditions.**

Many terms and conditions imposed by ILECs on small businesses, healthcare providers, and libraries and schools are simply anticompetitive. For competitive networks, in particular, terms and conditions on so-called discount plans stifle what little competition that could arise by imposing early termination penalties, loyalty and term commitments, shortfall penalties, overage penalties, and circuit migration charges.

By enacting these reforms, the Commission can lower costs for consumers, incentivize the deployment of next generation networks, and facilitate economic growth. At the very least, the Commission should not allow further delays in this proceeding.

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Respectfully submitted,

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